REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY JOHN FAIRFIELD,
COUNSELLOR AT LAW.

VOLUME III.

HALLOWELL:
GLAZIER, MASTERS AND SMITH.

1837.

JUDGES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE

DURING THE PERIOD OF THESE REPORTS.

HON. NATHAN WESTON, LL. D. CHIEF JUSTICE.
HON. ALBION K. PARRIS, } JUSTICES.
HON. NICHOLAS EMERY, }
Attorney General, NATHAN CLIFFORD, ESQ.

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1835.

SWETT *vs.* PATRICK.

In an action founded on a breach of the covenant of warranty in a deed of conveyance, the true measure of damages, where there has been an eviction by judgment of law, is, the value of the land at the time of the eviction and expenses incurred in defending the suit, including fees paid counsel.

THIS was an action of covenant broken in which the plaintiff declared on a breach of the defendant's covenant of warranty in his deed to the plaintiff conveying certain real estate. It appeared that the plaintiff had by judgment of law, been evicted by the President, Directors & Company of the Cumberland Bank, they having an elder and a better title to the premises; and that the defendant was duly and seasonably notified of the suit in which said judgment was rendered but did not take upon himself the defence thereof.

The jury found a verdict for the plaintiff for $134, being the value of the premises at the time of the eviction, and also for $89,60, expenses incurred by the plaintiff in defence of the aforesaid suit against him; which last mentioned sum, included the costs recovered by the Bank, and the amount paid by the plaintiff to witnesses and counsel.

If in the opinion of the Court these expenses were properly included in the verdict, judgment was to be rendered thereon.

Longfellow, for the defendant, insisted that the true measure of damages was the value of the land at the time of the eviction

and the costs of suit up to the time of notice or citation to the warrantor. In this case *Patrick* the defendant, elected to let the suit against *Swett* go by default. He chose to incur no useless expense in defending a suit which was indefensible; and *Swett* by doing it, after notice to *Patrick*, did it in his own wrong and is not therefore entitled to recover back the amount of his warrantor. At all events, there is no authority for including the fees of counsel in the estimate of damages.

Fessenden & Deblois, for the plaintiff, cited the following authorities: *Sumner* v. *Williams*, 8 *Mass.* 221; *Leffingwell* v. *Elliott*, 8 *Pick.* 456; 3 *Caine's Rep.* 111; *Pitcher* v. *Livingston*, 4 *Johns.* 1; *Waldo* v. *Long*, 7 *Johns.* 173; *Kitch* v. *Bridgham*, 7 *Johns.* 168; 13 *Johns.* 281.

Weston C. J. — The covenant of warranty, upon which the defendant was charged, is one of indemnity. He had been seasonably notified of the suit, in which the paramount title was established; and is therefore liable for costs. The cases cited for plaintiff show, that the costs of defending are to be allowed on the covenant of warranty. The plaintiff had a right to defend. He was justified in making every fair effort to retain the land, which he must be understood to have purchased for his own convenience. An equivalent in value might not be equally satisfactory. If the defendant was apprized of the infirmity of his title, he should have stepped forward and relieved the plaintiff, by making the best adjustment he could with the adverse claimant. In that way he might have protected himself from costs. The plaintiff could not defend without counsel; and if employed, they must be paid. It does not appear that he incurred any unnecessary expenditure.

The opinion of the Court is, that the plaintiff is legally entitled to the damages found.

Judgment on the verdict.

GREENLEAF *& al. vs.* QUINCY *& al.*

The admissions of one of two joint partners, though made after the dissolution of the partnership, are sufficient to take a case out of the statute of limitations as to both; the existence of the debt prior to the dissolution being proved by other evidence.

THIS was an action of *assumpsit* upon an account annexed to the writ, and was tried before *Whitman C. J.* in the Court of Common Pleas; from whose ruling the case was brought up by bill of exceptions.

The defence was founded upon the statute of limitations; and the plaintiffs to maintain the issue on their part, the original debt having been admitted, as stated in the account annexed, proved that *P. H. Greenleaf, Esq.*, in behalf of the plaintiffs, called on *Charles E. Quincy*, one of the defendants, in *July*, 1833, and requested payment of the demand. Said *Charles* thereupon accompanied *Mr. Greenleaf* to his office, and on examining the account upon the books of the plaintiffs, objected to one charge only of four dollars, but made no objection to the residue. He expressed surprise at the age of the account, and that it had not been presented to the assignees of the defendants, at the time of their failure some years before; and said that if it had been so presented it would have been paid. *Mr. Greenleaf* then remarked to him, that he, *Mr. G.*, was owing the other defendant and would like to have it turned in payment of that debt, to which he understood *Mr. Quincy* to assent; and remarked that if it had been presented to him or his brother or to their assignees it would have been paid.

Mr. Greenleaf further testified that a short time prior to the foregoing, he had a conversation with *William J. Quincy*, the other defendant, in which *Mr. Q.* said he thought the demand had been paid — that, he had, since it accrued, settled bills presented by one of the plaintiffs, which he presumed included the charges sued for. *Mr. G.* requested him to produce those bills, but he did not do it.

It was also proved, that a number of years prior to the time of these conversations, the defendants had failed in business and assigned their effects to trustees, and had ever since ceased to do business as partners.

Upon this evidence, the Judge instructed the jury, that, a new promise by one of a partnership firm, after the dissolution of the copartnership, would not revive a debt barred by the statute of limitations; and that if they did not find a distinct acknowledgment of the present demand as a subsisting debt by both of the defendants, they would find for the defendants; but that, if they were satisfied from the evidence that both defendants in the conversations testified to, meant to acknowledge a subsisting indebtedness they would find for the plaintiffs. The jury returned a verdict for the plaintiffs.

W. Goodenow, for the defendants, contended that it was erroneously left to the jury to decide what was *meant* by the defenddants in the language used by them. When the words are proved, it is for the Court to decide whether they amount to a new promise or not. *Miller* v. *Lancaster*, 4 *Greenl.* 159; and cases there cited.

He further insisted that the proof did not show a new promise, and cited *Perley* v. *Little*, 3 *Greenl.* 97; *Porter* v. *Hill*, 4 *Greenl.* 41; *Bell* v. *Morrison*, 1 *Peters*, 351.

If the declarations of one, amounted to a new promise, they would be insufficient to revive the debt, having been made after the dissolution of the copartnership. *Bell* v. *Morrison*, 1 *Peters*, 351.

He cited further, *Andover & Medford Turnpike Corporation* v. *Gould*, 6 *Mass.* 40; *Hackley* v. *Patten*, 3 *Johns.* 536; *Coet* v. *Tracy*, 8 *Con.* 277.

Megquier, on the other side, insisted that the evidence shew a new promise and cited *Murray* v. *Da Costa*, 20 *Johns.* 576.

The acknowledgment or promise of one was sufficient to revive the debt as to both. 2 *Stark. Ev.* 897, and authorities there cited. *Getchell* v. *Heald & al.* 7 *Greenl.* 26; *Smith* v. *Ludlow*, 6 *Johns.* 267; *White* v. *Hale*, 3 *Pick.* 291; *Johnson* v. *Beardsley*, 15 *Johns.* 3; *Hunt* v. *Bridgham*, 2 *Pick.* 583; *Parker* v. *Merrill & als.* 6 *Greenl.* 41.

The opinion of the Court was delivered by

Weston C. J. — If it be necessary that there should have been evidence of a new promise, or of an acknowledgment of in-

debtedness, from both defendants, to take the case out of the statute of limitations, it may be difficult to sustain the verdict; as there does not appear to have been sufficient evidence to this effect against *William J. Quincy*, one of the defendants, according to the modern approved cases, to have been left to the jury, or to have authorized their finding.

It is insisted that the same objection exists to the testimony against *Charles Quincy*, the other defendant. He did not deny the existence of the debt; but said it would have been paid, if it had been presented to his brother, or to himself, or to their assignees. This of itself did not amount to a clear admission of existing indebtedness; but the witness, who was authorized to demand the debt for the plaintiffs, understood him to assent to his proposition, that it should be turned against one, which was due from the witness to his brother. What the witness understood, the jury must have found to be true. The witness was then acting in behalf of the plaintiffs. *Charles*, by his assent to the proposition made, promised to pay it in the manner pointed out by their agent, which they must be understood to have adopted and approved. And this was such a promise as would take the case out of the statute of limitations, if that defendant had been the only party liable.

The defendants had been partners, but had failed some years ago, and assigned their property, since which time they had ceased to do business as such. The Judge predicated his instructions upon the assumption, that this was a dissolution of the partnership; and so we must understand it to have been, as the case is presented to us, under the exceptions taken.

If the promise of one of the defendants, after the dissolution of the partnership, the existence of the debt being otherwise proved, is sufficient to take the case out of the statute, the verdict is right, and the judgment below should be affirmed. Upon this point, the cases cited from *New York* do not harmonize with each other. In *Smith* v. *Ludlow*, 6 *John.* 267, the acknowledgment of one partner, after the dissolution, and after the statute had attached, was held sufficient to revive the debt against both. A different doctrine had previously been laid down in *Hackley* v.

Patrick, 3 *Johns.* 528, and subsequently, in *Waldren & al.* v. *Sherburne & al.* 15 *Johns.* 409.

In *Van Reimsdyk* v. *Kane*, 1 *Gall.* 635, *Story J.* held the confession of one partner, after the dissolution of the partnership, sufficient to take a case out of the statute. And although in *Bell* v. *Morrison*, 1 *Peters*, 371, the Supreme Court of the *United States* adopt a different doctrine; yet as it was a case, which originated in *Kentucky*, they were principally influenced by a course of decisions in that state.

In *Cady* v. *Shepherd & al.* 11 *Pick.* 400, *Wilde J.* by whom the opinion of the court was delivered, takes a view of this question, and of the English authorities bearing upon it, and, speaking for the court says, "the rule is, we think, correctly laid down by *Mansfield C. J.* in *Wood & al.* v. *Braddick*, 1 *Taunton*, 103." The opinion of the Chief Justice in that case was, that "the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction, which has occurred since their separation; but the power of partners with respect to rights created pending the partnership, remains after dissolution." *Wilde J.* adds, "this rule of law has been frequently recognized, with unqualified approbation, and is, I think, the settled law in *England* at the present day, notwithstanding the contradictory opinions, which have since prevailed in relation to the admissions made by a partner, as to debts barred by the statute of limitations." *Heath J.*, who concurred in the opinion in *Wood & al.* v. *Braddick*, placed it upon the ground, that when a partnership is dissolved, it is not dissolved with respect to things past, but only with regard to things future; and that as to the past, the partnership continues, and always must continue.

In our own state, *Parker* v. *Merrill & al.* 6 *Greenl.* 40, has a strong bearing in favor of the plaintiffs. But *Getchell, admr.* v. *Heald & als.* is, in principle, an authority directly in point. It was there held, that the admission of one of several joint debtors, after the statute of limitations had attached, revived the debt as to all. And we believe, whatever vacillation may have existed elsewhere, that no conflicting opinion can be found in *Massachusetts* or *Maine*. But to lay a foundation for this testimony, consistently with the principles upon which it is received, the exist-

ence of the debt before the dissolution, should be proved by other testimony. That being done, we are of opinion that the admissions of one partner afterwards may be received to defeat the bar, arising from the statute of limitations.

Judgment affirmed.

BRADFORD *& al. vs.* BUCKNAM.

To maintain an action on a promissory note it should be brought by one, or under the authority of one, having a legal interest in the note.

The payee of a note, negotiated it to a Bank and afterward failed, making an assignment of his property for the benefit of creditors. On the day the note fell due, the assignee, who was also second indorser on the note, commenced an action against the maker in the name of the payee, the property and possession of the note at the time, being in the Bank, to whom he subsequently, and before trial, paid the amount due and took up the note. *Held*, that the action could not be maintained.

THIS was an action of *assumpsit* on a promissory note of hand, and was submitted for the opinion of the Court upon the following agreed statement of facts.

The action was brought in the name of the payees for the benefit of their creditors on the day that the note fell due, to wit, *June 24th;* but prior to this, it had been negotiated by them to to the Maine Bank in the regular course of business and its amount received. At the time the suit was brought by direction of the assignees of the plaintiffs, who had failed in business, the note was in the Bank, where it remained until the 8th of *July* following, when it was paid and taken up by *Asa Hanson* who was second indorser thereon, and one of the plaintiffs' assignees prosecuting this suit. A nonsuit or default was to be entered according as the opinion of the Court should be upon these facts.

Fessenden & Deblois, for the defendant, contended that both the property and possession of the note at the commencement of the suit being in the Maine Bank no action could be brought by the plaintiffs, and cited *Mosher Exr.* v. *Allen*, 16 *Mass.* 453; *Bailey on Bills*, 74, 212; *Allen* v. *Ayer & al.* 3 *Pick.* 298.

Smith & Bradford, for the plaintiffs, insisted that the suit was well brought. It is sufficient if the plaintiffs acquire possession

of the note rightfully at any time prior to the rendition of judgment in the suit, or in season to give the defendant a legal discharge. *Little* v. *O'Brien*, 9 *Mass.* 427; *Marr* v. *Plummer*, 3 *Greenl.* 73; *Fisher* v. *Bradford*, 7 *Greenl.* 29.

In the last cited case the *authority* for bringing the suit is fully recognized, even without an interest. But here there is an authority *coupled with an interest*, both as it regards the real and nominal plaintiffs.

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

The objection taken to the right of the plaintiff to recover, is not founded on the merits of the case. The defendant interposes the rights of a third party, which have ceased to exist, and to whom he can never be held answerable. But with every disposition to sustain the action, we are unable to discover any legal ground, which would justify it, at the time it was brought. It should be authorized by a party, having a legal interest in the note. Such party, upon a negotiable note, with a blank indorsement, may sue in his own name, or in the name of any other person, with his consent. And it has been holden, that it will be sufficient, if such consent be subsequently obtained. *Marr* v. *Plummer*, 3 *Greenl.* 73. There the agent of the holder and owner of the note, who was the payee and had indorsed it, ordered the suit to be brought in the name of her son, who though ignorant of it at the time, afterwards approved of what was done.

In *Fisher* v. *Bradford*, 7 *Greenl.* 28, *Rice*, who was payee and indorser of a note, agreed that it should be regarded as the property of the plaintiff, and it was holden that he had a right to sustain the action, notwithstanding the note had then been pledged by *Rice* to a third party, the pledge having been redeemed, and the note procured before trial. In each of these cases the suit was ordered by the party, who was the general owner of the note. It was otherwise here. The plaintiffs had negotiated the note, for a full consideration, and had thereby ceased to have any interest in it, or control over it. *Mosher* v. *Allen*, 16 *Mass.* 453. And they acquired no title to it, until a subsequent period. The suit was not brought by the Maine Bank, the holders of the note, or by their privity or consent, or by any person acting for them,

or in their behalf. Upon these facts, the action being prematurely brought, cannot be supported.

Plaintiffs nonsuit.

Boynton *vs.* Fly.

One summoned as trustee in a process of foreign attachment, is "*a defendant*" within the meaning of *stat.* of 1827, *ch.* 359, which provides that where there are two or more defendants living in different counties, a Justice suit may be maintained against them all in the county in which either defendant lives.

A judgment of a Justice of the Peace, against one summoned as trustee under process of foreign attachment, in a case within his jurisdiction, though erroneous, cannot be avoided collaterally, but may be enforced until reversed on writ of error.

Assumpsit on two notes of hand payable in specific articles; the recovery of which, was resisted by the defendant on the ground that he had been compelled to pay the amount on a judgment recovered against him by a creditor of the plaintiff in a process of foreign attachment.

It appeared that *Boynton* and his creditor resided in *Cumberland* county, and *Fly* in *Oxford*. The trustee writ was issued by a Justice of the Peace in *Oxford*, and was addressed to the sheriffs of the counties of *Oxford* and *Cumberland*, and was by them served. Judgment was rendered against *Boynton* upon default, and against *Fly* upon his disclosure, which was satisfied by a sale of the specific articles named in the notes declared on in this action, the same having been delivered to the officer by *Fly* upon demand.

The introduction of this judgment and the proceedings under it, were objected to by the plaintiff's counsel, but was admitted by *Whitman C. J.* in the Common Pleas. A verdict being returned for the defendant, the plaintiff tendered a bill of exceptions to the foregoing ruling and thereupon brought the case to this Court.

Morgan, for the plaintiff, insisted that a Justice of the Peace had no jurisdiction in trustee suits, except where the debtor and trustee both reside in the same county, and that, consequently the

proceedings before the Justice in this case were all void. He cited the statutes of 1824, *ch.* 275, § 1; 1825, *ch.* 285, § 1; 1821, *ch.* 76, § 8; 1821, *ch.* 61, § 1, and commented particularly upon their provisions in support of the position taken.

Deblois, for the defendant, cited *Foster* v. *Jones*, 15 *Mass.* 185; *Howell* v. *Freeman & trustee*, 3 *Mass.* 121; *Commonwealth* v. *Pejepscot Proprs.*, 7 *Mass.* 399; *Com. Dig. Ev. a.* 5; *Dow* v. *Warren*, 6 *Mass.* 328; *Loring* v. *Bridge*, 9 *Mass.* 124; *Horner* v. *Fish & al.* 1 *Pick.* 435. He also commented upon the several statutes cited on the other side.

WESTON C. J. — By chapter 76 of the revised statutes, § 8, it is provided, that all civil actions, wherein the debt or damage does not exceed twenty dollars, and wherein the title of real estate is not in question, and specially pleaded by the defendant, shall and may be heard, tried, adjudged and determined, by any Justice of the Peace within his county. General jurisdiction to this extent having been thus given, the same section prescribes what process the justice shall issue, where it may be served, and how long before the time appointed for trial. The process is to be by summons, capias or attachment. The forms of these writs are prescribed in another statute. The service is to be made at least seven days before trial. Suppose the writ varies substantially from the form provided; or suppose it be served five days, instead of seven, before trial, yet if the justice renders judgment thereon, having jurisdiction, it will be a subsisting judgment, which may be enforced until reversed; which it may be by a writ of error. So if the writ is directed to an officer in another county, and is by him served, although not warranted by law, and the judgment rendered thereon may be reversable upon error, yet it remains in force, until so reversed. By law all personal or transitory actions, are to be brought in the county, where one of the parties lives, if both plaintiff and defendant are inhabitants of this State; and if otherwise brought, the writ shall abate, and the defendant be allowed double costs. There is no want of jurisdiction in the court; but it is matter of positive regulation. In the case before us the justice, having jurisdiction, the judgment, even if erroneous, remains in force, until reversed.

By the statute of 1824, *ch.* 275, a justice was authorized to issue a process of foreign attachment, when the amount demanded is not less than five, nor more than twenty dollars, provided the plaintiff and the supposed trustee live in the same county, where the justice has jurisdiction. By a subsequent statute of 1825, *ch.* 288, so much of the former as requires the plaintiff and supposed trustee both to reside in the county, where the justice has jurisdiction, is repealed. The trustee lived in that county, and was duly summoned. The power of a justice in all actions of assumpsit, is still further extended by the statute of 1827, *ch.* 359, where two or more defendants live in different counties, in which case the action may be brought in either county, and the process of the justice is to run into every county, where a defendant lives. Although the original debtor, in the judgment under consideration, was the principal defendant, yet the trustee was also a defendant, and called upon to answer averments, upon which he was finally charged. Here then is a case, within the provisions of the last statute, and justified under it. But it is enough for the defendant, that he is protected by a subsisting judgment, in a case of foreign attachment, within the jurisdiction of a justice, which is unreversed and in full force.

Judgment affirmed.

Bacon *vs.* Dyer.

In an action on a promissory note, made payable at a time and place certain, no averment or proof of a demand is necessary on the part of the plaintiff;—but if the maker was ready to pay at the time and place specified, that would be matter of defence.

This was an action of *assumpsit*, upon a promissory note of the defendant for one hundred dollars, payable in *one year* with interest, *at the defendant's store in Baldwin.* On the back of it was an indorsement of forty dollars in the hand writing of the defendant, and bearing date subsequent to the maturity of the note.

The plaintiff in his declaration alleged a presentment of the note by the holder at the place of payment, and demand of pay-

ment, and after issue joined, he proposed to amend by filing a new declaration in which this allegation was omitted, and also a count for money had and received.

To this the defendant's counsel objected; but *Ruggles J.* before whom the cause was tried in the Common Pleas, overruled the objection and allowed the amendments.

The plaintiff offered no evidence of a presentment of the note at the time and place of payment, other than the indorsement aforesaid, which he contended was sufficient. The defendant's counsel thereupon moved for a nonsuit; but the presiding Judge declined ordering it; and in committing the cause to the jury instructed them, that the indorsement was sufficient evidence of the presentment, so far as any proof of that fact was necessary. To which, a verdict being returned for the plaintiff, the defendant filed his exceptions, and thereupon brought the cause up to this Court.

G. W. Pierce, for the defendant, relied upon the case of *Tuckerman & al.* v. *Hartwell*, 3 *Greenl.* 147, in support of the position that it was necessary to allege and prove a presentment at the time and place of payment.

Fessenden & Deblois for the plaintiff, to show that no presentment was necessary cited the following authorities: 17 *Johns. R.* 248; 3 *Kent's Com.* 98; *Haxtun* v. *Bishop*, 3 *Wen.* 1; *Caldwell* v. *Cassidy*, 8 *Cow.* 271; *U. S. Bank* v. *Smith*, 11 *Wheat.* 171; *Woodbridge* v. *Bingham*, 12 *Mass.* 405; 4 *M. & S.* 462; *Carley* v. *Vance*, 17 *Mass.* 389; *Ruggles* v. *Patten*, 8 *Mass.* 480. To show that the partial payment was evidence of a waiver of the right to require a demand at the stipulated time and place, they cited *Herring* v. *Sanger*, 3 *Johns. Cas.* 71; *Hopkins* v. *Liswell*, 12 *Mass.* 52; *Jones* v. *Fales*, 4 *Mass.* 251; *Widgery* v. *Munroe*, 6 *Mass.* 436; *Chit. on Bills*, 248; *Boyd & al.* v. *Cleaveland*, 4 *Pick.* 525; *Fuller* v. *McDonald*, 8 *Greenl.* 213. The payment might also be regarded as evidence of a demand having been made. *Barker* v. *Parker*, 6 *Pick.* 80.

WESTON C. J.—The defendant objects to the filing of the new counts in the court below, by permission of the Judge, under leave to amend; but they were clearly within the practice,

which is well settled in regard to amendments. They were counts for the same cause of action, varying only in the form of declaring.

Whether in an action against the maker of a promissory note, or the acceptor of a bill of exchange, payable at a certain time and place, the plaintiff is bound to aver and prove a demand at the place appointed, has been the subject of great discussion in the English courts; where there has been much conflict of opinion. It would be labor bestowed to little purpose to review the cases there. Most of them have been examined by *Spencer C. J.* in *Wolcott* v. *Van Santvoord*, 17 *Johns.* 248, and have been adverted to in other cases cited in the argument. But the question was put at rest in *England*, by the case of *Rowe* v. *Young* in the house of Lords, 2 *Brod. & Bing.* 165. It was there decided, that if a bill of exchange be made payable at a particular place, the declaration in an action on such bill, must aver presentment at that place, and the averment must be proved. The bill in controversy in that suit, was payable two months after date. It is worthy of remark that this decision was against the opinion of eight of the Judges, one of whom was *Bayley* of the king's bench, the learned author of the treatise upon bills and notes. In the elaborate opinion, by him pronounced on that occasion, he says, "another rule upon the subject of demands, I take to be this, that the fixing a special time and place for payment, will not make an actual demand at the time and place necessary, as part of the plaintiff's title in a case in which otherwise the demand would not be necessary; but that, in that case also, a tender or readiness to pay at the time and place, is matter of defence, and of defence only." In the great commercial State of New York, it has been repeatedly decided that an averment and proof of demand in such cases is not necessary. *Fodom & al.* v. *Sharp & al.* 4 *Johns.* 183. *Wolcott* v. *Santvoord*, 17 *Johns.* before cited, where *Spencer C. J.* goes at large into a consideration of the question, upon principle and authority. To the same effect is *Caldwell* v. *Cassidy*, 8 *Cowan*, 271, and *Haxtun* v. *Bishop*, 3 *Wendell*, 1. There are intimations of an opposite tendency in *Woodworth* v. *The Bank of America*, in the Court of Errors, 19 *Johns.* 391; but that was a case, in which the liability of an in-

dorser was in question; to charge whom a demand at the place appointed must be averred and proved; as has been held in many of the cases, maintaining a different doctrine, when the suit is against the maker or acceptor. In that case, the judgment of the Supreme Court was reversed, against the opinion of the Chancellor. In *Caldwell* v. *Cassidy*, before cited, the court distinguish between a note, payable on demand at a certain place, and one payable at an appointed time as well as place; holding that in the first case, as for instance upon a bank bill, an averment and proof of demand is necessary, but not in the last. The same distinction is taken by some of the Judges in *Rowe* v. *Young*. In the case before us, the note was not payable on demand.

In the case of the *Bank of the United States* v. *Smith*, 11 *Wheaton*, 171, *Thompson J.* who delivered the opinion of the court, after adverting to the decision in *Rowe* v. *Young*, says, "a contrary opinion has been entertained by courts in this country that a demand on the maker of a note, or the acceptor of a bill, payable at a specific place, need not be averred in the declaration, or proved on the trial. That is not a condition precedent to the plaintiff's right of recovery." But upon this point, as it was not necessary, the court did not give a decided opinion; but intimated that they were strongly inclined to think that, as against the maker or acceptor of such note or bill, no averment or proof of demand of payment at the place designated, would be necessary.

But there are decisions in *Massachusetts* of a more authoritative character in this state, one prior to our separation and one directly afterwards, before any change could have taken place in the law of either state. *Ruggles* v. *Patten*, 8 *Mass.* 480, was brought by the indorser against the maker of a negotiable note, for the payment of a sum of money, in four months, at the Penobscot Bank, kept at *Buckstown*. The defendant, in his fourth plea, alleged that the plaintiff, the holder, did not demand payment at the Penobscot Bank, at the maturity of the note. To this plea the plaintiff demurred specially, and the defendant joined in demurrer. The court adjudged the plea bad; holding a demand at the bank unnecessary. In *Carley* v. *Vance*, 17 *Mass.* 389, the action was brought by the payee of a note against the maker.

The note was payable at a specified time and place. The declaration contained no averment of a demand at the place appointed. The defendant pleaded that he had the money ready at the time and place to pay the note; but that the plaintiff was not there to receive it. The plaintiff demurred generally to the plea, and the defendant joined in demurrer. The court held clearly, that when a note is made payable at a certain time and place, no averment or proof of demand is necessary against the maker; although it would have been otherwise, if the action had been against an indorser. If such an averment had been essential, the declaration, which omitted it, must have been adjudged bad. It was further held, that if the defendant was ready with his money, at the time and place stipulated, it was matter of defence, and must be so pleaded, with a *profert in curia*, as to the money; and because the profert was omitted, the court adjudged the plea bad.

The former of these decisions is equally binding upon us as upon *Massachusetts*, and the second is certainly evidence of what the law was upon this question, at the time of our separation. No conflicting opinion has been adduced in *Massachusetts* or *Maine*. The note in suit was payable at a certain time and place; and our opinion is, that in such a case, no averment or proof of demand was necessary, on the part of the plaintiff; but if the defendant was ready at the time and place, it is matter of defence. And as the verdict is legally sustained upon this ground, it becomes unnecessary to advert to that, upon which it was placed at the trial.

Judgment affirmed.

EVELETH *vs.* SCRIBNER.

A. agreed *by parol* to purchase of B. a lot of land and store thereon standing, for a stipulated price, and in *part performance* of the agreement entered into possession and removed the store to another lot. He afterwards demanded a deed, but B. declined giving one, because his own title then had not been perfected. Subsequently, however, he made a deed and tendered it to A. who then refused to receive it. *Held*, that under these circumstances B. could maintain no action for a breach of the contract.

Where the contract was, on the part of one to convey, and on the other to pay at *a future time*, it was held that the former was bound to convey on demand, and could not rightfully withhold the deed until the term of credit had elapsed.

THIS was an action of *assumpsit*, the writ containing seven counts. One was on an account annexed to the writ for the sum of $5,50, and the remainder, stripped of all technicality, were on a special parol contract, for the purchase by the defendant; of a lot of land and store thereon, situated in the town of *Windham.*

It appeared in evidence, that the defendant was to pay the plaintiff for the store and lot, the sum of $150. One half in money and the remainder in the notes of *Moses Little*, to whom the defendant was to sell his store for that sum, payable in one, two and three years without interest. The plaintiff was also to have four shares in an aqueduct company which was to be benefited by the removal of the plaintiff's store. It appeared, that in pursuance of the agreement, *Little* moved into and took possession of the defendant's store, and the defendant caused the store of the plaintiff to be removed to another lot. Afterward, upon two or three occasions, the defendant called upon the plaintiff for a deed of the store and lot, but he declined giving him one, because, he had not received a deed himself from *Elias Thomas*, of whom he had bought the property, and because of a right of redemption existing in *Thomas's* mortgagor which had still a short time to run.

After the lapse of about three years, and after the defendant had removed from the town of *Windham*, the plaintiff tendered him a deed of the store and lot and demanded the stipulated price; but the defendant declined receiving the deed or paying the price.

There was much evidence in the case, but from the turn which the cause finally took, the foregoing facts may be regarded, as those only which are material to be reported.

A verdict was returned for the plaintiff, for the amount of the account annexed to the writ, $5, 50; which was to be enlarged, or otherwise, as the opinion of the Court should be upon the whole case.

Longfellow, for the defendant, relied upon the statute of frauds, the contract not having been in writing — and contended that the doctrine of *part performance*, in a Court of law, did not take a case out of the statute — that, was confined to a Court of Chancery; and cited *Kidder* v. *Hunt*, 1 *Pick.* 328; *Freeport* v. *Bartol*, 3 *Greenl.* 340.

He also insisted, that the defendant's liability under the contract, if it was a valid one, ceased after the refusal of the plaintiff to give a deed on the demand of the defendant.

Fessenden & Deblois, for the plaintiff, contended that the case was taken out of the statute of frauds by the part performance of both parties, and cited to this point the following authorities: *Seymour* v. *Bennett*, 14 *Mass.* 266; *Davenport* v. *Mason*, 15 *Mass.* 92; *Crosby* v. *Wardsworth*, 6 *East*, 611; *Pike* v. *Williams*, 2 *Vern.* 455; *Earl of Aylsford's case*, 2 *Stra.* 783; *Wilkinson* v. *Scott*, 17 *Mass.* 249; *Com. on Con.* 80; *Sugden's Law of Vendors*, 72, *note* 7; *Winter* v. *Brocknell*, 8 *East*, 308; *Inman* v. *Stamp*, 1 *Stark.* 11; *Lofft*, 331; *Boyd* v. *Stone*, 15 *Mass.* 342; *Ricker* v. *Kelly*, 1 *Greenl.* 117; *Lessee of Tyler* v. *Eckhart*, 1 *Bin.* 378; *Welles* v. *Stradling*, 3 *Ves. Jr.*, 381; *Billington* v. *Welch*, 5 *Bin.* 129; 2 *Phil. Ev.* 65; 14 *Johns.* 453.

2. The covenants or promises of the parties were mutual and independent, and the plaintiff might maintain his action without showing a tender of the deed. *Smith* v. *Sinclair*, 15 *Mass.* 171; *Sears* v. *Fowler*, 2 *Johns.* 272; *Campbell* v. *Jones*, 6 *T. R.* 570; *Bordage* v. *Coe*, 1 *Saund.* 120.

WESTON C. J. — Waiving for the present the objection to the right of the plaintiff to recover, arising from the statute, or how

far it is removed by evidence of part performance, if by law it can have that effect, and without referring to the variance, which it is insisted exists between the declaration and the proof, are there other fatal objections to the claim of the plaintiff to have his verdict enlarged?

It is urged by his counsel, that the plaintiff tendered his deed seasonably, for that it could not be intended that he was to give it, until he received the consideration money, which was not all to be paid under three years. Upon a contract of sale, either of land or of personal chattels, where a term of credit is not given, payment of the price is to be an act precedent to, or concurrent with the transfer of the possession. But here a term of credit was expressly agreed. For one half of the consideration, the plaintiff was to receive the notes of a third person, and for the other, it does not appear, that he stipulated for any collateral security. The plaintiff on his part was bound then, to make the conveyance upon demand, upon receiving the notes he had agreed to accept. The jury have expressly found that he refused and neglected to do this; although he dispensed with a tender of the money or of the notes, on the part of the defendant. The plaintiff then, and not the defendant, is chargeable with a breach of the contract. The defendant was certainly not obliged to accept the deed at a future day, which, notwithstanding his urgent solicitations, had been so long detained from him, after he had left that part of the country, and had no further occasion for the property.

But it is contended, that the defendant, having removed the store partly on to his own premises, is answerable for its value, as a personal chattel. The removal of the store was principally with a view to accommodate the aqueduct company, of which the plaintiff was a member, in which he was, as a part of the bargain, to receive four extra shares. The defendant also proposed an accommodation to himself from that measure; as it would improve the prospect about his house. It was for their mutual convenience, and was one of the inducements to the bargain. So far as there has been a part execution of the contract, it has been to the prejudice of the defendant. He incurred the expense of removing the plaintiff's store, a title to which he was unable to obtain; and the plaintiff put *Little* into the defendant's store, to

which he was not entitled, unless upon the fulfilment of the contract on his part. It does not appear, that the defendant derived the least benefit whatever from the plaintiff's store; and the jury have found that the contract for the store and lot was entire. The case would have been presented under a very different aspect, if there had been no breach of the contract on the part of the plaintiff, and the defendant had sought to escape from it, under the statute of frauds. In that case, he would derive no protection from a contract, which he had repudiated, and might have been held answerable for meddling with the plaintiff's store, to the full extent of his damage. The defendant was ready and desirous of fulfilling the contract, which the plaintiff declined. Both have sustained damage. The plaintiff may have been the greater sufferer; but has no just claim upon the defendant for indemnity.

Judgment on the verdict.

LORING *vs.* O'DONNELL.

In a prosecution under the Bastardy act, it is necessary for the plaintiff to allege in her declaration, that, she being put upon the discovery of the truth, during the time of her travail, accused the defendant of being the father of the child whereof she was delivered.

A compliance with this requisition of the statute, is essential, not merely to qualify the plaintiff as a witness, but to the success of the prosecution.

THIS case is sufficiently stated in the opinion of the Court.

The principal question being, whether it was necessary for the plaintiff in a prosecution under the Bastardy act, to allege in her declaration, that she being put upon the discovery of the truth, during the time of her travail, accused the respondent of being the father of her child.

Megquier, for the plaintiff, contended that it was not. That, this was only necessary, in order to *qualify her for a witness*. But, that if she chose to rely upon the admissions of the respondent, or upon evidence other than her own testimony, she well might.

In this case, the strongest possible evidence is furnished of the

truth of the charge made by the plaintiff, *viz.* the *admission* of the respondent *by his demurrer.* All the facts are stated in the plaintiff's declaration, to which she would have been allowed to testify if she had been a witness — and all these facts are admitted by the demurrer. It would therefore seem to be a strange construction of the statute, which would deprive the plaintiff of the benefit of this admission, unless she had done, what it was necessary for her to do, only to qualify herself for a witness.

That, a literal compliance with every provision of this statute is not essential, is settled in the case of *Mariner* v. *Dyer*, 2 *Greenl.* 165.

In *Dennet* v. *Kneeland*, 6 *Greenl.* 460, the point now raised, was distinctly settled, in accordance with the views now taken by the plaintiff. The Court there say, "*this cannot be regarded as essential, inasmuch as the complaint may be made, and the party held to answer before delivery.*" This was not a mere *obiter dictum*, but a solemn decision of a point raised in the case; and as such, is deemed to be conclusive of the case at bar.

R. A. L. Codman, for the respondent, cited *Mariner* v. *Dyer*, 2 *Greenl.* 167; *Drowne* v. *Stimpson*, 2 *Mass.* 443; *Paul* v. *Frazier*, 3 *Mass.* 71; 4 *Kent's Com.* 178; 2 *Dane's Abr. ch.* 60, *art.* 3; *Foster* v. *Beatty*, 1 *Greenl.* 304; *Dennet* v. *Kneeland*, 6 *Greenl.* 460.

The opinion of the Court was delivered by

Parris J. — This is an application for a certiorari to the Court of Common Pleas in this county to send up the record in a case, wherein the petitioner is complainant against the respondent, prosecuted under statute *ch.* 72, for the maintenance of bastard children.

The petitioner sets forth, in her petition to this Court, a copy of her complaint which she made to the court below, and likewise a copy of a special demurrer filed thereto by the respondent alleging for cause "that the plaintiff hath not in and by her declaration alleged or shewn that she, being put upon the discovery of the truth during the time of her travail, accused the respondent of being the father of the child whereof she was delivered." An issue having been joined upon this demurrer, the declaration

was adjudged bad, and judgment rendered for the said *O'Donnell* against the complainant.

The petitioner prays the interference of this Court, that the judgment may be reversed, and that further proceedings may be had on her complaint.

It is an uniform rule of law, that when a statute gives a remedy, the party seeking the remedy, should in his declaration, allege all the facts necessary to bring him within the statutes.

The statute, on which this prosecution is founded is a transcript of the statute of *Massachusetts* upon the same subject, passed *March* 15, 1786. In commenting upon this statute, in *Drowne* v. *Stimpson*, 2 *Mass.* 443, *Parsons C. J.* says, "*To entitle the complainant to an adjudication*, the statute requires that she charge the defendant with being the father in her travail, and that she afterwards continue constant in her accusation." And again, in the same opinion he says, "In this complaint it ought to have been averred, not only that she had been delivered of a bastard child, of which the defendant was the father, but that she had accused him in the time of her travail." In *Foster* v. *Beatty*, 1 *Greenl.* 304, *Mellen C. J.* in delivering the opinion of this Court, says, "After the action is entered, and before the cause can be put to trial, the complainant must file a declaration, stating all the material facts which are necessary to be proved to support the prosecution. In this declaration she should state that she has been delivered of a bastard child; that it was begotten upon her body by the person accused, &c. *and that, being put upon the discovery of the truth respecting the same accusation in the time of her travail, she did thereupon accuse the defendant of being the father of such child.*"

The statute says, "If she, being put upon the discovery of the truth, &c. in the time of her travail, shall thereupon accuse, &c. and shall prosecute the accused as the father of such child, in which prosecution she shall be admitted as a competent witness, and the examination before the Justice shall be given in evidence on the issue, or if by default, or by his plea he shall admit the truth of the allegations contained in said prosecution, he shall be adjudged the reputed father, &c. The statute has pointed out the mode of prosecution and proof and that must be pursued, and

we much doubt whether any evidence, other than that specified by the statute, would be sufficient. Who, but the mother, can know the paternity of the child. To prove it, the statute has wisely required that she be particularly examined in writing and under oath before a magistrate ; — that she be again put upon the discovery of the truth of her accusation in the time of her travail, and unless these preliminaries are attended to, we think the accused cannot be put upon his defence. When these and the other requirements of the statute have been complied with, the burden of proof will be thrown on the accused, and then to rebut his proof, or support her own, the prosecutrix may resort to his confessions, his conduct and other testimony corroborative of her accusation.

The petitioner places much reliance upon the opinion pronounced by this Court, in *Dennet* v. *Kneeland*, 6 *Greenl.* 460. The language of the Judge giving the opinion is this, "It is objected that the complainant has not alleged in her complaint that she accused the party charged in the time of her travail. This cannot be regarded as essential, inasmuch as the complaint may be made and the party held to answer before delivery." — This observation must unquestionably refer to the complaint to the Justice of the Peace, and not to the complaint and declaration to be filed in the Common Pleas. In the latter she must aver that *she has been delivered* of a bastard child, *Drowne* v. *Stimpson*, and *Foster* v. *Beatty* before cited, for the only object of the whole procedure is to compel the accused to assist in the maintenance of such child, and give security to save the town free from charge, and he is not called to defend himself until the child is born. The application to the Justice of the Peace for a warrant is called a complaint on oath, in the second section of the statute, and it must have been that complaint upon which the opinion of the court was expressed in *Dennet* v. *Kneeland*. This is the more obvious from a succeeding paragraph in the opinion wherein the Judge says, " we are all of opinion, as she did not accuse the respondent with being the father of the child in the time of her travail, before delivery, that *this is a defect fatal to her prosecution.*"

But there is another difficulty in this case, which has not been adverted to by the counsel, on either side. What if the decision of the court below had been erroneous? How could any trial be had in this court? The statute provides that the proceedings shall be had in the Court of Common Pleas. — That court is to adjudge the respondent the reputed father of the child, and assess the sum for which he is to be charged for its maintenance and to order indemnity to the town. These powers are not given to this Court; *Drowne* v. *Stimpson*, before cited. And, as the proceedings are not according to the course of the common law, we are not authorized to render a right judgment, even if we were satisfied that the judgment of the court below was wrong. *Melvin* v. *Bridge*, 3 *Mass.* 305; *Edgar* v. *Dodge*, 4 *Mass.* 670.

But the difficulty ends not here. In *Commonwealth* v. *Ellis*, 11 *Mass.* 466, in giving the opinion of the court, *Jackson J.* says, "If the court below proceed in a course different from that of the common law, the only mode of correcting any error that may have occurred is by a *certiorari;* on which this Court, not having the same special jurisdiction, cannot, in any case, render such judgment as ought to have been rendered below; but can only affirm the proceedings, if found to be regular, or quash them if the court below has exceeded its jurisdiction, or proceeded in a manner not warranted by the statute, or other authority under which it acts." So in *Melvin* v. *Bridge*, before cited. *Bridge* prosecuted *Melvin* in the Common Pleas for taking certain fish in Merrimack River, contrary to a special statute of *Massachusetts*. *Melvin* was acquitted by verdict of a jury, and the court adjudged that *Bridge* take nothing by his complaint. *Melvin*, thereupon, moved for judgment for costs in his favor, which the court denied. He then brought a writ of error to have the judgment corrected. The court quashed the writ of error because the proceedings in the court below were not according to the course of the common law, but added, "If we were to consider these proceedings as certified on a *certiorari*, the plaintiff in error could not be relieved, as a judgment for costs could not be rendered, but only the proceedings affirmed or quashed."

It is true, that some of the difficulties here suggested have been removed by statute of *March* 11, 1835, *ch.* 165; but it is

expressly provided, that the provisions of that act shall not be applied to any actions pending or commenced before its passage.

This process was pending in the Common Pleas as early as *March*, 1834, and final judgment was rendered in that court previous to the passage of the act above referred to.

Under all the embarrassments pressing upon this case, we think the writ must be denied.

MANN *vs.* MARSTON.

If the return of the Selectmen of the laying out of a road, describe it as "a town road," it will be sufficient, though it do not state *for whose benefit* it was laid out.

Where the return was of a road laid out over a rangeway, describing it particularly, and the vote of the town was "to accept the report of the Selectmen laying out *the rangeway* near J. M's," &c; the latter was held to be virtually an "approval and allowance" *of the road* as located.

A vote of the town prior to the laying out of a road by the Selectmen, that the owners of the land over which the location of the road was contemplated might permit their fences to remain for one year, could have no legal operation whatever.

The 25th *sec.* of *stat. ch.* 118, providing for the removal of obstructions from certain ways by the order of some Justice of the Peace, relates exclusively to *private* ways, those which are laid out for the benefit of individuals only — but a nuisance in a *town road* or public highway, may be removed by any one whose passage is obstructed by it.

THIS was an action of trespass originally commenced before a Justice of the Peace, carried to the Court of Common Pleas by appeal, and brought into this Court by writ of error. The trespass alleged, was the throwing down the plaintiff's fence. The defendant justified on the ground that the fence was extended across a town road, and that it was removed to enable him to exercise his legal right of passing thereon.

On trial, the plaintiff offered evidence to show that the fence thrown down stood on one of the rangeways of the town of *North Yarmouth*, and had been kept up in that place by him for more than twenty-seven years.

The defendant, to maintain the issue on his part, read in evidence from the records of the town of *North Yarmouth*, the return of

the Selectmen locating the road in question, as a "*town road*," dated *August 27th*, 1832; and the acceptance thereof by the town, at a meeting regularly called for that purpose, *October 8th*, 1832.

The plaintiff also read from the records a request of *Thomas Marston* and others, to the Selectmen, to lay out the road in question, dated *May 4th*, 1832 — and a vote of the town, at a meeting held the *28th* of *May*, 1832, directing the opening of the road as prayed for by *Marston* and others, "before the closing up of the present season, and that *the fences stand as they now stand for twelve months.*"

The defendant proved that in *October*, 1832, a part of said road was built under the direction of the Selectmen, and that the fence thrown down was upon, and across, that portion of the road.

He also proved by one of the Selectmen, that he requested the petitioners to notify the owner of the land and others interested in the location of the road, of the time when the Selectmen would meet to lay it out; and that some of the owners were present; but that, he did not recollect that *Henry Scott*, whose fence inclosed some of the land over which the way was located, was present — that, he had no knowledge that *Scott* had been notified, but presumed he had been, inasmuch as he had requested the petitioners to notify all who were interested. There were other circumstances in evidence tending to establish the presumption, that, all who were interested in the location, had due notice of it.

It was also in evidence, that in obedience to instructions from the the town to that effect, it was not the practice of the Selectmen to lay out a way until application had been made therefor, and some directions given by the town in regard to it.

The counsel for the plaintiff hereupon contended, that, the return of the Selectmen ought to have stated that the road was laid out for the use of the town of *North Yarmouth*, or "for the use of certain individuals thereof or proprietors therein" — and that this omission made the proceedings void.

That there should be *positive proof* that notice had been given by the Selectmen to all the owners of land over which the way was to be located — and that the jury should be instructed that the

presumptive evidence, arising from the fact that the Selectmen had requested the petitioners to give notice, was not sufficient to prove that notice had actually been given to *Henry Scott*, one of the owners of the land.

He further contended, that the vote of the town accepting the report of the Selectmen, was not such an approval and allowance of the road as the law required. But if the road was legally laid out and accepted, the defendant had no right to remove the fence, but that his remedy should have been sought by an application to a Justice of the Peace.

He further insisted, that the vote of the town, passed *May 28th*, 1832, was intended to authorize and did authorize the plaintiff to keep up the fence until the 28*th* of *May*, 1833.

But *Ruggles J.*, before whom the cause was tried, ruled that the return of the Selectmen of their doings in laying out the road was good and sufficient: — that, the vote of acceptance by the town, on the 8*th* of *October*, 1832, was equivalent to an approval and allowance of the road: — that, the vote of the town, passed on the 28*th* of *May*, 1832, did not authorize the plaintiff to keep up his fence after the laying out of the road, but was virtually repealed by the subsequent vote of acceptance on the 8*th* of *October* — and that the defendant had a right by law to throw down and remove the fence erected across the road. He also instructed the jury, substantially, that the request of the Selectmen for the petitioners to notify the owners of the land, was not of itself sufficient to raise the presumption of notice having been actually given to *Scott* — but, that if they were satisfied that notice had been given to the owners of the land, before the laying out of the road by the Selectmen, of the time and place of meeting for that purpose, they should find for the defendant — which they accordingly did.

The errors assigned, were predicated upon the foregoing positions of the plaintiff's counsel, and the ruling of the Court thereon.

And now, *Eastman*, for the plaintiff, contended, that it should have appeared in the return of the Selectmen for whose benefit the road was laid out, in order to enable the owner of the land to know of whom to seek his remedy. If for public benefit, of the town. If for the benefit of individuals, then of such individ-

uals. He must seek his remedy within a year — it is therefore important that he should know early, to whom he should look.

2. The evidence of notice was insufficient. A notice to part, cannot be considered as notice to the whole. In this case there was no positive proof of actual notice to any of the owners of land. And there was nothing on which to found a presumption. *Harlow* v. *Pike*, 3 *Greenl.* 438; *Inhbts. of Lancaster* v. *Pope & al.* 1 *Mass.* 88; *Commonwealth* v. *Coombs*, 2 *Mass.* 489; *Howard* v. *Hutchinson*, 1 *Fairf.* 335.

3. The vote of acceptance was not sufficient. It was not a vote accepting the report of the laying out of a *road*, but of the laying out of a *range way*, which the Selectmen had no authority to do.

4. The vote of the town of the 28*th* of *May*, fully justified the plaintiff in continuing up his fence. See *Stat. ch.* 118, *sec.* 25.

5. The defendant had no right to remove the fence, but should have applied to a Justice of the Peace. *Stat. ch.* 118, *sec.* 25, 26, 27. When a nuisance is erected on a public highway, any one may remove it; but when erected on a private way, it must be removed by public authority.

Mitchell, for the defendant.

The opinion of the Court, was delivered by

PARRIS J. — As to the first error assigned, we think it is sufficiently apparent from the records of the town, that the Selectmen laid out a *town* way. In their report to the town, dated *Aug.* 27, 1832, they certify that they have surveyed and laid out the rangeway as a *town road* beginning at the range line opposite *Benaiah Titcomb, Jr's.* house and thence proceeding to the *Hallowell* road, describing said road by them so laid out by courses, metes and bounds. Nothing is said in any of the proceedings concerning a private way. The Selectmen certify that the road passes by the side of *Mann's* land sixty-six rods, through his land forty-four rods, and through his inclosure seventy-four rods, but that no damage was claimed. In the absence of all intimations to the contrary, we think the road is to be considered a town road, laid out and accepted for general benefit, and, consequently, that the first error is not well assigned.

The second error assigned is, " That the Court instructed the jury, that from the fact that the Selectmen had directed the petitioners to notify the owners or occupants of the land, of the time and place of their meeting to lay out said road, in connexion with the fact that some of said owners and occupants were present at the time of their meeting for that purpose, the jury might legally presume that due notice had been given to all the owners and occupants of the land over which said road was laid out, of the time and place of said Selectmen's meeting for that purpose, whereas, by law, said court ought to have instructed the jury, that, upon proof of these facts alone, they were not authorized to presume that notice had been given," &c.

The case shows that the Judge, so far from instructing the jury as is alleged in the assignment of errors, did in substance, give the instructions which the plaintiff in error contends ought to have been given.

The Judge certifies that the jury were substantially instructed, that the request of the Selectmen to the petitioners, to give the notice, was not of itself sufficient to raise the presumption of notice, and that there were other circumstances in evidence, tending to establish the presumption, that all persons interested in the land over which the road was laid out, had due notice of the time of the Selectmen's meeting for that purpose ; and that, upon this point, the jury were instructed, that if they were satisfied that notice had been given to the owners of the land, before the laying out of the road by the Selectmen, of the time and place of meeting for that purpose, they should find for the defendant. In finding for the defendant, the jury must have found that all persons interested were duly notified, and nothing appears in the case, tending to shew that they found this fact from incompetent or insufficient evidence. We are, therefore, of opinion that the second error is not well assigned.

The third error assigned is, that the Court of Common Pleas ruled and determined, that the vote of the town to " accept the report of the Selectmen, laying out the rangeway near *James Mann's*," was such an approval and allowance of the road, as is required by law. In order to understand this vote of the town, it is necessary to recur to the report of the Selectmen and ascer-

tain what they did. If they merely laid out a rangeway, their act, in so doing, would be wholly inoperative, as the statute gives them no power so to do. Their power is confined to laying out roads or highways, and a rangeway is not a proper description either of a town road or public highway. But, by looking at their report, whatever of obscurity may appear in the record of the town, is fully explained. They laid out a town road on a rangeway, as was done in *Howard* v. *Hutchinson*, 1 *Fairf.* 335. In their report to the town, they say, that they laid out the rangeway as a town road, and go on to describe the course, bounds, length and breadth of the road, with all necessary particularity; and this report was accepted in regular town meeting, called for that purpose.

We think that this action of the town was virtually an approval and allowance of the road as laid out, and it thereupon was legally established as a town way. We, therefore, adjudge that the third error is not well assigned.

As to the fourth error, we think with the Court below, that the unconditional acceptance, allowance and approval of the road on the 8*th* of *October*, established it as an open road from that time. Indeed we do not perceive how the votes of the town, passed on the 28*th* of *May*, long before any action by the Selectmen, could have any legal operation. Towns have no authority, by statute, to lay out roads except by their Selectmen, and the authority and duty of the town commences when the Selectmen report their doings thereto, and not before. Consequently, whatever the town may do in relation to a road, before receiving the Selectmen's report, would be legally inoperative. We have already decided, that even the warrant for calling a meeting to consider the Selectmen's report cannot be legally issued until after the laying out by the Selectmen. *Howard* v. *Hutchinson*, before cited. The votes of the 28*th* of *May* may be considered as advisory to the Selectmen, and as indicative of the willingness of the town at that time that the road should remain unopened for the term of one year; but it has not been contended that the first vote, "that the road, as prayed for by *Thomas Marston* and others, be opened, as requested by said *Marston* and others," has any validity. That vote did not establish the road, nor has it any

operation or effect, because the Selectmen had not, at that time, laid out the road and reported their doings to the town. Neither can the other vote, passed at the same time, have any greater validity. It was upon a subject not then regularly before the town, but upon which, when regularly presented, on the *8th* of *October*, the town might have legally acted, but did not. We, therefore, consider the road as regularly laid out and established on the *8th* of *October*, as an open road, and that the fourth error is not well assigned.

If this was a town road, as it undoubtedly was, then it was not necessary for the defendant to wait until an order could be procured from a Justice of the Peace for the removal of the obstruction.

The 25th *sec.* of *stat. ch.* 118, upon which the plaintiff relies, relates exclusively to *private ways*, and provides that obstructions across such ways may be removed by the order of some Justice of the Peace. This we think must refer to such ways as are laid out for the benefit of individuals only, and not to such public roads as may by their use become highways and great thoroughfares through a town. Surely it cannot be necessary for a traveller, who finds a town way hedged up by impassable obstructions, to resort to a Justice of the Peace for authority to remove such obstruction whereby he may be enabled to proceed on his journey. Town roads are, in many cases, the most public highways in the State. Suppose an individual should throw a fence across one of the principal streets in the city of *Portland*, which streets are laid out by the authority of the city only; — would it be contended that whoever should remove such fence would be a trespasser, unless he did it under authority from a Justice of the Peace? Such a principle would not be endured for a moment. Although the road under consideration may not be of so general importance, yet the case shews that it opened into the county road called the *Hallowell* road, and is very far from being what is denominated in the *25th section*, a *private* way.

Upon the whole, we think there is no error in the proceedings of the court below, and accordingly the judgment of that court is affirmed.

LOMBARD *vs.* BRACKETT.

In trespass to the plaintiff's close containing 28¾ acres, the defendant pleaded soil and freehold generally, on which issue was joined. Both parties claimed under the same grantor — the deed to the plaintiff being first executed, but the deed to the latter, *first recorded*. The plaintiff had enclosed three acres with a fence and occupied it prior to the conveyance to the defendant, but had no actual possession of the remainder of the lot, nor had the defendant notice of the prior conveyance. The jury having returned a general verdict for the plaintiff, the title to the *whole lot*, (should judgment have been rendered on the verdict,) would be confirmed to the plaintiff when he had no legal title to but *three acres*. The Court thereupon set aside the verdict, to give the parties an opportunity to make the pleadings conformable to the truth and justice of the case.

THIS case, which was trespass *quare clausum fregit*, is sufficiently stated in the opinion of the Court.

Longfellow and *Deblois*, for the defendant.

Mellen, for the plaintiff, cited the following authorities: *Gould's Pl.* 354; *Proprietors of Ken. Pur.* v. *Laboree*, 2 *Greenl.* 275; *Little* v. *Megquier*, 2 *Greenl.* 176; 5 *Com. Dig. Pleader, E.* 36; 1 *Saund.* 28; 1 *Chit. Pl.* 523; *Rideout* v. *Brough, Cowp.* 133; *Perkins* v. *Burbank*, 2 *Mass.* 81; *Phillips* v. *Byron*, 1 *Strange*, 509; *Smith* v. *Bouker*, 2 *Strange*, 994; *Gow on Part.* 182; 2 *Wm. Black.* 947; 6 *Taunt.* 587; 5 *Bac. Abr. Verdict, O.*; 1 *Saund.* 300, *n.* 5; *Cro. Eliz.* 133.

PARRIS J. delivered the opinion of the Court.

The plaintiff declared on a trespass, *qu. cl.* committed in his close containing 28¾ acres, which he particularly describes by metes and bounds. The defendant pleaded soil and freehold to the close generally, and issue having been joined on that plea, the evidence was submitted to the jury. The plaintiff claimed the close by his elder deed from *John Lombard, Jr.* and the defendant claimed it by a deed from the same *John Lombard, Jr.* subsequent in date but first recorded. To avoid the effect of the defendant's deed, the plaintiff contended and attempted to prove, that the second conveyance was taken with a knowledge that the premises had been previously conveyed to him, and that the defendant was so chargeable with notice that he could hold only in subordination to the plaintiff's title. This position the plaintiff failed to maintain. If he had succeeded in his proof of notice, so

as to avoid the force of the defendant's deed, the verdict would be right, and cover no more than the facts in the case would require. Having failed in this attempt, the plaintiff contended and proved that he was in the actual and exclusive possession and occupancy of a three acre piece, parcel of the 28¾ acre tract, claiming it as his own under his deed, having it inclosed with fence, when the second deed under which the defendant claims was executed, and that on this three acre piece the acts were committed by the defendant, which are complained of as a trespass in this case. It also appeared that the residue of the 28¾ acres were not improved or inclosed by the plaintiff, and that he was not so in possession thereof as to give the second purchaser notice of his claim, or put him on inquiry.

From these facts, it results, that the three acre tract did not pass by the subsequent deed, inasmuch as it was then held by the plaintiff under his prior deed, and *John Lombard, Jun.* was not seized thereof at the time of making his second conveyance. But the residue of the tract, not being held adversely by the plaintiff, passed by the second conveyance, and the defendant is the legal owner thereof.

As the pleadings now stand, the effect of a judgment on the verdict would be to confirm the whole tract to the plaintiff when he has no legal claim beyond his inclosure comprising the three acres. This would be unjust, and we must relieve the defendant from such consequences. The difficulty results from the manner of pleading, and that has grown out of a misapprehension of the facts, the plaintiff supposing that he could avoid the second deed by proof of notice, whereby his title to the whole close would be established; and the defendant relying upon his ignorance of the plaintiff's deed, or actual possession of any part of the close described in the declaration, in which case the defendant's deed would operate a conveyance of the whole. Who is chargeable with the error it is unnecessary to decide, as we now have the power of preventing the mischief which might result therefrom.

We shall, therefore, set aside the verdict, that the pleadings may be amended, unless the plaintiff will consent so to amend his declaration as to include the three acre tract only, which being done, the verdict will conform to the justice of the case, and udgment may be rendered thereon.

KNIGHT *et ux. vs.* MAINS.

It is sufficient for the demandant, in an action to recover dower, to show her husband's possession during the coverture; it is then incumbent on the defendant to show a paramount title in himself.

Where one took a deed from the State, containing the following reservation in favor of the widow of one who died in possession of the premises: "Reserving to E. M. formerly the wife of J. M. a life estate in the same, to one third thereof, in the same manner she would have been entitled to her right of dower in the premises, if her husband, J. M., had died seised of the same in his own right; and she shall be entitled to the privilege of having the same set off to her, in the same manner she would have been, had the said lot been the property of said J. M. at the time of his decease," — it was holden that such grantee could not rightfully resist the claim of E. M. to dower.

THIS was an action of *dower*, wherein the demandants alleged, that, *Elcy Knight* was formerly the wife of *James Mains*, deceased, and that the said *James Mains* during the coverture of the said *Elcy* with him, was seised of a lot of land on the *Cape*, lying between the towns of *Standish* and *Windham*, being lot numbered five, containing sixty acres, in which lot she claimed her dower.

The defendant, pleaded that the said *James Mains* was never seised during the coverture; upon which, issue was joined.

It appeared, that *James Mains* moved on the lot in question, fifteen or sixteen years ago, and continued to reside there with his family until his death — that, he erected a house and barn, improved the premises by tillage, pasturing and cutting hay; and called the place his property, though it was understood to be State's land. He died about six years ago, at which time, the tenant who was his son, lived with him.

The tenant offered in evidence, an agreement between *James Mains* and *James Irish*, Land Agent for the State, dated *Dec.* 27, 1824, in which the said *Irish* agreed to convey the land in question to *Mains*, on his paying certain specified sums.

The demandants offered in evidence a deed from *Daniel Rose*, Land Agent for the State, to the tenant, dated *January* 22, 1833, containing the following reservation, *viz:* "Reserving however, to *Elcy Knight*, now the wife of *John Knight* of said *Gore*, and formerly the wife of said *James Mains*, a life estate in the same

to one third thereof, in the same manner she would have been entitled to her right of dower in the premises, if her former husband, *James Mains*, had died seised of the same in his own right, and she shall be entitled to the privilege of having the same set off to her in the same manner she would have been had the said lot been the property of said *James Mains* at the time of his decease."

A verdict was taken for the demandants, subject to the opinion of the whole Court, upon the case as reported.

Fessenden and *Deblois*, for the tenant, contended that *James Mains* was never so seised of the land as to entitle his wife to dower therein. He was not in, claiming adversely to the State, but under the State, as appears by the articles of agreement entered into with the Land Agent in 1824. But if he went on as an intruder, still the State could not be disseised; and therefore he acquired no such seizin as would entitle the wife to dower. *Ward* v. *Bartholomew*, 6 *Pick.* 409; *Little* v. *Libby*, 2 *Greenl.* 242; 5 *Cruise on Real Estate*, 369; *Eldridge* v. *Forrester*, 7 *Mass.* 253; *Williams* v. *Amory*, 14 *Mass.* 20; *Holbrook* v. *Finney*, 4 *Mass.* 566; 1 *Cruise*, 182.

The demandant in this case is not aided by the reservation in the deed to the tenant. She claims dower at common law — and if the husband had no estate, she could acquire no right to dower under him. *Wentworth* v. *Wentworth*, *Cro. Eliz.* 450; 1 *Com. Dig.* 190; *Windham* v. *Portland*, 4 *Mass.* 388; *Fosdick* v. *Gooding*, 1 *Greenl.* 30.

Longfellow, for the demandants, cited *Newhall* v. *Wheeler*, 7 *Mass.* 189; *Snow* v. *Stevens*, 15 *Mass.* 278.

Parris J. — The only question, in this case, is, whether the evidence shews such a seizin, in *James Mains*, of the premises in which dower is claimed by the demandant, as entitles her to maintain this action against the tenant.

Possession is evidence of seizin; and the seizin of the husband is proved by shewing his actual possession of the premises. 2 *Phil. Ev.* 187.

It is sufficient for the widow to shew that her husband had been in possession during the coverture, and it is then incumbent

on the defendant to prove a paramount title in himself. *Forrest* v. *Trammell*, 1 *Bailey's Rep.* 77; *Jackson* v. *Waltermire*, 5 *Cowan*, 299.

James Mains was seised against all persons and claims, except the State. He had been in possession fifteen or sixteen years, resided on the premises with his family, erected a house and barn thereon, occupied the land by tilling, pasturing, cutting hay, and claimed it as his own, calling it his property.

Surely this is all the evidence of seizin that would have been required to enable *James Mains* to maintain a writ of entry against any person who, without title, had interrupted his possession. As against the State he was not seised, but as against all persons not deriving title under the State he was seised, and could, by legal remedy, have protected his seizin and possession; and as the dowress is in of the estate of her husband, her claim, which is the favorite of the common law, would be equally protected.

This is analogous, in principle, to the decisions giving to the widow of a mortgagor, dower in the lands mortgaged against any except the mortgagee and those claiming under him. So long as the mortgagee does not exert his right of entry or foreclosure, the mortgagor is regarded as seised in respect to all the world but the mortgagee and his assigns, and the widow of the mortgagor is entitled to dower, liable, however, to be defeated by the entry of the mortgagee.

The tenant, in the case at bar, is not aided by his conveyance from the State, for in that the widow's rights are expressly recognised, and the tenant stands in the same situation he did previous to that conveyance. — It is true, as contended by his counsel, the reservation in the deed from the State to him does not give *dower* to the widow, but the deed confers no rights upon him, as *against* the widow, to defeat her claim to dower. Without that deed, he, being a stranger, clearly could not interrupt her in the enjoyment of dower. Under it, he cannot because of the reservation, which secures to her the right of "having the same set off to her in the same mannnr she would have had, if the lot had been the property of *James Mains* at the time of his decease." By accepting a conveyance from the State with

this reservation, the tenant has precluded himself from the opportunity of exercising towards his mother, a power by which, while *he* might be enriched, *she* would be deprived of a shelter and a home.

We believe that the honest arrangement, made between the State and the tenant, in favor of his mother, can be substantially enforced under this action, without doing violence to any settled principles of law.

LANE *vs.* MAINE MUTUAL FIRE INSURANCE CO.

In a policy of insurance against fire it was stipulated, that, "when the property insured should be alienated, by sale or otherwise, the policy should thereupon be void." The insurance was on a store and $200 on the stock of goods therein, for the period of six years. During the existence of the policy, the assured sold all the goods and leased the store by parol to the purchaser; who continued to occupy the same, selling the goods for about six months; when the assured took back both the store and the remaining stock of goods. Held, that, this was not an *alienation* of the store within the meaning of the policy.

Held further, that, notwithstanding this stipulation, the policy would attach to *any goods*, the assured might have in the store, at any time within the period of the six years, not exceeding the amount insured.

The plaintiff in his declaration alleged that *his* store was consumed by fire, &c. Held, that although this was not a technical averment that he was the owner, yet it was sufficient *after verdict*.

So the omission to allege *a value* in the declaration would be cured by verdict.

THIS was an action of *assumpsit* on a policy of insurance, wherein the defendants insured the plaintiff against fire to the amount of two hundred dollars on his store, and the like sum on the goods in said store, for six years from the 17th day of *January*, 1832, promising, "according to the provisions of their act of incorporation, to pay the plaintiff the said sum within three months next after said buildings, &c. should be burnt." The store and its contents were consumed by fire on the night of the 7th of *June*, 1834.

In the 8th section of the act of incorporation, referred to in the policy, is the following provision, *viz.*: "When the property insured shall be *alienated* by *sale or otherwise*, the policy shall thereupon be void, and be surrendered to the directors of

said Company to be cancelled; and upon such surrender the assured shall be entitled to receive his deposite note, upon the payment of his proportion of all losses and expenses that have accrued prior to such surrender."

It was proved, that one *James Dunn* hired the store of the plaintiff, and purchased all the goods therein in *May*, 1833 — put his son into the store, who traded there and continued to hold exclusive possession until *November* of the same year, when the plaintiff took back the store and goods under an agreement with *Dunn* to allow him a certain sum for his services, and to pay the debts and receive the dues of the store. From this time, the plaintiff continued in the exclusive occupation of the store, and traded therein until it was burned.

The defendants contended, that this was such an *alienation* as rendered the policy void, both as to the store and the goods. But *Parris J.* ruled otherwise, and a verdict was returned for the plaintiff, subject to the opinion of the whole Court upon the facts here reported.

The defendants also filed a motion in arrest of judgment, because,

1. The plaintiff had not alleged in his declaration that he was the *owner* of the store and goods at the time they were burned — 2. That he had not alleged the *value* of said store and goods at the time.

Longfellow, for the defendants, contended that there had been an *alienation* of the store within the intent and meaning of the provision of the act of incorporation. The provision was inserted for the benefit of the Company — it was to protect them from risks they did not choose voluntarily to assume — and the risk might fairly be regarded as much less while the property was owned by some persons than others. This provision would be rendered nugatory, by adopting any other construction than that now contended for.

As to the goods, the case shews an *actual sale* — Not by retail, in the usual course of business, but the whole at once. And according to the terms of the contract the policy thereupon became absolutely void, so far at least as regards the goods.

As to the motion in arrest of judgment he insisted that, every

fact necessary to enable a plaintiff to recover should be alleged in the declaration — that, *ownership*, must be proved and therefore should be alleged. He also took the same ground in regard to the omission of an allegation of the *value*.

S. & W. P. Fessenden, for the plaintiff, insisted that in legal contemplation there had been no *alienation* of the store, and cited *Jacob's Law Dic. Tit. Alienation.*

If there had been, in regard to the goods, it could not affect the policy on the store; for though in the same policy, yet they are separate risks. *Stetson* v. *Mass. Mutual Fire Ins. Company*, 4 *Mass.* 330.

That these provisions should be construed strictly against the company, they cited *Lazarus* v. *Commonwealth Ins. Co.* 5 *Pick.* 76.

2. As to the goods, they contended that the *8th sec.* of the act of incorporation, part of the policy, was not intended to apply to them — it was so from the nature of the case. The true intent was to cover any goods that the plaintiff might have in that store, to the amount insured, during the term of the policy. If it went to restrain a sale of the goods it would be repugnant to the contract and therefore void. 3 *Com. Dig.* 97; *Dane's Abr. ch.* 111, *art.* 4, *sec.* 1.

3. It is not necessary to allege *ownership*, or *value*. *Nantes* v. *Thompson*, 2 *East.* 385; 3 *Caine's Rep.* 144; 2 *Chit. Pl.* 73, *note.*

But if necessary, it is then contended that they are sufficiently alleged. At all events the declaration is good enough *after verdict. Warren* v. *Litchfield*, 7 *Greenl.* 63.

Parris J. — The first question presented for our decision is, whether the hiring and occupation of the store by *Dunn*, from *May* to *November*, was such an alienation of the property insured as rendered the policy void under the 9th section of the act of incorporation therein referred to.

In the construction of this language we should have regard to the circumstances under which it was used, and the situation and object of the parties using it. The insured was the owner of the store, and for the purpose of securing his interest against the

peril of fire, became a member of the company, assuming the obligations of membership by the payment of money and depositing his note, thereby giving the company a lien, for the payment of such note, on the building insured.

The insurers, in assuming the risk, provide for the continuance of the interest of the assured in the property covered, so long as their liability continues. In other words, they guard against its becoming a gaming or wager policy in any event. Accordingly so long as the property covered belongs to the insured, whether it be in his possession, or that of his agent, servant or lessee, the company's lien continues, and an insurable interest remains. But when the property is alienated, that is, when the insured is divested of title by sale or in any other manner, the lien of the company ceases, and the insured is no longer a member of the company. If a loss then happen it is not his loss, for as he had no property he could sustain no loss, and consequently could be entitled to no satisfaction. The party insured must, in all cases of fire insurance, have an interest or property at the time of insuring and at the time the fire happens. But he need not have an absolute and unqualified or even immediate interest in the property insured. A trustee, mortgagee, reversioner, a factor or agent of goods to be sold on commission may legally insure their respective interests, subject to the rules of the office in which the insurance is effected. Upon general principles applicable to fire insurance, the person insured cannot convey the estate insured and assign the policy, so as to render it valid in favor of the grantee and assignee, unless by consent of the insurer. Mutual offices should have the power of exercising a discretion in the selection of persons whom they may admit to membership, and whose property they may insure. The character of the person insured may be a subject of importance.

If by conveyance of the estate and assignment of the policy, the purchaser would stand in the place of the insured and be entitled to indemnity under the policy, the office might be defeated of this right of selection.

Under these views of the law relating to fire insurance, we think the occupation of the store by *Dunn*, who, having no lease in writing, was at most only tenant at will, was not an alienation

of the property insured within the true meaning and intent of the act of incorporation. The language is, "when the property insured shall be alienated by sale or otherwise," &c. The word alien or alienate extends not only to alienations of land in *deed* but also to alienations in law. A transfer of title by devise, descent, or by levy would be as technically an alienation as a transfer by deed. *Blackstone*, speaking of title by alienation, *Book* 2, *ch.* 19, says. "The most usual and universal method of acquiring a title to real estate is that of alienation, conveyance or purchase in its limited sense; under which may be comprised any method by which estates are voluntarily resigned by one man, and accepted by another; whether that be affected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties." Alienation is defined in *Jacob's Law Dictionary* to be a transferring the *property* of a thing to another.

The object of the statute was, without doubt, to render certain by positive enactment what would otherwise have depended upon common law principles and judicial decisions, *viz.* that the policies of the company should not be obligatory any longer than the property insured continued in the individual named in the policy, as the owner; and that by a transfer of his interest the policy should be void. This construction is believed to be in accordance with general usage, and the intention and understanding of the parties.

As to the goods, we are clear that the policy was intended to cover and did cover whatever goods the plaintiff might have in his store, at any time during the continuance of the risk, not beyond the amount actually insured.

A construction limiting the policy to the goods actually in the store at the time the insurance was effected would defeat the very object of the insured, and so it must have been understood by the insurer. The plaintiff's business was trade, the vending of goods from his store. According to the construction put upon this policy by the company, the plaintiff has no security except upon the goods actually in the store when the policy was issued, and when those were disposed of, their liability was at an end. We cannot listen, for a moment, to such a suggestion. A policy

of insurance being a contract of indemnity, must receive such a construction of the words employed in it as will make the protection it affords coextensive, if possible, with the risks of the assured. *Dow* v. *The Hope Ins. Co.* 1 *Hall*, 66. The risk of the assured was to continue six years, and the assurers assumed that risk to the amount of two hundred dollars on the goods in the store. Both parties must have understood this to mean on goods which may be in the store at any time during the continuance of the policy. If the assured had goods to an amount exceeding two hundred dollars, the undertaking of the company was limited by that amount. If, by sale, the quantity was reduced below that sum in value, the insurers were so far benefited, as their risk was diminished below that paid for by the premium, and if the whole were sold, the insurers were benefited to a still greater degree by a suspension of the risk. And it was a mere suspension, for upon filling up again the risk revived; and we see no difference in principle between the case where the quantity is diminished by a partial sale and then replenished, and where the whole is sold and an entire new stock purchased. In either case there is a risk, limited in amount by the contract, which has been assumed by the insurer, and for which the insured has paid the stipulated premium.

We are clear that it is a continuing risk, to the amount specified, upon such goods as the insured may have in the store within the term covered by the policy, and not confined to such as were there at the time of assuming the risk.

The defendants have filed a motion in arrest of judgment on two grounds; 1st, because the plaintiff has not alleged in his declaration that he was the owner of the store and goods at the time they were burned; and 2d, because he has not alleged or set forth the value of the store and goods at that time.

The plaintiff alleges that *his* store was consumed by fire; and although this is not a technical averment that he was the owner, yet we think it is sufficient after verdict. The authorities all concur that where there is any defect, imperfection or omission in pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be

such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict. 1 *Saund.* 228, *a.* As when a promise depends upon the performance of something to be first done by him to whom the promise is made, and in an action upon such promise the declaration does not aver performance by the plaintiff, or that he was ready to perform, and there is a verdict for the plaintiff, such omission is cured by the verdict, — *ibid.* 228, *b;* and in *East* v. *Essington, Ld. Raymond,* 810, a condition precedent was not averred to be performed, yet the declaration was held good after verdict, for, say the court, if the condition had not been performed the jury would have found *non assumpsit.*

According to well established principles applicable to fire insurance, a verdict could not have been found, in this case, for the plaintiff, unless he had given evidence to the jury that the store and goods were his property at the time they were consumed. Unless this had been shewn he would have failed to prove that he sustained any loss, and consequently would not have been entitled to any damages and the verdict must have been against him. So also, as he must have proved the *amount* of loss to enable the jury to assess the damages, he must consequently have proved the value of the store and goods when consumed, for without this proof the amount of loss could not have been ascertained. The declaration might, perhaps, have been adjudged defective upon special demurrer, but we think it is sufficient after verdict. The Court will not arrest a judgment unless it be perfectly clear that the plaintiff is not entitled to retain it, and after verdict every legal intendment is to be admitted in its support.

There must be judgment on the verdict.

Brewer *vs.* Curtis.

Where one turned out property, as his own, to be taken by a collector for the payment of taxes, which property was afterwards replevied by a third person who claimed to be the owner, it was held that the first was not a competent witness in such suit, for the collector, he being liable to the collector on his implied covenant of title.

In an action of replevin originally commenced in the Court of Common Pleas, in which the plaintiff prevailed, he was held to be entitled only to "quarter costs," the property replevied not *exceeding* twenty dollars in value.

This was an action of replevin for a cow, valued in the writ at twenty-five dollars. The defendant pleaded the general issue and filed a brief statement, alleging that the property was in one *Anderson Brewer*, as whose it was seised for the payment of taxes, he, the defendant, being collector of taxes for the town of *Freeport*.

Much evidence was introduced by the plaintiff, tending to show her property in the cow, which was met by counter evidence on the part of the defendant, and tending to show that the cow was the property of *Anderson Brewer*.

It also appeared, that at the time the cow was taken by the defendant, she was in the possession of one *Rogers*, to whom she had been leased for a year by *Hezekiah Brewer*, in the absence of the plaintiff.

It was also in evidence, that *Anderson Brewer* turned out the cow to be taken by the collector, as his property.

Anderson Brewer was offered as a witness by the defendant, but was objected to by the plaintiff, and the objection was sustained by the Court.

The counsel for the defendant contended, that the action could not be maintained by the plaintiff during the existence of the lease to *Rogers* — and that if a right of action existed any where it was in *Rogers* — that no action could be maintained against the officer until after a demand, though there were no lease to *Rogers* for a specified time, yet he being rightfully in possession of her at the time of the taking.

Parris J. instructed the jury, that if at the time of the taking by the defendant the cow was in *Rogers'* possession, under lease from *Mrs. Brewer*, the plaintiff, or her authorised agent;

or if *Hezekiah Brewer* leased the cow without any authority from the plaintiff, and she subsequently ratified or assented to it, then this action could not be maintained. But the jury found specially that the plaintiff did not authorise or assent to any lease to *Rogers*.

The jury were also instructed, that if the cow was not in *Rogers'* possession under lease, but he was merely employed to keep her for the plaintiff, then his possession was so far the plaintiff's possession that she might maintain this action — and that no previous demand was necessary.

The jury returned a general verdict for the plaintiff, and also found specially the fact before stated, and further, that the cow was worth only twenty dollars when taken.

The defendant moved for a new trial on the ground of erroneous ruling of the Court and misdirection to the jury — and also because the verdict was against the evidence. The verdict was to be affirmed or set aside, as the opinion of the whole Court should be upon the questions raised.

Belcher, for the defendant, contended that the evidence in the case shew a lease, and that the Court should so have instructed the jury. The facts being proved, whether they amounted to a lease or not was a question of law and should not have been left to the jury. *Attwood* v. *Clark*, 2 *Greenl.* 249.

He contended also, that *Anderson Brewer* was a competent witness, and cited *Lothrop* v. *Muzzy*, 5 *Greenl.* 450; and *Page* v. *Weeks*, 13 *Mass.* 199.

He also entered into a minute examination of all the evidence in the case, and endeavored to show that the verdict was against evidence.

A question was also made in regard to the cost — the defendant's counsel insisting that the plaintiff was not entitled to full cost, the value of the property replevied not *exceeding* twenty dollars.

Mitchell, for the plaintiff, controverted the positions taken on the other side, and touching the question of costs, cited *Maine Stat. ch.* 186, 443, 193; *Harding* v. *Harris*, 2 *Greenl.* 162; *Powell* v. *Hinsdale*, 5 *Mass.* 343.

WESTON C. J. — No question is raised in the report of the Judge, as to the form of the verdict. It is for the plaintiff, on all the points in controversy, and enough is found to entitle him to judgment, unless the verdict is set aside on account of other objections presented in the case.

Whether the cow was under lease to the witness, *Rogers*, or whether he was a mere keeper of her for the plaintiff, was in our judgment a question of fact properly left to the jury.

With regard to the competency of *Anderson Brewer*, as a witness for the defendant, if when the defendant took the cow, he had been merely passive, he might have been admitted, according to the case of *Lothrop* v. *Muzzy*, 5 *Greenl.* 450, cited in the argument. But the case finds that the witness turned out the cow to the defendant. By this act a warranty was implied, that she was his property. It was decided that a vender was thus liable, in the case of *Hale* v. *Smith*, 6 *Greenl.* 416 ; and we are of opinion, that this case comes within the principle there settled. Being bound therefore, under his implied warranty, to indemnify the defendant, he had a direct interest in his favor. A verdict against the defendant, would be evidence against the witness offered. He might also be liable to the plaintiff, if she failed here, in consequence of his having turned out her cow. But the question of property would be open in an action between her and the witness, not affected by a verdict against her between these parties. He might prevail in such an action ; so that his interest in this case, arising from his liability to her, is not certain and direct, as it is in favor of the defendant. We hold the witness therefore to have been incompetent, and rightfully rejected.

It is urged that the verdict, being against evidence, ought not to be sustained. It may have been made to appear that the cow came from another, transferred by the husband of the plaintiff to *Anderson Brewer*, by the bill of sale of July, 1826. That was made for the nominal consideration of one dollar ; but the real consideration therein expressed was, that *Anderson* should maintain his father and his mother, the plaintiff, during their lives and the life of the survivor. The father died the same year. If *Anderson*, as the case finds, became insolvent, and unable to support the plaintiff, it was but an act of justice in him to make over to

her a small part of the property, charged with her maintenance. She was *cestui que trust* of the property, as far as it was wanted for her support. If the cow ever was *Anderson's*, it appears that long before she was turned out to the defendant, he permitted her to be taken away as his mother's property, upon her being claimed as such. She is after all a sufferer by his failure ; and it would be great injustice to permit a creditor of his to wrest from her the trifling provision he was able to make for her support. We regard the verdict upon this point clearly in accordance with the justice of the case.

By the act, in addition to an act, regulating judicial process and proceedings, statute of 1822, *ch.* 186, § 2, it is provided, that when in an action of replevin, part of the goods replevied are found to be the property of the plaintiff, and part of the defendant, and the value found for the plaintiff, does not exceed twenty dollars, he shall recover cost only to the amount of one fourth of the value. It has been the policy of the law to limit and restrict costs, in favor of the plaintiff, where an action is originally brought in the Common Pleas, for property of a less value than twenty dollars. And such is the general law, where debt or damage is recovered. *Stat. of* 1821, *ch.* 59, § 30. Cases of replevin do not strictly fall within the limitation there expressed ; but the same rule is very strongly implied in the statute of 1822. Jurisdiction having been since given to Justices of the Peace in actions of replevin, for property not exceeding the value of twenty dollars, statute of 1829, *ch.* 443, the plaintiff may elect a tribunal, which will subject him to no peril as to costs. It is one attended with less expense to suitors, and to which they can at all times have access. There is the same reason for protecting its exercise, by limiting costs, if other jurisdictions are sought, in actions of replevin for property of a value not exceeding twenty dollars, as exists in other cases. And viewing the statutes together, bearing upon this point, we are satisfied that the Legislature must have so intended. The late Chief Justice of this Court makes an intimation to the same effect in *Ridlon* v. *Emery*, 6 *Greenl.* 261. And we think that the plaintiff cannot be allowed costs, exceeding one fourth part of the value of the property.

Judgment on the verdict.

POTTER *Judge vs.* TITCOMB.

In a writ of *scire facias*, brought on a judgment rendered against an administrator in a suit on his Probate bond, it is not necessary for the person for whose benefit such *scire facias* is sued out, to aver in his writ that he is "*an heir, creditor, or legatee*" of the intestate, or the "*representative* of such heir, creditor or legatee;" — but if it substantially appear that he is "*interested*" in the bond, or judgment rendered thereon, it will be sufficient.

The right to this process to obtain execution for further damages, under the judgment rendered for the penalty of the bond, is not limited to those who were named in the writ in the original suit, as persons for whose benefit it was prosecuted, but all who are "interested" in the bond, are equally entitled to the process.

THIS case is fully and clearly stated in the opinion of the Court.

Hopkins and *W. Goodenow*, argued the case for the plaintiff, and cited the following authorities: *Gould's Pl.* 20, 315; *Co. Litt.* 126, *a*; 3 *Black. Com.* 314; *Lawes on Pl.* 147, 148; 2 *Show.* 42; *Stra. Rep.* 542; 10 *Mod. Rep.* 112, 192, 210; *Gilb. Cas.* 138; *Gould's Pl.* 299, 300, 465; *Thompson* v. *Collier, Yelv.* 112; 1 *Lev.* 163; *Sir T. Raym.* 118; 1 *Ventr.* 22; 3 *Saund.* 211, *n.* 3; 1 *Ld. Raym.* 338, 594; 2 *Day's Rep.* 392; 9 *Mass.* 533.

Longfellow and *Daveis*, for the defendant, cited 1 *Chit. Pl.* 404, *n.* 1; 1 *Johns. Cas.* 397; 1 *Lev.* 163; 1 *Com. Dig. Abatement I*, 14, 15; 3 *Chit. Pl.* 521; 2 *Sellon's Prac.* 187; *Gould's Pl.* 341; *Plowden*, 66; 3 *Keb.* 26; *Bac. Abr. Pleading E*, 32; 1 *Salk.* 274.

PARRIS J. — This is a writ of *scire facias*, on a judgment rendered in this Court, for the penalty of an administration bond given by the defendant as administrator of the estate of *Moses Titcomb*, late of the Island of *St. Croix*, deceased, to the Judge of Probate of this county.—See 2 *Fairf.* 157.

The *scire facias* sets forth the judgment and the several orders of this Court awarding execution in favor of certain persons, heirs of the said deceased; and it is therein alleged, that the said *Moses Titcomb*, deceased, died without issue leaving *Elizabeth Titcomb*, his widow, who, upon the death of said *Moses*, became and

was entitled by law to one half of the personal estate of her said husband, the estate being solvent, and there being no creditors of the same.

It is further alleged that the said *Elizabeth* has since deceased, and administration hath been duly granted upon her estate to *Moses Titcomb* of the city of *Portland*, merchant, and that this *scire facias* is brought by the said *Moses Titcomb*, in the name of *Barrett Potter*, Judge of Probate, &c., with a further allegation that the said *Moses*, as administrator of said *Elizabeth*, has in his said capacity, demanded payment of the defendant of one half of the amount of said judgment to be by him, said *Moses*, administered according to law. To this writ the defendant has pleaded in abatement, that in the description of the said *Moses*, by whom this action is brought, setting forth his name, place of abode and addition, he is not stated to be an heir, creditor or legatee of said *Moses Titcomb*, deceased, nor the representative of any such heir, creditor or legatee, nor is he one of the persons for whose benefit the suit aforesaid was originally brought, or having any right to the benefit or continuance of the same.

To this plea there is a replication, to which the defendant demurs specially. Although the demurrer sets forth sundry defects in the replication, yet, in law, it reaches back in its effect through the whole record, and attaches upon the first substantial defect in the pleadings on which ever side it may have occurred. If the declaration be good, although the plea and replication be both ill in substance and demurrer be joined on the replication, judgment must be for the plaintiff;—for the first substantial fault is on the defendant's part, and a bad replication is sufficient for a bad plea.

Are the writ and declaration sufficient? The defendant contends that they are not, because in the description of the said *Moses*, by whom this action is brought, he is not stated to be an heir, creditor or legatee of said *Moses Titcomb*, deceased, nor the representative of any such heir, creditor or legatee. But the statute, under which this process is instituted, *chap.* 470, *sect.* 1, does not require such an averment. It provides that any person or persons *interested* in a probate bond, or in a judgment that may have been rendered on such bond, shall have a right to insti-

tute a suit thereon without applying to the Judge of Probate to whom given, or in favor of whom rendered or his successor. And instead of indorsing on the writ for whose benefit the suit is brought, he or they instituting such suit shall allege in the writ his or their own name, place of abode and addition, and that the same is sued out by him or them in the name of the Judge of Probate. Nothing is said about heir, creditor or legatee, but the phraseology is, *any person interested in a probate bond.*

Now we think it is set forth in the *scire facias* with sufficient certainty, that *Moses Titcomb*, of *Portland*, who instituted this suit, is interested in the probate bond, as the representative of the widow of the deceased, who, as he alleges, was by law entitled to one half of the personal estate of said *Moses Titcomb*, of *St. Croix*, deceased, and that the provisions of the statute in this respect are fully answered.

It is further alleged by the defendant in his plea, that the said *Moses*, who prosecutes this *scire facias*, is not one of the persons for whose benefit the suit on the bond was originally brought, nor has he any right to the benefit or continuance of the same. That suit was instituted under the "Act to regulate the jurisdiction and proceedings of the courts of Probate," *chap.* 51, *sec.* 70, and was for a breach of the condition of the administration bond requiring an inventory of all the personal property of the intestate. It was prosecuted in the name of the Judge of Probate for the benefit of certain heirs of the deceased; judgment was rendered for the penalty, and execution was awarded in favor of each of the heirs for whose benefit the suit was commenced, for such part of the penalty as was judged reasonable. The judgment remains as a security for other and further damages, and any person interested in the bond may maintain *scire facias* to try his right to such other damages, and have execution therefor, whether such person were or were not named in the original suit.

We think the writ and declaration are sufficient, notwithstanding the matter contained in the defendant's plea in abatement, and accordingly there must be a judgment of *respondeas ouster.*

WILSON & *al. vs.* HANSON & *als.*

A. by deed, assigned his property to B., C. and D. for the benefit of his creditors. The debts due to *the assignees*, or either of them, were to be first paid. *Held*, that by a reasonable construction of the assignment, a debt due to a firm of which B. was a member, was entitled to the same preference as a debt due to B. alone.

Held, also, that a debt due to W. C. & *Co.* was secured under a provision to pay W. C. — the latter in fact having no separate demand or claim.

Parol evidence was not admitted to show, by the conversation of the parties at the time of executing the instrument, what debts were intended to be secured.

THIS was an action brought on the covenants in a deed of assignment from one *Robinson*, of all his property, to *Asa Hanson*, *John L. Megquier*, and *Peter W. Morrill*, the defendants, for the benefit of his creditors.

The assignment provided for the payment in the first place, of all debts due from *Robinson* to the assignees or either of them; and secondly, to pay the debts due to *William Cobb* and several others. And the principal question in the case was, whether a debt due to *Peter W. Morrill* and *A. P. Knox*, who were *partners*, was entitled to the same preference as a debt due to *Morrill* alone — and whether a debt due to *William Cobb & Co.* fell within the second class, there being in fact *no debt due to Cobb alone.*

A question was also reserved, as to the admissibility of parol evidence, to show what debts the parties intended should be embraced in the assignment. A verdict was returned for the defendants, subject to the opinion of the whole Court upon the foregoing questions.

Daveis, for the plaintiffs, contended that the debt due to *Morrill and Knox* was not secured in the first class. The security was to the "*assignees*" — *Knox* was not one of them, and so was not secured.

That parol evidence should not be received, he cited 7 *T. Rep.* 138; 3 *Stark. Ev.* 994 *to* 999; *Stackpole* v. *Arnold*, 11 *Mass.* 27; 2 *Caine's Rep.* 135; 1 *Taunt. Rep.* 117; *Morton* v. *Chandler*, 7 *Greenl.* 44; *Haven* v. *Brown*, 7 *Greenl.* 421; *Hale* v. *Jewell*, 7 *Greenl.* 435.

Longfellow, for the defendants.

WESTON C. J. — Parol or written testimony, other than the instrument of assignment, is admissible to show what debts are due, and under what circumstances, to those who are there provided for. But the meaning and true construction of the terms used in the assignment must be determined from what is there written. They cannot be waived, explained, or extended by parol testimony. The correctness of this rule is strongly illustrated, by the extraneous evidence received at the trial, subject to the opinion of the Court. The witnesses are not agreed as to what passed between the parties, or what intentions they expressed in regard to the subject under consideration. Upon this point, what they have written must remain as the best and only evidence of what has been agreed.

All sums due to the assignees, or either of them, were to be paid in the first class. *Peter W. Morrill* is one of them, and the case finds that there was a debt due from *Robinson*, the insolvent debtor, to him, and another to him and his partner *Knox*, and one of the questions submitted is, whether both these debts are to be considered as falling within the same class. Provision is next made to pay all debts due to certain other persons named in the assignment, of whom *William Cobb* is one. It appears that no debt was due to *William Cobb* alone, but that one was due to *William Cobb & Company*. And it is agreed, that if that debt is provided for in the second class, under the name of *William Cobb*, and the debt due to *Morrill and Knox* is to be placed upon the same footing with that due to *Morrill* alone, the plaintiffs have not maintained their action. A just construction requires that, effect should be given to every part of an instrument, subject only to be controlled and modified by a general view of the whole. When provision is made for *William Cobb*, it must be understood to have had some meaning. It is apparent, that in the contemplation of the parties there was some debt, upon which it was to operate. If we hold it inoperative, their intentions in this part of the instrument are defeated. This part of it can be satisfied only by the debt due to *William Cobb & Company*, which we are clearly of opinion it must have intended to embrace. If we can ascertain the meaning of parties, although there may be a want of precision and exactness in the terms in

which it is expressed, effect is to be given to it. It is manifest here, that they did not accurately distinguish between debts due to a firm from those due to the individuals of which it was composed. The same reasoning applies to the debt due to *Morrill and Knox*, although not with equal strength, because there was a debt due to *Morrill* alone. But we think, upon the whole, the same construction must be given to both. It is insisted that those only are entitled to be paid in the first class who are assignees, and that *Knox* is not assignee. It is not to be paid because due to him, but because it was due to *Morrill*, and all sums due to him are expressly provided for. The debt due to *Morrill and Knox* was as much due to *Morrill*, as the debt due to *Cobb & Co.* was due to *Cobb*, and that the parties intended to provide for this last debt, although *Cobb* alone is mentioned, cannot admit of question. As these debts, with others not in dispute, exhaust the fund, the defendants have nothing in their hands which can be claimed by the plaintiffs.

Judgment on the verdict.

WALKER *vs.* WEBBER.

A. covenanted with B. and others, to cut a canal from *Crotched pond* to *Long pond*, for the purpose of floating logs from one to the other and from thence to a market — and B. and others covenanted to sell to A. "*all the pine logs which they or either of them should haul or cause to be hauled in, or rafted into Crotched pond*," for a term of years. In an action brought by A. against B. on this covenant, it appearing that the timber lands of B. and others were situated on *Stearn's pond*, about two miles above *Crotched pond*, the two being connected by a canal, and that this was the only way in which logs could be floated from *Stearn's pond* to a market, it was held that B. and others were bound to sell to A. logs hauled into *Stearn's pond* and floated into *Crotched pond*, as well as those hauled directly into *Crotched pond*.

Held also, that the covenants were *several*, and that an action might well be maintained against B. alone.

THIS was an action of *covenant broken*. Plea, *non est factum*, with a brief statement alleging, 1. That the instrument declared on does not support the plaintiff's declaration; said instrument being a *joint* covenant and not several; and being variant

from the declaration. 2. General performance. 3. That, the plaintiff, after the making the obligation declared on, and before any pretended breach thereof, waived any and all claims to the fulfilment thereof, and excused and acquitted the defendant therefrom.

The plaintiff, to maintain the action, introduced the instrument declared on, which purported to be mutual covenants between the plaintiff of one part, and the defendant and six others on the other part. The material parts of it were as follows, viz: "The "said *Walker*, on his part, covenants and agrees to make a canal "from *Crotched pond* to *Long pond*, in *Bridgton*, in the county "of *Cumberland*, suitable to convey logs from one pond to the "other, and that he will take and receive all the pine logs which "are fit for merchantable boards that the said *Webber* and others "or either of them haul or cause to be hauled or rafted into "*Crotched pond*, and boom them in well, for the term of fifteen "years." [Then followed stipulations as to the mode of fixing the price, security, &c.] "And the said *Webber* and others do "covenant and agree with the said *Walker*, his heirs and assigns, "that they will sell him all the pine logs which they or either of "them may haul or cause to be hauled in, or rafted into *Crotched* "*pond*, for the term of fifteen years and no longer," &c.

The plaintiff then offered evidence to show, that the defendant had sold to other persons, at different years since the making of the bond, a large number of logs lying in *Stearn's pond*, in *Sweden*, cut from his land in *Sweden*.

The counsel for the defendant objected to this evidence on the ground of its irrelevancy. But *Parris*, the presiding Judge, admitted it.

It appeared that the waters of *Long pond* communicate with *Sebago pond* and thence with *Presumpscot river*, which supplies the mills at *Saccarappa*. It was in evidence that in 1822 there was no water communication sufficient to float logs from *Crotched pond* to *Long pond*, and that in pursuance of his agreement, the plaintiff, at an expense of about $5000, exclusive of what he paid for water privileges, opened such a communication by means of slips, through which large quantities of logs have since been transported; on which the plaintiff has received a toll of one

dollar per thousand for running logs from *Crotched pond* to *Long pond* and booming them in the latter. The canal and slips had been very productive property to the proprietor, and the opening them caused a great rise in the value of timber hauled into *Crotched pond*, and timber land in the vicinity. The distance between the two ponds is about two miles.

The opening of the canal was considered a very doubtful and hazardous enterprise at the time, and the contract was probably one of the inducements to opening the canal.

It further appeared, that *Stearn's pond* is about two miles distant from *Crotched pond;* and that a company was incorporated in 1823, to open a canal on the stream communicating between these ponds, for the purpose of floating timber from *Stearn's pond* to *Crotched pond*, which canal was subsequently opened; and that the expense of transporting logs from *Stearn's pond* to *Crotched pond* was twenty-one cents per thousand. Logs hauled into *Stearn's pond*, it appeared, could not be floated from thence to market in any way but through *Crotched pond* and *Long pond*. The timber lands owned by the defendant, and those covenanting with him, were contiguous to, and back of, *Stearn's pond*. One lot, No. 66, was situated about 200 rods from *Stearn's pond*, and about two miles from *Kezer river*, which communicates with the *Saco*. It was proved that timber had been hauled from this lot to *Kezer river;* and there was evidence tending to show that lumber bore a higher price on the *Saco* than on the *Presumpscot* waters; but it appeared that timber could be transported from said lot to market with less expense through *Stearn's pond* than through *Kezer river*.

There was evidence tending to prove, that the plaintiff had demanded of the defendant the logs by him hauled into *Stearns'* pond in the several years for which he claimed damages under the contract, but the defendant refused to sell them to the plaintiff under the contract, but did sell to others, excepting a quantity which the plaintiff purchased in 1828, but not under the contract — and the defendant contended, that by this purchase, the plaintiff waived his right to damages for not having these logs delivered to him under the contract. But the Judge instructed the jury, that if the plaintiff first demanded these logs under the con-

tract, and the defendant refused to deliver them, he waived no rights by his subsequent purchase.

It was contended by the defendant, that he was under no obligation to sell to the plaintiff any of his logs lying in *Stearns'* pond, nor any of his logs, unless they were conveyed by him into *Crotched pond.* But the Judge instructed the jury that they would consider the plaintiff as having the same right under the contract to purchase the defendant's logs in *Stearns'* pond, as he had to purchase them in *Crotched pond.*

The defendant contended further that if he was under obligation to sell to the plaintiff his logs in *Stearns'* pond, and the plaintiff was entitled to receive them in *Crotched pond,* there should be a deduction from the damages, of the expense of delivering them from *Stearns'* pond into *Crotched pond* — and the plaintiff contended that this expense should be added to the damages. These questions were reserved by the presiding Judge for the decision of the whole Court, instructing the jury to ascertain the expense of driving logs from *Stearns'* pond to *Crotched pond;* which they did, and found it to be twenty-one cents per thousand.

It was proved that the plaintiff received a toll on the passing of the logs in question through the canal from *Crotched pond* to *Long pond;* and the defendant claimed to have a deduction made from the plaintiff's claim for damages, on this account also; there being evidence tending to show that the profit arising from the general toll, after defraying all the expenses of constructing and repairing the canal, and incidental costs considerably exceeded the actual expenditure annually required and incurred in transporting logs through it by the plaintiff. But the Judge declined so to instruct the jury.

A verdict was returned for the plaintiff, subject to the opinion of the whole Court, upon the case as reported.

Davies, for the defendant, made the following points.

1. The obligation in this case is *joint,* and therefore no action can be maintained against *Webber* alone.

2. The defendant has performed his covenants. He was to deliver to the plaintiff the logs he hauled or rafted into *Crotched pond* — this he has done. He did not covenant to deliver those hauled into *Stearns'* pond. The question therefore resolves

itself into a geographical one, *viz.*, whether *Stearns'* pond and *Crotched pond* are the same. We contend that they are entirely distinct. *Crotched pond* lies two miles above *Long pond* — and *Stearns'* pond two miles above the former — entirely distinct sheets of water — lying in different counties — and separated by natural obstructions, which were overcome by the cutting of a canal.

3. But it is contended that the contract is perfect in itself — that there is no such ambiguity in it as would let in parol proof to explain it. 7 *T. Rep.* 178; 3 *Stark.* 994 to 999; *Morton* v. *Chandler*, 7 *Greenl.* 44; *Haven* v. *Brown*, 7 *Greenl.* 421; *Hale* v. *Jewell*, 7 *Greenl.* 435.

In this case, to admit the testimony introduced by the plaintiff, to show that *Stearns'* pond was intended to be embraced in the agreement, would be to superadd a clause to a written agreement, which can never be done. 3 *Wilson*, 275; 2 *Wm. Black.* 1249; 12 *East*, 6; 12 *East*, 583; 2 *B. & P.* 565; 3 *Taunt.* 147; *Elder* v. *Elder*, 1 *Fairf.* 80.

4. If parol testimony be received at all, then the bonds offered in evidence by the defendant should also be received as explanatory, to some extent, of the contract declared on. As authority for this he cited, 1 *Stark. Rep.* 14; *Purrington* v. *Sedgley*, 4 *Greenl.* 345.

Longfellow, *Fessenden* and *Deblois*, for the plaintiff, to the first point, that the action might well be maintained against *Webber* alone, they cited, 1 *Saund.* 154; *Swett* v. *Patrick*, 2 *Fairf.* 179. 2. That the parol proof was properly admitted, they cited 10 *Mass.* 379; 10 *Mass.* 459; 14 *Mass.* 453. They then argued to show that the contract was intended to embrace logs hauled into *Stearn's pond*, as well as those hauled into *Crotched pond*.

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

The defendant and other persons, being the owners of certain timber lands, in the neighborhood of *Crotched pond*, were desirous of obtaining a sufficient water communication, to float logs thence to *Long pond*, from which there already existed facilities to forward them to the mills at *Saccarappa*, where they were to be sawed for the *Portland* market.

As an inducement to the plaintiff, to make at his own expense a canal for this purpose, they covenanted to sell to him, upon certain terms prescribed, all the pine logs, which they or either of them, may haul or cause to be hauled in, or rafted into *Crotched pond.* It appears that logs could be forwarded through this channel at less expense than by any other; so that the plaintiff had a just expectation of receiving all the pine logs, which might be cut for market, from the defendant's land, and from the land of the other parties, covenanting with him. There was another route by *Kezer river* into the *Saco,* of which they were at liberty to avail themselves, whenever there were sufficient inducements to do so. But the benefit of all that were to pass by *Crotched pond,* was secured to the plaintiff.

To give the covenant any other construction, would deprive the plaintiff of the profit to which he looked, to reimburse himself the expenses of his enterprise. It was deemed hazardous and uncertain in the outset. He might sustain great loss, or realize large profits, from his undertaking. What was the profit, for which he stipulated? Whatever might remain of the proceeds of one half of the boards, and of the three dollars and fifty cents per thousand, which he was to receive upon the other half, after paying all the expenses. The profit resulted from the facility, created by the plaintiff. Independent of the instrument, upon which he declares, which was intended to secure the profit to himself, it would add so much to the value of the standing timber intended for that market. If the defendant was at liberty to sell his pine timber standing, or in its transit to *Crotched pond,* he would put this profit into his own pocket, and the right of the plaintiff under the covenant would be defeated. There were but two ways by which the logs could reach *Crotched pond;* either hauled by teams, or floated by water. Both these modes of ingress were provided for. From what quarter were those logs to come, which were expected to be rafted, or water borne, into the pond? It does not appear that there was any other stream, running into *Crotched pond,* except what came from *Stearn's pond,* above. But this, it is urged, would not admit of the passage of logs, at the time when this contract was made,

and could not, therefore, have been in the contemplation of the parties. But to this it may be replied, that if this had not been contemplated, there would remain nothing, which would require a stipulation, as to the logs, which might be rafted into *Crotched pond.*

If the canal, between that and *Long pond,* succeeded, it was doubtless intended to improve the communication with *Stearn's pond.* Accordingly we find that improvement immediately followed, by which the timber put into that pond, could be water borne, through *Crotched pond* to market. When put into *Stearn's pond,* it was on its way, and must necessarily pass through *Crotched pond.* That the design of the contract might not be defeated, all that was rafted or floated into that pond, was made subject to its provisions. The contract embraced all that the defendant might cause to enter *Crotched pond.* Whatever logs were put into *Stearn's pond,* were necessarily to take that destination. That was the effect, which was thus caused by the act of the defendant, and therefore within the contract.

There is no reference, in the covenant declared on, to any other instrument; and we are therefore not at liberty to avail ourselves of any other, in arriving at the intentions of the parties.

It does not distinctly appear upon what principles of calculation, the jury arrived at the damages, they found in favor of the plaintiff. But it does appear, that they allowed nothing for the expense of transportation from *Stearn's* to *Crotched pond,* which was twenty-one cents per thousand. That was an expense, which did not fall upon the plaintiff, as he was under the contract to receive the logs in *Crotched pond,* and it was therefore properly omitted in the estimate.

If the toll, paid to the plaintiff for passing his canal, by the purchasers from the defendant of the logs in question, exceeded a just equivalent for the facility enjoyed, it came from the pocket of the purchasers. It might, however, and probably did, diminish the value of the timber, before it passed the canal, and would thus fall upon the vendor. How much the excess was, the jury have not found. It is claimed as a gain made by the plaintiff, which should be offset against so much of damage, he sustained by a breach of the contract. If the jury, in estimating the

profit, which the plaintiff might have made, took into consideration the toll as one of the expenses previously to be charged, which being equitable and just, they may have done, the toll received would exactly balance the toll charged, in estimating the loss sustained by the plaintiff, who would thus receive only a fair indemnity. The defendant had no claim to a further deduction on that account. If he had broken his covenant, which the facts prove, the question for the jury was, what injury the plaintiff had thereby sustained. It does not appear, nor is it to be presumed, that they awarded him damages beyond the injury.

We are well satisfied, from the language of the instrument, and the authorities cited, that the defendant's covenant must be regarded as several.

Judgment on the verdict.

HOBART *vs.* HAGGET.

However the law may be in regard to acts that are entirely *involuntary*, yet a trespass cannot be justified on the ground of *mistake* merely.

A. bought of *B. an ox*, paying therefor $25,50, and was directed to go and take him from B's enclosure. A. took an ox that he supposed he had bought, but which, it appeared, B. did not sell. *Held*, that *trespass* would lie for such taking.

The jury having returned a verdict for the plaintiff, for the value of the ox taken, viz. $37, "*including the sum of* $25,50, *already paid by the defendant*," the Court directed the verdict to be put in form, and amended by omitting that part relating to the $25,50.

TRESPASS, for the alleged taking and converting to his own use by the defendant, an ox, the property of the plaintiff. The general issue was pleaded and joined.

"The defendant proved, that he met the plaintiff in the street, and paid him $25,50 for an ox, which the plaintiff directed him to go and take. That, he went and took an ox out of the plaintiff's inclosure, supposing it to be the one he had so purchased; and produced much other evidence, tending to show, that the ox taken, was the one he had bargained for.

The plaintiff introduced evidence to show, that there had been a mistake and misunderstanding between himself and the defend-

ant; and that the ox, which he supposed he had sold, was another ox of much less value; and that he never supposed the defendant considered himself as having purchased the ox which he had taken, until he, the plaintiff, returned home and found the ox in question had been taken instead of the other."

Whitman C. J., who tried the cause in the Common Pleas, instructed the jury, that, if they were satisfied there had been an innocent mistake between the parties, and that the defendant had supposed he had purchased the ox in question, when in fact, the plaintiff supposed he was not selling that ox, but another, they would find for the plaintiff.

The jury, thereupon, returned their verdict in the following form, viz: "The jury find that the defendant did commit the "trespass alleged against him, and assess damages in the sum of "thirty-seven dollars, including the sum of twenty-five dollars "and fifty cents, already paid by the defendant." Which, the Court, though objected to by the defendant, directed to be altered so as to read as follows: "The jury find that the defendant is "guilty in manner and form as the plaintiff has alleged against "him, and assess damages in the sum of thirty-seven dollars:" which was affirmed by the jury in the usual manner.

To this ruling and direction of the Court, the defendant took exceptions, and thereupon brought the case up to this Court.

Daveis, for the defendant, contended that *trespass* would not lie upon these facts. This remedy implies a degree of *wrong*. And if the maxim *damnum absque injuriâ* will apply any where, it is in such a case as this.

The remedy should have been pursued in *contract*, or perhaps in *trover;* and there should have been a *previous demand* upon the defendant. *Beckwith* v. *Shawdike*, 4 *Burr.* 2092.

Where the act complained of is involuntary and without fault, trespass will not lie. 2 *Esp. N. P.* 60; *Esp. Dig. tit. Trespass*; *Cole* v. *Barnes*, 8 *T. Rep.* 188; *Leed* v. *Bray*, 3 *East*, 593; *Cole* v. *Fisher*, 11 *Mass.* 137; *Brown* v. *Gay*, 3 *Greenl.* 136; *Ross* v. *Gould*, 5 *Greenl.* 212.

2. The counsel further contended, that the verdict was wrongfully amended. It was just and equitable that the $25,50 paid by the defendant should have been deducted from the damages.

The power of the Court to the extent claimed is questionable. *Little* v. *Larrabee*, 2 *Greenl.* 37.

Fessenden & Deblois, were of counsel for the plaintiff, and cited in their argument the following authorities: *Gibbs* v. *Chase*, 10 *Mass.* 125; *Bolster* v. *Cummings*, 6 *Greenl.* 85; *Jackson* v. *Williams*, 2 *Term Rep.* 281; *Coffin* v. *Jones*, 11 *Pick.* 48; *Clark* v. *Lamb*, 8 *Pick.* 415; *Higginson* v. *York*, 5 *Mass.* 341.

PARRIS J. — The ox taken by the defendant was the property of the plaintiff, and although the defendant attempted to prove that he purchased *that* ox, and consequently had a right to take it, the attempt wholly failed. He may have considered himself as the purchaser, but unless the plaintiff assented to it, no property passed. The assent of both minds was necessary to make the contract. The court below charged the jury that if they were satisfied there had been an innocent mistake between the parties and that the defendant had supposed he had purchased the ox in question when in fact the plaintiff supposed he was not selling that ox but another, that they would find for the plaintiff. The jury having found for the plaintiff have virtually found that he did not sell the ox in controversy, and the question is raised whether the defendant is liable in trespass for having taken it by mistake. It is contended that where the act complained of is involuntary and without fault trespass will not lie, and sundry authorities have been referred to in support of that position.

But the act complained of in this case was not involuntary. The taking the plaintiff's ox was the deliberate and voluntary act of the defendant. He might not have intended to commit a trespass in so doing. Neither does the officer, when on a precept against A. he takes by mistake the property of B. intend to commit a trespass; nor does he intend to become a trespasser, who, believing that he is cutting timber on his own land, by mistaking the line of division cuts on his neighbor's land; and yet, in both cases, the law would hold them as trespassers. The case of *Higginson* v. *York*, 5 *Mass.* 341, was still stronger than either of those above supposed. In that case one *Kenniston* hired the defendant to take a cargo of wood from *Burntcoat Island* to *Boston.*

Kenniston went with the defendant to the island, where the latter took the wood on board his vessel and transported it to *Boston*, and accounted for it to *Kenniston*. It turned out on trial, that one *Phinney* had cut this wood on the plaintiff's land without right or authority, and sold it to *Kenniston*. *York*, the defendant, was held liable to the plaintiff for the value of the wood in an action of trespass, although it was argued that he was ignorant of the original trespass committed by *Phinney*. A mistake will not excuse a trespass. Though the injury has proceeded from mistake the action lies, for there is some fault from the neglect and want of proper care, and it must have been done voluntarily. *Basely* v. *Clarkson*, 3 *Lev.* 37. Nor is the intent or design of the wrongdoer the criterion as to the form of remedy, for there are many cases in the books where the injury being direct and immediate, trespass has been holden to lie though the injury were not intentional, as in *Guille* v. *Swan*, 19 *Johns.* 381; where the defendant ascended in a balloon which descended into the plaintiff's garden; and the defendant being entangled and in a perilous situation, called for help and a crowd of people broke through the fences into the plaintiff's garden, and beat and trod down his vegetables, the defendant was held answerable in trespass for all the damage done to the garden. In this case *Spencer C. J.* said, "The *intent* with which an act is done, is, by no means, the test of the liability of a party to an action of trespass. If the act cause the immediate injury, whether it was intentional or unintentional, trespass is the proper action to redress the wrong." See also 1 *Pothier*, *art.* 1. *sec.* 1; 1 *Sumner*, 219, 307.

From the exceptions, it appears that the defendant paid the plaintiff twenty-five dollars and fifty cents towards *an* ox, which the defendant contended was the ox in controversy, but which the plaintiff contended was for another ox.

The jury substantially found, that the payment was not on account of this ox, as this was never sold. That amount was so much money of the defendant's in the plaintiff's hands, and which could be reclaimed in a proper action, provided it should appear that there had been no sale of either ox or by reason of the mistake. But it could not be offset against a trespass. The jury had no authority to deduct that sum from the injury resulting

from the trespass. Their business was to inquire whether the ox in controversy was the plaintiff's property, whether he was so taken by the defendant as, under the instructions from the Court, would amount to a trespass, and the damage arising from such trespass.

They had no right by law to make offsets or deductions in the nature of an offset, and the Judge very properly directed all that which related to the payment of the twenty-five dollars and fifty cents to be stricken from their verdict.

It was immaterial whether this direction was previous to their going into consultation, or on their return into court. It was an instruction according to law, proper for the Judge to give, and by which the jury in the correct discharge of their duty would have been governed.

Probably it was not a subject on which the jury were originally charged, having been omitted under a belief that in estimating damages they would not take it into consideration. But when, on their return into Court, having found every material fact, and properly certified such finding, the Judge perceived, appended to their verdict, a further irrelevant finding, he very properly directed that to be stricken out, which having been done, the verdict was affirmed.

Clearly there could be nothing improper in this, as the correct judgment to be rendered on the verdict as originally returned would have been for the full sum of thirty-seven dollars, without any regard to the deduction. Courts have repeatedly gone much farther than this in amending verdicts even after a discharge of the jury. This correction was made in the presence of the jury and with their consent, as they subsequently affirmed it in its amended form.

The exceptions are overruled and there must be

Judgment on the verdict.

BRACKETT *Ex'r vs.* MOUNTFORT.

Where the defendant acknowledged, within six years from the commencement of the action, that the claim of the plaintiff "was once due, but that he had paid it years before *by having an account* against him," it was held not to be sufficient to take the case out of the operation of the statute of limitations, though the defendant filed no account in offset, nor offered proof of one.

ASSUMPSIT on a promissory note dated in 1817, by which the defendant promised to pay the plaintiff's testator $65,85 on demand, with interest.

The defendant relied on the statute of limitations in his defence; and also upon the fact of there having been a material alteration of the note, whereby its validity had been destroyed.

The counsel for the plaintiff, contended that if the note was impaired or destroyed by such alteration, still the original cause of action remained unimpeached; and that as the note was given for a balance of account then due, the action was maintainable, if not defeated by the statute of limitations, for that balance, on the count upon an *insimul computassent.*

To prove a new promise within six years before the commencement of the action, evidence was offered tending to show, that the defendant acknowledged that the above balance was due and that he was willing to pay it. To rebut this evidence, witnesses were called by the defendant who testified that they were present at the above conversation, and that the declaration of the defendant, was, that the above balance was once due, but that he had paid it ten years before by having an account against the testator.

The counsel for the plaintiff contended, that, as no account had been filed in set-off by the defendant, he could not in any manner, avail himself, in this action, of this account by which he said he had paid the balance; and that, therefore, the confession of the existence of the above balance as a debt due was not contradicted or impaired by such addition.

But *Parris J.* who tried the cause, instructed the jury that the confessions of the defendant must all be taken together; and that, as when he acknowledged the existence of the above balance he stated also that he had paid it years before by having an account against the testator, it did not amount to such an acknowledgment

of indebtedness as would avoid the bar of the statute of limitations; and that it was not incumbent on the defendant either to file his account in offset or to prove it as payment.

If these instructions were wrong, the verdict, which was for the defendant, was to be set aside and a new trial granted, otherwise judgment was to be rendered thereon.

Mellen and *Longfellow*, for the defendant, maintained the positions taken at the trial, to show that the action and was maintainable for the original cause of action, they cited *Clark* v. *Leach*, 10 *Mass.* 51; *Varner* v. *Nobleboro'*, 2 *Greenl.* 121; *Banorgee* v. *Hovey*, 5 *Mass.* 11; *Thatcher* v. *Dinsmore*, 5 *Mass.* 299; *Johnson* v. *Johnson*, 10 *Mass.* 350.

Fsssenden & Deblois, for the defendant, cited *Saunds* v. *Gelston*, 15 *Johns.* 511; *Perley* v. *Little*, 3 *Greenl.* 97; *Norcroft* v. *Summers*, 4 *M. & S.* 457; *Porter* v. *Hill*, 4 *Greenl.* 41.

WESTON C. J. — No question is raised as to the note. The defendant relies upon the statute of limitations to bar the account. And it is barred, unless the plaintiff adduced at the trial, evidence, competent to take the case out of the statute.

The only point really presented for our consideration is, whether the effect of the statute of limitations, which was otherwise a good bar, was removed by the testimony adduced in the case, taken alogether. Unless it was, the defendant is entitled to the protection of the statute. The testimony for the plaintiff was sufficient for this purpose; but it is the rebutting testimony, which the jury must have believed, to which our attention is directed. That contains no promise to pay, express or conditional. It must then have amounted to an admission of indebtedness, or upon principles now well settled, the bar is not removed. It would be a most unauthorized perversion of language, worthy only of the old cases, which have been so justly repudiated, to extract from what the defendant said, an admission that he was then indebted to the plaintiff. This he expressly denied. He insisted that he had paid the debt. Until the plaintiff had taken the case out of the statute by affirmative proof, in which he failed altogether, the defendant was under no obligation to prove how he paid him. It

was not necessary that he should file an account in offset. And if he had filed one, he had no occasion to prove it. The statute was a sufficient defence for him, until repelled by counter proof, which although attempted was not done.

Judgment on the verdict.

GILBERT *Pl'ff. in equity vs.* MERRILL.

A., being the owner of a farm, mortgaged it to B., and afterward, conveyed the right to redeem to C., who paid B's debt and took an assignment of the mortgage to himself. — In the meantime, however, D., a creditor of A., had attached the right in equity, and on obtaining execution, caused it to be sold. — E., having also an execution against A., placed it in the hands of the officer making the sale, and bid a sum for the equity, large enough to cover both executions. He then paid the first, and caused his own to be returned satisfied. Within the year given by law to redeem, C., tendered to E., the amount he had *actually paid, viz:* the first execution and charges — and thereupon the Court held, in a bill in equity brought by E., to redeem, that the tender made by C., was sufficient to discharge all E's interest in the right in equity, and so he could take nothing by his bill.

C., paid for the right in equity, $1085; and at the same time gave a bond to A., in the penal sum of $2000, conditioned to reconvey on payment of $1085, within four years — there being also an understanding, that if A. should not redeem the right in equity, C., should pay him a sum sufficient to make up the $2000. — E., a creditor of A., attempted to impugn the sale on the ground of fraud. But the Court held that, under the circumstances it was not fraudulent; it appearing that A., had assigned C's bond to E., as security for his debt long before the expiration of the four years, but that he did not avail himself of his right to redeem, on the ground, as it appeared further in his answer to a cross bill of E., that the right in equity was really worth *no more than the* $1085.

THIS *Bill in equity* was brought by the plaintiff as owner of a right in equity, by a purchase at a sheriff's sale, to redeem the premises, a farm in Falmouth, in this County, from a mortgage originally made to one *Royal Lincoln*, and subsequently assigned to the defendant.

The bill set forth a conveyance by *Samuel Merrill* the original owner, by deed of mortgage, dated *February* 18, 1826, to *Royal Lincoln*, to secure the payment of $343,94 in twelve months, with interest. — An attachment of said *Samuel Merrill's* right in equity, *February* 16, 1827, in a suit brought by one *David Winslow* — the recovery of judgment by *Winslow*, and a

sale of the equity, *November* 14, 1829, on an execution issuing thereon, by *David Wescott*, a deputy sheriff, to *Gilbert*, the plaintiff, for the sum of $534 — and a tender of $453 to the defendant, *January* 15, 1831.

It further set forth a conveyance of the premises by *Samuel Merrill*, to the defendant, *June* 20, 1827, for the consideration of $1085. — An assignment of the mortgage aforesaid by *Lincoln* to *Isaac Sturdivant* — and an assignment of the same by *Sturdivant* to the defendant.

Most of these facts were not controverted by the answer. By which, and the answer of *Gilbert*, to a cross bill filed by *William Merrill, Jr.*, and other evidence in the case however, it appeared, that *Winslow's* execution was for $72,16, and that the whole amount paid by *Gilbert*, on the purchase of the equity, was only $84,21 — and that the remainder of the nominal consideration of $534, was endorsed by the officer on an execution against *Samuel Merrill*, in favor of *Gilbert*, which he had placed in the officer's hands for that purpose.

Before the expiration of a year from the sale, the defendant tendered to *Gilbert*, the plaintiff, the sum of $90 — which covered the amount actually paid by *Gilbert*, with interest and charges; but he refused to receive it.

It appeared that *Gilbert* and *Wescott*, the officer, both had notice, prior to the sale on execution, of the conveyance from *Samuel Merrill*, to the defendant.

At the time of this latter conveyance, the defendant gave to *Samuel Merrill*, "a bond in the penal sum of two thousand dollars, conditioned for the reconveyance upon the payment of the sum of $1085, in four years, together with all demands, expenses, repairs and interest which he the said *William Merrill, Jr.*, might be required to pay on account of the premises. — And *Samuel* testified that, in case he did not redeem the right in equity, he considered the bargain to be, that *William* was to pay him a sum sufficient to make up the sum of $2000.

This bond, *Samuel Merrill* assigned to *Gilbert*, the plaintiff, as collateral security for his debt, *December* 1, 1828. But *Gilbert* did not avail himself of it, admitting that the $1085 was the full value of the right to redeem the *Lincoln* mortgage.

Fessenden and Deblois, counsel for *Gilbert*, insisted that the case shew a *secret trust* in favor of *Samuel Merrill*, which rendered the sale from him to *William*, fraudulent and void.

They also contended that the right in equity was *an entirety* — that the officer was obliged to sell the whole — and that having sold it, pursuing in all respects the course prescribed by law, he well might appropriate the excess to the payment of other executions in his hands against the debtor.

But if the officer had no such right to appropriate the excess, then *William Merrill, Jr.*, has *a plain and adequate remedy at law* against him, and should pursue that remedy, rather than seek to obtain it of *Gilbert*, in a court of equity.

Daveis, for the defendant, made an elaborate argument, citing the following authorities: *Fay* v. *Valentine*, 12 *Pick.* 40; 1 *Schoale and Lefroy's Rep.* 149; *Newland, on Con.* 504; *Jennings* v. *Moor*, 2 *Vernon*, 609; 1 *Atkins*, 520; *Smithson* v. *Thompson*; 1 *Maddox Chan.* 525; *Jeremy's Eq.* 188; *Baker* v. *Harris*, 16 *Vesey*, 397; 2 *Fonblanque*, 272; 5 *Wheaton*, 284; 4 *Kent's Com.* 87, 177, 179; *Lawrence* v. *Tucker*, 7 *Greenl.* 195; *Blaney* v. *Bearce*, 2 *Greenl.* 132; *Wilson* v. *Wilson*, 1 *Cranch*, 100; 1 *Chit. Pr.* 470; 7 *Johns. Chan. Rep.* 65; 1 *Maddox Ch.* 524, 525; *Wade* v. *Mervin*, 11 *Pick.* 280; *Dunlap* v. *Stetson*, 4 *Mason*, 349; *Williams* v. *Gray*, 3 *Greenl.* 207; *Train* v. *Marsh*, 4 *Pick.* 131; *Lapish* v. *Wells*, 6 *Greenl.* 175; *Thompson* v. *Chandler*, 7 *Greenl.* 381.

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

Parris J.—By the deed of *Samuel Merrill* to *William Merrill, Jr.* of the 20*th* of *June*, 1827, the latter became entitled to all the rights of *Samuel Merrill*, as mortgagor, subject only to the lien created by the prior attachment on *Winslow's* writ.

By the conveyance from *Lincoln* to *Sturdivant*, and *Sturdivant* to *William Merrill, Jr.*, the latter became entitled to all the rights of mortgagee in the same premises, so that if there had been no attachment of the equity of redemption, prior to the conveyance from *Samuel* to *William*, the latter would, by virtue of both conveyances, have acquired an indefeasible title to the whole estate.

Winslow's suit having been prosecuted to judgment, the right in equity of *Samuel Merrill*, which had been attached on the writ, on the 16*th* of *February*, 1827, was seised on the execution and duly sold to *Gilbert*, for $534; — the amount of the execution, on which the sale was made, being only $72,16. This sale, having relation back to the time of the attachment, rode over the conveyance from *Samuel* to *William;* and *Gilbert*, being the purchaser of the equity, acquired a defeasible right to redeem the premises, by paying up the *Lincoln* mortgage, then held by *William Merrill*, there being no other incumbrance upon the premises at the time of the attachment on *Winslow's* writ; — from which time *Gilbert's* title takes effect.

But this right in *Gilbert*, to redeem the original mortgage, was liable to be defeated, by payment to him, by the mortgagor, of the sum actually paid for such right in equity, with the interest thereof, at any time within one year next after the time of executing the deed thereof.

We have heretofore decided, in this case, that the purchaser may hold his purchase for the whole sum by him paid, although that sum may exceed the amount of the judgment to satisfy which the equity is sold. 8 *Greenl.* 295. We, thereupon, held that the tender of $90, by *William Merrill, Jr.*, on the 10*th* of *July*, 1830, although made within one year from the time of the sale to *Gilbert*, and although more than sufficient to satisfy *Winslow's* execution and all charges arising thereon, did not relieve the equity from *Gilbert's* claim under the sheriff's sale, as it *then* appeared that *Gilbert* had actually paid therefor the sum of $534.

The case, however, *now* comes before us under a very different state of facts. From *Gilbert's* answer to the cross bill, filed in this case, and from the testimony of *Wescott*, who made the sale, it appears that *Gilbert* had also an execution against *Samuel Merrill*, the judgment debtor, whose right in equity was sold, and that for the purpose of causing the surplus money arising from the sale of the equity after paying the *Winslow* execution, to be applied towards the payment of *Gilbert's* execution, he placed that in the hands of *Wescott*, the officer, and that the whole amount paid by *Gilbert* was $84,21, which was to satisfy

the *Winslow* execution, and that the residue of the $534 was endorsed on *Gilbert's* execution, by *Wescott*, and receipted for to *Wescott*, by *Gilbert*, no money having been paid or received by either party. This would have been a very proper course provided *Samuel Merrill* had still continued to be the owner of the right in equity. The surplus would, in such case, have been his property, to be paid over to him, or applied towards the payment of his debts. But by his deed to *William Merrill, Jr.*, of the 20*th* of *June*, 1827, he conveyed all his interest in the premises, and the said *William* thereby became the owner of the right in equity, subject to *Winslow's* attachment. Of this conveyance *Gilbert* had notice long previous to the sale, as he took from *Samuel Merrill* an assignment of a bond of which this deed was the principal subject matter, and he expressly admits notice in his answer to the cross bill. *Wescott*, the officer, also had notice of *William Merrill's* interest, as he saw the deed on record previous to advertising the sale of the right in equity. They both knew that the surplus money, arising from the sale, if any there should be after satisfying *Winslow's* execution, was the property of *William Merrill, Jr.*, and that any appropriation of it for the payment of *Samuel Merrill's* debts, would, at least, be inequitable. *Gilbert* says, in his answer, that he relied upon the knowledge of *Wescott*, and that he was glad, in this manner, to recover his just and lawful debt due from *Samuel Merrill*, if the mode was lawful and right.

There is no necessity for imputing intentional fraud, in this case, to either *Wescott* or *Gilbert*. They undoubtedly mistook the law of the case. The equity was too apparent to be misunderstood by any one. It would have comported as well with equity, and perhaps we might say as well with law, if the money of an entire stranger to these transactions had been appropriated to pay *Samuel Merrill's* debt to *Gilbert*, as the money arising on the sale of this right in equity to redeem the *Lincoln* mortgage. That being the money of *William Merrill, Jr.* and traced into the hands of *Gilbert*, by his own procurement, and direction to *Wescott*, the officer, we think it is to be considered as so much money held by *Gilbert*, for *William Merrill's* use, and being so in *Gilbert's* hands, it was unnecessary for *William* to include this

sum in the tender; — that it could not be required that a tender should be made to *Gilbert,* of what he had already in possession and claimed to hold.

In this view of the case, as the amount actually tendered exceeded the *Winslow* execution and all charges arising thereon, and as the tender was made by the assignee of the mortgagor, who owned the whole estate, subject only to the incumbrance created by this sale, we think it was sufficient to discharge that incumbrance, and that *Gilbert* had no equitable claim upon *William Merrill, Jr.* for the amount endorsed on the execution against *Samuel Merrill.*

This will place *Gilbert* in the enjoyment of all his legal rights. It refunds the money which he actually paid for the right in equity, with interest; it leaves him to seek his remedy against *Samuel Merrill,* but not to appropriate the property of others to pay said *Samuel's* debts; it leaves *William Merrill, Jr.* in the enjoyment of his property, to which by law as well as equity he is entitled, provided the purchase was not infected with fraud.

But it is further contended, that in the transaction between *William* and *Samuel,* there was a secret trust or reservation for the benefit of *Samuel,* which renders the conveyance fraudulent and void as against his creditors, and that *William* is, therefore, precluded from any benefit arising under it. The only evidence relied upon to support this position is the testimony of *Samuel Merrill,* from which it appears that when he made the conveyance to *William Merrill,* of the 20*th* of *June,* 1827, by which the right in equity passed, a bond was given back by *William* in the penal sum of two thousand dollars, conditioned for a reconveyance upon the payment of $1085, together with all demands, expenses, repairs and interest which *William* might be required to pay on account of the premises, and *Samuel* testifies that, in case he did not redeem the right in equity, he understood the bargain to be that, *William* was to pay him a sum sufficient to make up the sum of two thousand dollars. This, of itself unexplained, might, under certain circumstances, be evidence of fraud. But from the answer of *Gilbert* himself, and other evidence in the case, the appearance of fraud wholly vanishes. This bond, which gave *Samuel* the right to redeem upon payment of $1085,

in four years from the date of the deed, was assigned to *Gilbert*, as collateral security for his debt, more than two years previous to its expiration, whereby *Gilbert* was fully authorised to redeem the right in equity, upon the payment to *William Merrill* of the sum of $1085 only — or if by reason of the bond being of different date from the deed, he could not compel a reconveyance, he would, in case of refusal by *William* to convey, recover the damages arising from such refusal, which would be the difference between the value of the right to redeem from *William*, and the sum stipulated to be paid. If this right was, in fact, worth $2000, or any sum exceeding the $1085, then *Gilbert* had the benefit of it, and might have realized it, and there could have been no fraud practised upon him, as a creditor of *Samuel Merrill*. If, on the other hand, as *Gilbert* himself says was the fact, this right was not worth any thing, that the $1085 was the full value of the right to redeem the *Lincoln* mortgage, then *Samuel* had received of *William* a fair consideration for the property conveyed, and no creditor of *Samuel* has reason to complain.

Under this view of the evidence, we think the case is not infected with fraud.

The obligation in the answer to the original bill that *Sturdivant* entered to foreclose the *Lincoln* mortgage, is wholly unsupported by evidence.

The result of our examination is this; the right in equity which *Samuel Merrill* had to redeem the *Lincoln* mortgage, was legally conveyed to *William Merrill, Jr.*, subject to the attachment made in favor of *Winslow*. — *Gilbert*, as the purchaser of the right in equity, actually paid nothing more than the amount of the *Winslow* execution and charges of sale, being $84,21. — The tender by *William Merrill, Jr.* to *Gilbert*, on the 10*th* of *July*, 1835, of $90 was valid and sufficient to discharge all *Gilbert's* interest in the right in equity under the sale on *Winslow's* execution, and, consequently, that *Gilbert's* tender to *William Merrill, Jr.* of $453 on the 21*st* of *January*, 1831, was wholly invalid, as he had not, at that time, any legal right to the premises or any interest therein.

But, it is contended, that if *Wescott* ought not to have appro-

priated the surplus to the payment of *Gilbert's* execution against *Samuel Merrill*, and if, in fact, the said surplus belonged to the defendant, still he is not entitled to relief in the manner prayed for, inasmuch as he has a plain, adequate and sufficient remedy, at law, against *Wescott*. If *Wescott* had actually received the money, it might be recovered in the manner suggested by the plaintiff. But the case shews, as well from *Wescott's* testimony as *Gilbert's* answer, that no money was actually paid beyond what was necessary to discharge *Winslow's* execution.

It is, moreover, to be kept in view that, *Gilbert* is the moving party in this case; that he claims the right (through the purchase of the right in equity sold by *Wescott* on *Winslow's* execution,) to redeem the *Lincoln* mortgage held by *William Merrill*, and unless he can avail himself of this right, his bill is wholly unsupported.

We are clearly of opinion, for the reasons before given, that proof of the tender by *William Merrill*, on the 10*th* of *July*, 1830, is a perfect answer to any claim by *Gilbert*, arising from his purchase at the sale by *Wescott*, on the 18*th* of *December*, 1829, and that since said tender, his rights, acquired under that sale, have been completely barred.

Brock *vs.* Sturdivant.

By contract *in writing*, A. agreed to deliver to B. from *one to three hundred* perch of stone, at one dollar the perch. In an action by A., brought to recover the price of a quantity of stone delivered, he proved, *by parol*, an agreement made subsequently to the written one, (which written contract was introduced by the defendant,) to deliver from *two to six hundred* perch, at the same price. *Held*, that the evidence was admissible, inasmuch as it did not contradict, vary or explain the written contract, and applied merely to that portion of the stone not covered by the written contract.

This was an action of *assumpsit*, in which the plaintiff declared in a count of general *indebitatus assumpsit* upon account annexed, and on a special contract set forth in his declaration. The general issue was pleaded and joined, and a brief statement was also filed by the defendant.

The plaintiff offered witnesses to prove a *parol* contract, for

the delivery of a large quantity of island rocks, for the purpose of laying into wall, at a place called *Robinson's wharf;* and *Isaac Washburn* and *Benjamin Brock*, being called by him, testified to such a contract, as having been made in their presence, on the 2*d* of *April*, 1833; — that the agreement was for the delivery of from *two to six hundred* perch. *Brock* was to have one dollar per perch for the stone, delivered on the wharf, or one dollar and twenty-five cents if he laid them into wall; and it was to be optional with him whether to lay them or not. One of the witnesses testified that he understood, by the agreement, that the rocks were to be measured, and both testified that it was stated that the agreement which they witnessed, was to be put in writing.

The defendant's counsel objected to the introduction of such proof, on the ground that there was a special contract in regard to the subject matter as set forth in the declaration; but as no such written contract was shewn, *Parris J.*, who tried the cause, overruled the objection and permitted the witnesses to testify, reserving to the defendant's counsel, at his request, the benefit of the objection, if he should be entitled to it. The witnesses testified to the delivery of a large quantity of rocks, according to the agreement, and that *Sturdivant* was frequently present when boat loads were delivered, directed where they should be deposited, and expressed his satisfaction with the quality. The rocks were not laid into wall by *Brock*, but *Sturdivant* employed other persons to do it.

The defendant's counsel, at the commencement of his defence, introduced the following written contract: — "*March* 23, 1833. "Then agreed with *Daniel Brock*, to furnish and deliver at *Rob-* "*inson's wharf*, from *one to three hundred* perch of stone, suita- "ble to lay into a wall to build up the old wharf, at $1 per "perch if hove on the old wharf, or $1,25 per perch if laid into "said wall in a workmanlike manner, one half to be paid as fast "as the stone are brought, the other half as soon as the stone "are laid and measured, which is to be done as soon as it can be "conveniently. — Witness our hands.

Daniel Brock.
Isaac Sturdivant."

The defendant's counsel also suggested, that a counterpart of the agreement was in possession of the plaintiff, and contended that the parol evidence, in regard to such contracts, should be excluded and ought to be laid out of the case; and argued to the jury, that if such written contract had been originally shown or admitted, the parol evidence would have been ruled out. But, inasmuch as the contract, proved by parol, appeared to be subsequent to the written contract, and the quantity of rocks contracted to be delivered under the parol agreement, was much larger than the quantity mentioned in the written contract, the presiding Judge did not exclude the parol evidence.

In the course of his closing argument, the plaintiff's counsel stated that he had a counterpart of the agreement of *March 23d*, 1833, and stated, as a reason why it had not been produced before, that it had been mislaid in the Clerk's office, and offered now to produce it to the jury, but the defendant's counsel objected thereto.

The parol testimony, being submitted to the jury, the defendant's counsel commented thereon as a part of the plaintiff's evidence, and it was insisted on by the plaintiff's counsel, in support of the action. The defendant's counsel argued, that the parol testimony, if proper for the consideration of the jury, was to be considered in connection with the written contract, and that its import, if it comprehended the whole or extended to the further quantity of rocks to be delivered than that expressed in the written contract, should be regulated and determined by the terms of that contract, both as to the manner of ascertaining the quantity and time of making payment.

The plaintiff's counsel contended, that the terms of the written contract were to be confined to the amount of three hundred perch therein expressed, and were not to be extended to the further quantity claimed to have been delivered, but that the extra quantity was the subject of a separate parol agreement, testified to by the witnesses, independent of the terms of the written contract.

The Court instructed the jury, that the written contract exhibited, was to be the rule for the quantity therein expressed, and that although parol evidence is not admissible to explain or modify a written contract, yet the terms of a written contract may be

subsequently extended by parol, or a new parol agreement may be made, touching the matter of a written agreement; that, as the terms of the parol contract, in this case, were similar to those of the written contract, it was not material whether the parol contract was considered as an extension of the written contract, or as independent of it; that, the rights of the plaintiff, or the liabilities of the defendant, were no greater under the parol contract, than under the written; except that a greater quantity of rocks appeared to have been delivered, than was provided for by the written contract.

The defendant had paid on account of the contract, at different times, to the amount of $269; — an order was also drawn on the defendant, by the plaintiff, *Oct.* 29, 1833, for $100, in favor of *Smith & Brown*, or order, and specially accepted by the defendant, *Nov.* 19, 1833, in the following terms: "Accept-"ed to pay what may be due after deducting former liabilities." The order was not subsequently presented to the defendant for payment, but was taken up by the plaintiff.

There having been no admeasurement of the rocks, the plaintiff introduced evidence, tending to show that a part of the rocks were so laid in the wall, by the defendant, as to render an admeasurement of them impracticable — and that with regard to another part, there was an unreasonable delay by the defendant, in laying them in the wall.

It was contended, by the defendant's counsel, that the circumstance of the order being drawn and accepted, as before stated, might be considered as evidence of waiver, by the plaintiff, of any delay by the defendant, in laying the remainder of the rocks, or of consent that the subject should be suffered to remain in the state it then was, at the time of drawing and accepting the order, for a reasonable and convenient time and season for finishing the laying, or ascertaining and adjusting the amount or balance due, according to the agreement. But the presiding Judge stated, that the order might, perhaps, be considered as evidence of the amount supposed to be due by the plaintiff, but that he did not regard it as evidence of a waiver, as contended for by the defendant's counsel.

It was contended further, that no action would lie on the agreement, until after payment had been requested, of which there was no evidence; but the Judge ruled, that if *Sturdivant* had neglected to do what was incumbent on him to do, that is, seasonably to lay the rocks into such a wall as could be measured with reasonable accuracy, the plaintiff might maintain this action without shewing a previous demand.

The jury returned a verdict for the plaintiff, for $243,96, which was to be subject to the opinion of the whole Court, upon the facts as reported.

Fessenden and *Daveis*, for the defendant, to the point relating to the inadmissibility of parol evidence, cited the following authorities, viz.: 2 *Stark. Ev.* 81; 2 *Barn. & Cres.* 634; *Brewer* v. *Palmer*, 3 *Esp. Rep.* 203; *Jeffrey* v. *Walton*, 1 *Stark. Cas.* 239; 3 *Stark. Ev.* 1515; *Hodges* v. *Drakeford*, 1 *N. H. Rep.* 270; *Rex* v. *St. Paul*, 6 *Term Rep.* 454; *Fielder* v. *Ray*, 6 *Bing.* 332; *Fenn* v. *Griffith*, 6 *Bing.* 530.

They also insisted that there had been a waiver by the plaintiff, of any claim arising out of the alleged neglect of the defendant, as to the laying of the rocks.

Longfellow, for the plaintiff.

WESTON C. J. — The rule of law, that where parties have entered into a written contract, parol testimony of what has been agreed is inadmissible, is well established. It is a rule, not controverted in this case, and is uniformly enforced and practised upon in our courts.

The plaintiff attempted to prove his case by parol testimony; and he thus proved a contract for the delivery of from two to six hundred perch of stones. This was objected to by the counsel for the defendant, upon the ground that there was written evidence of what the parties had agreed. This was affirmed at the time of the objection, but proof that any written evidence existed, did not appear, until a subsequent stage of the trial. But it was all at length received, and we are now able to determine, from a view of the whole testimony, whether that which was objected to, was admissible at the time. The parties made a contract in writing, in *March*, 1833, wherein the plaintiff agreed to deliver

for the use of the defendant, from one to three hundred perch of stones, upon certain stipulated terms. It was at the option of the plaintiff to deliver, under this contract, the less or the greater number of perch stated, or any intermediate quantity. That contract remained as evidence of what the parties had then agreed, nor was it attempted at the trial to vary, impair or explain it, by any parol testimony. But in the *April*, following the first agreement, the parties made a new contract by parol. It does not appear that they had it in contemplation to rescind the first; nor was there any reference thereto in the parol contract. They do not at all conflict with each other. They may both be enforced, without any violation of the principles of law. The defendant wanted more stones, than he had a right to demand under the first contract, and he made a second parol agreement with the plaintiff, to furnish the additional quantity.

The second was a new and independent contract, of which, and of its fulfilment on his part, it was competent for the plaintiff to offer parol testimony. As to that contract, he could offer no other. His declaration covered both contracts; but it was no prejudice to the defendant, if he proved but one of them. Our attention is called only to the competency of the testimony, and not to the regularity of the course, pursued by the plaintiff in other respects. There would have been a propriety in his proving his whole case in his opening; but the reason assigned for his failing to do so is satisfactory, that his written evidence could not at that time be found. The defendant introduced the counterpart of the first agreement, the effect of which was to show, that all the stones were not delivered under the second contract. And then the plaintiff, having found the original, introduced that, also, by which the first contract was proved, of which the plaintiff had offered no evidence whatever in his opening. The whole case, with all the testimony which could bear upon it, was at length fairly before the jury, and they have passed upon its merits. We are satisfied that the testimony objected to was admissible as evidence of the second contract; and it does not appear to have been offered for any other purpose.

No other objection is taken to the ruling and instructions of the presiding Judge, at the trial, except as to the effect of the

order drawn by the plaintiff, in *October*, 1833, in favor of *Smith & Brown*, and of the special acceptance of the defendant thereon. It is insisted, that this was evidence of a waiver, by the plaintiff, of any right to charge the defendant upon the ground of neglect and failure on his part, and of consent by the plaintiff that the business might be further delayed; and that the jury should have been so instructed. But we are of opinion, that no such evidence is fairly deducible from the order, or its acceptance. If the order itself proves any thing, it is, that the plaintiff claimed to have funds then due, in the defendant's hands. By the acceptance, the defendant undertook to pay "what may be due, after deducting former liabilities." This implies, not that the plaintiff had then no existing demand, under the contract in controversy, but that the defendant had opposing claims, by way of offset. If any such existed, upon being filed, the defendant could have had the benefit of them, upon competent proof at the trial, but nothing of this sort was attempted. And whatever was to have been implied from the acceptance, it does not appear to have been satisfactory, either to the holder or to the plaintiff; as the order was given up by the one, and received back by the other.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK, APRIL TERM, 1835.

LORD *vs.* LORD.

A father conveyed to his son, 132 acres of land in fee, and an interest in his dwellinghouse and barn standing on other land, in the following terms: "and also that the said J. shall have *the privilege* of the eastern part of the dwellinghouse, one lower room, bed-room, and cellar and chamber, and one fourth part of the barn, so long as they shall stand, *to his use.*" *Held*, that it conveyed merely a *personal privilege* to the son, which was not *assignable* by him to a stranger.

A reservation to the grantor, in the same deed, of a life estate, and a subsequent relinquishment of the same on the back of the deed, were both held to apply to the lot of land, and not to the privilege in the house and barn.

THIS was a writ of entry, brought to recover possession of a part of a dwellinghouse, situated in *Lyman*, in this county, and was tried upon the general issue, *September* term, 1834, before the Chief Justice.

The demandant, to prove the issue on his part, read a deed from *Samuel Lord* to *James Lord*, dated *Feb.* 15, 1817, conveying one hundred and thirty-two acres of land — following which were these words — "and also that the said James shall have the "privilege of the eastern part of the dwellinghouse, and one "lower room, bed-room, and cellar and chamber, and one fourth "part of the barn, to be the western part, so long as they shall "stand, to his use, excepting and reserving to myself, the use and "improvement of all of the above during my natural life."

On the back of this deed, was a release, dated *March* 28, 1829, from *Samuel Lord* to *James Lord*, of all his right and interest therein reserved.

The demandant then read a deed from *James Lord* to himself, dated *June* 27, 1826, conveying all his interest in the house aforesaid. Also, deeds from *Samuel Lord* to the demandant, and *Samuel Lord* to *Aaron Lord*, both dated *March* 14, 1829 — the first conveying 100 acres of land, and the other conveying all said *Samuel's* homestead farm, except what he had before conveyed to his sons *James* and *Lyman Lord*.

It was proved, that the demandant took possession of the demanded premises at the time of his deed in 1826, and continued to occupy the same until *October*, 1830, when he removed with his family to *Bradford*, in the County of *Penobscot* — and that while thus in the occupation he made considerable repairs upon the house.

The defendant, on his part, read a deed from *Samuel Lord* to *Solomon Hill*, dated *October* 10, 1828, of the homestead of the said *Samuel*, containing 200 acres of land — and deeds of the same from said *Hill* to *Aaron Lord* and the demandant, both dated *March* 28, 1829, conveying to the former 100 acres, including the demanded premises, upon certain conditions; among which were the support of the said *Samuel* and wife during their lives, and the payment of certain sums to their daughters — and conveying to the demandant 100 acres of land, "being the same premises which said *Samuel Lord* conveyed to said *Lyman Lord*, *March* 14, 1829."

He also read a release from the demandant to his father, *Samuel Lord*, dated *March* 14, 1829, of all right, title and interest, which he had or might have in the estate of the said *Samuel*, whether real or personal.

The defendant then offered evidence, which was objected to by the demandant, but admitted by the Court, that, the witness was present at the house of *Samuel Lord*, on the 27th and 28th days of *March*, 1829, with *Solomon Hill*, *Aaron Lord* and others; between whom much conversation was had relative to the difficulties then existing between them, and the mode of settling them; *Lyman Lord* having commenced an action against *Samuel Lord* for covenant broken upon his deed of *March* 14, 1829, on account of said *Samuel Lord's* having conveyed the same land

previously to *Solomon Hill*, by his deed of *October* 10, 1828. The witness further testified, that on the second day, an arrangement was effected, and that the deeds from *Solomon Hill* to *Aaron Lord* and the demandant, were thereupon made — that the demandant appeared to understand it, and read the deed from *Hill* to his brother; and remarked, that he did not intend to live where he then did.

Another witness testified, that he was present at the above arrangement — that he heard nothing said about that part of the house which the demandant had occupied, and that the demandant's object seemed to be to secure his title to the 100 acre lot conveyed to him by his father, which was wild land — and that he understood the agreement, at the time to be, that the demandant was to have 100 acres of land, and that *Aaron Lord* was to have the residue of his father's property.

Upon this evidence a nonsuit was ordered, which was to stand or be taken off, and the cause stand for trial, as the opinion of the whole Court should be upon the case as reported by the presiding Judge.

N. D. Appleton, for the plaintiff.

The first question is, what estate did *James Lord* receive under his deed from *Samuel Lord*. We contend that it was a freehold estate — an estate for life, determinable upon the happening of a subsequent event. *Co. Litt. L.* 1, 426; *Dane's Abr. ch.* 130, *a.* 1, § 8; 4 *Com. Dig. Estates, E.* 1; 1 *Cruise's Dig.* 60; 4 *Kent's Com.* 26. *Rutty* v. *Tyler*, 3 *Day's Rep.* 470; *Heard* v. *Cushing*, 7 *Pick.* 169.

2. The estate conveyed by the foregoing deed was *real estate*, and may properly come under either of the terms, *lands*, *tenements* or *hereditaments*. 2 *Bl. Com.* 16, 20.

Such a construction should be given to the deed as will carry into effect the intention of the parties, if it can be done consistently with the rules of law. *Bridge* v. *Wellington*, 1 *Mass.* 219; *Wallis* v. *Wallis*, 4 *Mass.* 135.

The intention here was manifestly to convey something more than a mere chattel in trust. The conveyance is of a part of a dwellinghouse, with the *cellar, so long* as they shall stand. The

estate conveyed has the appropriate and necessary qualities of real estate — *immobility*, and a sufficient legal indeterminate *duration*. 2 *Bl. Com.* 386.

The land under the part of the house conveyed, if not clearly included in the terms used in the deed, may pass as appurtenant to it. *Doane* v. *Broad-street Association in Boston*, 6 *Mass.* 332; *Clapp* v. *Draper*, 4 *Mass.* 266; *Howell* v. *McCoy*, 3 *Rawle*, 256; 2 *Term Rep.* 498; 2 *Coke's Rep.* 526; *Cro. Eliz.* 114; 4 *Com. Dig. Grant, E.* 5, 6, 9.

3. A *real action* is the proper and only effectual remedy for the demandant. *Jackson on Real Actions*, 1.

4. The demanded premises were not released to *Samuel Lord* by the deed of the 14th of *March*, 1829. It does not on its face purport to convey them, and there is nothing in the attending circumstances rendering such a construction of the deed necessary. As to the rule of construction he cited, *Adams* v. *Frothingham*, 3 *Mass.* 352; *Worthington* v. *Hilyer*, 4 *Mass.* 205; *Watson* v. *Boylston*, 5 *Mass.* 411 — and commented at length on the facts to show that the premises were not intended to be released.

It was intended to bar any future claim of *Lyman Lord*, as an heir at law to his father's estate — and such would be its legal effect and operation. *Quarles & al.* v. *Quarles*, 4 *Mass.* 680; *Kenney et ux.* v *Tucker*, 8 *Mass.* 143.

5. The demandant is not estopped to claim the premises by reason of his being present on the 28th of *March*, 1829, when *Solomon Hill* conveyed to the tenant. *Henderson* v. *Overton*, 2 *Yerger*, 394; *American Jurist*, *No.* 24, *p.* 439; and *No.* 23, *p.* 150; *Eagle* v. *Burns*, 5 *Call*, 463.

6. But whether the demandant knew what the deed from *Samuel Lord* to the tenant contained, was a question of fact which should have been submitted to the jury.

E. Shepley and *D. Goodenow*, for the tenant, contended, 1. that the deed from *Samuel Lord* to *James Lord*, of *Feb.* 15, 1817, did not convey such an interest as could be recovered in a *real action*.

2. That the interest conveyed was a mere *personal privilege*, and was not *assignable*.

3. That it was relinquished by the demandant to *Samuel Lord*, by his deed of *March* 14, 1829.

4. That the demandant was *estopped* to claim the premises, by being present at the time of their conveyance to the tenant by *Hill*, and making no objection thereto.

They cited the following authorities: *Miller* v. *Miller*, 4 *Pick.* 249; 7 *Pick.* 169; *Safford* v. *Annis*, 7 *Greenl.* 169; *Thompson & al.* v. *Androscoggin Bridge*, 5 *Greenl.* 62; *Wood* v. *Barstow*, 10 *Pick.* 368; *Clinton* v. *Fly*, 1 *Fairf.* 292.

PARRIS J. — It may well be doubted whether by the deed of the 5*th* of *February*, 1817, from *Samuel Lord* to *James Lord*, the latter took any thing more in the dwellinghouse than a personal privilege of occupancy, not assignable or transferable in any manner, so that a stranger might by possibility come into the possession. The conveyance is from father to son of one hundred and thirty-two acres of land in fee, followed by this additional clause: "And also, that the said *James* shall *have the privilege* of the eastern part of the dwellinghouse, one lower room, bed room and cellar and chamber, and one fourth part of the barn, so long as they shall stand, to *his use*." The dwellinghouse and barn were not situated on the lot conveyed in fee, but on the homestead still remaining in the possession of the grantor.

Considering the circumstances under which the conveyance was made, the affinity of the parties, that the grant was from father to son, and the privilege to be enjoyed by the latter was in the dwellinghouse of his father, we should not think it a constrained construction to say, that the privilege mentioned in the latter clause of the descriptive part of the deed, was available only to *James*, and could not by him be assigned so as to be operative in favor of a stranger. Under such a construction, we should find no difficulty arising from the habendum part of the deed. That would apply to "the aforegranted and bargained premises," the one hundred and thirty-two acres conveyed in fee, and it was evidently intended so to apply. Neither does the release of *Samuel*, on the back of his deed to *James*, have any more extensive operation. By a reservation in that deed, *Samuel*, the grantor, had a right to the use and improvement of the property conveyed,

during his life, and by the release he relinquishes that right to *James*, the grantee. This was probably intended to apply only to the land conveyed, *viz.* the one hundred and thirty-two acres. But whether it was so restricted, or applied also to the privilege in the house, the release from *Samuel* was not until the 28*th* of *March*, 1829, long after *James'* quit claim deed to *Lyman*, so that *Lyman* could derive no advantage from any subsequent conveyance from *Samuel* to *James*. By a release, no right passed but the right which the releasor hath at the time of the release made. *Co. Litt. sec.* 446; *McCracken* v. *Wright*, 14 *Johns.* 194; *Jackson* v. *Hubble*, 1 *Cowen*, 613; *Jackson* v. *Winslow*, 9 *Cowen*, 13.

There might be sufficient reasons why the son would be accommodated by the father, most cheerfully, with the use of a part of his dwellinghouse, when the like accommodation afforded to a stranger would be an annoyance hardly to be endured. The situation and circumstances of the contracting parties may properly be considered in giving a construction to the instrument. *Wood* v. *Barstow*, 10 *Pick.* 368; *Clinton* v. *Fly*, 1 *Fairf.* 292.

But if the interest which *James Lord* took in the dwellinghouse, under the deed from *Samuel Lord*, to him, was an assignable interest, as contended by the plaintiff, then it passed to the plaintiff on the 27*th* of *June*, 1826, by a release or quit claim deed to him from *James Lord*, of that date. It was an interest in the estate of which *Samuel Lord* held the fee. This interest or easement the plaintiff released to *Samuel*, his father, the owner of the estate, by deed on the 14*th* of *March*, 1829, and *Samuel*, in consideration thereof, on the same day, conveyed to the plaintiff, one hundred acres of land in fee.

We think it is manifest, from all the papers in the case, that the release of *Lyman Lord*, before mentioned, was intended to discharge the estate from this incumbrance. It is said that such could not have been the understanding of the parties, because *Samuel Lord* was not at the time owner of the fee, having previously conveyed to *Hill*. For what purpose the deed to *Hill*, the son in law of *Samuel Lord*, of the 10*th* of *October*, 1828, was made, is very questionable;—but certain it is, that *Samuel*

Lord, the grantor, continued in possession, and subsequently exercised the same ownership over the property as he had before, and on the 14*th* of *March*, 1829, when he received the release discharging the easement, conveyed to *Lyman*, in consideration thereof, a lot of land, which was included in the previous deed to *Hill*, and which conveyance *Hill* likewise confirmed to *Lyman* by deed, on the 28*th* of the same month. *Lyman Lord*, by taking a deed from his father, treated the estate as belonging to the latter, as distinctly after the conveyance to *Hill*, as before;—*Samuel*, the grantor, by all his acts, treated *Hill's* deed as a nullity, and *Hill* himself claimed no right under it, but conveyed to *Lyman* and *Aaron*, in accordance with their agreement with *Samuel*.

The parties then, in making use of the language in *Lyman's* release to *Samuel*, "*all right, title and interest in the estate of Samuel Lord*," must have referred to this easement or privilege in the house, for *Lyman* then had no other right or title or interest in *Samuel Lord's* estate, and it is not pretended that *Samuel* had any other real estate, except that described in the deed to *Hill*, of which the house constituted a part. It follows, therefore, that the plaintiff has no cause of action, and the nonsuit is confirmed.

McKim *vs.* Odom.

An action of debt will lie as well on *a decree of a Court of Chancery*, in another State, for the payment of money only, as on a judgment of a Court whose proceedings are according to the course of the common law.

Assumpsit will not lie upon such decree.

Courts of equity have jurisdiction of all matters of *account*.

This was an action of *assumpsit* on a decree in chancery in the State of *Maryland*, for the payment of money. A statement of the case was agreed on by the parties, and sufficiently appears in the opinion of the Court.

Dane, for the defendant, contended, that no action at law would lie upon this decree, but that if any could be maintained

it should be *debt* and not *assumpsit*. In support of which, he cited the following authorities: *Bissell* v. *Briggs*, 9 *Mass.* 462; 7 *Dane's Abr.* 553; 5 *Dane's Abr.* 218; *Buttrick & ux.* v. *Allen*, 8 *Mass.* 273; *Doug. Rep.* 1; *Richards* v. *Jones*, 3 *Gill and Johns.* 163; *Hall & al.* v. *Williams*, 6 *Pick.* 232; *Commonwealth* v. *Green*, 17 *Mass.* 546; 8 *Johns.* 173; *Warren* v. *Flagg*, 2 *Pick.* 448; *Mitchell* v. *Osgood*, 4 *Greenl.* 124.

He also argued against the validity and effect of the decree, on the ground of a want of jurisdiction in the Court making it.

Holmes and *Goodenow*, for the plaintiff, maintained that the Court of Chancery in *Maryland*, had jurisdiction of the case — that, the decree was valid and binding on the parties — and that, *assumpsit* as well as *debt* would lie thereon; citing the following authorities: 1 *Phil. Ev.* 281; 1 *Stark. Ev.* 246; *Com. Dig. Tit. Evidence*, A. 4; *Hall* v. *Odber*, 11 *East*, 117; *Buttrick et ux.* v. *Allen*, 8 *Mass.* 273; *Taylor* v. *Boyden*, 8 *Johns.* 173; *Warren* v. *Flagg*, 2 *Pick.* 448; *Watson* v. *Bourne*, 10 *Mass.* 339; 17 *Johns.* 384; *Mills* v. *Duryee*, 7 *Cranch*, 481; *Post and al.* v. *Neafie*, 3 *Johns.* 22; 5 *Johns.* 132; *Hall & al.* v. *Williams & al.* 6 *Pick.* 232; *Taylor* v. *Boyden*, 8 *Johns.* 173; *Starbuck & als.* v. *Murray*, 5 *Wend.* 148; *Shumway* v. *Stillman*, 6 *Wend.* 447.

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

PARRIS J. — It has been repeatedly adjudged, that foreign judgments are *prima facie* evidence merely of the right and matter which they purport to decide. Such was understood to be the law when the Constitution of the *United States* was adopted, and such is now holden as law in all, or nearly all the American Courts. It is unnecessary, in this case, to enter into a consideration of that principle. Much strong argument may be found, in books of great authority, in favor of giving a higher sanctity, than mere *prima facie* evidence, to foreign judgments, in personal actions, rendered in courts having jurisdiction of the parties and the subject matter, especially when both parties are natives or citizens of the country by whose tribunals such judgments have been rendered.

Many eminent jurists hold, that when a foreign judgment has been fairly obtained, pronounced by proper authority, in a case between citizens, and within the jurisdiction of the court, such judgments should every where be taken as conclusive evidence, between the same parties, of the facts which it purports to decide; and that no further enquiry into the merits should be permitted. But foreign judgments have not been treated with that respect in the courts of this country, either before or since the revolution. While the several states were colonies, they were considered foreign to each other, and their judgments were deemed foreign judgments, and were received as *prima facie* evidence only, in the courts of the other colonies. Consequently, the merits of such judgments were open to re-examination.

To remedy this inconvenience, the people, in the first section of the fourth article of the constitution of the *United States*, provided that full faith and credit should be given in each state, to the public acts, records and judicial proceedings of every other state; — and Congress, in pursuance of authority under the constitution, enacted that the records and judicial proceedings of the states, properly authenticated, shall have such faith and credit given to them, in every court within the *United States*, as they have by law or usage in the courts of the state from whence the said records are or shall be taken.

By these provisions, the judgment of a court of any of the states is put upon a footing of domestic judgments; — for being duly authenticated, as provided by the Act of Congress, of 1790, *chap.* 11, the court, to which such authenticated copy is presented, is bound to examine it and pronounce judgment upon it, in the same manner that they would upon a record of any court of their own state. *Mills* v. *Duryee*, 7 *Cranch*, 481; *Hall* v. *Williams*, 6 *Pick.* 232. In the latter case, the court say, that the judgments of sister states are to be treated altogether as domestic judgments, in regard to the proof of their existence.

But to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and the subject matter; and whether it thus had jurisdiction or not is, if the defendant see fit to make it so, a question preliminary to the enquiry, what does the record say as to the facts adjudicated. The

record itself may be *prima facie* evidence that the court had jurisdiction, but it has been holden that this may be controlled and overcome by other evidence. If the jurisdiction be established, or not denied, the judgment is as conclusive as a domestic judgment, and as such, is to be treated by the Court.

To an action of debt on such a judgment, as to a like action on a judgment of our own courts, the proper plea is *nul tiel record*, and under our statute abolishing special pleading, this must be pleaded as the general issue. Some doubts were expressed in the argument, whether the defendant might not properly plead *nil debet*, and *Bissel* v. *Briggs*, 9 *Mass.* 462, was relied upon. The form of pleading does not appear to have been distinctly made a question in that case. *Nil debet* was pleaded and replied to without objection.

There seems to be one uniform current of authority, that where the action is brought on a judgment, *nil debet* is an improper plea. Where the specialty or record is but inducement to the action, and matter of fact is the foundation of it, *nil debet* is a good plea; but where the action is grounded upon a record or specialty, it is no plea: 1 *Saund.* 38, *note* 3; *Selw. N. P.* 531; 1 *Chitt. Pl.* 108, 481; 2 *Stark. Ev.* 463. *Nil debet* is not a good plea in a suit on a judgment in another state, because not a good plea in such state. *Nul tiel record* is the proper plea in such a case: 1 *Kent's Com.* 260; *Benton* v. *Bergot*, 10 *Serg. & Rawle*, 240; *St. Albans* v. *Bush*, 4 *Vermont Rep.* 58. In *Hall* v. *Williams*, 6 *Pick.* 232, the defendant pleaded both *nul tiel record* and *nil debet*. The court held the former to be a proper plea, and, as the cause went off on the issue formed on that plea, no decision was had on the other. We perceive no difficulty, under our mode of pleading, in presenting a defence on paper in such a manner as to secure to the defendant all his rights with *nul tiel record* for the general issue. He may allege in his brief statement, whatever might have been set forth in a special plea, previous to our statute abolishing special pleading. He may plead a release, or that the debt was levied by a *fieri facias*, &c. 1 *Chitt. Pl.* 481. So he may show by plea, that the court, from which the record comes, had no jurisdiction over his person, or

he may plead any other fact which shews the judgment to be a nullity, as was done in *Aldrich* v. *Kinney*, 4 *Connect. Rep.* 380, and in *Harrod* v. *Barretto*, 1 *Hall*, 155.

In 7 *Wentw. Pl.* 114, will be found a plea of *nul tiel record*, and a replication tendering an issue to the court, and a special plea, in the same case, with a replication tendering an issue to the country. In *Hall* v. *Williams*, before referred to, the defendants pleaded specially to avoid the judgment as improperly obtained, in addition to the general plea, and the court said, this was the usual mode of raising the question in the other states. Any special plea may be pleaded which would be good to avoid the judgment in the state where it was pronounced, 1 *Kent's Com.* 261.

It is contended, that an action at law cannot be maintained in this court on a decree rendered in the High Court of Chancery, in *Maryland*. We readily assent to the position in all those cases where the decree is for specific performance, and not for the payment of money. It is a general principle, that where a man is under an obligation to pay money, the law will provide the process and the means to enforce payment. The cases of assumpsit on foreign judgments, to be found in the books, are sustained on the implied promise, which the law presumes every man to make to perform what the law enjoins. As said by *Blackstone*, 3 *Com.* 160. "Every man is bound, and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. Whatever the laws order any one to pay, that becomes instantly a debt, which he hath beforehand contracted to discharge. And this implied agreement it is that gives the plaintiff a right to institute a second action, founded merely on the ground of contract, in order to recover such sum. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution, he may afterwards bring an action of debt on this judgment and shall not be put upon the proof of the original cause of action; but upon shewing the judgment once obtained, still in full force and yet unsatisfied, the law immediately implies that, by the original contract of society, the defendant hath contracted a debt and is bound to pay it."

It is admitted, that a judgment in a court of law in another state, or in a foreign court, is a sufficient ground of action here; and why should not a decree in Chancery be alike available? If such a decree be conclusive between the parties, in the state where it was rendered, if the court had jurisdiction, the parties were heard, and nothing of irregularity or fraud appears, or is even suggested to vitiate the proceedings, it is not easy to perceive why a decree emanating from the highest tribunal in the state is not entitled to as much respect and consideration as a judgment of a subordinate court of law. A foreign state may provide that all controversies between its citizens shall be litigated in Chancery, or as is the case in one of the *United States*, the courts may be governed by the principles and proceed according to the forms of the civil law, and who shall say that the administration of justice there is not as pure as here, or that the judgments or decrees of such a court are entitled to less respect than those of a court proceeding according to the course of the common law. If a foreign state have jurisdiction of the person of the debtor, and of course the right to enforce the payment of the debt, it cannot be important by what form of process, or in what manner they exercise that right. *Stevens* v. *Gaylord*, 11 *Mass.* 265.

Justice is administered in a court of equity upon as settled and certain principles as in a court of law. The maxims of the Court of Chancery are as fixed as those which govern other tribunals, and it is as much bound as a court of law by a series of decisions applicable to the case and establishing a rule. It has no discretionary power over either principles or established precedents: 1 *Kent's Comm.* 490. Whatever discretion it exercises is governed by the rules of law and equity, and in no case does it contradict or overturn the grounds or principles of law: *Cowper* v. *Cowper*, 1 *P. Wms.* 753. The system of courts of equity is a laboured, connected system, governed by established rules and bound down by precedents, from which they do not depart. The systems of jurisprudence, both of law and equity, are founded on the same principles of justice and positive law, but varied by different usages in the forms and mode of their proceedings. The

rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, the same. 3 *Bl. Com.* 342, *et seq.*

Such are the principles which govern courts of Chancery, both in this country and *England.* From the record before us we perceive that the learned Chancellor of *Maryland* does not feel authorised to depart from the ancient landmarks of the court. In his very able opinion, delivered on the fifth of *January*, 1829, upon the motion for a *distringas* against the *Franklin Bank*, after a lucid exposition of the law applicable to the motion, the Chancellor says, "When I consider that this is the first application of the kind, that there has been, heretofore, no regularly settled practice in this court, in relation to bodies politic, and that it has a large and almost unlimited control over its own rules of practice, I feel tempted, at once, to make the evidently useful alteration in the course of proceeding. But when, on the other hand, I recollect that it has been always considered as an established principle, that this court is confined, in all material particulars, to those forms of proceeding which have been settled by the court of Chancery, in *England*, and that this conformity to the ancient English course of proceeding has been, in various ways, recognized by our legislative enactments, I have become satisfied that it is safest and best to leave the matter to the Legislature, who alone are competent to alter and shorten the process in Chancery, permanently and effectually."

We think that, on principle, as much credit is due to decisions in Chancery as to judgments at law, and the record before us affords plenary evidence that the adjudications of the Chancellor of *Maryland* are entitled to the highest consideration.

Why then should not this record have the same effect as a judgment certified to us from the Court of Appeals of the State of *Maryland?* Unless it can be enforced in a court of law it cannot be enforced at all in this state, as we have no separate court of Chancery. The consequence will be, that when a case has been litigated in Chancery, in another state, for years and at great expense, as this has been, and the plaintiff has succeeded in obtaining a decree in his favor, the defendant may completely avoid the effect of such decree by removal to another jurisdiction and the plaintiff be necessarily subjected to all the costs of the prior proceedings.

In *Hopkins* v. *Lea*, 6 *Wheat.* 109, the court say, "a fact, which has been directly tried and decided by a court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other court. Hence a verdict and judgment of a court of record, or a *decree in Chancery*, although not binding on strangers, puts an end to all further controversy concerning the points thus decided between the parties to such suit. In this there is and ought to be no difference between a verdict and judgment in a court of common law, and a decree of a court of equity. They both stand on the same footing, and may be offered in evidence under the same limitations, and it would be difficult to assign a reason why it should be otherwise." In the case just referred to, the court held that the report of a Master, accepted and confirmed by the court, was, with the decree, proper evidence of the matter which they professed directly to decide, also adding that they do not mean to deny that they were *conclusive*, but leaving that point undecided, as the case did not require a decision thereon. A decree in Chancery is of the like nature with a judgment at common law. *Chan. Rep.* 234. It was said by *Ch. Just. Eyre*, in *Emerson* v. *Lashley*, 2 *H. Bl.* 251, that there is a sort of credit given to the judgments of a court of competent jurisdiction, that they create debts and duties upon which actions of debt are founded. In 7 *Wentw. Pl.* 95, is a declaration, *Mercer* v. *Montague*, in debt in the King's Bench, in one of the colonies, for a sum of money decreed to be due to the plaintiff, by the Chancellor in the Court of Chancery at *Westminster*. *Ch. Just. Holt* says, "pleading, though it does not make the law, yet is good evidence of the law, because it is made conformable to it:" 1 *Ld. Raym.* 522. So pleading is the best evidence of the law,—3 *Bingh.* 541,—and *Lord Kenyon*, speaking of the form of proceedings, says, "this shews the distinction beyond all doubt, and is of greater authority than even adjudged cases, because *the writs and records form the law of the land*," 4 *T. R.* 648—and, as said by its great oracle, the law itself speaketh by good pleading—*Co. Litt.* 115, *b.*

But we are not without adjudged cases upon this point. As the court of Chancery in *England*, and the several courts of Chancery in the *United States*, have power to execute their own

decrees within their respective jurisdictions, and as such decrees are generally for the performance of certain acts to which common law courts cannot compel obedience, and, therefore, the successful party can, in such cases, obtain execution only out of the same court, there is rarely, occasion to resort to another jurisdiction for aid. There are, however, such cases in the books of both countries. *Sadler* v. *Robins*, 1 *Camp.* 253, was an action on a decree of the High Court of Chancery in the island of *Jamaica*. It appeared, at the trial before *Lord Ellenborough*, that the decree in the Court of Chancery had not been made up, so that it could be ascertained how much was actually due, and the court held it to be too imperfect to be the foundation of an action, but the *Ch. Jus.* said, "had the decree been perfected, I would have given effect to it as well as to a judgment at common law." In *Henley* v. *Soper*, 8 *Barnw. & Cresw.* 16, which was debt on a decree in a Colonial court, *Lord Tenterden, Ch. Jus.* said, "There is a great difference between the decree of a colonial court, and a court of equity in this country. The colonial court cannot enforce its decrees here, a court of equity in this country may; and therefore, in the latter case there is no occasion for the interference of a court of law, in the former there is, to prevent a failure of justice. In the case of *Sadler* v. *Robins*, the sum due on the decree was left indefinite, but *Lord Ellenborough* said that, had the decree been perfected, he would have given effect to it as well as to a judgment at common law. *Holroyd J.* said, "But for the case before *Lord Ellenborough*, I should have entertained some doubts upon the present question. That, however, is an authority in favor of an action upon the decree of a foreign court of equity, if duly perfected. The other Judges of the King's Bench concurred, and the action was sustained. There can be no doubt, therefore, upon this point, at the present day, in the English Courts. In *Post* v. *Neafie*, 3 *Caines*, 22, the Supreme Court of *New York*, after full consideration, decided that debt will lie on a decree of a court of Chancery in a sister State, if it be simply for the payment of a sum of money by the defendant, without any acts to be done by the plaintiff.

In *Dubois* v. *Dubois*, 6 *Cowen*, 494, which was debt on the decree of a Surrogate, the court say, "The principal question raised is, whether debt will lie;—The general rule is, that this form of action is proper for any debt of record, or by specialty, or any sum certain. It has been decided that debt lies upon a decree for the payment of money made by a court of Chancery of another State, and no doubt the action will lie upon such a decree in our domestic courts of equity. Whether a Surrogate's court is a court of record need not be decided. It has often been said that a Court of Chancery is not a court of record. It is sufficient that a decree in either court, unappealed from, is final. Debt will lie."

In *Evans* v. *Tatem*, 9 *Serg. & Rawle*, 252, the Supreme Court of *Pennsylvania* decided, that an action at law is maintainable in that State on a decree of a court of equity in *Tennesee*, for the payment of money. *Ch. Jus. Tilghman*, in the conclusion of his opinion says, "In *Pennsylvania*, the courts should be extremely cautious in establishing the principle, that an action will not lie for a sum of money decreed to be paid by courts of equity in other states. Very urgent cases may arise, where crying injustice would be done, if relief were denied." *Howard* v. *Howard*, 15 *Mass.* 196, was debt on a decree of divorce ordering the defendant to pay alimony. On demurrer to the declaration, the defendant contended that debt would not lie, there being no judgment according to the course of the common law. The court in overruling the demurrer, say, "there seems to be no reason why debt should not lie. The debt is certain, and it is proved by record; and the decree is, in effect, as much a judgment, as if rendered on the common law side of the court. So it was decided by the same court in *Rice* v. *The Barre Turnpike Corporation*, 4 *Pick.* 130, that an action of debt would lie on an order of the Court of Sessions in favor of one whose land had been injured by the location of the turnpike. It was objected that the form of action was misconceived, for the order on which it was brought was not a judgment. The court said, there could be no question but the action was well brought.

After this examination of principles and authorities, we feel clear in deciding as the law of this State, that an action can here

be maintained on a decree in Chancery in another State, for the payment of money only. But it is said that no action at law will lie in this court, to enforce a decree in Chancery in *Maryland*, because none would be sustained on such a decree by the courts of law in that state, and we are referred to the case of *Richardson* v. *Jones*, 3 *Gill & Johns.* 163. The ground of that decision was, that the Court of Chancery of *Maryland* would enforce its own decrees within its own jurisdiction, and that no action at law would lie to enforce such a decree within the territorial jurisdiction of the court which rendered it. The Court of King's Bench would probably decide in the same way. *Carpenter* v. *Thornton*, 3 *Barnw. & Ald.* 52. But the reason of the decision in *Richardson* v. *Jones*, wholly fails here. *Odom*, the losing party, has removed from the jurisdiction of the court, and can no longer be reached by its process. The court had jurisdiction over the person of the defendant, and the subject matter of the suit. The investigation was full and thorough, and conducted according to the well established principles of courts of Chancery, and, after a full hearing, a decree was entered, which, within that State, at least, of which both parties were citizens, is final and conclusive. Is it to be rendered of no validity by the act of the defendant himself? Surely, courts would labor to very little purpose, if the whole effect of their judgments were to depend upon the voluntary acquiescence of the losing party, or if he could wholly avoid such judgment by a mere change of domicil. Because the foreign court could not enforce its own decrees in England, was the reason given for sustaining the action in *Henley* v. *Soper*, before referred to; and the like reason was given in *Evans* v. *Tatem*. Again, it is said, that by sustaining this action, we shall give to the decree greater effect than it would have in *Maryland*. By the Act of 1790, Congress prescribed the effect that the public acts, records, and judicial proceedings of each State should have in the courts of every other State, viz.: such faith and credit as they have by the law or usage in the courts of the State from whence the said records are or shall be taken. This has no reference to the mode of enforcing the judgments of the courts of the several states, but to the credit which shall be given to their records as evidence, and

their effect when offered as such. If, in the courts of the State from which such records are taken, they have the faith and credit of the highest evidence, that is to say, record evidence, of incontrovertible verity, they are to have the same faith and credit in the courts of every other state. If a judgment is conclusive in the State where it is pronounced, it is equally conclusive in every other. If it is open to re-examination there, it is so everywhere: 3 *Story's Com. on Const.* 183; 1 *Kent's Com.* 260. If the record, which is here produced, would be received as conclusive evidence of the facts adjudicated in the courts of *Maryland*, in any proper action wherein it would be admissible as evidence, it is to have the same conclusive effect here, in any action between the same parties, wherein the subject matter is in litigation. The objection of the defendant is as to the remedy. He says the plaintiff has no remedy in a court of law in this State, and he relies upon the constitution and law of the *United States*, relating to evidence. It is one thing for the law to afford a remedy, but quite another for a party to prove by competent and conclusive evidence that he is entitled to it.

It is further objected, that the Court of Chancery in *Maryland* had no jurisdiction of the subject matter whereon the decree was rendered, as the plaintiff had a plain and perfect remedy at law.

The plaintiff became the owner of one half of the schooner *Beauty*, under a purchase from *Moore*. The defendant, the owner of the other half, had sailed her on a voyage to the *West Indies*, and back to *Baltimore*, and thence on another voyage to *Monte Video*, where he sold her, being authorised so to do by the plaintiff's vendor. He had shipped a part of the proceeds of that sale in the United States' ship of war *Cyanne*, consigned to *George Law*, in *Baltimore*, who acted for the owners of the *Beauty*, as ship's husband. The object of the plaintiff's bill in the Court of Chancery in *Maryland*, was twofold; first, to obtain possession of the money consigned to *Law;* and to effect this, *Law* and his partner *Harrison*, and *Anderson*, who, as *Law's* agent and attorney, received the money from *Capt. Elliot*, commander of the *Cyanne*, and the *Franklin Bank* of *Baltimore*, where the money was alleged to have been deposited, were

made parties to the bill; and by it, and an amended bill subsequently filed, they were severally put upon the discovery of the truth concerning the plaintiff's allegations touching the money shipped by the *Cyanne*. But so far as it related to *Odom*, the object of the bill was to obtain an account of the proceeds of sale and earnings of the schooner, and payment of a moiety thereof to the complainant, *McKim*. This is expressly stated to be the object by the Chancellor, in his order for publication, passed *September Term*, 1829, and this object was well understood and not objected to by *Odom*. On the 15*th* of *March*, 1831, by an order of the *Chancellor* of that date, the case was referred to an auditor, with directions to state such account as the nature of the case might render necessary, and such other accounts as either party might require. No objection was made to this procedure, although the defendant, *Odom*, had appeared in person and filed his answer, and was also represented by eminent counsel, one of whom is the present Chief Justice of the *United States*. On the coming in of the auditor's report, the defendant, *Odom*, excepted thereto, and to the account stated between him and the owners of the *Beauty*. The exceptions, twelve in number, allege sundry improper omissions, rejections, and erroneous charges, but at no time was it urged as an exception to the proceedings of either Chancellor or auditor, that the defendant was not required by the bill to account. We do not find in either the original or amended bill any particular prayer that *Odom* may be required to account; but there is, in the original bill, a general prayer, that such relief may be afforded in the premises as may seem right and just; and under this general prayer the proceedings against *Odom* are sustainable, even if the question were now open. It is usual to add to the prayer of the bill, a general prayer for that relief which the circumstances of the case may require, that if the plaintiff mistakes the relief to which he is entitled, the court may yet afford him that relief to which he has right. Considering the object of the bill against *Odom* to be what the Chancellor said it was, to obtain an account of the proceeds of sale and earnings of the schooner, and payment of a moiety thereof to the complainant, *McKim*, it was no usurpation, by the Court of Chancery, of the rights of common

law courts, to hold and exercise jurisdiction thereof. *Blackstone* says, courts of equity have acquired a concurrent jurisdiction with every other court in all matters of account, and as incident to accounts, they also take the concurrent jurisdiction of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, receivers, *factors and agents:* 3 *Bl. Com.* 437. In *Post* v. *Kimberly*, 9 *Johns.* 469, the court say, it by no means follows, even admitting the remedy complete at law, that the court of Chancery has not also jurisdiction. It cannot be denied, at this day, but that there are many subjects upon which courts of law and equity have concurrent jurisdiction. Matters of account form one class of this description of cases, with respect to which the court of Chancery has a very broad jurisdiction, as the course of proceeding in that court has been considered peculiarly well calculated for the settlement of accounts, if they are in any degree long and complicated. In *Ludlow* v. *Simond*, 2 *Caine's Cas. in Err.* 54, *Kent C. J.* said he should regret exceedingly that any opinion, which might be given by that court, should tend to embarrass the benign and well settled jurisdiction of Chancery in the unlimited cognizance of accounts. In *Ripple* v. *Ripple*, 1 *Rawle*, 389, the court say, "To the act of the court of another State, in holding jurisdiction of the subject matter, the maxim *omnia presumuntur rite esse acta*, is as applicable as it is to the judicial proceedings in our own State." The record of a judgment in a neighboring state is *prima facie* evidence that the court, by which it was rendered, had jurisdiction: *Shumway* v. *Stillman*, 4 *Cowen*, 292, and every presumption is in favor of the court which rendered the judgment. *Harrod* v. *Barretto*, 1 *Hall*, 155. The record before us, from the High Court of Chancery of *Maryland*, shows most clearly, that the case was within the jurisdiction of the Chancellor, and that, in exercising it, he usurped the jurisdiction of no other court.

Whether a court of Chancery be a court of record or not, we do not deem it material to inquire. It is understood to be the highest court in the State from which this record comes, as it is known to be usually in those governments where such tribunals are established. Neither the constitution of the *United States* nor the law of Congress make mention of courts of record. It

is alike unimportant whether a decree in Chancery be technically a judgment. "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State," is the language of the constitution; and they are to have such faith given to them in every court within the *United States*, as they have by law or usage in the courts of the State from whence they are taken. If there are "judicial proceedings" in courts of Chancery, and if such courts have records, (2 *Saund.* 23,) the constitution and law of the *United States* prescribe the faith and credit they shall receive, and the effect they shall have throughout the Union. No distinction is made between chancery and common law judgments. As said by the court, in *Dubois* v. *Dubois*, 6 *Cowen*, 496, "It is sufficient that a decree unappealed from is final. Debt will lie." In *Evans v. Tatem*, 9 *Serg. & Rawle*, the court say, "If it be objected that proceedings in chancery are not according to the course of the common law, the same objection lies against judgments of courts on the continent of *Europe*, where the proceedings are according to the civil law. To be sure, in case of a foreign judgment, the defendant is permitted to deny the original cause of action. But so likewise would the defendant, in the present case, have been permitted to enter into the merits of the original controversy, were it not for the constitution and laws of the *United States*, which forbid it. The objection, therefore, of being precluded from contesting the merits of the decree, does not lie against the action of debt, which in its nature did not preclude it, but against the constitution."

The only remaining question is, whether the plaintiff has declared in the proper form of action. He has brought assumpsit, and the defendant contends, that debt is the only proper remedy, and that assumpsit will not lie. It is laid down in the books as a settled principle, that when a party has a security of a higher nature he must found his action thereon, and as the law has prescribed different forms of actions on different securities, assumpsit cannot, in general, be supported when there has been an express contract under seal or of record, but the party must proceed in debt or covenant where the contract is under seal, or in debt or *scire facias*, if it be of record, even though the debtor, after such

contract were made, expressly promised to perform it: 1 *Chitt. Pl.* 94; 1 *Cowp.* 129; *Bull. N. P.* 128; *Toussaint* v. *Martinnant*, 2 *T. R.* 102. By the judgment the original debt is merged so that no action can be maintained thereon, and the party must resort to his highest remedy: 1 *Chitt. Pl.* 49, *et seq.* and the cases there cited. Debt is the proper remedy on records and judgments: 1 *Chitt. Pl.* 354; *Com. Dig. Debt, A.* 2. There are many cases to be found in the books, where assumpsit has been brought and held to lie on judgments, but they either were foreign judgments, or were treated as such. The cases of *Crawford* v. *Whittal*, *Sinclair* v. *Frazer*, *Plaistow* v. *Van Uxem*, and *Buchannan* v. *Rucker*, cited by the plaintiff's counsel, were all on foreign judgments. But *Ld. Mansfield* said, in *Walker* v. *Witter*, 1 *Doug.* 1, that *such* judgments were not specialties but only *prima facie* evidence of a simple contract debt; the *prout patet per recordum* in the declaration was absurd, and the plea of *nul tiel record*, a mere nullity. So it was held in *Duplex* v. *De Roven*, 2 *Vern.* 540, that a judgment in *France* must be considered in *England*, as a debt by simple contract. The distinction will be found generally to run through all the cases, that where the judgment is to be received as conclusive, as are all domestic judgments, it is a specialty, and must be declared upon as such; but where the judgment is received as mere *prima facie* evidence, as is the case with all foreign judgments, the action may be assumpsit or debt.

There are several cases to be found in the reports where assumpsit has been sustained on judgments from other States, but in all these cases such judgments were treated as foreign judgments, and received merely as *prima facie* evidence of a simple contract debt. In *Hitchcock* v. *Aicken*, 1 *Caines*, 460, the Supreme Court of *New York* decided, that a judgment in a sister State is to be considered in the light of a foreign judgment, only *prima facie* evidence of a debt, and the consideration thereof examinable. While this continued to be law in *New York*, the judgments of other States were there treated merely as foreign judgments on which assumpsit would lie, and we, therefore, find the practice conforming to it. That case has been overruled, and the eminent and very distinguished jurist who turned the decision

in *Hitchcock* v. *Aicken*, is now a high authority that a judgment is conclusive in every other State, if a court of the particular State where it was rendered would hold it conclusive: 1 *Kent's Com.* 260. How much of the foundation of that Judge's argument against the decision in *Post* v. *Neafie*, is destroyed by the overruling of *Hitchcock* v. *Aicken*, it is unnecessary to inquire. Certain it is, that the decision in the latter case, against which *Thompson J.* argued with great power, was the only obstacle to *his* concurring in *Post* v. *Neafie*. Since the decisions in *Mills* v. *Duryee*, 7 *Cranch*, 481; *Hampton* v. *McConnel*, 3 *Wheat.* 234; *Bissel* v. *Briggs*, 9 *Mass.* 462, and *Borden* v. *Fitch*, 15 *Johns.* 121, there has been a uniformity of decision throughout the Union, and the judgments of the courts of the several States, when properly authenticated, are now put upon the same footing as domestic judgments. The consequence of this has been to change the effect of a judgment from another State, when offered as evidence. It is no longer received as mere *prima facie* evidence of a simple contract debt, but as conclusive, as evidence of incontrovertible verity of a specialty, the merits of which cannot be re-examined, and which, under the constitution of the *United States* and the law of Congress, is entitled to all the sanctity of a domestic judgment. On such a judgment assumpsit will not lie. The question has been distinctly settled in *New York*. In *Andrews* v. *Montgomery*, 19 *Johns.* 162, which was assumpsit on a judgment recovered in *New Jersey*, the Court decided that a judgment fairly obtained in another State is conclusive evidence of a debt, and that an action of assumpsit, therefore, will not lie on such a judgment. The same principle is recognised in *Benton* v. *Bergot*, 10 *Serg. & Rawle*, and *Garland* v. *Tucker*, 1 *Bibb*, 361.

We think that any court, which respects the decisions of the Supreme Court of the *United States*, in the cases above referred to, must come to the same conclusion.

FROST *vs.* PAINE *Ex'r.*

A. B. C. and D. having levied executions on the same tract, — the two first on the property as belonging to J. L. — the third, as the property of *J. L., Jr.* — and the last, as the property of both the *L's*, agreed that D. should bring a suit in his own name for the joint benefit of all, to obtain possession; which was done. Afterward D. gave to the others a writing under his hand, reciting these facts, and adding the order in which the claims were "to be paid and satisfied from the funds arising from the sale of said farm (said sale to take place as soon as possible,") the claim of D. being placed in the first class:

Held, that, by the contract, the duty of making the sale and distributing the proceeds was assumed by D:

That, there was a *sufficient legal consideration* for this promise:

That, no conveyance was necessary from A. and others to enable D. to perform his contract:

That, two and a half years was such an unreasonable delay on the part of D. to make sale of the property as to render him liable to the action of A. and others:

That the interest of A. B. and C. was *several*, and that they need not *join* in an action against D:

That, the agreement between the parties did not constitute *champerty*.

A mistake in the officer's return upon a writ, of *the name* of the defendant, was holden not to impair the validity of an attachment, the property attached being easily designated after *striking out* the name.

This was an action of *assumpsit*, founded upon the special agreement of the defendant's testator, *Ichabod Butler*, made with the plaintiff and two others. The writ was dated *January* 4th, 1833. The contract was as follows:

"Whereas, I the subscriber, at the Supreme Judicial Court, "which was holden at *Alfred* within and for the county of *York* "on the third Tuesday of *September*, 1829, recovered judgment "for possession, against *Ichabod Lord* and *Ichabod Lord, Jr.*, of "*Shapleigh*, for the farm on which they then lived and occupied, "containing about sixty acres, and whereas my suit was prosecut- "ed against the said *Lords* for the benefit of myself, *Robert* "*Fernald* and *John Frost* of *Kennebunk*, and *John Powers*, who "claims a judgment against said *Ichabod Lord*, recovered by "*Samuel Curtis* of *Wells*, whereon execution has been sued "out and extended on said farm: Now be it known, that it was "agreed, and I hereby confirm said agreement, that the respective

"claims of myself, *Fernald*, *Frost* and *Powers*, including all "costs, are to be paid and satisfied from the funds arising from the "sale of said farm (said sale to take place as soon as possible,) "in manner following, to wit: — First, my claim, said *Fernald's* "claim and said *Frost's* claim, including all my costs, are to be "paid. Secondly, the surplus is to be paid to *John Powers* to "satisfy the claim of said *Curtis*, either in whole or in part. And "should said surplus exceed said claim, in the name of said *Cur-* "*tis*, the balance to be paid equally between myself, said *Fer-* "*nald*, *Frost* and *Powers*.

"My claim is against *Ichabod Lord* and *Ichabod Lord, Jr.* — "*Robert Fernald's* claim is against *Ichabod Lord, Jr.* — *John* "*Frost's* claim is against *Ichabod Lord* — *John Powers'* is "against the same. *Ichabod Butler.*

"*May* 14*th*, 1830."

It was agreed, that on the 12*th* of *May*, 1823, *Ichabod Lord* was owner of the farm mentioned in said contract, and on that day conveyed it to his son, *Ichabod Lord, Jr.*

On the 3*d* of *October*, 1826, the plaintiff caused said property to be attached as the property of *Ichabod Lord*, and on the 15*th* of *November*, 1826, extended his execution on twenty acres, part of said tract.

On the 27*th* of *June*, 1827, *Samuel Curtis* extended an execution on all the residue of said tract, as the property of *Ichabod Lord.*

February 17*th*, 1827, said *Fernald* caused said property to be attached, and on the 16*th* of *November* following, extended his execution on the whole of said tract, as the property of *Ichabod Lord, Jr.*

On the same 17*th* of *February*, said *Butler*, the defendant's testator, sued out a writ against both the *Lords*, on which the officer made the following return, viz.: "By virtue of this writ I have attached all the right, title and interest, the within named *Frosts* have in and to the farm on which they now live, situate in *Shapleigh*, containing about 100 acres, and on the 19*th* of *April*, gave each of them a summons in hand."

The plaintiff recovered judgment in this suit, and levied his execution, *November* 16*th*, on the whole tract, as the joint property of the two *Lords.*

Butler acted as the attorney of *Fernald*, *Frost*, and *Curtis*, in obtaining judgment and making the levies, receiving seisin and possession for them.

In *May*, 1831, *Fernald* entered into possession of the farm, and still continues to occupy it.

In *October*, 1832, the plaintiff requested *Butler* to sell the land according to his agreement, who replied, that he could have sold it for $1000, but that he was too sick to attend to it. And it appeared, that he continued too sick to attend to business from the time of the above request to the time of his death, which was in *April* following.

The land was agreed to be worth about $800.

Fernald's levy was	for	- -	$76,60.
Frost's "	for	- -	80,28.
Butler's "	for	- -	58,09.
Curtis' "	for	- -	223,57.

A default was entered by consent, which was to stand, and the defendant to be heard in damages, if, in the opinion of the Court, the action was maintainable. Otherwise the default was to be taken off, and a nonsuit entered.

Burleigh, for the defendant, contended that the terms of the contract imposed no duty on *Butler*, other than what was imposed upon the others. It is agreed, that the land is to be sold as soon as possible — but it is not said *by whom*. *Butler* would have as good right to call upon either of the others to make sale, as they upon him. If *Butler* was to sell, the other parties would have put it in his power to make the sale, by releasing to him, which they did not do. They now retain all the title they ever had, never having transferred it. So that if *Butler* was to act as the agent of the others and make the sale of the property, he could not do it, without their aid, and not having rendered that aid, they have now no just cause of complaint.

Again, *Butler* had no power to convey, because he acquired no title by his levy. His attachment was of all the property that the "*Frosts*," and not the *Lords*, had in the farm. He, therefore, took nothing by his levy as against *Fernald* — and consequently had nothing which he could convey.

2. If the contract should be so construed that *Butler* was bound to sell the property and divide the proceeds, it is then contended that the promise was to the other three *jointly*, and that the action should have been in their joint names: *Gilman* v. *Webber*, 12 *Pick.* 120.

3. There is no sufficient consideration for the agreement, if one was made. The suit was prosecuted for the benefit of the other parties — but surely that would constitute no consideration for any thing further that *Butler* should promise to do. *Shiels* v. *Blackburn*, 1 *H. Black.* 158; *Newland* v. *Ward.* 6 *Johns.* 194; 4 *Johns.* 235; *Wilbur* v. *How*, 8 *Johns.* 346; 7 *Term Rep.* 346, *note;* 1 *Com. on Con.* 16.

The land was conveyed in 1822, by *Ichabod Lord* to *Ichabod Lord, Jr.* *Frost*, therefore, acquired no title by his levy.

4. The agreement constitutes *champerty*, and therefore no action can be maintained on it. *Hawk. Pl. Cr.* 545; *Com. Dig. Tit. Maintenance;* 1 *Com. on Con.* 33.

J. and E. Shepley, for the plaintiff, to the point that the consideration was sufficient, cited *Davenport* v. *Mason*, 15 *Mass.* 94.

That no conveyance was necessary from *Frost* to *Butler*, to enable him to execute the contract, and that *Frost* would be *estopped* by the agreement, they cited *Com. Dig. Tit. Estoppel; Co. Litt.* 352, *a.; Cutler* v. *Dickinson*, 8 *Pick.* 386; *Lent & al.* v. *Padelford*, 10 *Mass.* 230; *Barnard* v. *Pope*, 14 *Mass.* 434.

That *Butler's* attachment was sufficient, notwithstanding the mistake of the officer, they cited *Bacon* v. *Leonard*, 4 *Pick.* 277.

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

The first inquiry is, as to the true construction of the agreement, signed by the defendant's testator in *May*, 1830. There is great want of precision in its terms; but the defendant, as the representative of the testator, is bound by any lawful contract made by him, which can fairly be deduced from it. The agreement provides for the distribution of the funds, arising from the sale of the farm, which once belonged to *Ichabod Lord*. It is sufficiently clear that it was agreed to be sold. Did the testator

agree to sell it? It appears to us, that the instrument by him is to be so understood. The plaintiff, and *Powers* in the right of *Curtis*, had levied upon the land as the property of *Ichabod Lord*; *Robert Fernald* had levied upon part of it as the property of *Lord, Jr.* but the testator, having obtained judgment and execution against both the *Lords*, had levied upon the whole land as their property. Neither of the *Lords* could defend against the testator; but all the other levying creditors might be embarrassed by conflicting and opposing claims. The value of the farm was amply sufficient to satisfy all their demands, if they could agree, as it appears they did, to proceed in concert. Their first object was, to dispossess the *Lords*. To effect this, they put forward the testator, who, for their common benefit, obtained judgment for possession against them, in *September*, 1829. He thus acquired actual seisin of the land, which gave him a lawful right to sell and convey it; and he could pass a title, which neither of the judgment debtors could disturb. He appears to have been the party, through whom the others agreed to act. The plaintiff must have taken the agreement, signed by the testator, as evidence that he was to make the sale, and distribute the proceeds, in the manner therein stipulated.

The interest of the other parties, named in the agreement, was several. They were to receive the amount of their respective claims, if the fund proved sufficient, and if it did not, the agreement provided for a certain order of distribution, and if there was any surplus, it was to be equally divided. The agreement of the testator must then be taken distributively, as both promises and covenants must be, where the interest is several, and such is the intention of the parties.

It is contended, that the testator was not bound, because there was no consideration moving from the plaintiff. But the agreement that the testator should prosecute his action against the *Lords*, for the benefit of all, carried with it a right on his part, to call upon each to contribute to the expense; and the co-operation of the plaintiff, and his forbearing to assert his rights, or to bring them in conflict with the testator, together with the plaintiff's agreement that the land should be sold, and that in dividing the proceeds, the testator's claim should be placed in the first class,

which is set forth in the instrument, constituted in our opinion a sufficient legal consideration to support the promise, upon which the plaintiff relies.

It is further insisted, that the testator acquired nothing by his levy, and therefore had nothing to sell. This objection arises from the return of the officer, who served the writ and made the attachment in the original suit brought by him. In the return, the *Frosts* are named. No persons of that name are to be found in the process. The word *Frosts* is perfectly unmeaning, and manifestly slipped in by mistake. *Utile, per inutile, non vitiatur.* By overlooking that word, or striking it out, the property attached cannot be misunderstood. It never ought to be suffered to impair the validity of the attachment; certainly not at the instance of any of the parties to the agreement, who acquiesced in the title of the testator, and made use of it for their common benefit.

A further point taken for the defendant, is, that the testator was not bound to sell, until the other parties put him in a condition to pass an indefeasible title, by releasing their interest to him. Such a course was doubtless necessary to satisfy a prudent purchaser: and should have been provided for in the agreement. That instrument is very loosely drawn, and apparently upon little advisement. Possibly the parties might think that the testator, having obtained judgment for the land, and having taken possession, and proceeding also as he did for their benefit, it was not essential for them to convey to him, or to join in any other assurance. Be that as it may, the testator stipulated to sell, without imposing any condition upon the other parties. If it was an improvident contract, or one not well adapted to effect the purposes contemplated, we must take it as made by the parties, and are not at liberty to interpose terms, which, in our judgment, would render it less exceptionable.

If the testator was to sell, it was to be done as soon as possible; and we hold it to be very clear, that his omission to do so, from *May*, 1830, to *January*, 1833, when this action was instituted, was a violation of his promise; especially as performance was in the mean time demanded by the plaintiff.

As to the objection of maintenance, it does not apply to this

case. The parties all of them had an interest in the subject matter of the agreement. They were seeking payment of their honest debts. The property, upon which they had levied, was sufficient to pay them, if they could act in concert; and we perceive nothing unlawful in the measures they adopted.

There having been a violation of this agreement on the part of the testator, the default is to stand. In regard to damages, they may turn out upon inquiry to have been merely nominal. No sale has been made. The deceased had received no money to the use of the plaintiff. His title to the land, whatever it is, remains unimpaired. As neither he, nor the other parties, invested the deceased with lawful authority to sell their interest, if he had sold, a purchaser might have been unwilling to have given more than his interest alone was fairly worth. For, although it has been contended, that if the deceased had sold at their instance, and for their benefit, they could not have been permitted to have set up their title against a purchaser; yet no one could have been expected to give much for an interest, subject to litigation upon this point. It may, therefore, be thought that the plaintiff's situation would not have been much improved, if the testator had sold; and these are circumstances, to be considered, in estimating the amount of damages.

Manufacturer's Bank *vs.* Osgood *& al. and Trustee.*

A. having a claim against another, assigned it to B., C. and D., his creditors and attorneys, to pay them for *their services in a certain suit* then pending, the overplus to be paid to A. The amount of the claim was afterward received by B. when he was summoned, in a process of foreign attachment, as the trustee of A. *Held*, that it was not necessary that C. and D. should also have been summoned jointly with B. — that, in addition to the demand which the assignment was intended to secure, B. might set off a claim which he had against the principal, for services other than those rendered in the suit aforesaid — that, he could retain for C. and D. also, enough to satisfy their claim for *services in that suit;* but not to pay a note against A., held by them, growing out of other transactions.

In this case, the trustee disclosed that, on the 21*st* of *September*, 1828, *Osgood*, the principal defendant, had a suit against

one *Nathan Elden*, pending in the Supreme Judicial Court, in which *Messrs. J. and E. Shepley* and himself were engaged as counsel—and that during the progress of the trial, *Osgood* made to them the following assignment, *viz.*: "Know all men by these "presents, that I, *James Osgood*, for a valuable consideration, "hereby assign and make over to *J. & E. Shepley* and *J. Fair-* "*field*, all my claim against *Nathan Elden*, in the action myself "plaintiff in review, against said *Elden*, now pending in the Su- "preme Judicial Court, and the judgment that may be rendered "in said suit in my favor—to have and to hold the same and all "moneys that may by them be received by virtue of said claim "or judgment, for the purpose of paying them their charges and "claims against me for services, &c. rendered in said action, the "balance to be paid me on demand. Given under my hand and "seal, &c."

That, the same day a verdict in said suit was rendered in favor of *Osgood*, on which he had judgment; and on account of which, he, the trustee, afterward received the sum of $313,74. That, at the time of receiving it, and of the service of the writ, there was due to him from *Osgood*, for his services and expenditures in that suit, $118,01—and for other professional services, $5,74. That, the *Messrs. Shepleys*, by their memorandum in writing, handed to him, claimed to have one half of the amount paid to them under the assignment, or that they should be called on jointly with said trustee. He stated further, that he believed their claim for services in the suit aforesaid, was about $40.—and that they had a note against *Osgood* for about $80, growing out of other transactions.

J. Shepley, contended, 1. that the trustee should be discharged, because the other assignees and joint proprietors of the money, living within the process of the Court, were not summoned.

It was immaterial which of the joint assignees had the actual custody of the money. Their rights ought not to he affected by the circumstance that it was received by one rather than another of the assignees. A payment by *Elden* to either of them would be a valid payment; and as they were not partners, it was im-

possible that it should be more effectually in the hands of the whole three, than it was, unless it had been actually divided.

"The general rule is, that the possession follows the property; and the possession of one, under a joint title, is the possession of all, holding under the same title. The circumstance that the property was in the custody of one, does not constitute a several possession." *Guild* v. *Holbrook & Trustees*, 11 *Pick.* 101.

The indebtedness to *Osgood* arose in consequence of a joint conveyance by him to the assignees, and their accountability to him was a joint one. "When therefore," say the Court in *Jewett* v. *Bacon & Tr.* 6 *Mass.* 62, "a debtor holds a joint contract against two or more, and a creditor would avail himself of the benefit under this special attachment, he must summon all the parties liable by law to discharge it." To the same point he cited also *Parker* v. *Danforth*, 16 *Mass.* 299; *Kidder* v. *Packard*, 13 *Mass.* 82.

2. But if the trustee ought not to be discharged for these reasons, then it is insisted he has a right to retain of the money in his hands, enough to pay all the demands which he and the *Messrs. Shepleys* had against *Osgood*, at the time of the service of the writ, which will absorb the whole fund. This position is fully supported by the decision of the Court in *Hathaway* v. *Russell*, 16 *Mass.* 473, in which the Court say that, "when one or more joint debtors are omitted in a trustee process, care must be taken that the others shall not be subjected to any loss or inconvenience." The Court held, that all set-offs, which the joint debtors, or either of them, had against the principals, should be allowed, whether summoned or not. And that, this right of set-off extended "to all demands against the principal, of which he could avail himself in any form of action, or any mode of proceeding between himself and his principal; whether by way of set-off on the trial, as provided by our statutes; or by setting off the judgment under an order of Court; or by setting off the executions in the hands of the sheriff, as also provided by statute."

In a suit against either *Fairfield* or the *Shepleys*, they would have had the right of setting-off all their respective claims, if a suit could be maintained against either separately. Surely they could if the suit were against them jointly, as it should be.

Their contract was joint, and the remedy upon it should be pursued against them jointly. And why should the plaintiff, by refusing to summon all the assignees, acquire rights over this money which *Osgood* himself had not, and could not assert by any suit in his own favor?

A. G. Goodwin, for the plaintiffs, cited *Hathaway* v. *Russell*, 16 *Mass.* 473; *Cushing's Trustee Process*, 44; *Donnells* v. *Edwards*, 2 *Pick.* 617; *Parker & al.* v. *Danforth & al. & Trustee*, 16 *Mass.* 299.

At a subsequent term, the opinion of the Court was delivered by

PARRIS J. — Neither the *Messrs. Shepleys* or *Mr. Fairfield*, has, by virtue of the assignment, any greater interest in the judgment against *Elden*, than to the amount of their several charges, and claims against *Osgood*, for services rendered in the action on which that judgment was obtained. They did not become the debtors of *Osgood*, merely by receiving the deed of assignment; neither did they, upon the payment of the money, become his *joint* debtors, even if the amount should exceed their respective demands. Although the assignment is, in form, joint, yet the interests of the assignees are several, and either might maintain a separate action to enforce his rights, as readily as if the assignment had been to him alone. *Platt on Covenants*, 130; 1 *Saund.* 154; *Servante* v. *James*, 10 *Barn. & Cresw.* 410; *Prince* v. *Shepard*, 9 *Pick.* 185.

The true construction of the instrument is, that so much of the judgment was assigned to the *Messrs. Shepley* as should be sufficient to pay their demand for professional services, and so much as should be necessary, was, for the like purpose, assigned to *Mr. Fairfield*, and the balance remained the property of *Osgood*, not assigned to any one, and for which he would have a right of action against either *Shepley* or *Fairfield*, to whichever it might have been paid. But, inasmuch as they were not partners, and had entered into no joint engagements or covenants, it is not perceived that *Osgood* could maintain an action against them jointly for the balance remaining in the hands of either.

The money was, in fact, paid over to *Fairfield* by *Elden*. Could *Osgood* immediately thereafter have maintained an action, for money had and received, against the *Messrs. Shepley*? They had received none of the money, not even that to which they were entitled for their professional services. They had, in no way, become accountable to *Osgood* for *Fairfield's* acts, or for any balance that might remain in his hands, and we do not see how *they* could be considered as *Osgood's* debtors.

The cases cited by the counsel in defence, are all distinguishable from this in important particulars. The case of *Guild* v. *Holbrook*, was an assignment by an insolvent debtor for the purpose of paying the assignees and other creditors, *and the property was received by the assignees jointly*. The court say, "that the possession of one under a *joint* title, is the possession of all holding under the same title. It must generally happen that one of several *joint* owners of personal property must hold the custody for himself and co-tenants, unless they happen to be partners." These observations can have no application to the case under consideration, for *Shepley* and *Fairfield* were not owners of the balance remaining after paying their several demands. If they were, then clearly this process cannot be maintained, for it is only upon the goods, effects, and credits of *Osgood*, that it can operate.

In *Jewett* v. *Bacon*, the court, in the passage relied upon by the counsel, are speaking of a joint debt or contract against two or more; and they say, that in such a case, all the parties liable by law to discharge the contract, should be summoned. So in *Kidder* v. *Packard*, the court say, "debtors, who are co-partners here, must all be summoned;" and in the case of *Hathaway* v. *Russell*, a part only of joint contractors, with the principal defendant, were summoned as trustees. If, at the time of the service of the writ, in the case at bar, the *Messrs. Shepley* had been answerable to *Osgood*, for the money actually in *Fairfield's* hands, then the authorities relied upon would be applicable, but as they were not in any manner indebted or answerable, it was not necessary that they should be summoned as trustees.

It is further contended, that if they are not entitled to come in and disclose as trustees, they are entitled to have retained in *Mr.*

Fairfield's hands, an amount, sufficient not only to satisfy their demands for professional services covered by the assignment, but also such other demands as they may have against *Osgood*, and of which they could avail themselves by way of set-off in a suit by him against them.

If this money was so situated that *Osgood* could not reach it, except by a suit against the *Messrs. Shepley*, the position would be entitled to consideration; as to permit *Osgood's* creditors to reach the money, through the trustee process, free from *Shepley's* right of off-set, when *Osgood*, himself, could not do it, would be clearly improper. But the case is not thus situated. Whatever claims *Osgood* may have for the balance, after paying the sums included in the assignment, they are to be enforced against *Fairfield*. He alone has received so much of *Osgood's* money, and he alone is accountable for it. It follows, therefore, that *Osgood* could call for this balance, without being subjected to off-set on account of any demands of the *Messrs. Shepley*, other than those specially covered by the assignment.

We think that *Mr. Fairfield* has a right to retain sufficient to satisfy all his demands against *Osgood*, and also sufficient to satisfy the *Messrs. Shepley*, for their services rendered in the action against *Elden*, as provided for in the assignment, and that for the balance, he must be adjudged trustee.

Tibbets *vs.* Merrill.

Where the officer, in his return of the extent of an execution on the land of the debtor, taxed the expenses *in gross*, the levy was held not to be void for that cause.

Parol evidence is not admissible to show that the appraisers, in estimating the value of the land, made deductions on account of a supposed defect of title.

This was a writ of entry, brought to recover possession of a lot of land containing about thirty acres.

It appeared, on trial, that the land originally belonged to the demandent, *Moses Tibbets*, and that *Elisha Allen*, under whom the defendant claimed, in *March*, 1830, caused an execution to be extended on the demanded premises and *two other tracts*. The whole was appraised at the sum of $115,36.

The expenses of the levy, $20,36, were indorsed on the execution, *in gross*, no list of items being returned by the officer.

To the two last mentioned tracts, the demandant had no title at the time of *Allen's* levy. And the demandant introduced copies from the record of two prior levies, on, as it was said, the same land, by *John Storer* and others; in which some of the appraisers appeared to have been the same with those who acted as such in extending *Elisha Allen's* execution.

The deposition of *Francis A. Allen* was also offered, to show that the appraisers, at the time of *Allen's* levy, made deductions in estimating the value of said two lots, on account of the supposed defect of title in *Tibbets*, the question of its admissibility being reserved.

The plaintiff's counsel objected to the sufficiency of the return of the officer, because of the *joint estimate* of value, and because the expenses were *taxed in gross*.

A nonsuit was entered, which was to be set aside, and the cause proceed to trial, if the whole Court should be of opinion that the action could be maintained, otherwise judgment was to be entered for the defendant.

Holmes, for the demandant, contended, 1. That, the levy was void because *the items* of the expense of levy were not stated by the officer in his return; 2. on account of its indefiniteness and uncertainty; and 3. that the whole evidence should have been submitted to the jury, who should have passed upon the question of fraud. He cited *Goff* v. *Jones*, 6 *Wend.* 522, and *White* v. *Bond*, 16 *Mass.* 400.

J. and *E. Shepley*, for the defendant, cited *Sturdivant* v. *Frothingham*, 1 *Fairf.* 100; *Atkinson* v. *Bean*, 14 *Mass.* 404; *Frost* v. *Stickney*, 5 *Greenl.* 390; *Bond* v. *Bond*, 2 *Pick.* 382.

Emery J. — It is objected that the levy is erroneous, because the expenses are in gross.

The appraisers say, "Which said several tracts of land, we "have, on our oaths, appraised at the sum of one hundred and "fifteen dollars and thirty-six cents and no more; and we have "set out the said tracts of land by metes and bounds, to the "creditor within mentioned, to satisfy the execution and all fees."

And the deputy sheriff returns, that those "fees and charges "amount to the sum of twenty dollars and thirty cents," but the particular items amounting to this aggregate are not stated.

The demandant further objects to the levy on account of uncertainty, because there was no title to two of the tracts, in the demandant, at the time of the levy.

There does not appear to be any uncertainty in the description of the tracts. Reference is had to the levies of the executions, *John Storer & others* against *Moses Tibbets*, and *John Storer & others* against *Edward Tibbets*, which were both made on the 11*th* of *March*, 1830. In that against *Moses*, the appraisal is at ninety-nine dollars and eighteen cents; and in that against *Edward Tibbets*, at fifty-five dollars and eleven cents. And, inasmuch as part of the appraisers, on the execution in favor of *Mr. Allen*, made on the 13*th* of *March*, 1830, against *Moses Tibbets* and *Edward Tibbets*, were also appraisers on the two executions in favor of *John Storer & others*, before stated, on the 11*th* of *March*, 1830, it is insisted that sufficient appears from these three levies to justify the demand of putting this case to the jury, on the ground of fraud.

The lands taken on all the executions may have been the same. But neither in the appraisal, nor in the officer's return, is notice taken of incumbrances on account of the supposed title of any body.

And the complaint would seem rather with most propriety to be against the amount, at which the appraisement is made, than any thing else. The only way to correct that is by seasonable redemption. As this was not attempted, if *Allen* did not acquire a title to the two tracts, he alone, it would seem, had cause to complain.

It was said at the bar, in argument, that the nonsuit was entered by consent, without any intimation that it was desired to present the question to the jury, of a fraudulent levy.

But we do not perceive, upon the facts reported, how that question could rightfully be raised — and we must be guided by the report.

No parol evidence is admissible, of deductions made on ac-

count of dower, or other incumbrance, unless apparent on the appraisement or officer's return. *Barnard* v. *Fisher*, 7 *Mass.* 71.

It is true, that the lands remain the debtor's, unless the creditor has a good title to them by matter of record, and it is therefore to be inferred that parol evidence is inadmissible to uphold a levy. *Ladd* v. *Blunt*, 4 *Mass.* 402.

The omission to give the items of charges for the levy, is not a ground to set it aside: *Sturdivant* v. *Frothingham*, 1 *Fairf.* 100. Even should there be manifestly illegal fees included, the levy would not be void. "For when the sheriff takes for any "of the services mentioned in the statute, any greater fee than is "provided in the statute, he forfeits thirty dollars for every of-"fence." "And when the debtor has redeemed the land, *assump-*"*sit* may be maintained for any excess taken by the officer, beyond "his legal fees. The law thus provides a proper punishment for "the offending officer, and a remedy for the debtor. And there "seems to be no necessity that can render it fit and proper to "hold the extent void on that account, and leave the innocent "creditor to seek redress by an action against the officer: *Burnham* v. *Aiken*, 6 *N. H. Rep.* 306. On looking into the return of the officer, on the execution of *Elisha Allen* against *Moses Tibbets* and *Edward Tibbets*, we perceive rather a peculiarity of expression selected by the officer, as to the appointment of one of the appraisers.

He says "*Benjamin Stanley* was chosen by the creditor within "named, *John Hanson* chosen by me, and *Thomas S. Emery* "was chosen by me with the consent of the debtors."

This is not in conformity with the literal phraseology of the statute. That provides, that "the officer to whom the execution "is directed and delivered, shall cause three disinterested and dis-"creet men, being freeholders in the county, one to be chosen by "the creditor or creditors, one by the debtor or debtors whose "land is to be taken, if they see cause, and a third by the officer. "And in case the debtor or debtors shall neglect or refuse to "choose as aforesaid, after being duly notified by the officer, if "the debtor be living in the county in which such land lies, the "officer shall appoint one for such debtor or debtors to be "sworn," &c.

Now it is not in so many words, stated in the return, that the debtors were notified to choose an appraiser, nor that they neglected or refused to choose. It is on those events that the officer may appoint one for such debtor or debtors.

But we cannot, for this cause, consider the levy void. The fact of notice being given, is implied from the circumstance that the officer's choice of an appraiser *was by the consent of the debtors*. And we are inclined to view this as an inartificial return of a choice of the appraiser, by the debtor's confirming the preference of the officer, and shewing that the debtors had an opportunity to choose one. At any rate, as indicating a substantial compliance with the requisition of the statute. For there is *no positive allegation of refusal or neglect to choose one* on the part of the debtors. Their knowing and consenting to the choice must be deemed, in this case, adopting and making it. And this construction, we think, may well be reconciled with the decision in *Eddy petitioner for partition* v. *Knapp*, 2 *Mass.* 154. See 7 *Greenl.* 146; *Means & al.* v. *Osgood.*

There is nothing then to impeach the levy, upon the facts reported. As the title to the demanded premises was legally vested in *Elisha Allen*, by the levy, and the demandant never redeemed the land, the Court are of opinion that the action cannot be maintained. The nonsuit is therefore confirmed, and judgment must be entered that the defendant recover his costs.

SPRING *vs.* PARKMAN.

The title of a devisee under a will, to whom an immediate estate is given, will date from the *death of the testator*, and not from the time of the *probate of the will.*

And where the will was made and proved in another State, and a copy was subsequently filed and recorded in a Probate Court in this State, pursuant to the provisions of *stat.* of 1821, *ch.* 51, the estate of the devisee would vest by relation back to the time of the death of the testator, and not to the time of filing and recording the will.

Where one undertook to convey as executrix, by virtue of an alleged authority given in the will of the testator, warranting against her heirs, who were also the heirs of the testator, it was holden, that, in case of a defect of title or authority, there being no fraud in the case, the grantee must look for his remedy to the covenants in her deed, and that he could not maintain *assumpsit* to recover back the consideration paid.

THIS was an action of *assumpsit*, for money had and received, brought to recover back money paid by the plaintiff to the defendant, as the consideration of certain conveyances made by her, in her capacity of executrix of the last will and testament of *Samuel Parkman*, late of *Boston*, deceased.

On trial, the following facts were developed. In the year 1824, *Samuel Parkman* died in *Boston*, leaving a will, which was duly presented at a Probate Court held *June*, 1824, and proved, approved, and recorded; and the defendant, his widow, at the same court, was appointed executrix.

The 22d and 23d items in said will were in the following words, *viz.*: "22d. All the residue and remainder of any estate, "real, personal, or mixed, I give to my beloved wife, to be by "her used as she may think best during her life, and what of it "remains at her decease, I give to my eight children and to their "heirs, to be equally divided. And I hereby appoint my wife "the residuary legatee, she paying all the legacies and annuities, "and fulfilling my wishes as expressed in this instrument."

"23d. And I hereby appoint my wife, *Sarah Parkman*, the "sole executrix of this my last will and testament, giving her full "power and authority to sell, convey, and give sufficient deeds "of all my real estate which she may deem expedient to sell, "and which is not otherwise appropriated in this instrument; and

"also to make such conveyances among the heirs as may be "found necessary."

The lands subsequently conveyed by the defendant to the plaintiff, were not otherwise appropriated in the will.

A principal part of these lands had been conveyed to *Samuel Parkman*, by *Seth Spring*, the father of the plaintiff, as early as the year 1814, said *Parkman* giving him back a writing, not under seal, acknowledging that he held them as collateral security for the payment of certain notes he held against the firm of *Seth Spring & Sons*, of which firm the defendant was a member.

On the 2*d* day of *July*, 1827, *Seth Spring* addressed a letter to *Mrs. Parkman*, informing her that he had made arrangements with his son, *John Spring*, to settle and adjust all the claims which the estate of *Samuel Parkman* had against the firm of *Seth Spring & Sons*, and requesting her to settle with him in such manner as they could agree.

Accordingly, on the 4*th* day of *July*, 1827, *Mrs. Parkman*, in pursuance of an agreement between her and the plaintiff, conveyed to him, in her capacity of executrix and residuary legatee, the lands aforesaid, partly lying in this State and partly in *New Hampshire*, warranting against all claiming under her and her heirs. The defendant at the same time giving up, to be cancelled, the memorandum aforesaid, given by *Samuel Parkman* to *Seth Spring* — and also reconveying the same lands to the defendant, by deeds of warranty and mortgage, to secure the payment of five notes of hand for four thousand dollars each, then also given by the plaintiff to the defendant.

On the 21*st* of *March*, 1828, the defendant, by her attorney, filed in the Probate Court, in the County of *Lincoln*, an attested copy of the will of *Samuel Parkman*, and of the probate thereof in the County of *Suffolk*, and petitioned the Judge of Probate to have the same recorded, which was done after notice, returnable at a Court, holden *June*, 1828. There was no evidence of her having been appointed executrix of said will in this State, other than the filing and recording of the will aforesaid, or that she had ever given bonds in this State, as executrix. Nor was there any evidence that a copy of the will had been filed and recorded in the State of *New Hampshire*.

The plaintiff and his father had continued to occupy most of the property conveyed as aforesaid, and had been disturbed in such occupation by no one but the defendant, under the mortgage aforesaid.

Upon this evidence, the Chief Justice directed a nonsuit, which was to stand, or be taken off and a new trial granted, as the opinion of the whole Court should be upon the case as reported.

A. G. Goodwin, for the plaintiff.

1. The defendant had not the power to convey, by force of the will, which she assumed to have, not being administratrix in this State: *Cutter* v. *Davenport*, 1 *Pick.* 81; *Stearns* v. *Burnham*, 5 *Greenl.* 261. The title to, and disposition of real estate must be governed by the laws of the State where the land lies: *Goodwin* v. *Jones*, 3 *Mass.* 518.

2. Nor did she acquire that power by causing the will to be filed and recorded in this State, and giving bond, *prior to the conveyance*: *Borden* v. *Borden*, 5 *Mass.* 67; *Stearns* v. *Burnham*, 5 *Greenl.* 261; *Thompson* v. *Wilson*, 2 *N. H. Rep.* 291; *Maine Stat. ch.* 60, § 14, 17.

3. The filing and recording of the will, in 1828, did not operate to confirm her deed of 1827. The doctrine of confirmation is not applicable to such a case. It cannot affect a void estate: *Cruise Dig. Tit.* 32, *Deed.*

4. No title of her own passed by the deed. The devise and power did not give her *the fee*. 1. "Though an estate, if given to a person generally, or indefinitely, with a power of disposition, carries *a fee*, yet if an estate *for life* only is given, and annexed to it a power of disposition of the reversion, the express limitation for life will control the operation of the power, and prevent it from enlarging the estate to a fee:" 4 *Kent's Com.* 535, 536, and cases there cited; *Cruise Dig. Tit.* 38, *Devise*; *Co. Litt.* (96) *a*; *Inman & als.* v. *Jackson*, 4 *Greenl.* 237; *Lessee of Willis* v. *Bucher*, 2 *Bin.* 455; *Jackson* v. *Merrill*, 6 *Johns. Rep.* 193; *Lithgow* v. *Kavanagh*, 9 *Mass.* 165; *Jackson* v. *Bull*, 10 *Johns.* 148; 4 *Kent's Com.* 540; *Stearns et ux.* v. *Winship et ux.* 1 *Pick.* 326; *Maine Stat. ch.* 38, § 3. Nor, 2.

did her *life estate* under the will pass. She had no *seisin in law*. The will, until proved and recorded, could give no title. *Shumway* v. *Holbrook*, 1 *Pick.* 116; *Dublin* v. *Chadbourne*, 16 *Mass.* 442. The fee was cast upon the heirs of *Samuel Parkman: Co. Litt. sec.* 169, 113 *a*; *Brown & al* v. *Wood et ux.*, 17 *Mass.* 68; *Wells* v. *Prince*, 4 *Mass.* 67; *Quarles & al.* v. *Quarles*, 4 *Mass.* 668; *Somes* v. *Skinner*, 3 *Pick.* 52; *Davis* v. *Hayden & al.* 9 *Mass.* 518. Nor had she *a seisin in fact*, and therefore nothing passed by her deed: *Porter* v. *Perkins & al.* 5 *Mass.* 236; *Warren* v. *Childs*, 4 *Mass.* 222; *Mayo & al.* v. *Libby*, 12 *Mass.* 343; *Somes* v. *Skinner*, 3 *Pick.* 56.

Nor, 3. did the defendant, by the filing of the will in 1828, become seised of a life estate which *enured to the plaintiff*. This principle of law is confined to covenants of warranty: 4 *Kent's Com.* 261, note *b*, and cases there cited; *Porter* v. *Hill*, 9 *Mass.* 34; *Mason* v. *Muncaster*, 9 *Wheat.* 454; *Jackson* v. *Matsdorf*, 11 *Johns.* 97; 2 *Serg. & Rawle*, 515; *Allen* v. *Sayward*, 5 *Greenl.* 227; *Dane's Abr.* 495; *Webber & al.* v. *Webber*, 6 *Greenl.* 127; *White* v. *Erskine*, 1 *Fairf.* 306; 1 *Salk.* 276; *Hathorne* v. *Haines*, 1 *Greenl.* 238.

5. The defendant, by undertaking to convey a fee, when at most she had but a life estate, forfeited that estate, and it may, at any moment, be successfully claimed by the heirs of *Samuel Parkman: Co. Litt. sec.* 415, 251, *a*; *Cruise Dig. Tit.* 3, *Estates for Life*; *Com. Dig. Tit. Forfeiture*, A.; *Stevens & ux.* v. *Winship & ux.* 1 *Pick.* 327.

6. There are no covenants in the defendant's deed, which would constitute a consideration for the notes given by the plaintiff. At the time of the conveyance, the title was in the heirs of *Samuel Parkman*. And them, her covenant in no wise affects. As heirs to *Samuel Parkman*, they could not be estopped as heirs to *Sarah Parkman*, or *vice versa*. It did not even operate upon her own heirs. It was a covenant, dependant and waiting upon the land. *Com. Dig. Estoppel*, C; 3 *D. & E.* 438; 8 *East.* 231; 1 *Ld. Raym.* 388; 1 *Salk.* 199; 11 *East*, 165; 8 *Mass.* 50; 11 *Pick.* 280; 1 *Greenl.* 359.

Nor did the giving up of the notes of *Seth Spring & Sons*, constitute a consideration for the plaintiff's notes. The convey-

ance by *Seth Spring* to *Samuel Parkman*, and the writing back did not constitute a mortgage — and the giving up of the notes did not impair the title of the heirs.

7. *Assumpsit* to recover back the consideration paid, is the proper remedy: *Bishop* v. *Little*, 3 *Greenl.* 405; *Shearer* v. *Fowler*, 7 *Mass.* 31; *Johnson* v. *Johnson*, 3 *Bos. & Pul.* 162; *Shepperd* v. *Little*, 14 *Johns.* 210; *Com. on Con.* 43; *Hatch* v. *Smith & trustees*, 5 *Mass.* 51.

Goodenow, for the defendant, argued at length in opposition to the positions taken by plaintiff's counsel, citing the following authorities: *Sugden's Vend.* 312 to 318, and authorities there cited; *Greenleaf* v. *Cook*, 2 *Wheat.* 13; *Jacob's Law Dic. Tit. Executor*; *Goodwin* v. *Jones*, 3 *Mass.* 517; *Howard* v. *Witham*, 2 *Greenl.* 390; *Lloyd* v. *Jewell*, 1 *Greenl.* 352; *Fairbanks* v. *Williamson*, 7 *Greenl.* 96; *Knox* v. *Jenks*, 7 *Mass.* 488; *Gray* v. *Gardner*, 3 *Mass.* 399; *Colman & al.* v. *Anderson*, 10 *Mass.* 105; *Perkins* v. *Fairfield*, 11 *Mass.* 227; *Barrett* v. *Barrett*, 8 *Greenl.* 346.

E. Shepley, closed the argument on the part of the plaintiff.

At a subsequent term of the Court, the opinion was delivered by

Weston C. J. — Much of the argument, on the part of the plaintiff, turns upon the assumption, that the defendant had no title to the land, she undertook to convey, until after the date of her deed, when she filed in the probate office for the county of *Lincoln*, in this State, an attested copy of the will of her late husband and of the probate thereof; and when by order of the court of probate for that county, upon her petition, the said attested copy, with the probate, was ordered to be there recorded.

By the *statute* of 1821, *ch.* 51, regulating the jurisdiction and proceedings of the court of probate, § 17, it is provided, that where the copy of any will, which has been proved and allowed in any probate court in any of the *United States*, shall be directed to be filed and recorded in any probate court in this State, pursuant to the act, the filing and recording thereof shall be of the same force and effect, as the filing and recording of an original will, proved and allowed in the same court of probate. And

when an original will is thus proved and allowed, does the title of the devisee under it, to whom an immediate estate is given, date from the death of the testator, or from the time of the probate? We have no doubt, from the death of the testator. Sometime must necessarily elapse, between his decease and the probate of the will. Thirty days are allowed to the executor, within which to file it in the probate office. And when it is offered for probate, if the utmost diligence is used, notice must be given to the heirs at law, and a day appointed to receive proof of it. If on that day, it is proved, approved and allowed, an appeal may be interposed to the Supreme Court of Probate. It may often be a year, sometimes more, before the final decree of the appellate court. If the will is ultimately established, the estates and interests, upon which it operates, prove to have been lawfully devised. They cannot, therefore, in the mean time, have vested in the heirs at law; for by the *statute* of 1821, *ch.* 38, respecting wills, and regulating the descent of intestate estates, § 17, such lands, tenements, or hereditaments, or any right thereto or interest therein, of which any person shall die seised in fee simple, or for the life of another, only descend to his heirs, which he shall not have lawfully devised.

No estate can or ought to intervene between that of the testator, and that of the devisee. And the doctrine is, that a devise vests on the death of the testator, before entry: *Coke Lit.* 111 *a*; 4 *Kent's Com.* 533. An entry, or something equivalent, where the possession is not vacant, may be necessary to give the devisee actual seisin. Were the law otherwise; if, upon the probate of the will, the estate did not vest in the devisee, by relation to the death of the testator, he would not, as he unquestionably is, be entitled to the rents and profits in the mean time; and there would be no one, who could bring an action for an injury to the estate, during that period, or who would be entitled to the damages.

The defendant, having authenticated her title in this State, in the form prescribed by law, and that title having relation back to the decease of the testator, it now appears, that when she executed her deed to the plaintiff, she was seised of a life estate at least, with a lawful power to dispose of the fee; so that the plaintiff has, in fact, obtained all the title, contemplated by his

purchase. And she had actual seisin of all the lands conveyed here; for, *Seth Spring*, in whose possession such of them were, as were not vacant and unoccupied, held in subordination to her title, and expressly acquiesced and aided in the arrangement, by which the conveyance was made to the plaintiff. It has been contended, that the defendant, having only a life estate, by conveying in fee, forfeited that estate; but she had a disposing power, coupled with her interest, which was inseparably connected with it, and which she lawfully exercised.

But, if the defendant had no right to convey an indefeasible estate, and if the heirs at law of the testator could have recovered the land, the plaintiff received actual possession, and has never been disturbed by the heirs. Nor did he rely entirely upon the efficacy of the conveyance, without taking covenants to secure his title, which were effectual for this purpose; or which would have entitled him to an adequate equivalent in damages. That which he purchased, was the right and interest, of which the testator died seised. If this was not lawfully conveyed by the defendant, his executrix, the plaintiff could be disturbed by no one, but the heirs at law of the testator. The defendant was his widow and the mother of his children. His heirs then were also her heirs. If the plaintiff was protected against them, his title could not be defeated; and she expressly warrants the estate against her heirs, and all persons claiming under them. It is true that these heirs, if they inherited the estate from their paternal ancestor, would not be so bound by the warranty, that they might not claim and recover it. But she and her estate would be bound to make good the warranty, and if the covenant was broken by a recovery on the part of the heirs, must have been held liable to answer for the damages. And she had an ample estate, as the plaintiff well knew, for his security. He relied, as he well might, upon her covenants; and they afforded him an effectual remedy, if it had turned out that there was any defect in her title or authority, in regard to that, which she undertook to convey. In this view of the case, as there is no pretence that any fraud or deception was practised upon the plaintiff, if he was disappointed in his title, his proper remedy should have been upon his covenants. And this was so decided in the case of *Joyce* v. *Ryan*, 4 *Greenl.* 101.

It does not appear that the will has been authenticated in *New Hampshire*, by any official proceedings there, if such are required by their laws. Whether, therefore, the plaintiff's title to that portion of the land, which lies in that State, which the defendant conveyed to him by other deeds, executed at the same time, is subject to any embarrassment, the case does not afford us the means of determining. These lands may be of little value, as the consideration expressed in the deeds, is merely nominal. But they are protected by the same covenants, which are to be found in the deed, conveying the lands in this State.

It appears therefore to us to be quite clear from the facts, that the plaintiff has not paid, or secured to pay, the consideration for his purchase, under circumstances, which will enable him to maintain an action of assumpsit to recover it back.

Nonsuit confirmed.

HALL *& al. vs.* BEAN.

William Bean, being the owner of a farm, conveyed it to *Elijah Bean*, taking back a life lease of one half in common, and afterward mortgaged the said undivided half to *Hall & Conant*. Subsequent to which, *Elijah Bean* mortgaged the whole to *Hall* alone. In an action by *Hall & Conant*, against *William Bean, Jr.*, to recover possession of one half, the latter pleaded special non tenure, averring that he held under *Elijah Bean*, who was tenant of the freehold. Evidence that the defendant said, on receiving a letter from *Hall*, alone, threatening a suit if he persisted in carrying on the farm, that he did not care for the title of *Hall*, and should go on as usual, was held not to be *conclusive* evidence to negative the plea.

THIS was a writ of entry, in which the demandants counted upon their own seizin within twenty years and a disseisin by the tenant, of one undivided moiety of a certain farm, lying in *Waterborough*, in this county.

The defendant pleaded the general issue, and filed a brief statement under the statute, embracing, substantially, a plea of *special non tenure;* avering that he held and occupied as tenant at will, under *Elijah Bean*, who was tenant of the freehold.

The demandants, to maintain the issue on their part, introduced a deed of mortgage, dated *March* 14*th*, 1827, from *William Bean*,

father of the defendant, conveying the demanded premises. Also, a deed of mortgage from *Elijah Bean* to *David Hall*, one of the demandants, dated *November* 26, 1828, conveying the whole farm, and describing it as the same that he purchased of his father, *William Bean*, and of which he gave the said *William Bean* a lease of one undivided half part during his natural life, and the life of his wife.

The demandant also proved, that the defendant had occupied the whole farm in common with *Elijah Bean*, since the year 1830, taking one half of the income of said farm.

They also proved by *Joseph Bean*, that *William Bean, Jr.*, the defendant, showed him a letter he had received from *Mr. Hall*, one of the demandants, in 1832; in which he, said *Hall*, stated that the respondent must not be put out with him, *Hall*, if he commenced a suit against him, the respondent, if he carried on the land any longer, — that the respondent laughed and said he was not afraid of *Hall's* title, and that he meant to continue and carry on the farm as he had done: — and that, at another time, when the respondent was at work upon the land, the same year, the respondent told the witness that he was not afraid of *Hall's* claim.

It was also proved that the whole farm was carried on and improved in common, by *William Bean* and *Elijah Bean*, from the year 1813 to 1830 — and since that time, in the same way by *William Bean, Jr.* and *Elijah Bean* — the father, *William Bean*, having that year left the premises and removed to *Parsonsfield*, to reside with another son.

Elijah Bean testified, that both his father and the defendant occupied the premises as aforesaid, by his consent and agreement.

The respondent introduced the deed before mentioned, from *William Bean* to *Elijah Bean*, dated *February* 1, 1813.

There were two counts in the writ, and the Chief Justice, who presided at the trial, ruled that upon the testimony, if true, the demandants could not maintain their action upon the first count, which the demandants, upon leave, struck out. As to the evidence applicable to the second count, the Judge ruled that the testimony of *Joseph Bean* was sufficient, if believed, to show that the defendant held the premises adversely to the demandants'

title, and as tenant of the freehold. If, in the opinion of the Court, this ruling was correct, the default, which was entered by consent, was to stand; otherwise it was to be taken off, a new trial granted, and the plaintiff's first count to be restored.

Howard, for the tenant, argued against the correctness of the ruling of the Judge, at the trial, and cited the following authorities: *Knox* v. *Silloway*, 1 *Fairf.* 201; *McClung* v. *Ross*, 5 *Wheat.* 116; *Chapman* v. *Gray*, 15 *Mass.* 439; *Brown & al.* v. *Ward & ux.* 17 *Mass.* 68; *Higbee & al.* v. *Rice*, 5 *Mass.* 344; *Shephard* v. *Ryers*, 15 *Johns.* 501; 2 *Cruise*, 530; 3 *Wilson*, 118; 1 *Term Rep.* 758; *Fox & al* v. *Widgery*, 4 *Greenl.* 219; *Cumming* v. *Wyman*, 10 *Mass.* 464; *Tuffts* v. *Seabury*, 11 *Pick.* 140; *Morton* v. *Fairbanks*, 11 *Pick.* 368; *Aylwin* v. *Ulmer*, 12 *Mass.* 22; *Tyler* v. *Ulmer*, 12 *Mass.* 169; *Benham* v. *Carey*, 11 *Wendell*, 473.

Goodenow, and *N. D. Appleton*, for the demandants, endeavored to maintain the correctness of the ruling of the Judge, citing the following authorities: *Proprs. Ken. Purchase* v. *Springer*, 4 *Mass.* 416; *Boston Mill Corporation* v. *Bulfinch*, 6 *Mass.* 229; *Porter* v. *Hammond*, 3 *Greenl.* 190; *Brigham* v. *Welch*, 6 *Greenl.* 376; 1 *Bur.* 110; *Dewey* v. *Brown*, 2 *Pick.* 387; *Somes* v. *Skinner*, 3 *Pick.* 52; *Davis* v. *Mason*, 4 *Pick.* 156; *Lamere* v. *Barker*, 10 *Johns.* 312; *Jones* v. *Ins. Co. of North America*, 4 *Dal.* 249; *Parlin* v. *Macomber*, 5 *Greenl.* 413; *Jackson on Real Actions*, 91, 95; 5 *Dane's Abr.* 382; *Willes' Rep.* 25; *Jackson* v. *Parkhurst & al.* 9 *Wendell*, 207.

Parris J. delivered the opinion of the Court.

As to the first ruling of the Judge, that upon the evidence introduced, the plaintiffs could maintain their action on the second count, it is unnecessary now to give an opinion, except so far as it relates to the character of the tenant's possession.

The demandants claim possession of an undivided moiety of the demanded premises, under a mortgage deed from *William Bean*, the father. The tenant, by a plea of special non tenure, alleges that, at the time of suing out the demandants' writ, he was not, and never since has been, tenant of the freehold, but then held and continues to hold and occupy the premises, as ten-

ant at will under *Elijah Bean*, who is, and at the time of suing out the writ, was, and ever since has been, tenant of the freehold.

If the tenant succeed in supporting his plea by proof, he will shew conclusively that there is no cause of action, and will, therefore, be entitled to judgment.

The Judge ruled, that the testimony of *Joseph Bean*, if believed, was sufficient to show that the defendant held the premises as tenant of the freehold. By that testimony it was proved, that *William Bean, Jr.* the tenant, shew the witness a letter from *Hall*, one of the demandants, in which he stated that the "respondent must not be put out with him, *Hall*, if he commenced a suit against respondent, if he carried on the land any longer; that the respondent said he was not afraid of *Hall's* title, that he meant to go on and carry on the land as he had done;" and that, in a subsequent conversation, he said, "he was not afraid of *Hall's* claim." Now, this evidence taken by itself, without any reference to other facts in the case, would be sufficient, perhaps, to negative a plea of non-tenure. But it is to be kept in mind, that *Hall* had a claim to the premises, separate and distinct from that which he and *Conant* held under *William Bean*, the father. *Hall's* separate title was by mortgage from *Elijah Bean*, who continued in possession, and who testified, as reported by the Judge, that *William, Jr.* the tenant, occupied the premises by his "consent and agreement." When *Hall* demanded possession, the tenant might well suppose that it was under his mortgage deed from *Elijah*, and if actually in under *Elijah*, as testified by the latter, the tenant's statement to *Joseph Bean* would not be such a direct assertion of claim as tenant of the freehold, as *necessarily* to exclude any other construction. If so, then, although *Joseph Bean's* testimony should stand uncontradicted, the tenant's plea *may* also stand as not inconsistent with it. If he was not in under *Elijah*, then his declaration to *Joseph* would be evidence against him; but if he did so hold, as testified by *Elijah*, then his declarations might be susceptible of a construction consistent with his plea. The fact how he held, whether as mere tenant at will under *Elijah*, or as tenant of the freehold, we think, ought to have been settled by the jury, and, accordingly, the default must be taken off and a new trial granted.

ALLEN *vs.* PRAY.

The acceptance, by a widow, of the provisions made for her in the will of her husband, constitutes a bar to her claim of dower in lands aliened by him during coverture; such claim of dower appearing to be inconsistent with the provisions of the will.

THIS action, which was brought by the plaintiff to recover her dower in certain lands, grist mill and mill privileges, was submitted to the Court, upon an agreed statement of facts, that part of it relating to the questions raised, being as follows: —

Elisha Allen, the husband of the demandant, on the 16*th* day of *May*, 1831, being then legally seised in fee of the premises, conveyed them by deed of warranty to his son, *Francis A. Allen;* and on the 11*th* of *June*, following, said *Francis* made and executed to his father, an instrument under his hand and seal, wherein he covenanted with said *Elisha*, that "neither he, his heirs, executors or administrators would ever claim from the said *Elisha's* heirs, devisees, executors or administrators, any damage or compensation on any covenant of warranty in said deed contained, by reason of said *Elisha's* widow claiming or taking her dower in the premises described in said deed, or any part thereof."

On the 18*th* of *May*, 1831, said *Elisha Allen* made his last will and testament in writing, which was duly proved, approved and allowed by the Probate Court for this County, *October* 3*d*, 1831, he having died the 1*st* of *August*, preceding.

The devise, in this will, to the demandant, was as follows: — "One third part of all my real estate, during her natural life; "also, one third part of all my personal estate to hold to her "heirs and assigns, forever."

The remainder of his estate he devised to his children and grandchildren. The whole estate was divided by order of the Court of Probate, among the devisees, according to the terms of the will; the demandant entering into possession of that portion of the estate assigned her, which she had ever since held. She also received her distributive share of the personal estate, according to the terms of the will, so far as the executor had been thereto ordered, on the settlement of his accounts in the Probate Court.

After the death of said *Elisha Allen*, his son, *Francis A. Allen*, by agreement with the demandant, rendered to her one third part of the nett income of the grist mill, until *April*, 1833, when he sold with warranty to the defendant, reserving the right of the demandant to her dower therein.

For a short time after this purchase by the tenant, he also rendered to the demandant one third part of the income of the grist mill; but subsequently refused either to do that or to assign dower.

If, upon these facts, the opinion of the Court should be, that the action was maintainable, the defendant was to be defaulted, and a commissioner was to be appointed by the Court, to assess the damages; otherwise the demandant was to become nonsuit.

N. D. Appleton, for the demandant, to show the foundation and extent of the widow's rights, both at common law and under the statutes, cited 2 *Black. Com.* 129; 4 *Kent's Com.* 35; *Maine Stat. ch.* 37, *sec.* 6; *ch.* 38, *sec.* 18; *ch.* 37, *sec.* 2; *ch.* 60, *sec.* 27; *ch.* 51, *sec.* 25.

2. The demandant is not barred of her claim of dower, by the provisions of the will. In order that a testamentary provision should have this effect, it must appear in *express terms* to be *in lieu* of dower; or such intention must be deduced by clear and manifest implication from the will, founded on the fact, that the claim of dower would be inconsistent with the will, or so repugnant to its dispositions as to disturb and defeat them: 4 *Kent's Com.* 58; 2 *Black. Com.* 138; *Co. Litt.* 36 *b. Harg. notes; Cruise Dig. Tit. Dower; Lawrence* v. *Lawrence*, 1 *Ld. Raym.* 438. In this case it was manifestly the intention of the testator, that the widow should have her dower, demanded in this action, in addition to the provision in the will. This appears by the obligation which he took from *Francis A. Allen.*

3. But the widow's right of dower in the real estate of her husband, aliened by him in his lifetime, is expressly reserved to her, in the statute directing the mode of transferring real estate, *Maine Stat. ch.* 36, *sec.* 2. The right thus reserved by the statute, is independent of the power of the husband. And the language of the statute, *ch.* 38, *sec.* 15, which provides, that "the widow may, in all cases, waive the provision made for her in the

will of her deceased husband, and claim her dower and have it assigned, as if her husband died intestate," must be understood as having relation to the estate of which the husband died seised, and is under the jurisdiction of the Probate Court.

On the death of the husband, the widow has a right *immediately* to demand her dower in an estate conveyed by him during the coverture; she not having signed the deed, or otherwise released her dower. Can her claim in such case, be made to depend upon the contingency of her accepting the provisions made for her in the will, a decision upon which she may delay for years?

4. The demandant has never accepted the provisions made for her in the will, in lieu of dower. At the very time that she accepted of the devise, she was claiming and enjoying one third of the income of the estate in which dower is demanded. This fact is sufficient to negative any inference that she accepted the devise in lieu of dower. *Wake* v. *Wake*, 3 *Broke*, 255; 1 *Cruise, ch.* 5.

5. The tenant is *estopped* to deny the demandant's right of dower, by the express reservation in his deed from *F. A. Allen*. *Nason* v. *Allen*, 6 *Greenl.* 244, and cases there cited; 3 *Johns. Cas.* 174; 5 *Dane's Abr. ch.* 160, *a.* 1.

6. The tenant, being a *stranger* to the will of *Allen*, the testator, has no right to contest with the demandant, the question whether she has accepted the provision made for her or not. He does not hold under the will, nor is he affected by any of its provisions. *Pixley* v. *Bennett*, 11 *Mass.* 298.

Hayes, argued for the tenant, citing 4 *Kent's Com.* 56; 4 *Dane's Abr. ch.* 130, *a*, 88; *Hannah Currier, Appellant, &c.* 3 *Pick.* 375; *Reed* v. *Dickerman*, 12 *Pick.* 150; *Perkins* v. *Little & al.* 1 *Greenl.* 148; 1 *Cruise Dig. Tit.* 6, *ch.* 5, *sec.* 22, 32, 33; *Brackett* v. *Leighton*, 7 *Greenl.* 383. His several positions were sustained by the opinion of the Court, which was, at a subsequent term, delivered by

Weston C. J. — By the English law, a provision made for the widow, by will, and an acceptance of it by her, is no bar to her common law right of dower, unless it be expressed in the will to be in lieu of dower, or the enjoyment of it will be inconsistent with its provisions. The testator gives estate, real and

personal, to his widow; that is to say, one third of his real estate during her natural life, and the entire property in one third of his personal estate. The remainder of his estate, he bestows upon his children and grandchildren. What is the remainder, after one third is withdrawn? There can be but one answer, the other two thirds; to which is to be added the reversion expectant, upon the determination of the widow's life estate. If, besides the testamentary interest of one third, she is to be allowed dower, instead of a remainder of two thirds for the children and grandchildren, there will remain one third, or four ninths, if her testamentary interest contributes to dower. This claim, therefore, clearly disappoints the will, and is inconsistent with it.

Every devisee must confirm the will in toto, if he claims any interest under it; and must consequently forfeit such interest, if he impeaches or interrupts any part of it. 6 *Cruise, Tit.* 38, *ch.* 2.

But it is urged, that there will be no inconsistency, if the widow waives her dower in the real estate, of which her husband died seised; that this is all which can be required of her, and that this part of her dower she has never claimed. But we cannot regard the title of dower, as possessing this divisible character. It must be allowed generally, or withheld generally. If the right of dower, to the extent allowed by the common law, be inconsistent with the will, if the widow would enjoy the one, she must waive or relinquish the other. But the claim of dower, besides diminishing the remainder of the real estate otherwise devised, may diminish also the personal estate bequeathed to the children and grandchildren. It will be held to make good to the grantees of lands, conveyed by the testator, in his life time, by deeds of warranty, any damage to which they may be subjected, by the claim and assignment of dower. The tenant, by the deed he accepted, may have precluded himself from any remedy; but no such reservation can be presumed to have qualified other deeds of conveyance, made by the testator.

In *Perkins* v. *Little*, 1 *Greenl.* 148, the testator had devised to his widow one third part of his real estate, during her life; and after providing for the payment of his debts, and giving certain legacies to his children, he bequeathed to her one third part

of the residue of his personal estate. The widow, who had able counsel, did not claim to hold under the will and her dower also, although as fairly entitled to do so as the demandant here, but contended that the dower to be allowed her under the statute, ought to be extended, so as to embrace a third part of the personal estate, which was not allowed.

In this State and in *Massachusetts*, the widow is by statute entitled to dower, if she relinquish the provision made for her in the will. The implication is very strong, that she is not otherwise to have her dower; although the construction is not to be carried so far, if dower is consistent with the will. But in *Reed* v. *Dickerman*, 12 *Pick.* 146, the Supreme Court of *Massachusetts* have held, that under the statute, the provision made by the will, instead of being presumed to be a bounty in addition to dower, according to the English rule, will be presumed to have been given instead of dower, unless the enjoyment also of that clearly appear to be consistent with the will.

There is no latent ambiguity in the will in question, arising from its application to the property, upon which it operates. The intention of the testator must therefore be gathered from that alone; and cannot be affected by other instruments, to which he may have been a party.

We are all of opinion, that the claim of dower, being inconsistent with the provisions of the will, which, so far as they are for her benefit, she has not waived, she cannot maintain the present action.

Demandant nonsuit.

Hanson *& al. vs.* Willard *& al.*

Partition may be had of a *mill and mill privilege*, under the provisions of *stat.* of 1821, *ch.* 37, *sec.* 2.

It seems, however, not to be absolutely necessary that such partition should be by *metes and bounds*.

This was a petition for partition under the provisions of *stat.* of 1821, *ch.* 37, in which the petitioners stated that they were owners and interested, in certain proportions, with others, in the

Province mill privilege and the *mill* standing thereon; that, they could not improve their respective parts to advantage, while the same were in common and undivided," and "prayed that their said parts might be set off, and assigned to them in severalty."

The respondents, by their plea, objected to the partition prayed for, because they alleged, "that the several parts could not be divided and set off to each partitioner and owner, to hold in severalty, without great injury, injustice, and inconvenience to the owners, and without destroying the proper use and enjoyment of the mill, and rendering it useless."

To this plea the petitioners demurred, and the demurrer was joined by the respondents.

The case was argued in writing by *D. Goodenow* and *N. D. Appleton*, for the respondents, and by *J. Shepley*, for the petitioners.

The counsel for the respondents argued at length, to show that partition of this kind of estate would destroy it, or render it of little or no value to its owners, and further maintained, that this position was admitted by the demurrer of the petitioners.

They then contended, that the *stat. ch.* 37, under a reasonable construction, was not intended to apply to property of this description; or at all events, that the terms of the statute were not *peremptory*, but entrusted a *discretionary power* to the Court, to order partition or refuse it. They also cited the following authorities: *Co. Litt.* 187; 3 *Bac. Abr.* 211; *Co. Litt.* 175, *b*; *Stat.* 31 *Hen. VIII, ch.* 1; *Stat.* 32 *Hen. VIII, ch.* 32; *Stat.* 7 *Ann, ch.* 18; *Maine Stat. ch.* 37, *sec.* 2; 1 *Bl. Com.* 91; 2 *Bl. Com.* 189; *Co. Litt.* 164, *b*, 165, *a*; 4 *Dane's Abr.* 769; *Maine Stat. ch.* 59, *sec.* 31; *Bartlett* v. *Willis*, 3 *Mass.* 100.

The counsel for the petitioners controverted the arguments on the other side, and cited the following authorities: 2 *Cruise Dig.* 529, 561; 2 *Com. Dig.* 646; *Co. Litt.* 164, *b*, 167, *b*; *Turner* v. *Morgan*, 8 *Veasey*, 144; *Baring* v. *Nash*, 1 *Veasey and Beame*, 554; *Clarendon* v. *Hornby*, 1 *P. Will.* 446; *Maine Stat. ch.* 37, *sec.* 2; *Bemis* v. *Stearns*, 16 *Mass.* 200; *Stearns* v. *Stearns*, 16 *Mass.* 167; *Pond* v. *Pond*, 13 *Mass.* 413; *Morrill* v. *Morrill*, 5 *N. Hamp. Rep.* 134, and 329; *Arms* v. *Lyman*, 5 *Pick.* 210; *Symonds* v. *Kimball*, 3 *Mass.* 299.

At a subsequent term, the opinion of the Court was delivered by

PARRIS J. — By the common law, parceners might be compelled, by writ, to have partition of their inheritance, but until the statute of 31 *Hen. VIII, ch.* 1, there was no mode of compelling partition among joint-tenants and tenants in common. They might make an amicable division of their joint or common property, but unless all would agree to such a division, no individual could obtain a partition whereby he might enjoy his share in severalty. The preamble to that statute recites the inconveniences to which those might be subjected, who were interested in joint or common property, and could not compel a division, viz. that "divers and many of the joint-tenants and tenants in common, oftentimes of their perverse, covetous, and malicious minds and wills, against all right, justice, equity and good conscience, by strength and power, not only cut down all the woods and trees growing upon the same, but also have extirpated, subverted, pulled down and destroyed all the houses and the whole commodities of the same, and have taken and converted them to their own use, to the open wrong of the other joint-tenants and tenants in common of the same property, who have been always without any assured remedy for the same."

The statute then proceeds to give the remedy, by providing that "all joint-tenants and tenants in common, of any estate of inheritance of any lands, tenements, or hereditaments, shall and may be coacted and compelled to make partition between them, in like manner and form as coparceners have been and are compelled to do."

As early as 1693, the colonial legislature provided, that "all persons holding any lands, tenements, or hereditaments, as coparceners, joint-tenants or tenants in common, may be compelled by writ of partition at common law, to divide the same." This is substantially the phraseology of our statute, *ch.* 37, *sec.* 1.

From this review it will be seen, that we have adopted what is usually called partition at common law, that is, by writ *de partitione facienda*, and in cases under that mode, as our statute embraces the same subject matter as the *stat.* 31 *Hen. VIII, ch.* 1, viz. "*lands, tenements, and hereditaments,*" we may be aided in

our investigations by the judicial expositions of that statute, and the practice under it.

Under the writ *de partitione*, a partial partition cannot be made. The demandant must institute his process against all the other co-tenants. He must, at his peril, state his own share, and that of the others, with precision, and every one must have a part set out in severalty.

This was found to be very inconvenient, and, in many cases, partition "though much desired and of great advantage, was often hindered and delayed, by reason that infants were interested, or that the parties concerned were numerous and lived remote from each other, and sometimes in parts beyond sea, and were some of them unknown:" *Preamble to Statute of March* 11, 1784. To remedy this and other inconveniences, a mode was provided, by the statute above mentioned, by which persons interested with others in any lot, tract of land or other real estate," might have their share or shares set off and divided from the rest. This is the mode prescribed by our statute, *ch.* 37, *sec.* 2.

We have taken this review to arrive at the object of partition by petition, as prescribed by our statute, and we think it is apparent, that the statute does not modify the common law as to the species of property that may be the subject of partition, but that, of whatever kind of property partition might be demanded, by parceners at common law, it might be demanded by joint-tenants and tenants in common, under *statute* 31 *Hen. VIII, ch.* 1, and under both the 1*st* and 2*d sections* of our *statute, ch.* 37.

The phraseology of the 2*d sec.* "any person or persons interested with others in any lot, tract of land, or other real estate," is, at least, as broad and comprehensive as "all persons holding any lands, tenements, or hereditaments, as tenants in common," &c. which is the language of the 1*st section*, and is substantially the language of the English statute above referred to, which was the earliest statute upon the subject.

Under the provisions of our statute, *ch.* 37, *sec.* 2, a tenant in common may have his property divided and set out from the residue of the common property, without causing a division of the whole, as he must if he proceed by writ. That section changes

the mode of procedure, but it neither limits nor enlarges the objects on which the process is to operate. If the estate be such as the petitioner could demand partition of it by writ under the first section, he may have it by petition, in the mode pointed out in the second. He has his election. In the one case, the whole common property must be divided among all the co-tenants; in the other, the petitioner's share alone is to be set out, and the residue will continue as before, the common property of all the remaining tenants.

Considering then, that whatever property would be partible under a writ of partition at common law, would be alike partible under the statute process of partition, we proceed to inquire what kinds of property may be the subject of partition. We have seen that lands, tenements, and hereditaments, or, as described by statute, lands or other real estate may be divided, and as it is essential to an estate in common to be subject to partition, it is incident to such an estate that either tenant may enforce it. Those interested in the common property may make a conventional partition so as best to accommodate the whole, having regard to the nature and situation of the estate; but if no such partition can be agreed upon, either tenant may claim it as of right, and it is no sufficient objection to a partition that it would be attended with the most inconvenient consequences, and that the value of the property so much depends on its entireness, that its division would materially lessen that value. The strongest arguments of inconvenience will not prevail, and it is said, in a recent treatise on partition, that if there is only one entire subject matter of division, it must be severed into shares, although the difficulty of doing it should be almost insuperable, and although it should be attended with the most palpable inconvenience and even destruction. *Allnatt on Partition*, 85. As was said by *Lord Eldon*, in *Turner* v. *Morgan*, 8 *Ves. jr.* 143, the difficulty is no objection, if the parties insist upon having the law take its course, the partition must proceed. If they would avoid the difficulty, they ought to agree to buy and sell. 11 *Ves.* 157, *note*; 17 *Ves.* 546, *note*. We might refer to a great number of cases, some at law, and others in Chancery, all recognizing the principle that tenants in common may demand partition of right, and that injury to the

common property, or inconvenience to other co-tenants, cannot be urged to stay the proceedings. It is not material here to inquire into the origin of the authority of Courts of Chancery to order partition. The jurisdiction has been assumed and exercised concurrently with courts of law, and upon the same principles. The bill for partition is in the nature of a writ of partition, and as far as regards the property, the commission is due in those cases in which the writ lies. *Turner* v. *Morgan, before cited.*

We come to the conclusion, that if the petitioner, as he alleges, is interested with others as tenants in common, in the real estate described in his petition, he may claim of right to have partition made and his share set off and divided from the rest, however inconvenient it may be to make such partition, or however much the other co-tenants, or the common property may be injured thereby.

We do not, however, intend to be understood as deciding that the partition must, in all cases, be made by metes and bounds; by an actual division of the estate. That question has not been raised in the argument. It will more properly come before us, upon the report of the committee. It may, however, be useful to make a few suggestions on this point. The mode of partition is not prescribed, either by our statute, or by the English statute before referred to. It is no where enacted that the common estate shall be divided by metes and bounds. But that is, undoubtedly, the usual, and, generally, the most convenient mode. There are, however, cases in which actual partition cannot be made, as of things which are in their nature entire; yet it may be made in effect, for where the thing and the profits are the same, a partition of the profits is a partition of the thing. *Per Holt C. J.* in *Bishop of Salisbury* v. *Philips*, 1 *Salk.* 43. The process of partition, whether by writ or petition, does not affect the inheritance; it is the possession, merely, which is affirmed or ascertained. And why is it not as substantially a partition, to assign the entire possession or use of the common property to one tenant for one week, and to another tenant for another week, and so on to as many tenants as there may be, as to assign the unlimited possession and use of an acre to each to hold in severalty. This case is put in one of the books, in which most of the learning

upon this subject is to be found. "If a partition be made between two coparceners, of one and the self-same land, that the one shall have the land from *Easter* until *Lammas*, to her and her heirs, and the other shall have it from *Lammas* till *Easter*, to her and her heirs, or the one shall have it the first year and the other the second year, *alternis vicibus, &c.* there it is one self-same land, wherein two persons have several inheritances at several times. Wherein it is to be noted that the possession is not only several, but the inheritance also." *Co. Litt.* 4, *a.* It is said, in *Fitzherbert's Nat. Brev.* 62, *I*, "Partition betwixt coparceners, that one shall have the occupation of the land from *Easter* until *August*, solely, and in severalty to herself, and then that the other shall occupy the land solely and severally, from *August* to *Easter*, yearly, to them and their heirs, is adjudged a good partition;" and the same is recognised as law, by the author before referred to. *Co. Litt.* 167, *a, b.*

It is said by *Allnatt*, in his late treatise on partition, before referred to, *page* 51, speaking of what kinds of property partition may be demanded by writ, and how they must be divided, "If the property is not in its nature severable, the profits may be divided; or it may be divided so as to confer the enjoyment by turns;" thus recognizing the ancient doctrine as laid down by *Fitzherbert* and *Coke*. But we will pursue this branch of the subject no further.

We are of opinion, that the petitioners are entitled to partition, notwithstanding any thing alleged against it in the respondents' pleas.

EMERSON *vs.* LITTLEFIELD.

The title of an execution creditor, under a levy upon the real estate of his debtor, is not affected by notice of a prior conveyance not recorded, the creditor having no knowledge thereof at *the time of the attachment upon his writ.*

THIS was trespass *quare clausum fregit*, brought to try the title to a lot of land, lying in *Wells*, in this county, and was submitted to the Court, upon the following agreed statement of facts.

On the 2*d* of *July*, 1832, *Thomas Boston*, being seized in fee of the lot in question, conveyed it to the defendant, who at the same time and as a consideration for the conveyance, obligated himself to support the grantor and wife, during their lives, mortgaging back the same estate to secure the fulfilment of this obligation. The first deed was not recorded until the 5*th* of *September*, 1833, and the latter in *May*, 1834.

Previous to these conveyances, said *Boston* was indebted to the plaintiff in the sum of $60, on which he commenced his suit, and attached the lot in question on the 13*th* of *May*, 1833. Judgment was obtained and execution duly levied, the following *June*. At the time of the levy the defendant objected thereto, and gave the plaintiff notice of *Boston's* deed to him, of *July* 2*d*, 1832.

Boston, and the defendant, had lived together on the premises, from the time of said conveyance.

Holmes, for the defendant, endeavored to show that there was no distinction between a subsequent purchaser with notice, and a levying creditor with notice. That, in either case, the attempt to acquire a title after such notice, was a fraud upon the purchaser, and could not be successful.

Bourne, for the plaintiff, relied on the case of *Stanley* v. *Perley*, 5 *Greenl.* 369.

WESTON C. J. — It may possibly deserve consideration, whether there may not be ground for distinguishing the case of an attaching creditor, with notice, from that of a second purchaser with notice. The latter, with full knowledge of the facts, lends his aid to the vendor in defrauding the first purchaser. He pays his grantor for what he knows belongs to another. The attaching creditor is seeking an honest debt, and endeavors to save himself from loss, by taking advantage of the negligence of the purchaser, in omitting to record his deed. If notice, however, is equivalent to registry, aside from the ingredient of fraud, as seems now to be generally understood, no such distinction could obtain.

But without resorting to any such ground, the plaintiff is entitled to judgment. His title relates back to the day of the attachment. At that time he had no knowledge whatever of the de-

fendant's deed. He has a right to hold, therefore, although apprized of the deed, when he made his levy. The case of *Stanley* v. *Perley*, 5 *Greenl.* 369, cited for the plaintiff, is expressly in point.

Defendant defaulted.

THORNTON *vs.* THE U. S. INSURANCE COMPANY.

Where a ship, bound from R. to B., was compelled to put into an intermediate port, for the preservation of the ship, cargo, and lives of the crew, the wages and victualling of the crew, from the time of the ship's bearing away for such intermediate port until her departure therefrom, were held to constitute a proper subject of general average.

In an action on a policy of insurance, by the owner of a ship against the underwriters, the adjustment of a general average loss made in a foreign port, is not conclusive upon the owner; but he may show, that items of loss were omitted in such adjustment, which by the laws of this country, where the contract was entered into, should have been included.

THIS was an action of *assumpsit*, on a policy of insurance upon one half of the ship *Mordecai*, and was tried before the Chief Justice, in this county, *September* term, 1834.

The plaintiff claimed to recover for losses under both general and particular average.

It appeared in evidence, that on the voyage from *Richmond* to *Bremen*, the ship was compelled to go into *Cuxhaven*, an intermediate port, for the safety of the ship, cargo, and lives of the men. While there, an adjustment of the general average took place, but in which no notice was taken of the wages and victualling of the crew, from the time the ship bore away for the intermediate port, until her departure therefrom. This item the plaintiff now claimed to recover, under general average. But the Chief Justice ruled, that the foreign adjustment could not now be opened, — that it was conclusive and binding upon all the parties — and the verdict of the jury was returned in conformity thereto.

Other questions were raised in regard to the partial loss, but as no decision of the Court was had thereon, the facts are not reported.

The questions being reserved on report of the Judge, if the foregoing ruling was correct the verdict was to stand, otherwise it was to be set aside and a new trial granted.

Fairfield, for the plaintiff, to show that the wages and victualing of the crew constituted a proper subject for general average, cited *Hughes on Ins.* 220; *Latward* v. *Curling*, *Park*, 207; *Walden* v. *Le Roy*, 2 *Caines' Rep.* 263; *Barker* v. *Phœnix Ins. Co.* 8 *Johns.* 307; *Padelford & al.* v. *Boardman*, 4 *Mass.* 548; 4 *Dallas Rep.* 274.

2. That the foreign adjustment was not conclusive upon the plaintiff, he cited *Power* v. *Whitmore*, 4 *M. & S.* 141; *Lennox* v. *U. S. Ins. Co.* 3 *Johns. Cas.* 178; *Shiff* v. *Louisiana Ins. Co. Martin's Rep.* 629; 3 *Kent's Com.* 238; *Bonsfield* v. *Barnes*, 4 *Camp.* 228; *Hughes on Ins.* 228.

D. Goodenow, for the defendant, insisted that the adjustment of the general average abroad was conclusive and binding, as well upon the plaintiff as upon all the other parties to it. The Master was the agent of the owner, and procured the adjustment to be made at the proper place, and this adjustment was in accordance with the laws of that place. *Phil. on Benecke*, 268, 269; *Simonds* v. *White*, cited in 2 *B. and Cres.* 803; *Phil. on Benecke*, 279, *n. (a;)* *Strong* v. *N. Y. Fireman Ins. Co.* 11 *Johns.* 323; *Depeau* v. *Ocean Ins. Co.* 5 *Cow.* 63.

2. But if this adjustment should be opened, the wages and victualing of the crew ought not to be allowed. *Abbott on Shipping*, 275, 281, 283; *Phil. on Stevens & Benecke*, 370, 379, 382, 383; *Power* v. *Whitmore*, 4 *M. & S.* 141; *Park* 52, 81; *Da Costa* v. *Newnham*, 2 *T. R.* 407.

E. Shepley, replied on the part of the plaintiff.

The opinion of the Court, at the next *April Term*, was delivered by

PARRIS J.—The plaintiff's ship, *Mordecai*, insured by the defendants, being on a voyage from *Richmond* to *Bremen*, was compelled to put into *Cuxhaven*, an intermediate port, for the preservation of the ship, cargo, and lives of the crew. For the ship's proportion of the losses and expenses incurred in this necessary

procedure for the common benefit of ship, freight and cargo, the plaintiff claims indemnity of the insurers. This claim, to a certain extent, is admitted. But it is denied, on the part of the defendants, that in the computation of a loss like this, which falls under the character of general average, the insured can include the wages and victualing of the crew from the time the ship bore away for *Cuxhaven*, until her departure from thence for her port of destination.

There may have been some vacillation in the English Courts upon this subject, but we suppose it now to be settled law in Westminster Hall, not to include wages and provisions during the detention, in a general average loss. The case of *Power* v. *Whitmore*, 4 *Maule & Selw.* 141, and several others, are direct upon that point.

But the law has been differently settled in the American courts, and we apprehend, is now at rest upon this point, perhaps in every state in the Union, certainly in all the principal commercial states. It is stated, in *Philips on Insurance*, that the decisions of the American courts and the practice of insurers concur in allowing the wages and provisions as a part of the average loss, in case of an interruption of the voyage to refit. 1 *Phill. Ins.* 348. In the notes to *Abbot on Shipping*, by *Story*, page 350, it is said that in *America*, the rule seems definitively settled in our principal commercial states, that whatever be the nature of the injury, whether arising from a voluntary sacrifice or a mere peril of the sea, the wages and provisions of the crew from the time of putting away for the port, and every other expense necessarily incurred during the detention for the benefit of all concerned, are to become as general average; and this position is abundantly supported by *Padelford* v. *Boardman*, 4 *Mass.* 548; *Clarke* v. *United Insurance Company*, 7 *Mass.* 365; *Spafford* v. *Dodge*, 14 *Mass.* 74; *Walden* v. *Le Roy*, 2 *Caines*, 263; *Barker* v. *Phœnix Insurance Company*, 8 *Johns.* 307; *Dunham* v. *Com. Ins. Company*, 11 *Johns.* 315.

It is desirable that decisions in relation to the law of insurance, and commercial law generally, should be similar in all the courts in this country; and when we find a principle so well settled, and by courts of so great respectability in the most commercial states,

we feel no hesitation in adopting it. For about thirty years, the courts in *New York* and *Massachusetts* have steadily and implicitly adhered to this principle, and it must have long since become familiar to the mercantile community, and their contracts are now presumed to be formed in reference thereto.

From the report in this case it appears, that on the arrival of the *Mordecai*, at *Bremen*, her port of discharge, a general average of the loss was adjusted by the proper officers there, by which two hundred and fifty rix dollars were apportioned on the cargo, and seventy rix dollars on the ship; but, in this adjustment no notice was taken by the officers, who made it, of the wages and victualing of the crew, after the ship bore away for *Cuxhaven*. The question now presented, is, whether the *Bremen* adjustment is to be taken as conclusive between the parties.

According to adjudged cases, the adjustment is conclusive between the owner of the ship and the owner of the cargo, notwithstanding the omission to include the wages and provisions as part of the average loss. The loss is to be adjusted and contribution made at the port of discharge, and according to the laws and usages there existing. The owner of the ship has a *lien* on all the goods on board, not only for the freight, but to answer all averages and contributions that may be due, and until this *lien* is discharged he may safely refuse to deliver the goods. But when the adjustment of the loss is made and the several proportions ascertained according to the usage and law of the place, the owner of the ship is bound to deliver the goods upon payment, or tender of payment, of such average portion of the loss as shall have been apportioned thereon. For the amount thus paid the insurer of the goods is liable, even if it exceed the amount of average as it would be apportioned at the home port or place where the insurance was effected. This is the principle decided in *Strong* v. *The New York Fireman Insurance Company*, 11 *Johns.* 323, and *Depau* v. *The Ocean Insurance Company*, 5 *Cowen*, 63. The ground of the decisions is, that the insured may have a complete indemnity; and although he may have been compelled to pay unconscionably, yet as he could obtain his goods in no other way, he has his remedy over against his insur-

ers for the amount thus paid. For the same reason, that is, the principle of complete indemnity and nothing more, the owner of the vessel, who has not, in order to relieve his vessel, been compelled to settle and contribute by actual payment, according to the foreign adjustment, will not be permitted to recover of his insurer, beyond his actual loss, as adjusted according to the law of the place where the assurance is effected. This is well illustrated in the editor's note to the last edition of *Stevens & Benecke on Average, page* 279. Where there has been an adjustment and contribution, the party actually contributing in order to relieve his goods from the claim of average, has been damnified to the amount so paid, and that is the measure of *his* loss, in an action between him and his insurer. But the loss of the party to whom the contribution is made, is not thus conclusively measured by the foreign adjustment. In the language of the editor above referred to, he has not been compelled actually to contribute any thing on the basis of the foreign adjustment, in order to obtain possession of his property. He has sustained a loss for which his insurers are answerable. By the average contribution from the owners of the cargo, his loss has been partially remunerated, and the insurers so far relieved; but their liability for the residue of the loss is measured only by its actual amount. In no other mode can there be complete justice done between the insurer and the insured. By no other principle will the assured receive exact indemnity and nothing more. He resorts to his insurer with his policy. He accounts for what he has received under the foreign adjustment, and has a right to claim indemnity for the balance of his loss acording to the law of the place where the contract was entered into. We know it is often said in the books, that the foreign adjustment is conclusive. As between the parties, it unquestionably is so. The party contributing can recover nothing back; the party to whom the contribution is made can recover nothing further, and he, who has been compelled actually to contribute on the basis of the foreign adjustment, can recover of his insurer the amount thus contributed and nothing more. To this extent we admit the conclusive character of foreign adjustments, but have been unable to find adjudged cases to carry us further. We have found no case, where the party to whom the contribu-

tion has been made, has been restricted, in his claim upon his underwriters, to the sum apportioned as his share of the loss, by the foreign adjustment, when that sum fell short of a complete indemnity, according to the law of the place where the contract of assurance was entered into.

If the foreign adjustment includes, as general average, what constitutes only a partial loss or particular average, according to the authorities, the adjustment is not binding upon the underwriters, either because the loss was not covered by the policy, or not coming within the term, general average, is not to be adjusted abroad; and we do not perceive any good reason against applying a similar rule *in favour* of the insured, in cases where, by the foreign adjustment, losses are excluded, which, by the law of the place where the contract was made, are considered as falling within general average.

The general rule is, that in the interpretation of contracts, the law and custom of the place of the contract is to govern. By the law of the place where this contract of assurance was entered into, the term, *general average*, includes the wages and provisions of the crew, and unless there be something in the contract from which it can be inferred that the parties contracted with reference to the law or usage of some other place, this construction must govern.

We readily admit the principle, that the construction of the contract may be varied by reference to the law of the place where it is to be performed, when the place of performance is different from that where the contract was entered into. But in this case, the place of execution and performance was the same, and although the amount of indebtedness might depend on and be affected by foreign laws, as they would measure the amount of contribution to be received from the owners of the cargo, yet, as the contract is one of indemnity, it must render the insurers answerable for all the loss insured against, excepting so far as the insured has been indemnified by such contribution under the foreign adjustment.

We cannot admit that the contract is to be *construed* by foreign law or foreign usage, or that we are to resort to either to

ascertain what losses are covered by it, or what is to be included in each description of loss.

The insured has sustained a loss covered by his policy. For the amount of that loss the insurers are answerable, after deducting what the assured has already received by way of average contribution, from those who were interested in the cargo, and we have not been able to perceive any sound reason for limiting his claim to the sum estimated as his loss in the foreign adjustment, when it conclusively appears that losses were excluded from that adjustment, which, by our laws, were covered by the policy and to be borne by the insurer.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF OXFORD, MAY TERM, 1835.

WHITE *et ux.* *vs.* HOLMAN.

In a real action by husband and wife, to recover possession of land claimed in her right, evidence of the wife's declarations, made during coverture, was held not to be admissible for the defendant.

THIS was a writ of entry to recover seizin and possession of an undivided ninth part of a tract of land lying in *Dixfield*, in this County, in which the demandants counted upon their own seizin in right of the wife, and upon a disseizin by the tenant.

The tenant claimed title under a conveyance in fee and in mortgage by the father of the wife from whom the land descended, and the main question in the cause was, whether the mortgage had been paid and discharged.

Among other evidence to this point, the defendant offered to prove certain declarations of the demandant's wife. This was objected to by the demandants' counsel; but the Chief Justice, intending to reserve the question for the consideration of the whole Court, admitted it.

A verdict was returned for the defendant, which was to be set aside and a new trial granted, if the evidence received should have been rejected; otherwise, judgment was to be rendered thereon.

R. Goodenow, for the demandants, argued against the admissibility of the wife's declarations, insisting that, wherever they had been admitted, it was upon the ground of her *agency* for the husband, or from *the necessity of the case*. He cited the follow-

ing authorities: 2 *Stark. Ev.* 706; 1 *Stark. Ev.* 103; 2 *Kent's Com.* 178; 2 *Term Rep.* 265; *Sheppard's Ex.* v. *Starke et ux.* 3 *Mum. Rep.* 29; *Pillem* v. *Foster*, 1 *B. & C.* 248; *Kelley* v. *Small*, 2 *Esp. Cas.* 716; 2 *Stark.* 703 and 708 *in notis*; *Davis* v. *Dinwoody*, 4 *Term Rep.* 678; *Alban et ux. & Ratcliffe et ux. Exrs.* v. *Pritchett*, 6 *Term Rep.* 680; *Lessee of Moody* v. *Fulmer*, *Wharton's Dig.* 249, cited in 2 *Stark.* 707, in note; *Commonwealth* v. *Manly*, 12 *Pick.* 176.

Davies, for the defendant, contended that the evidence was admissible, and cited the following authorities to show that the wife's declarations had been admitted, 1. without the limitation of *agency*; 2. with the limitation of *not violating confidence*, and 3. in regard to *facts within her own knowledge*, in cases *affecting the interest of the husband*. *Haven* v. *Brown*, 7 *Greenl.* 421; *S. P.* 5 *Esp.* 72, 134; 2 *Taunt.* 565; 10 *Ves.* 128; 2 *Esp.* 511; *Gregory* v. *Parker*, 1 *Camp.* 394; 1 *Strange*, 527; *Fenner* v. *Lewis*, 10 *Johns.* 38; *Walton* v. *Green*, 1 *Carr. & Paine*, 621; *Aveson* v. *Lord Kinnaird*, 6 *East*, 188; *Cary* v. *Atkins*, 4 *Camp.* 92; *Fitch* v. *Hill et ux.* 11 *Mass.* 486; *Williams* v. *Johnson*, 2 *Strange*, 504; *Richardson* v. *Learned*, 10 *Pick.* 268.

2. Evidence of the wife's declarations are also admissible in this case on the ground of her being *a party in interest*. 7 *Term Rep.* 604; *Rex* v. *Hardwick*, 11 *East*, 578; *Hanson* v. *Parker*, 1 *Wils.* 257; 16 *East*, 143; 3 *Camp.* 465; 7 *Term Rep.* 665; *Harrison* v. *Valland*, 1 *Bing.* 45; *Richardson* v. *Field*, 6 *Greenl.* 305; *Parker* v. *Merrill & al.* 6 *Greenl.* 43; 1 *Stark. Ev.* 69; *Dale* v. *Johnson*, 1 *Strange*, 568.

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

It is urged, that the declarations of the wife objected to, do not appear by the report to have been made during the coverture, and that they might have been made before, or in the presence of him, who became her husband. They are reported to have been made by the demandant's wife, which must be understood, while she sustained that relation. If the fact was otherwise, it should have been so stated, or if made in the presence of the husband, which is not to be presumed from the report.

It does not appear that the husband had an inchoate right, as tenant by the curtesy, to the land demanded, which was the inheritance of the wife, but besides his interest in the costs of the suit, he had an undoubted right to enjoy the land, and to receive the rents and profits to his own use, during the coverture. He had important rights then to be affected by the declarations of the wife, received in evidence. It is conceded that it is a general rule of law, that husband and wife cannot be received as witnesses for or against each other. But many cases have been cited by the counsel for the defendant, to show that declarations of the wife have been received, under certain circumstances, to charge or affect the husband. And upon examination, they will nearly all of them be found to turn upon the assumption, that when making such declarations, she was acting as his agent.

It has been contended, that their admission in these cases, has been carried further in practice, than the principle would legally warrant. It may have been so; but that must have resulted from a misconception of the facts, rather than the law. And where the principle of law laid down is misapplied, it cannot be received as a precedent, beyond the legitimate range of the principle. When an agent has discharged his duty, and his authority is determined, his admissions do not affect his principal. But where the admissions, offers, or promises of the wife have been received to affect the husband, she being regarded as his agent, it must have been upon the ground, that in relation to the subject matter, she had a continuing agency, express or implied, under him to direct and control it, until it was finally disposed of. If in any case the agency assumed, upon which the admission was predicated, was carried too far, it was merely a mistake of the fact.

In this case, it is not pretended, that in making the declarations received, the wife acted as the agent of her husband, so as to bring the testimony within the principle, which governed that class of cases.

In *Aveson* v. *Lord Kinnaird et als.* 6 *East*, 188, the declarations of the wife, whose life the plaintiff had caused to be insured by the defendants, while she lay apparently ill, were received, as to the state of her health then, and also a few days before, when the policy was effected. *Lord Ellenborough* held the testimony

admissible, upon the ground that the answers of patients, to inquiries put to them as to their symptoms and complaints, must be resorted to from the very nature of the thing. And that she having been before examined by the surgeon, who had testified as to her satisfactory answers to his inquiries, the subsequent inquiry and her answers were receivable, as a sort of cross-examination. *Grose J.* thought her answer to the inquiry, why she was in bed, the best evidence the nature of the case afforded. He added, that "in strictness, such declarations are admissible, not so much as evidence of the confessions of the wife against her husband, as of the actual state of her health, in her own opinion at the time. But in getting at this opinion, it is impossible to help particular expressions mingling with it, and coming out from the witness to explain that fact, which are not evidence of the particular facts alluded to." *Lawrence J.* was of opinion, that as the husband had introduced testimony of what she had said to the surgeon in his favor, and had made it evidence, "the same sort of examination could not cease to be evidence, because it turned against him." In our opinion, no general principle can be extracted from a case, so peculiar in its character.

In *Fitch* v. *Hill et al.* 11 *Mass.* 206, the deposition of the wife was received in evidence, the husband being no party to the suit, and having only a contingent interest in the subject matter. *Richardson* v. *Learned*, 10 *Pick.* 262, adopts the same principle, upon the authority of the case last cited.

The policy of the law, which does not admit husband and wife to be witnesses for or against each other, equally extends to the declarations of either, not within any established exception. Aside from this objection it is undoubtedly true, and well sustained by the authorities cited, that the confessions of a party to the record, or of a party in interest, are receivable in evidence. But the application of this rule to a feme covert, who is made a party with her husband is objectionable upon another ground. Her civil capacity is merged in that of her husband. She is incompetent to affect by any act or declaration of hers, except in connection with her husband, her own interest, much less his. But she would be permitted indirectly to affect both, if her declara-

tions or admissions as a formal party to a suit, were receivable in evidence.

There are direct authorities, most of which have been cited for the plaintiffs, against the competency of the evidence here received. *Kelley and wife* v. *Small*, 2 *Esp. Rep.* 716, was assumpsit for a sum of money lent by the wife, while sole. The defendant offered to prove that, after the marriage, the wife admitted that she had no demand against him. *Lord Kenyon* held the testimony inadmissible. It would be receiving admissions of the wife to the prejudice of the husband. *Alban and wife and Ratcliffe and wife* v. *Pritchett*, 6 *T. R.* 680, was an action brought by the plaintiffs, in right of their wives, executrixes of *T. Stead*. Evidence of the declarations of the wife of *Ratcliffe*, in favor of the defendant, was rejected. *Lord Kenyon* held, that the husband had an interest in the cause, which could not be affected by the wife, and that it was quite immaterial, whether his right was or was not *jure uxoris*. In *Dunn* v. *White and wife*, 7 *T. R.* 112, it was held by the court, that the wife's confession of a trespass, committed by her, could not be given in evidence to affect the husband, in an action, in which he is liable for the damages and costs. And in *Lessee of Moody* v. *Palmer*, in the Supreme Court of *Pennsylvania*, cited 2 *Stark.* 707, note (2), which was brought to recover land, in which the wife was jointly interested, and a party to the suit, her declarations were not permitted to be given in evidence.

The opinion of the Court is, that in the case under consideration, the declarations of the wife, received at the trial, were not legally admissible.

New trial granted.

HILBORNE *vs.* BROWN *& al.*

A. being the owner of a blacksmith shop, placed it upon the land of B. under a parol license from the latter, setting it upon stone pillars and building the forge upon the ground. B. afterwards conveyed the land making no reservation of the shop, and the purchasers entered and converted the shop to their own use. *Held*, that they were liable to A. in an action of *trover*, for the value of the shop.

THIS was an action of *trover* for a blacksmith shop, and was tried upon the general issue, by *Parris J.* at the last *October Term*, in this county.

It appeared in evidence, that the shop in question, which was the plaintiff's property, was placed upon land belonging to the heirs of *Andrew Craige*, deceased, in 1827, under a license or *parol* permission of *Wm. C. Whitney*, their agent, on the plaintiff's agreeing to pay a ground rent of two dollars *per annum*. That, in 1832, the said heirs conveyed the land on which the shop stood to the defendants, making no reservation of the shop, who entered and converted the shop to their own use.

It appeared that the shop was placed upon stone pillars, and the forge was built upon the ground.

The defendant's counsel contended, that the plaintiff had no right to the shop, but that it passed by the conveyance from the heirs to the defendants, as a part of the estate, — that it was so attached to the soil, as that the plaintiff had no right to remove it, either against the heirs or their grantees. But the presiding Judge ruled otherwise, and directed the jury to find the value of the shop, standing on the premises at the time of the conversion, and also the value of the shop to be removed. The jury found the value of the shop, as it stood on the premises at said time, to be $73 — and the value of it to be removed was $54. The Court directed a verdict to be entered for the largest sum, subject to the opinion of the whole Court.

Fessenden, for the defendants, contended that the shop, erected as it was, upon a permanent foundation, passed by a deed of the land, and cited *Waterhouse* v. *Gibson & al.* 4 *Greenl.* 230; *Co. Litt.* 4, *a.* If there was any *conversion* in the case, it was by the heirs of *Craige*, and against them the plaintiff should seek

his remedy. *Wells* v. *Bannister*, 4 *Mass.* 514; *Cook* v. *Stevens*, 11 *Mass.* 533; *Osgood* v. *Howard*, 6 *Greenl.* 452; 1 *Saund.* 320; 1 *Salk.* 368; 3 *East*, 52.

Mellen, for the plaintiff, cited *Wells* v. *Bannister*, 4 *Mass.* 514; *Osgood* v. *Howard*, 6 *Greenl.* 452; *Russell* v. *Richards*, 1 *Fairf.* 429.

PARRIS J. — If *Hilborne* owned the shop, the action is maintainable against the defendant, inasmuch as the case finds the conversion.

The plaintiff erected the shop under a license from the heirs of *Craige*, who owned the site on which it was placed. He paid a yearly ground rent for his license, and, as between him and the heirs, it is not denied that he was the legal owner of the building.

But it is contended, that the shop passed to the defendant, by virtue of the deed to him from the heirs of *Craige*. Such would have been the operation of that deed, if the shop had been the property of the grantors. But being the property of the plaintiff, and having been erected and continued there by permission of the heirs, they had no interest in it, or legal right to it, and consequently, could not make any conveyance by which it would pass to the defendant. It remained the plaintiff's property after the conveyance to *Brown*, the same as before, and the defendant, having converted it to his own use, as the jury have found he did, is as clearly liable for damages in this form of action, as the heirs of *Craige* would have been, if they had taken possession of the shop and converted it to their use. The case of *Russell* v. *Richards*, 1 *Fairf.* 429, is a conclusive authority for the plaintiff.

There must be judgment on the verdict.

BROWN *plff. in equity vs.* HAVEN *& als.*

W. and H., two of four defendants in equity, demurred to the bill, because several independent causes were alleged therein, in which they averred they had no interest or concern. But the demurrer was overruled, it appearing by the bill, that W. was concerned in all the causes assigned, and that H. was charged with having combined and confederated with the others to defraud the plaintiff, in relation to the subject matter of the controversy. Relief may be had distributively, as the equity of the case may require.

S. and F. demurred to the bill, because B. was not made a party. As, however, B. was but the servant of the plaintiff, and not otherwise interested, the demurrer was overruled.

They further demurred, because the bill was exhibited for distinct causes, which had no relation to, or dependence on each other, and which concerned divers and distinct persons, who had no common interest therein. But the demurrer was overruled, it appearing to the Court, that the specifications in the bill had relation to one subject matter, in which all the defendants are alleged to have been combined and concerned, to the prejudice of the plaintiff.

Though *parol* testimony is not admissible to vary the terms of a written contract, in equity, any more than at law, yet it is admissible to prove and locate the boundaries and monuments in a deed, and these being proved, an ambiguity latent in the deed, may become apparent, the description being inconsistent with itself; whereupon the Court will proceed to deduce the *intention* of the parties

THIS was a Bill in Equity, an abstract of which, with the answers of the defendants, was as follows, viz:

The plaintiff in his bill alleges, that on the 7*th* of *August*, A. D. 1826, he contracted with *Samuel Haven*, *Andrew Foster*, *John Foster*, and *Thomas Foster*, through *Wm. C. Whitney*, their agent, to purchase of them a certain tract of land, described in their bond of that date, on the conditions therein specified, which bond makes a part of said bill, — that, it was his design to purchase, and their design to sell, lot No. 5, 2d Range, new survey, by bounds and monuments, shown him by the said *Whitney*, at the time of making the contract, — that, these boundaries were a hemlock tree, as the north-east corner of the tract — thence on the old line, bearing to the north-west, to *Hogan pond* — thence up by the east side of said pond to *Samuel Brown's* land — thence north-east on said lot to *Simon Staples'* land — thence north-west to the first mentioned bound, being the hemlock tree aforesaid, — that said *Whitney* pretended to be well acquainted

with the boundaries of said tract, pointed out an old line, running nearly north-west, as the true line thereof, and that confiding in this representation, he contracted to purchase said tract: That the principal value thereof was the pine timber, — that, he, the plaintiff, informed *Haven* and the *Fosters*, through *Whitney*, that he intended to pay for the land by cutting and selling said timber, — that, said *Whitney*, as an inducement for the plaintiff to make the purchase, then consented that the plaintiff might cut and carry away said timber, at his pleasure, to enable him to pay for the tract, — that, in pursuance of said license, the plaintiff, with one *David Bolster*, his servant, did cut and carry away a quantity of said timber, within the bounds of said tract, as shown by said *Whitney*, — that the said *Haven* and wife and the said *Fosters*, moved by the misrepresentations of said *Whitney*, or other evil minded persons, representing that the plaintiff had actually cut timber on No 5, 4th Division, and without the boundaries of his purchase, pretending that the course from said hemlock tree was *south-west*, where the plaintiff says there was no old line, thereby diminishing the tract purchased to less than 70 acres, did, on the 28*th* of *Sept.*, A. D. 1829, sue out a writ and commence an action of trespass against the plaintiff and said *Bolster*, returnable at the *Oct.* Term of the Supreme Judicial Court, and now pending in said Court, which writ and the proceedings thereon make a part of the plaintiff's bill. That, at the *October* Term of said Court, in *Oxford* County, the action was tried and a verdict returned in favor of the said *Brown* and *Bolster*, which, at the next *May* Term, was set aside and a new trial granted, in consequence of the admission of illegal evidence; that, previously to the trial, *William Bradbury*, *Esq.* was, by consent of the parties, appointed surveyor, to run lines, &c. and return a plan, which was done, — and the plaintiff asks that said plan be taken as a part of his bill. That it appears by the plan, that a line, before unknown to the plaintiff, was found, different from the one alleged by *Whitney* as the true line of the tract purchased, according to the new survey, which new survey *Whitney* said he helped make, — that said *Bradbury* discovered another line, marked on said plan, alleged, by said *Whitney*, to be the side line of said lot, and that referred to as running south-westerly

from said hemlock to said *Hogan pond.* That, after said verdict was set aside at the *Oct.* Term of said Court, A. D. 1831, it was proposed to the plaintiff, in order to end all controversy between the parties, that a person, disinterested, unprejudiced, having formed no previous opinion, be appointed by Court, to mark the boundaries of said lot No. 5, according to the new survey on the face of the earth, and ascertain, if any, what quantity of timber the said *Brown* and *Bolster* had cut, prior to the commencement of said action, without the boundaries which said surveyor should mark out and establish as the boundaries of lot No. 5, according to the new survey, extending the boundaries of said lot to *Hogan* pond, — that the plaintiff consented to the appointment, being equitably disposed, and relying on said *Whitney's* assertion, that he helped run the head line of said lot, discovered by said *Bradbury* as aforesaid, and supposing that the said line, running to *Hogan* pond, might be the side line of said lot, — that, said *Whitney* and the attorney of the plaintiff proposed *Uriah Holt, Esq.* for said appointment, and being persuaded by *Whitney* and the plaintiff's counsel, and "urged by the Court," the plaintiff consented, assured of said *Holt's* ability, integrity and impartiality. That said *Holt* undertook to act under his appointment, but to the plaintiff's astonishment and subversion of his rights, at the suggestion and under the influence and control of said *Whitney*, marked the head line of said lot in a place where no line was ever before run or marked, and no bounds or monuments indicating a line, and at a little distance from *Hogan* pond, thereby making a location of said lot totally different from any thing before pretended, giving but a small tract of land, upon which there was very little, if any, pine timber, (the great object of the plaintiff in purchasing) which tract so bounded, was and is nearly worthless, compared with the price paid — against the earnest remonstrances of the plaintiff, — that said *Holt* returned a plan of his doings, which, together with his doings, the plaintiff prays may be made a part of his Bill.

That, the defendants, and said *Whitney* and *Holt* combined to injure the plaintiff, to take his money without an equivalent, or else the defendants lending themselves to said *Whitney*, to take away the property of the plaintiff without an equivalent, deceiv-

ed the plaintiff, to induce him to give a great sum of money for what was of trifling, if of any value, in the following particulars:

1. In showing him an old line, running from said hemlock tree north-westerly to the *Hogan* pond, as one line of the tract which the plaintiff contracted to purchase.

2. In bringing an action of trespass against him, to recover damages for cutting timber on said land, after giving him express liberty so to cut.

3. Pretending and alleging that the lines, discovered and marked in *Bradbury's* plan, were the true lines of said tract, without intimating that there was any other actual or supposed lines or line of said tract, whereby the plaintiff was induced to agree to the appointment of a surveyor to locate said lot No. 5, new survey.

4. That said *Holt*, without the plaintiff's knowledge, previously to his appointment as surveyor, had been, by direction of said *Whitney*, acting as agent and attorney as aforesaid, taken unto said lines in company with *Whitney*, examined the same, and made up an opinion on the subject matter of his appointment, and this was well known to *Whitney*.

5. That said *Havens* and *Fosters*, through said *Whitney*, confederating with said *Holt*, to injure and defraud the plaintiff, caused *Holt* to locate said tract by metes, bounds and lines, where none existed before, or were supposed to exist by any one.

6. That the plaintiff never understood there was any denial that said hemlock tree was one corner of said tract, but that the only dispute was, whether the line should run north-westerly on said old line from the hemlock tree, or south-westerly from said tree, where was no line, to *Hogan pond*, — that, the question to be submitted to said *Holt*, was, whether the said tract should be located according to the old line, as shewn to the plaintiff when he made the contract, according to the line discovered and marked by said *Bradbury*, on his plan returned.

7. That the agreement to cause said tract to be located and marked by *Holt*, as executed by *Holt*, is inequitable, unconscionable, and ought not to be enforced.

8. That the plaintiff has ever tendered to *Whitney*, the defendants' Agent, the several payments for said land, as they fell

due and requested him to give up the notes given for said land, — but *Whitney* refused to accept the money, or give up the notes — that, the plaintiff has always been and is ready to pay up said notes and receive a deed of said land according to the true meaning of the bond.

The bill concludes with a prayer, that said *Haven*, *Fosters*, *Whitney* and *Holt*, may be summoned and held to answer in equity — that said *Haven* be compelled to disclose the amount due on said notes, to receive pay therefor and give the plaintiff a deed in conformity with the conditions of the bond — that they be enjoined against any further proceedings against the plaintiff in said suit — that the agreement to appoint *Holt* be annulled and his proceedings set aside — and that the said *Havens*, *Fosters*, *Whitney* and *Holt* be held to answer truly and definitely to all the matters alleged in the bill.

Whitney and *Holt*, two of the respondents, demur, because it appears by the bill that distinct and several causes are exhibited therein, which have no relation to a dependence upon each other, wherein these defendants have no interest, nor are in any way concerned, whereby these defendants are perplexed and unjustly put to expense and trouble. For which reasons and divers other errors and imperfections in said bill appearing, these defendants demur thereto and pray judgment, whether they shall be required to answer further, and that they be dismissed and for their costs.

Said *Whitney* also answers, that on the 7*th* of *August*, 1826, as agent of *Haven* and others, he contracted to sell said *Brown*, lot No. 5, 2d Range, in *Hebron*, new survey, — containing one hundred acres more or less — beginning at a certain hemlock tree — thence by a south-west course on the old line to *Hogan* pond — and thence by other courses described in said contract, to the beginning — which contract was delivered to said *Brown*, and which he prays he may be required to produce, to ascertain whether it is truly set forth in the bill, — that said *Whitney*, a long time then past, had some knowlege of the location and situation of said land, — but had not nor did he profess to have, any particular knowledge of the lines or corners of said lot No. 5 — but that said *Brown*, living near the same, did profess to know with certainty the boundaries thereof, — that *Brown* said he

wished to purchase No. 5, which *Whitney* agreed to sell him at $8 per acre — said lot No. 5, as originally located and surveyed, was the only subject of said contract. *Brown* told *Whitney*, that he well knew the bounds and conducted *Whitney* to said hemlock tree, declaring it the north-east corner of No. 5. *Whitney* replied, that if it were so, the course would be south-west from that tree to the pond — they accordingly marked the tree, *Whitney* relying wholly on the declarations of *Brown*, as he did not pretend to be well acquainted with the bounds, though he knew the lines ran south-west and north-east, and at right angles with the same — that he did not then, or at any other time, shew *Brown* any old or new line running nearly north-west, nor in any northerly or westerly direction from said tree as the line of said lot, nor was any such line spoken of between them as the line of said lot then, or at any time — the only line or course spoken of was, the old south-west line of said lot, which *Whitney* told *Brown*, and supposed, would probably be found in a south-west course from said tree to the pond, if said tree, as *Brown* represented, was the north-west corner.

That *Brown* did not inform *Whitney* how he expected to obtain the money to pay for the land, nor what were his inducements to purchase it, nor did *Whitney* ever give *Brown* license or consent to cut and take away the timber thereon, nor would he have been willing to sell *Brown* all the timber on the credit mentioned in the bond, or upon *Brown's* personal security — had such been his intent, he should have given a deed instead of a bond to convey the land.

That said *Brown*, as *Whitney* believes, with intent to defraud the owners of the land, after the execution of the bond, falsely pretended, that the line of the lot ran north-west from said tree, by some trees found marked, extending in a crooked line, by various courses, between north and west, towards the outlet of the pond, probably marked as a hunter's line, a wood road, or for some such private purpose, which would include nearly three times the quantity of land which *Brown* contracted for — and further falsely pretending that *Whitney* had shown him said north-west line as the true line of said lot, and that said *Brown*, or some other per-

son, by his procurement or connivance, altered or attempted to alter the word, "south-west," in said bond, into the word, "north-west," insisting it was originally written north-west, and not otherwise.

In farther execution of said wicked intent, said *Brown*, with one *David Bolster*, being admitted to a joint interest in the land, trespassed upon the lands of said obligors, as well beyond as within the limits of said pretended north-west line, and also within and beyond the true lines of lot No. 5, by cutting and carrying away the timber thereon, for which trespass the owners sued *Brown* and *Bolster* at law, the suit still pending for judgment in this Court, to the records and files whereof *Whitney* asks leave to refer. That before the commencement of the suit, *Whitney*, by his agent and attorney, remonstrated with *Brown* on the injustice of his pretended claim and conduct, requesting him to desist, and offered, if there were any mistake in the description of said lot in the bond, to make it correct according to the true bounds, as they might afterwards be discovered; and at all events to make up and convey to him the full complement of 100 acres: to which *Brown* refused to accede — saying he would have all the land within the "north-west line or none." *Brown* thus refusing to listen to any offers of accommodation, the owners were obliged to resort to law.

When *William Bradbury, Esq.* discovered and marked on the plan mentioned, a line running a north-west and south-east course and crossing between said hemlock tree and the pond; *Whitney* supposed it might be the true head line of the lot, but does not recollect that he asserted it was so. But *Brown* positively declared that he knew that it was not the line of said lot — that it only partially crossed the lot and that it was made for some private purpose. *Brown* made a like assertion relative to some marked trees extending in a south-westerly direction from said tree, for a few rods, but not standing near it, which trees *Whitney*, never to his recollection, asserted to be on the side line of the lot, though he thought them to be so, being deceived by *Brown's* false assertion that said hemlock tree was the corner.

That, at the *May Term* of this Court, A. D. 1832, and not at the *October Term*, as stated by *Brown*, said cause came on for

trial, when the plaintiffs renewed their overtures to *Brown* for a just and amicable compromise, again offering *Brown* a deed of 100 acres; which he refused, still insisting that the hemlock tree was the corner, that there was a line which was the true line of the lot referred to in the bond, extending west, or a little southerly of west, from said tree to the pond, and that he should succeed in establishing it at the trial. It was therefore proposed by one of the plaintiff's counsel, and assented to by *Whitney*, that a disinterested and competent surveyor be appointed to run out, ascertain, locate, mark, and establish the lines and bounds of the lot, (No. 5, 2d Division) and that the lot so ascertained should be taken and deemed to be the lot mentioned in said bond; and that the same surveyor should also ascertain the amount of damages, if any, done by *Brown* and *Bolster*, for their trespass aforesaid, beyond the limits of said lot so ascertained, for which amount judgment should be entered in said action. The proposition originated with the plaintiff's counsel aforesaid, not with *Whitney;* but made with his assent and was committed to writing, as is specially set forth in the same on file in said action. The proposal was taken out of the Court room by *Brown* and *Bolster*, and their counsel, and after being amended and interlined at their suggestion, was by them accepted. And this defendant says, that the counsel for *Haven & als.* being asked by the counsel for *Brown* and *Bolster*, to name a surveyor to perform the service, named *William Bradbury, Esq.* and urged his appointment, to which *Brown* and *Bolster* refused to assent; and they being then requested by the counsel of *Haven & als.* to name a surveyor, did of their own mere motion, nominate *Uriah Holt, Esq.*, to whose appointment, not without some objection, the counsel for *Haven & als.* assented: that said *Holt* was never nominated or proposed by him or by *Haven & als.* or their counsel, nor by any one else on their behalf, to his knowledge or belief, but by said *Brown* and *Bolster*, or their counsel, — that said *Holt*, never to his knowledge or belief, previously examined the boundaries of said lot, or formed any opinion respecting the same: that, once in the autumn of 1830, he went with *Whitney*, to find an old line, which, it was said, would be crossed by a course southwest from the hemlock tree, and for no other purpose than to

run said course, and assist in finding said line — without examining any thing else about said lot, or forming or expressing any opinion relative to the location of it, — that this is all the knowledge, as *Whitney* believes, said *Holt* had of said lot, previously to his appointment; nor did *Whitney*, then or at any time previous to *Holt's* appointment, make any representation as to the true location of said lot — the lines, &c. of the lot had been so differently represented by *Brown*, and by the plan taken in the cause, that *Whitney* was uncertain where they would be established; some persons supposed the lot did not extend to the pond — and *Brown* would not consent to the proposal aforesaid, unless *Whitney* would, at all events, grant him the land extending to the pond, whether it should fall within the limits of No. 5, or not, to which, unreasonable as it was, *Whitney* consented, and the agreement was interlined and altered accordingly; whereupon said *Holt* performed the service at the request of all the parties, made a report and plan now in Court, and referred to as part of this answer. This defendant further says, that he never by himself or agent, directly or indirectly attempted to influence or control said *Holt*, in any way relative to the performance of the duties of his appointment, except in the usual way of evidence and argument at an open hearing of both parties by him appointed, — that it was the mutual understanding of both parties, that the whole subject of the location of said lot should be left at large to said *Holt*, to decide absolutely between them, without regard to any thing other than what appeared in the agreement aforesaid, — that it was never intended that he should bound said lot by said hemlock tree, unless he should find it had been originally so located, — that this defendant never supposed said tree to be the corner, after *Bradbury's* survey and some time before, but he believes it was not, and that *Brown* wilfully deceived him therein; and solemnly avers, that to the best of his knowledge and belief, the location of said lot, as ascertained and reported by *Holt*, is the true, original, actual location of the same, — that said *Holt* was not influenced by any sinister motives in his doings, but acted uprightly, according to the true intent of said agreement, and upon legal evidence and in the exercise of sound and legal judgment and discretion. He further avers, that he never

wilfully misrepresented any fact respecting said lot to *Brown* or *Bolster* — nor used inducements or persuasions to them to enter into said agreement, other than the general motive of making an end of disputes, both as regards the trespass and the meaning of the bond.

That it was never understood between him and *Brown* and *Bolster*, nor had they reason to believe or understand that the only dispute between them was whether the true course was north-west or south-west from said hemlock tree, nor whether said lot was to be located by the lines shewn by said *Whitney*, or discovered by said *Bradbury* — nor does he believe *Brown* so understood, — on the contrary, said *Whitney* did not shew *Brown* any lines of the lot, and it was well understood between them, that the whole location of the lot, except the south-east side, was in dispute and uncertain; that *Holt* was to ascertain the same, and that they were to be bound by his location, fall where it might, without reference to any previous transactions.

That said *Brown*, at some time tendered money to him, professing thereby to comply with the conditions of said bond on his part, and coupling said tender with a demand of a deed of said lot, by a course north-west from said tree, as the condition of the payment so tendered; which he refused to receive because of the condition annexed to the tender, because of the illegal nature of the money tendered, and because it was not sufficient in amount — that, there is due from the obligees to the obligors, if they are obliged to receive it, the sum of $768,62, *March* 24, 1834, — that the price agreed to be paid by *Brown* for said lot, is reasonable and fair, — that *Brown* always professed to be well acquainted with its location and value, — that the agreement to refer said matter to said *Holt*, was equitable, reasonable and fair; as much for the benefit of *Brown* and *Bolster* as of the other parties, — that this defendant has no interest in the subject matter of the said contract or suit on the plaintiff's bill, — and he denies all conspiracy, confederacy, intent to deceive or injure, and unreasonable advantage wherewith he is charged in said bill — and prays to be hence dismissed with his reasonable costs.

Uriah Holt, one of the defendants, not waving his demurrer but insisting thereon, answers, that as to any matters stated in the

plaintiff's bill, to have been transacted between the plaintiff and *Wm. C. Whitney*, and as to the allegations therein, relative to the proceedings in the suit mentioned, before the time of his appointment as surveyor and referee therein, he knows nothing except from common report. That in the autumn of 1830, he was requested to meet *Whitney* at the new mills, so called, with his compass — which he did, and by *Whitney's* request went with him to said hemlock tree, and ran a course south-west from the same, to see if such course would cross a supposed old line between that tree and *Hogan* pond; and they found that it did. But *Holt* did not examine any other lines or boundaries, nor make any search for the lines or bounds of lot No. 5, nor was he informed by *Whitney* or any other person how the lot was bounded, nor did he ever form any opinion respecting it previous to his appointment aforesaid, that he supposed himself called upon merely in the exercise of his profession as a surveyor, to run the south-west line and assist in ascertaining whether it would cross any old line whatever, and when it was ascertained that it did, his service on that occasion was ended, — that he knew not what line it was, and was not called upon to explore it but returned home, never expecting to be again called upon in relation to the lot. That, this was the first and only time he was ever on the lot, till he went as referee, after notice to the parties, to ascertain the bounds of it. That, at the time of his appointment as referee, and of his entering on the duties of his appointment, he had not formed any opinion respecting the location of the lot, that he stood wholly unbiased, uninfluenced, and indifferent between the parties, — that, neither these defendants, nor any one else in their behalf, ever attempted, directly or indirectly, to influence his judgment, or affect his decision upon the matters submitted to him, other than by the evidence and arguments laid before him in the presence of *Brown*, and at an open hearing of the cause: that, in ascertaining the true location of the lot, he explored the whole neighboring region, lines and corners, over many lots on all sides of the same, exercised his best skill and judgment as a surveyor of many years experience, and decided wholly upon the evidence of his own senses, and upon such other evidence as the parties laid before him in the presence of each other, in the usual

and ordinary course of proceedings in such cases, without any prejudice or sinister influence whatever; that, he patiently heard all the evidence and arguments offered by either party, and carefully considered it — and that he verily believes he has ascertained and reported the bounds of the lot, according to the true original location.

And this defendant denies that he has any interest in the subject matter of the bill — and further denies all the conspiracy, &c.

Samuel Haven and *John Foster*, two of the defendants, demur to the plaintiff's bill, because *Wm. C. Whitney* and *Uriah Holt* are made defendants, who by the plaintiff's own shewing, have no interest in the subject matter thereof, but are material witnesses for these defendants, — and as to that part of the bill that relates to the action of trespass, these defendants demur, because it appears by the plaintiff's own shewing, that *David Bolster* is not a party to the bill, as he ought to have been in seeking relief against that suit. They further demur, because the bill is exhibited for distinct causes, which have no relation to, or dependence on each other, and which concern divers and distinct persons who have no common interest therein.

They further answering, say, that said *Whitney* was their agent in the management and sale of their lands in *Oxford* County, at the times mentioned in the bill, — that all the knowledge they have of the transaction, has been derived from *Whitney* and from their counsel, — that their instructions to *Whitney* went only to the general and faithful care of their interests, and a fair sale of their property, but were not of a character to make it the interest of *Whitney* to deal otherwise than justly and fairly with any person, or to deceive any one in the quality, quantity, or value of any portion of their lands, or to make a hard bargain for the same, nor had he any direction or intimation from them so to do, nor have they any reason to believe that he did so, — that said *Whitney* or *Holt* never had any interest in the bond, contract or suit mentioned in the bill.

These defendants further say, that they have been informed by *Whitney*, and verily believe, that he contracted in their behalf with *Brown*, to sell him lot No. 5, in the 2d Range, in *Hebron*,

according to the new survey, so called, — that *Whitney* entered into a written contract for the sale thereof, now in the hands of *Brown*, which they pray he may be required to produce, — that the conversation between *Whitney* and *Brown* was wholly of a sale of lot No. 5, however bounded, containing one hundred acres at $8 per acre, which *Brown* represented to be bounded as described originally in the bond, viz. by a course due south-west from the hemlock tree to the pond; that after the execution of the bond, *Brown*, or some other person, altered or attempted to alter the word "south-west" into the word "north-west," in order that *Brown* might seem to have purchased nearly three times the quantity of land bargained for, — that *Brown* pretended he had purchased by a line running north-west from the hemlock tree, which, in fact, was never agreed upon nor mentioned between him and *Whitney*.

They further answer, that they never, at any time, gave *Brown* liberty or license to enter said lot or any other of their lands, and cut and take timber therefrom, but that *Brown*, without license from either of these defendants, did enter upon the lands of these defendants and others, and cut and take away large quantities of timber growing thereon, for which he and one *David Bolster*, his co-trespasser, were sued in trespass, as to which suit and the proceedings therein, these defendants refer to the records of this Court. They further say, that after it was discovered that a south-west course from the hemlock tree would not give *Brown* one hundred acres of land, they were willing, at all times to make up to him, that quantity out of their adjoining lands, if he would have accepted the same, notwithstanding they were not bound so to do by the language of the bond, and by their agent repeatedly offered it, but *Brown* refused every such offer, unjustly insisting upon the north-west course aforesaid.

And they utterly deny all the conspiracy, confederacy, &c.

There was a mass of evidence confirmatory of, and adverse to, the bill and answers, which, perhaps, is sufficiently noticed in the opinion of the Court.

Fessenden and *Daveis*, for the plaintiff, claimed to have *Holt's* report set aside, because, 1. he had no power to make a *new* line

for lot No. 5. He was to locate the lot according to a *new survey*, but he had no power to make a new line.

2. Because the plaintiff was under an entire misapprehension as to the terms of the agreement under which *Holt* run out the lot. They adverted to the proof in the case to show it, and claimed relief on the ground of *mistake*. 1 *Mad. Ch.* 75, 78, 296; *Jeremy's Eq.* 494; *Brown* v. *Brown*, 1 *Vern.* 157; *Morgan* v. *Mather*, 2 *Ves. Jr.* 15; 2 *B. & B.* 120; 6 *Ves.* 337; 1 *Ves.* 318; 2 *Atk.* 33, 203; 2 *P. Will.* 70; *Jeremy's Eq.* 255, 384, 456; 1 *Mad.* 255; 1 *Chit. Gen. Pr.* 833; *Newland on Con.* 156, 213, 214 to 227; 2 *Dow & Clark*, 463.

Greenleaf, for the defendants, cited the following authorities: *Coop. Eq.* 20, 42; *Mitford's Pl.* 12, 45; *Plummer* v. *May*, 1 *Ves.* 426; 2 *Johns. Ch.* 550; 1 *P. Will.* 596; 1 *Johns. Ch.* 246; 6 *Johns. Ch.* 201; 2 *Cowan's Rep.* 139; 2 *Mad.* 416; 7 *Ves.* 287; 1 *Johns. Ch.* 73; 2 *Stark. Ev.* 766; 1 *Johns. Rep.* 576; 2 *Atk.* 228; 1 *Vern.* 230.

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

William C. Whitney and *Uriah Holt* demur to the plaintiff's bill, because several independent causes are alleged therein, in which they aver they have no interest or concern. But *Whitney* is charged in the bill with being concerned in all the causes assigned; and *Holt* is charged with having combined and confederated with the others to defraud the plaintiff, in relation to the subject matter of the controversy. How far these allegations may be sustained, is not a question upon demurrer. But if sustained, they are sufficient to justify the insertion of these defendants as parties. Relief may be had distributively, as the equity of the case may require, according to the gravamen made out against the defendants.

Samuel Haven and *John Foster* demur, because *Whitney* and *Holt* were made parties, which we hold justified for the reasons before stated; and because *Bolster* was not made a party. As however he was but the servant of *Brown*, and not otherwise interested, we think his omission cannot prejudice the defendants. They further demur, because the bill is exhibited for distinct

causes, which have no relation to, or dependance on each other, and which concern divers and distinct persons, who have no common interest therein. But it appears to us, that the specifications in the bill have relation to one subject matter, in which matter all the defendants are alleged to have been combined and concerned, to the prejudice of the plaintiff. We adjudge the causes of demurrer to be insufficient; and the demurrers are accordingly overruled.

Proceeding to the consideration of the bill, answers and proof, we are of opinion that the plaintiff has failed to sustain his bill against *Holt*; who is discharged and allowed costs.

The testimony of *Holt* and *Whitney* is objected to as witnesses, at least without the previous order of a Judge; and upon this point several authorities have been cited. As, however, their testimony does not affect the case, in the view we have taken of it, we deem it of no importance to decide upon its admissibility.

From the bill, answers and evidence before us, it may be important to determine, if we may, what tract of land *Haven & als.* through their agent *Whitney*, intended to sell to the plaintiff, and what tract he intended or expected to purchase. And this does not appear to us to be a question of very great difficulty, notwithstanding the conflict in the testimony, and the discrepancy between the bill, and the answer of *Whitney*, as to some of the facts.

He insists, that he doubted whether the hemlock tree was the true corner of the lot, and that it was marked as such, and adopted in the bond, from the assurance of the plaintiff that it was so. The course thence to *Hogan* pond has been in controversy — a question having been raised as to the true reading of the bond, in describing this line. But as to how far the tract was to extend in other directions, the bond is express; and there does not appear to have been any misunderstanding between the parties; whether they can be reconciled or not, with another part of the description.

The land was to run to *Hogan* pond. It was to run thence, on *Samuel Brown's* line, to *Simon Staples'* land. It is not pretended, nor is there any evidence, that *Whitney* was led into any error by the plaintiff, in this part of the description. The lot

agreed to be sold them, was to run from *Hogan* pond to *Staples'* land. It is also described, as lot number five, in the second range, according to the new survey. Both parties supposed that this would coincide with the other boundaries given. *Staples'* land was one of the pigeon hill lots. The parties then must have supposed, that the line of these lots was the head line of number five in the second range. There is reason to believe, however, from the survey made by *Holt*, and other evidence in the case, that the head line of lot number five, in the first range, bounds on the pigeon hill lots. And *Samuel Brown's* land runs through the first and second ranges.

The cause of the error, into which both parties fell, undoubtedly was, that the line between the first and second ranges, in that neighborhood, not having been marked, number five, in the second range, was supposed to run to the pigeon hill lots. Hence the lot was to run to *Staples'* land, which was one of those lots. With this impression, it is very clear, that there was a mistake in selecting the hemlock tree as the north-east corner; for a south-west course thence to the pond, would pass about through the centre of number five, in the second range. It was in the line of the pigeon hill lots; but was not so far north as the side line of five, in the first range, which was an extension of the side line of five, in the second range. Where that line, namely, the north line of number five in the second range, extended, would strike the line of the pigeon hill lots, was the true north-east corner of the tract, which the one party intended to sell, and the other to purchase. For there is no doubt as to the width of number five, at the pond, and the line thence was to be continuous, running a north-east course.

The foregoing deduction, as to the intention of the parties, is not opposed to the principle settled in *Elder* v. *Elder*, 1 *Fairf.* 80, that parol testimony is not admissible, to vary the terms of a written contract, in equity, any more than at law. Parol testimony is admissible, to prove and locate the boundaries and monuments given in a deed, and these being proved in this case, an ambiguity, latent in the deed, became apparent; the description given not being found consistent with itself; so that the mistake

is satisfactorily proved, by an exception to the rule before cited, and which is as well settled as the rule itself.

The lot, as located by *Holt*, differs most essentially from the boundaries, given in the bond. The latter bounds upon *Samuel Brown's* lot, along his whole north line, to *Staples'* land. The former extends upon that line but about half the distance. The one runs to *Staples'* land, the other stops one hundred rods short of it. The one is bounded on *Hogan* pond, the other runs over and beyond it.

So strong was the impression that number five, in the second range, extended to *Staples'* land, that it was entertained, even after *Bradbury* made his survey, by order of the Court; and it was not discovered that it did not, until *Holt* had extensively explored the lines and surveys in that part of the country. It is then very apparent to us, that when the plaintiff agreed by his counsel, that *Holt* should locate, mark, and establish lot number five, in the second range, according to the new survey, and that the lot so established, should be taken as the lot mentioned in the bond of *Haven & als.* to him, he acted under a misapprehension, which has led to a result unexpected by both parties; and which does not accord with the justice of the case.

We are satisfied that the land agreed to be sold, as the parties intended, was to bound, the width of number five, in the second range, on *Hogan* pond, and to run thence, within the side lines of that lot extended, to the line of the pigeon hill lots, the whole being supposed to be five in the second range, the line between the first and second ranges not having been there marked, and neither party being aware that the new survey would result in a different location of that lot. The plaintiff in equity insists in his bill, as he did before in the trial at law, and when he claimed a deed of the other contracting party, that by the condition of the bond, the line of his purchase ran from the hemlock tree, a north-west, instead of a south-west course to *Hogan* pond; but we are of opinion, that south-west is the true reading of that course, in the condition of the bond; and there is, in our judgment, no satisfactory proof, that north-west was the course intended.

Whitney, the agent of *Haven & als.*, states that he considered himself bound to resist this assumption, which we deem unwarrantable, but that he was always ready to correct any mistake, and to do what is equitable and proper; and he has in their behalf expressed a desire, that the Court would intimate what, in their opinion, the equity of the case requires them to do, and they would conform to it. To meet this liberal proposition, which is all the plaintiff in equity can expect, or is entitled to, we do not hesitate to give the intimation desired, not as an order or decree in the case, but by way of recommendation, with a view to an arrangement between the parties. We are of opinion then, that the plaintiff in equity ought to pay to *Haven & als.* whatever remains unpaid of the sum of eight hundred dollars, which he agreed to pay, with interest, and that *Haven & als.* should thereupon convey to him, by a good and sufficient deed of warranty, all the land from *Hogan* pond to the line of the pigeon hill lots, which would be embraced by an extension of the side lines of number five, in the second range, eastward to the line of those lots. That it then be left to *Mr. Holt*, to determine, whether the plaintiff in equity, or any one under him, did before the action of trespass against him, cut any timber from the lands of *Haven & als.* without the bounds of the land last described, and if he did, to ascertain its value. That, thereupon, *Brown* and *Bolster* become defaulted in that action; and that judgment be rendered against them, for the amount thus ascertained, with costs. But if *Holt* find that no timber was thus cut, without the bounds described, that *Haven & als.* the plaintiffs in that action, become nonsuit, and the defendants be allowed their costs. That *Whitney*, as the agent of *Haven & als.* should have made himself better acquainted with the true description of the land he undertook to sell; and therefore, although not interested in the cause, is not entitled to receive costs.

The plaintiff in equity has made out a case calling for relief, yet having pertinaciously insisted upon more than he was entitled to, and having thus set up a claim, which the adverse party was constrained to resist, it does not present a case, in which costs upon this bill ought to be adjudged in his favor. If *Haven &*

als. are ready to adjust the controversy upon these terms, it is all the relief the plaintiff in equity can justly claim.

If they decline it, the Court are of opinion, that the plaintiff in equity is entitled to relief, upon the foregoing facts, by way of defence to any action brought against him; and will enjoin *Haven & als.* to consent to discharge the agreement, to refer to *Holt;* and if, at a further trial of the action at law, it should be proved that their agent gave a license to *Brown*, the plaintiff in equity, to cut timber from the land they agreed to sell him, will enjoin them from prosecuting him, or *Bolster*, who acted under him, as trespassers, for cutting on the land, between the side lines of number five, in the second range, extended easterly, from *Hogan* pond to the line of the pigeon hill lots.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF LINCOLN, MAY TERM, 1835.

HATHORNE *vs.* STINSON *& als.*

In the grant of a lot of land, it was bounded upon a certain pond — the water, at the time, being raised by artificial means above its natural level. Subsequently, on the obstructions being removed, and the consequent recession of the waters, two and a half acres, between the lines of the lot, became disencumbered and capable of tillage. *Held*, that the lot was not limited to the margin of the pond, as it was at the time of the grant, but that it embraced the two and a half acres.

A *license* to flow the land of another, is not to be presumed in favor of the mill owner, from an uninterrupted use by flowing for twenty years or more, where it appears that the owner of the land sustained *no damage* by such flowing.

A special Act of the Legislature, relieving mill owners from a statute obligation to keep a passage open for fish, four months in the year, was held not to affect their liability to the owners of land, for the increased injury to them by flowing.

THIS was a complaint against the defendants under the provisions of *stat.* of 1821, *ch.* 45, for flowing, by means of their dam, about two and a half acres of meadow, claimed by the plaintiff.

The defendants filed a brief statement, denying the plaintiff's seizin, and alleging their right to flow on various distinct grounds, such as a grant of the right to flow, from the common owners of lot No. 49 and of the defendant's mills — also a license.

The plaintiff proved his title to lot No. 49. The two and a half acres were a part of No. 49, if that extended to the margin of the waters of *Neguasset* pond, in its natural state. The location of this lot appeared on an ancient plan, which was used at

the trial, and by which the easterly end of the lot appeared to be bounded by the pond. There was evidence, tending to show that there was a mill and dam on the *Neguasset* stream, as early as 1730, which appeared to have been renewed from time to time, up to the period when this complaint was made. And there was evidence, tending to show, that when the original survey and plan were made, and also when lot No. 49 was granted by the Propriety, the two and a half acres were covered by the waters of the pond. Whereupon, the counsel for the defendants requested the Chief Justice, who tried the cause, to instruct the jury that the owner of No. 49 was restricted to the margin of the water as it then existed, but he declined so to do, instructing them that the plaintiff had proved his seizin in the land, alleged to have been flowed.

It appeared that these two and a half acres were first brought into cultivation about the year 1790 — prior to which time they remained in a state of nature — overgrown with bushes and affording no profit. The defendants' counsel requested the Judge to instruct the jury, that if they should find that the dam complained of was generally kept up to such a height, as to flow the two and a half acres, from the year 1730 or 1760 to the year 1789, without any complaint on the part of the owners of lot 49, it furnished a legal presumption that the owners of the dam had a license thus to flow, and that such license was irrevocable. But the Judge instructed the jury, that the land being in a state of nature and affording no profit, and the owners, therefore, sustaining no damage, their forbearing to complain or to pursue any remedy against the owners of the dam, was no evidence that they had licensed such owners thus to flow.

It appeared that lot No. 37, which was upon the eastern side of the *Neguasset* stream, were drawn and granted on the same day, and it was contended for the defendants, that 37 being earlier in the series, must be taken to have been granted first, and that it embraced the eastern side of the stream, where the dam was, and therefore justified the flowing without the payment of the damages; but the Court ruled otherwise.

It appeared that in 1788, the legislature required, that from *May* to *September*, a passage should be kept open in the dam for

fish, and there was evidence, tending to show that the productive value of the land in question, depended upon the state of things growing out of this regulation. In 1828, by an act of the legislature, the owners of the dam were relieved from this obligation, whereupon the land became less productive. And it was contended by the defendants' counsel, that they were not answerable for damage thus occasioned, but the Court ruled otherwise.

The defendants' counsel offered in evidence, to prove the existence of a mill or mills and a dam at *Neguasset*, *Hubbard's History of the Indian Wars*, and *Sullivan's History of Maine*, but they were rejected by the Court, as incompetent evidence of the existence of the mill or dam at the time therein stated.

A verdict was returned for the complainant, which was to stand, if the ruling of the presiding Judge was correct, and further proceedings had according to law; otherwise it was to be set aside and a new trial granted.

Allen and *Sprague*, for the defendants.

1. At the time of the original grant of lot No. 49, and at the time of the making of the plan, the pond covered the two and a half acres, and they were therefore not granted. That grant is not affected by the Ordinance of 1641. Here was no high and low water mark, and that ordinance was intended to apply to tide waters only. *Storer* v. *Freeman*, 6 *Mass.* 435. The plaintiff could not claim this two and a half acres by the common law, on the ground of going to the thread of the stream. That principle will not apply to ponds and lakes in this country, and it has never been so extended.

2. The keeping up of the dam from 1730 to 1789, was evidence of a *license*. If it be said that there was no damage to the owner of the land, the reply is, that if the drawing off of the water would have rendered the land productive, the keeping it flowed was a damage, for which the plaintiffs might have complained. Preventing it from becoming productive, was as much a damage as destroying it after it became so.

3. No. 37, where the mill is, was first granted. Because the vote was first passed — and because earlier in the series. Admitting they were both on the same day, still the votes operate

like deeds. If there were two deeds, and one was delivered before the other, it would vest rights which could not be impaired by the second deed. This is not like a case of a deed and mortgage, which as between the parties may be regarded as one transaction; but here were two grantees having no privity or connexion whatever.

4. The land having been productive by operation of the Fish Laws, and not by any labor of the plaintiff, he is not entitled to the benefit thus acquired, any longer than those laws continue. When those laws were repealed, both parties were restored to the same rights and privileges enjoyed when they were enacted. If the plaintiff could not have maintained a complaint in 1788, against the mill owners, for keeping the water up and thereby preventing the land from becoming productive, he cannot do so now, after it has become so. And he could not have complained in 1788, after a lapse of 58 years, during all which time he was deprived of the use of this land. The legal presumption is, that he would not have thus omitted to complain, or rather the owners of the lot, unless compelled to, either in consequence of having granted the right of flowing by deed or by license, the evidence which is now lost by lapse of time and accident.

Bailey and *Mitchell*, for the complainant, argued in opposition to the positions assumed on the other side, and cited the following authorities: *Graves* v. *Fisher*, 5 *Greenl.* 69; 5 *Wend.* 483; *Storer* v. *Freeman*, 6 *Mass.* 435; *Lapish* v. *Bangor Bank*, 8 *Greenl.* 85; 1 *Cranch*, 24; 2 *Cranch*, 67; 8 *Johns. R.* 94; 3 *Kent's Com.* 427.

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

Parris J. — The law now arising in this case is to be applied to a very different state of facts from that which appeared in the case when before us in 1833. 1 *Fairf.* 224.

It is contended, that the complainant had no title to the land flowed, because that was covered with water, at the time of the conveyance from the common proprietors of the whole tract. We do not think the grant is to be thus limited. If the *Neguasset* pond was a large pond or lake, and had not been raised by

artificial causes, we might view this point differently. But even then much difficulty would result from the principle that all proprietors of land bordering on lakes are to be limited to the margin of the water, as it existed when the lands were originally granted by the public, perhaps a century ago; and that whatever may have since been reclaimed by a recession of the water, is to be considered no part of the grant. We are not now called upon to decide such a case. *Neguasset* pond, as it is called, in its natural state, never covered any part of the two and a half acres, which the complainant claims as his property. That pond is naturally a small accumulation of water, of considerable length, but opposite lot numbered 49, is, in width not more than half the length of the lot, as delineated on *Johnson's* original plan, taken in 1740. We have no boundaries given of lot 49, except as they appear on the plan. By this the eastern end of the lot is represented as bounded on the pond. We think the eastern limits of the lot were not so restricted by the margin of the pond, as it then existed, raised as it was by artificial means, as to exclude the two and a half acres from the lot, — but that when the water receded in 1789, by reason of the removal of the artificial obstructions, the complainant had a right to the soil thus disencumbered, as constituting a part of lot 49.

In 1790, this tract of two and a half acres was brought under cultivation by the complainant, and he continued to occupy it, as a part of his farm, until 1828, a period of thirty-eight years, which, by our statute would be a bar to any action that could be brought to recover possession, either by the original proprietors or their heirs. Thus the first question raised in the case is disposed of.

The Judge was requested to charge the jury, that, "if they should find that the dam complained of was generally kept up to such a height as to flow the two and an half acres from 1730, or 1760 to 1789 without any complaint on the part of the owners of lot 49, it furnished a legal presumption that the owners of the dam had a license thus to flow." If the owner of lot 49 sustained any injury or damage by the flowing, perhaps the uninterrupted continuance of that injury for twenty years and upwards, by the mill owner, and an acquiescence by the owner of the land

flowed and injured for that length of time, might be considered as evidence of a license. Upon this point we give no opinion, but refer to our former remarks in this case, 1 *Fairf.* 239.

But if the owner of the land sustained no damage by the flowing, then his acquiescence ought not to be construed into an admission of right, or taken as evidence against him, either of grant or license. Generally, when one encroaches upon the inheritance of another, the law gives a right of action, and even if no actual damages are proved the action will be sustained, and nominal damages recovered; because, unless this could be done, the encroachments acquiesced in, might ripen into a legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title.

But in the case of flowing, the owner of the land flowed can maintain no process unless he has sustained damages in his lands by their being flowed. *Stat. Chap.* 45, *Sect.* 2.—In *Stowell* v. *Flagg*, 11 *Mass.* 364, the court say, "the process is given only to those who have actually suffered damage." In the same case it is decided, that by the statute of 1795, *chap.* 74, for the support and regulation of mills, of which our statute is substantially a transcript, the common law remedy by action for the owners of lands for damage done by overflowing the lands by means of a mill dam lawfully erected, is taken away, and the only remedy in such case is by complaint pursuant to the provisions of the statute. A statute providing for similar objects was passed by the Provincial Government in 1714. *Province Laws, Chap.* 111. The concluding paragraph of this statute, provides, "if the jury find no damage for the complainant, then he or they to be at the cost of the jury, as shall be allowed by the justices of said court."

If, therefore, the common law right to maintain an action against the mill owner for flowing his neighbor's land, is taken away by the statute, and if the statute affords no remedy except in those cases where damages have been actually sustained, the continuing to flow under such circumstances ought not to prejudice the title of the owner of the land thus flowed. His hands are tied. He can neither resort to his action at common law, nor to process under the statute. The mill owner can flow in perfect security without license and free from all liability to legal

process; and so long as he can do this, no grant or license is to be presumed in his favor.

Such was the situation of the owner of this mill from the time of its first erection until the complainant "actually suffered damage." If he suffered no damage until 1789, he had nothing to complain of for which the law would afford him any remedy, and consequently, his omitting to complain subjects him to no legal disability.

It is entirely immaterial whether lot 37, or lot 49, was drawn first, as it is manifest from *Johnson's* plan of the original survey that lot 37, did not include the mill site.

But were it material, the book of records of the proprietors in common, shows conclusively that lot 49, was first drawn, and consequently the argument which was raised, and upon which we gave an opinion, in 1 *Fairf.* that the grant of a mill gave the right to flow the grantor's land, as flowed at the time of the grant, is not sustained by the facts. The facts show that the land flowed was first granted the grantor retaining the mill.

We do not perceive how the special Act of the Legislature of 1828, gave the mill owners any rights against the complainant. It relieved them from the obligation, under which they had been placed by the act of 1788 for public accommodation, but it clothed them with no rights against the owners of the land which they might overflow by reinstating their dam.

So far as it regarded private injuries the special law of 1828 had no operation. The complainant's land had then been under productive improvement for nearly forty years, and if the mill owners found it for their interest so to flow as to interrupt and destroy that improvement there is no principle either of law or equity which gives them the right of so doing, without paying the damages.

From the view which we have taken of this case, the rejection of *Hubbard's* History of the *Indian* wars, and *Sullivan's* History of Maine, offered as evidence of the existence of the mill and dam, becomes immaterial.

The verdict must stand and such further proceedings will be had in the case, as the statute provides.

CROCKETT *vs.* DODGE *& als.*

In the case of a voluntary sacrifice of a cargo of lime, for the preservation of the vessel, by scuttling her, the Court held, that the owners of the cargo had no claim against the owners of the ship for contribution upon the principle of general average, if at the time of the sacrifice of the cargo *there was no possibility of saving it.*

THIS was an action of *assumpsit*, in which the plaintiff claimed contribution of the defendants, upon the ground of general average, alleging that he had a quantity of lime on board the defendant's schooner *Rambler*, and that the same was sacrificed for the preservation of the vessel. The general issue was pleaded and joined.

It appeared in evidence, that in May, 1831, the defendants' schooner *Rambler*, was lying at a wharf in *East Thomaston*, taking in a cargo of lime for the plaintiff, and before she was fully laden, the lime on board took fire. The vessel was thereupon closed up, according to the usual course upon such occasions, in order to deaden and extinguish the fire. The two days following, the vessel was opened and a part of the lime saved, and the sails and rigging were also taken from her; but on the third day she was hauled off from the wharf and scuttled, by which the lime became of no value, and the vessel was preserved.

The counsel for the defendants requested the Court to instruct the jury, 1. That the plaintiff had no claim if the lime could not, when the vessel was scuttled, by any means possibly have been saved. 2. That if the lime in its condition and situation at that time was of no value, the plaintiff was not entitled to contribution. Intending to reserve these questions for the whole Court, the presiding Judge withheld these instructions.

The counsel for the defendants further requested the Judge to instruct the jury, that if the sails, rigging and furniture did not owe their preservation to the destruction of the lime, they were not to contribute to repair the loss — which request was complied with. 4. That, the damage to the vessel by the fire so far as it was occasioned by opening her to preserve the lime, entitled the *defendants* to contribution. The Court did not give this instruc-

tion, but stated to the jury, that for the damage to the vessel, occasioned by scuttling, the defendants were entitled to contribution.

The court instructed the jury further, that if the destruction of the lime was the foreseen and inevitable consequence of the scuttling of the vessel, and that if by this sacrifice, the safety of the vessel was purchased, the owners of the lime had a claim for contribution, upon the principles of general average, but that its value must be estimated, as if in safety in its deteriorated state. That, the value of the vessel, deducting therefrom the deterioration caused by the fire, and without estimating the sails and rigging which had been previously removed, and the value of the cargo, as it was, if in a place and condition of safety, was to contribute to the loss to the owners of the cargo, occasioned by scuttling and sinking the vessel, and to the loss arising to the owners from that act.

A verdict was returned by the jury, for the plaintiff, in conformity to these instructions which was to stand, be amended, or set aside according to the opinion of the Court upon the whole case.

Sprague and *J. S. Abbott*, for the defendants, argued in support of the positions taken at the trial, and cited the following authorities: *Stevens and Benecke, (Phil. ed.)* 67, 96, 99; *Nickerson* v. *Tyson*, 8 *Mass.* 467; *Abbott on Shipping*, 349, *n.* 1.; *Bradhurst* v. *Col. Ins. Co.* 9 *Johns.* 9.

Allen, for the plaintiff, cited *Phil. Ins.* 337; *Park's Ins.* 145; *Molloy, tit. Average*, sec. 15; 2 *Poth.* 128, 414; *Hall's Rep.* 442; 1 *Caine's Rep.* 214.

Weston C. J. — A measure was in this case deliberately taken, by which the vessel was preserved. That measure was necessarily attended with the certain destruction of the plaintiff's lime. It may then be assumed that the sacrifice of that, was the price of the safety of the vessel. Had the lime thus sacrificed any value? If it had, the plaintiff is entitled to contribution, upon the principles of general average. *Benecke on average*, 110, *Phillips'* edition, lays down the law to be, that if but for the voluntary destruction of part, the whole would certainly and unavoidably have been lost, no claim for contribution could be

sustained; because a thing cannot be said to have been sacrificed, which had already ceased to be of any value. But if there be a possibility of saving the ship and cargo, and the master deliberately resorts to this measure, because he thinks it more prudent to sacrifice a part, it is a case for general average.

If the lime, in the condition in which it then was, could by no possibility be saved it was of no value, and the owner lost nothing by the course pursued. The possibility of preservation is generally to be presumed. The impossibility of saving that, which had been destroyed, it may in most cases be difficult to establish by proof, yet, unless it be made to appear to the satisfaction of a jury, the claim of contribution, which is a favored one, is to be sustained. Where the peril admits of a selection, and the part destroyed might have been saved by the sacrifice of the part preserved, it is a case for contribution; for the part sacrificed might have been selected for preservation. *Benecke* cites no authority in support of the rule before stated, but it is based upon the principle upon which general average is founded, which is, that something valuable is sacrificed for the safety of what remains.

It is remarkable that among a people so highly commercial as the English, very few judicial decisions on general average can be found. *Abbot*, afterwards *Lord Tenderden*, in his learned treatise on merchant ships and seamen, 327, says, "the determination of English courts of justice, furnish less authority on this subject, than on any other branch of maritime law, there being only three reported cases of questions between the parties liable to contibution in the first instance, and very few questions between the party so liable and the insurer, from whom indemnity has been sought." Nor has the question been often the subject of judicial investigation in this country. Two such cases only have been cited in the argument. The one was in *New-York*, *Bradhurst* v. *The Col. Ins. Co.* 9 *John.* 9. There a ship in a case of extremity was run on shore. The ship was lost, but the cargo saved. It was held not to be a case of general average. The ship was not voluntarily sacrificed to preserve the cargo, but in a case of extreme peril, she was run on shore, as a measure by which it was hoped that both might be preserved. The other is *Nicker-*

son v. *Tyson*, 8 *Mass.* 467. There the bowsprit, masts and yards of a vessel, and the rigging and sails attached thereto, having been suddenly carried away, without the agency of the captain or crew, by the violence of the wind, but remained in the sea, attached to the vessel by some of the rigging. And the ends of the masts and bowsprit, beating at times against the bow and sides, it was determined by the master and crew, for the preservation of the vessel and cargo, to free them from the vessel. The court held, that at the utmost, all the owners of the vessel could claim, would be a contribution proportioned to their value, when thus hanging by her side.

We are of opinion, that if in this case there was no possibility of saving the plaintiff's lime, he has no claim for contribution. Upon this question the jury have not passed, and there must be a new trial, that it may be settled.

If the jury should be of opinion, that there was a possibility that the lime might have been saved, we are satisfied with the correctness of the principles, upon which the plaintiff's claim for contribution was settled at the former trial.

New trial granted.

TRUE *vs.* HARDING.

Where the plaintiff loaned money to A. B. at the request of the defendant, taking A. B's note for the amount, payable in two years, and the following special agreement of the defendant on the back of the note, *viz :* "I agree to secure the within note to H. T. out of or with a deed of a piece of land and water privilege situated," &c., "given to the said [defendant] by E. H." [maker of the note] — it was holden that this constituted a guaranty — and that the defendant was not entitled to *notice* of non-payment.

A writing, not under seal, signed by the heirs of the guarantor after his decease, the plaintiff being one of them, purporting to release a portion of the estate to one of the heirs, reserving enough to pay the note aforesaid, was held not to be proof of a *payment* of the note, or *satisfaction* of the liability aforesaid of the guarantor.

THIS was an action of *assumpsit* against the defendant as administrator on the estate of *Amos Barrett*, and was founded upon the following special agreement of the defendant's intestate,

written on the back of a note for $200, given by *Ebenezer H. Barrett* to the plaintiff and payable in two years from the 4th day of *July*, 1828.

"I agree to secure the within note to *Rev. Henry True*, out "of or with a deed of a piece of land and water privilege, sit- "uated in *Camden*, given to said *Amos* by *E. H. Barrett* of "*Camden*."

The plaintiff proved by *Ebenezer H. Barrett*, though objected to by the defendant, that the consideration for the above promise or agreement, was the loaning of two hundred dollars, by the plaintiff, to the witness, at the request of the defendant's intestate; and that the money was expended in erecting a paper mill on the land named in said special agreement.

It was admitted that the defendant's intestate died in 1829, and that the plaintiff demanded of the defendant, in the spring of 1832, payment or security, according to the terms of the agreement.

The defendant then introduced the following agreement in writing, which he relied upon as proof of payment, *viz.*: "In "consideration of a division of real estate of the late *Amos Bar-* "*rett*, deceased, among the heirs, and of mutual releases of the "same, we agree to release and quit-claim to *Ebenezer H. Bar-* "*rett*, an undivided part of the paper mill at *Camden*, to the "value of nineteen hundred dollars, according to the original cost, "on demand. Reserving sufficient of said mill to pay *H. True's* "note.

"*Henry True.*
"*Amos Barrett.*
"*D. F. Harding.*

"*Dec.* 27, 1830."

The defendant also contended, that there should have been a regular demand and notice on the day the note fell due.

On both points the presiding Judge ruled against the defendant, and he was thereupon defaulted. If, in the opinion of the whole Court, this ruling was correct, the default was to stand, otherwise to be taken off and a new trial granted.

Harding, for the defendant, argued in support of the positions taken at the trial, citing *Read* v. *Cutts*, 7 *Greenl.* 190.

Abbott, for the plaintiff, also cited and relied on the case of *Read* v. *Cutts*.

WESTON C. J. — The consideration for the promise declared on, was the loan of the money to *Ebenezer H. Barrett*. The note itself shows that it was given, upon value received. As the promise of the intestate was made at the same time with the promise to the principal, it was supported and sustained by the same consideration. *Leonard* v. *Vanderburg*, 8 *Johns.* 38; *Dearborn* v. *Parks*, 5 *Greenl.* 81. The intestate promised to secure the note, which was given for money loaned at his request, and appropriated towards the erection of a building, the legal title of which was in him. To secure, is a term equally as strong, as if he had engaged to guaranty, and must be understood to have the same meaning. A promise to secure the note is a stipulation, that it should be paid, according to its tenor and effect. The guarantor knew the amount of the note, and when it was payable. He had undertaken to secure it, and had thereby engaged, that the principal should pay it, or that he would pay it himself. No notice from the plaintiff was necessary. *Norton* v. *Eastman*, 4 *Greenl.* 521; *Allen* v. *Brightman*, 20 *Johns.* 365; *Boyd* v. *Cleaveland*, 4 *Pick.* 525; *Read* v. *Cutts*, 7 *Greenl.* 186.

The intestate promised to secure the note, by and with certain real estate, of which he was the legal owner. This he was bound to fulfil; or failing to do so, an obligation would rest upon him to pay the stipulated amount in money. If a party contract to pay a certain sum, at a time limited, in property specified, either real or personal, if he would avail himself of the privilege of so paying, he must take care to do it, or tender performance at the time. It is true, the intestate deceased, before the maturity of the note; but that did not discharge his estate, or his representative, from the obligation he had assumed to the plaintiff. And as payment has not been made, an action may be maintained against the defendant for the amount of the note.

The written evidence introduced by the defendant, showing that there had been a division of the real estate of the intestate among his heirs, of whom the wife of the plaintiff was one, did not prove that the plaintiff had been paid. It appeared thereby,

that a part of the estate, referred to in the guaranty, was left undivided, and reserved for this purpose; but it has not been so applied, and still remains the property of the heirs.

Judgment for the plaintiff.

BAILEY *Judge of Probate, &c. vs.* SMITH *& al. Ex'rs.*

A writ returnable to the *Supreme Judicial Court*, bearing the seal of the *Court of Common Pleas*, was quashed on motion of the defendant, though made at a term long subsequent to the return term.

The seal is matter of substance and not amendable.

THE writ in this case was entered at the *May* term of this Court, 1830, and was made upon a Common Pleas blank, having the seal of that court impressed thereon.

At the *September* term, 1834, the defendant moved, that the writ be quashed for the want of a seal, and the plaintiff moved for leave to amend by affixing the seal of this Court.

F. Allen, for the plaintiff, contended, that it was now *too late* for the defendant to make this motion. It should have been done at the return term. By not insisting on the objection then, he may be considered as *waiving* it.

At all events, it is matter of form and so amendable. *Ripley* v. *Warren*, 2 *Pick.* 592; *Maine Stat. ch.* 59, § 16; *Sawyer* v. *Baker*, 3 *Greenl.* 29.

Farley, for the defendants, cited *Hall* v. *Jones*, 9 *Pick.* 446.

WESTON C. J.—This Court has its seal; so has the Common Pleas. They are in the keeping of the proper officer, to be used in the authentication of process, and other public papers, to which they are to be applied. The process of each Court is by law to be under its own seal; and the impression is not here a mere matter of form. A seal has been adopted by this Court, with appropriate devices. It gives additional solemnity to the papers, to which it is affixed, and renders it more difficult to forge or counterfeit them.

It has been decided by this Court, in *Sawyer* v. *Baker*, 3 *Greenl.* 29, that if the clerk omit to affix the seal of the Court

to an execution, it may be amended, even after the execution has been extended on lands, and the extent recorded. But that was a judicial writ; and the amendment was allowed upon authorities applicable to that kind of process.

In *Hall* v. *Jones*, 9 *Pick.* 446, where an original writ, like the one before us, had the seal of the Common Pleas, instead of that of the Supreme Court, to which it was returnable, the plaintiff moved that the writ should be amended by affixing the proper seal; but the Court decided that it could not be done. It is true, that in *Massachusetts*, their constitution has provided, that such process should be under the seal of the court from which it issued. But the act of the legislature, under their constitutional powers, is equally binding upon us, with the provisions of the constitution. It is only where they conflict, that the latter has paramount authority.

Upon the whole, we regard the seal matter of substance, and the process being an original writ, not amendable. We regret that the defect was not pointed out at an earlier stage of the proceedings; but we are not satisfied that it is now too late to take the objection. It is insisted that it ought to be held to have been waived by the defendants. If the requisition, in regard to the proper seal, had been to secure an advantage to them, as the provision that a writ shall have an indorser does, the ground of waiver would more properly apply. We do not abate the process so much for the sake of the defendants, as because the plaintiff has departed from a substantial requirement of law of a public nature, in bringing his action.

Writ abated.

COGSWELL & *al. vs.* REED & *al.*

A division of the real estate of an intestate among the heirs, by commissioners appointed by the Court of Probate, is not effectual and binding, if it has not been returned to, and accepted by, said Court; nor, will an heir be *estopped* to claim his undivided share in the whole estate, by an acquiescence of eight years in such division, and a conveyance to a stranger, of the share assigned to himself.

THIS was an action of trespass for breaking and entering the plaintiff's close, and cutting down and carrying away a large number of trees. There was also a count *de bonis asportatis.*

The defendants, *Benjamin Reed* and *Samuel D. Reed*, pleaded separately; and claimed title to the *locus in quo* as heirs at law of *Eliphalet D. Reed*, deceased, intestate.

The plaintiffs shew conveyances of the *locus in quo* from three of the heirs of the said *Eliphalet Reed*, including *Benjamin Reed*, one of the defendants, describing said shares by metes and bounds.

The plaintiffs also offered to prove that the heirs of said *Eliphalet* had, ever since the year 1823, occupied their respective shares, according to a division and report of a committee, which had not been returned to, and accepted by, the Judge of Probate. That said *Samuel* had conveyed his own share by metes and bounds conforming to the division aforesaid, and had bought trees of *Benjamin*, cut upon the *locus in quo;* and several other acts of said *Samuel* and the other heirs, indicating their acquiescence in said division.

As to *Benjamin Reed*, the Chief Justice ruled, that he was *estopped* by his deed to deny the title of the plaintiffs.

He also ruled, that the evidence offered did not make out a case against *Samuel* — that the report of the division never having been accepted and recorded, was not effectual to divest the title of *Samuel* to his share in the *locus in quo*, and directed the jury to return a verdict of acquital as to him, which was accordingly done.

If this ruling was erroneous the verdict was to be set aside and a new trial granted; otherwise, judgment was to be rendered thereon.

Bulfinch, for the plaintiffs, contended that *both* defendants were *estopped*.

1. If the provisions of the statute have not been in all respects complied with, in the division of the estate of *E. Reed*, yet the appointment of a committee on the petition of *S. D. Reed & als.* and his subsequent ratification of their doings, might, for the purposes of justice, have the effect and operation of a submission and award; which, though it might not operate as a *conveyance*, would estop a party from setting up a title against the award. *Kyd on Awards*, 63.

2. The defendant, *S. D. Reed*, is estopped by his silence and submission to the division by the committee. *Danes' Abr. ch.* 160, *a.* 1, 26; *Fairbanks & al.* v. *Williamson*, 7 *Greenl.* 96; 1 *Stark. on Ev.* 305; 2 *Stark. Ev.* 24; *Farley* v. *Thompson*, 15 *Mass.* 18; *Chapman & al.* v. *Searle, Admin'r*, 3 *Pick.* 38.

3. He is estopped by his *acceptance* of the share assigned him by the committee. *Kyd on Awards*, 636; *Calhoun's Lessee* v. *Dunning*, 4 *Dallas*, 120; 4 *Johns. Rep.* 202; 9 *Johns. Rep.* 270; *Varnum* v. *Abbott*, 12 *Mass.* 476.

4. He is estopped by his own deed, conveying his share to *John Chapman*. 4 *Stark. Ev.* 30; 9 *Johns.* 92.

Allen, for the defendants, cited the following authorities, *Porter* v. *Perkins*, 5 *Mass.* 233; *Porter* v. *Hill*, 9 *Mass.* 34; *Porter* v. *Pitts*, 11 *Mass.* 125; *Bartlett* v. *Harlow*, 12 *Mass.* 348; *Baldwin* v. *Whiting*, 13 *Mass.* 60; *Keay* v. *Goodwin*, 16 *Mass.* 4; *Rising* v. *Stannard*, 17 *Mass.* 285; *Cutting* v. *Rockwood*, 2 *Pick.* 443; *Miller* v. *Miller*, 7 *Pick.* 133.

WESTON C. J.—The partition of the estate of *Eliphalet Reed*, father of the defendants, attempted under the authority of the court of probate, failed of being carried into effect. The return of the commissioners, if it was ever signed by them, never reached the probate office, and was never accepted or recorded. And although each of the heirs may have occupied under the partition contemplated, and some of them may have conveyed their supposed shares by metes and bounds; yet this would not have constituted a legal partition, or bind any but the grantors in such deeds; and that by way of estoppel. It is well settled

that a conveyance by one tenant in common by metes and bounds, is void against the co-tenants. The cases cited for the defendant, are express to this point.

The plaintiff offered to prove that the defendant, *Samuel D. Reed*, had conveyed by metes and bounds the share, supposed to have been or intended to be assigned to him, to one *Chapman*, by which it is insisted he is estopped. And he is so, as to *Chapman*, and those claiming under him. But the plaintiff is no party to that estoppel; nor is there any privity between him and *Chapman*. The conveyance to *Chapman* is void as to the other heirs. A parol partition, between tenants in common, which is void in law, cannot be made good by a conveyance by each, by deed of his several share, by metes and bounds. Such a course of proceedings is not justified, by any right of offset existing between the parties. Although Samuel may have conveyed to *Chapman* more than belonged to him, and may therefore have made himself liable upon his covenants, he is not thereby deprived of his interest, derived by inheritance, in the land claimed by the plaintiffs, which he has never legally parted with or conveyed.

He was then a tenant in common of the *locus in quo*, and no action of trespass, *quare clausum*, can lie against him for entering upon it. Being tenant in common of the land, he had an equal interest in the timber there standing and growing, or which may have been cut and felled thereon. At common law, each of the tenants in common has an equal right to the enjoyment of the common property. Nor will trespass lie by one against the other. As this right was liable to abuse, the statute of 1821, *c.* 35, *sec.* 2, has forbidden its exercise by any tenant in common, who has occasion to take to his own use any timber, stone, ore, or any other valuable matter from the land, without forty days previous notice in writing, to the other parties in interest. Failing to do so, he is made liable to treble damages, to be recovered in an action of trespass. The action before us is not under the statute, but at common law. And we are very clear that it cannot be maintained against *Samuel Reed*, a tenant in common, for appropriating to his own use some of the timber taken from the common land. The opinion of the Court is, that the jury were properly instructed at the trial, by the presiding Judge.

Judgment on the verdict.

HEWITT *vs.* LOVERING.

A. purchased a quantity of goods of B., and gave his bill on C., at thirty days for the amount, which was protested for non-acceptance. In an action by B. against C., to recover the price, A. was held to be incompetent as a witness for B. to prove that in making the purchase he acted as *the agent* of C.

THIS was an action of *assumpsit*, in which the plaintiff claimed to recover the price of a cargo of lime alleged to have been delivered to one *Charles Spaulding* on the defendant's account.

The lime was put on board the defendant's vessel of which *Spaulding* was Master, but who was sailing the vessel at the time, as the defendant alleged, on shares.

The plaintiff called *Spaulding* as a witness, to prove that he made the purchase as *the agent* of the defendant, who was permitted to testify, though objected to by the defendant's counsel. Whereupon a verdict was returned for the plaintiff which was to be set aside if the witness was improperly admitted, otherwise judgment was to be rendered thereon.

Farley and *Abbott*, insisted that *Spaulding* was not a competent witness for the plaintiff, and relied upon *Scott* v. *M'Lellan*, 2 *Greenl.* 199, as conclusive upon the question.

F. Allen, for the plaintiff, argued in favor of the competency of the witness, under the exception in favor of agents and factors, and cited *Descadillas* v. *Harris*, 8 *Greenl.* 298; *McLane* v. *Harris*, 8 *Greenl.* 324; *Page* v. *Weeks*, 13 *Mass.* 199; *Locke* v. *N. A. Ins. Co.* 13 *Mass.* 61; *Rice* v. *Austin*, 17 *Mass.* 197; *Fisher* v. *Willard*, 13 *Mass.* 379.

PARRIS J. — Six hundred casks of lime were purchased of the plaintiff, as he says, by the defendant, through the agency of *Charles Spaulding*. The bill was made out by the plaintiff, in the name of *Spaulding*, as purchaser, for which the latter gave the plaintiff his draft for value received. The lime was lost by the perils of the sea, and one question in the case is, can *Spaulding* be admitted as a competent witness, to testify that, in making the purchase, he acted as the agent of the defendant.

It is a familiar principle of the law of evidence, that the testimony of a person who has an interest in giving it, and whose inter-

est consequently conflicts with his duty, cannot be received. There are some exceptions to this rule, but they have arisen from the most urgent necessity and been admitted with great caution. *Starkie* says, the exceptions are rare and seem to be confined to the case of a servant who transacts his master's business, and who, in the usual course of affairs, is the only person who can give evidence for his master. He adds, since the benefit of such testimony is purchased at the price of a departure from a most beneficial and fundamental rule, it is not probable that the Courts would willingly extend this class of exceptions. 1 *Stark. Ev.* 89.

In *Ilderton* v. *Atkinson*, 7 *T. R.* 480, the court admitted an agent as a competent witness, to prove his agency, but it was on the ground, that in any event, he stood indifferent in point of interest between the parties, being liable either to pay the money received to the plaintiff, or refund it to the defendant. Servants and carriers have been held competent to prove the payment or receipt of money, on the delivery of goods, and factors to prove a sale; but we have not met with a case where a purchaser, standing in the situation of *Spaulding*, has been permitted to relieve himself by throwing the contract upon another person.

Descadillas v. *Harris*, cited by the plaintiff's counsel, and *Evans* v. *Williams*, referred to in that case, were clearly distinguishable from this. In each of those cases, the witness was proved, by evidence other than his own testimony, to have been the authorised agent of the person charged. As master, he was authorised to borrow money for the use of the vessel, and he stood *in equilibrio* as to interest, accountable either to the lender, or the owner under whom he was employed. To the witness, therefore, it was a matter of entire indifference which of the litigants succeeded.

Spaulding's situation is entirely different. In the first place, if he took the vessel on shares, as was the case of *Thompson* v. *Snow*, 4 *Greenl.* 264, he was placed in the owner's stead during the time the vessel was thus employed, and held no relations to the general owner, either as agent or master, nor was he invested with any authority to bind the general owner, either for cargo or supplies.

In *McBrain* v. *Fortune*, 3 *Campb.* 317, it was held, that in an action for goods sold, a person who entered into a contract for the purchase in his own name, is not a competent witness to prove that he purchased them as the agent of the defendant. *Lord Ellenborough* said, "I do not think *Summers*, the person who made the purchase, can be examined, either on the ground that he is a necessary witness, or that he stands indifferent between the parties. If he was the agent of the defendant, there is no reason why this circumstance may not be proved by other evidence. Then he has a clear interest, without any counterbalance in the event of this action. If it succeeds, the verdict would be evidence for him in an action against himself, to which he is *prima facie* liable." The same principle is recognised as law in *Roscoe on Evidence*, 85; 3 *Stark. Ev.* 1648; 1 *Phill. Ev.* 100; 13 *Petersdorff's Abr.* 746; and in *Emerton* v. *Andrews*, 4 *Mass.* 653. *Starkie* says, it has been held that in an action for goods sold to the defendant, and delivered to A. B. at his request, A. B. is not a competent witness for the plaintiff, without a release, and he refers to *Wright* v. *Wardle*, 2 *Campb.* 200. That was an action by an upholsterer, for the price of certain household furniture, supplied to one *Mary Ann Clarke*, at the request and on the credit of the defendant. To prove that the credit had been given to the defendant, the principal witness was *Mrs. Clarke*, herself. But *Lord Ellenborough* held, that she could not be admitted.

In *Shiras* v. *Morris*, 8 *Cowen*, 60, the Supreme Court of *New York* decided that one, who borrows money as the assumed agent of another, drawing a bill upon his pretended principal for the amount, which is protested for non-acceptance, is not a competent witness for the lender, in an action by him against such principal, for the money lent. The court say, "It would seem that the witness must be responsible to the plaintiff, if this action should fail, and of course had a direct interest in the event of the suit."

We think it is so in the case at bar. If the plaintiff recover, it must be on the testimony of *Spaulding*, who will thereby be saved from his liability. If the plaintiff do not recover, *Spaulding* will be liable as drawer of the bill. The inference is, that he is directly interested to support the plaintiff's action, and is not a competent witness.

The Inhabitants of WISCASSET *vs.* TRUNDY.

An action to recover a penalty of fifty dollars for a violation of the statute of 1834, *ch.* 141, entitled, "an act for the regulation of innholders, retailers and common victuallers," was held to be rightly brought in the name of the inhabitants of the town where the offence was committed.

THIS case, which was debt for a penalty, is sufficiently stated in the opinion of the Court, which was delivered by

EMERY J. — The inhabitants of *Wiscasset* are said in the writ to prosecute in this action by *Ebenezer Hilton*, *Patrick Lenox* and *Ebenezer Albee*, their Selectmen; and *Edmund Dana*, their Treasurer and Clerk: and the suit is founded on the statute of this State, *ch.* 141, *sec.* 1*st* and 10*th*, passed *March* 13th, 1834, entitled, "An Act for the regulation of Innholders, "Retailers and common Victuallers."

The first section imposes a penalty of "fifty dollars on any "person for being a common victualler, innholder, or seller of "wine, brandy, rum, or any strong liquors, by retail, or in less "quantities than twenty-eight gallons, and that delivered and "carried away at one time, except such person be duly licensed, "&c."

The 10th section provides, "that any fine, forfeiture or penalty, "not exceeding twenty dollars, arising for any of the offences, "mentioned in the act, shall be recovered by action of debt be-"fore any Justice of the Peace within the same county where "said offence was committed; one moiety thereof to the use of "the person, who may sue therefor, and the other moiety thereof "to the use of the town where such offence was committed. "And all forfeitures or penalties exceeding twenty dollars, wheth-"er on bond or otherwise, shall be recovered by action of debt in "any court competent to try the same. And the whole of such "forfeitures and penalties shall be for the use of the town where "the offence was committed. It shall be the duty of the select-"men, treasurer, town clerk of towns, the assessors, treasurer "and clerk of plantations, and the aldermen and city clerk of "cities to prosecute each and every person who, without being "duly licensed, shall presume to be a common victualler, inn-"holder or retailer, upon their obtaining evidence thereof."

At the Court of Common Pleas the defendant moved that the writ be quashed — and the plaintiffs moved that they might so far amend their writ and declaration as to strike out the words "the inhabitants of the town of Wiscasset," and leave the Selectmen and Clerk and Treasurer aforesaid as plaintiffs — which motion to amend was overruled by the Court of Common Pleas, and upon the motion of the defendant, it was decided by the Court that the writ be quashed and that the defendant recover costs of suit. From this judgment the plaintiffs appeal.

If there be a misjoinder of plaintiffs in an action, the defendant may plead it in abatement, or it will be a good cause of nonsuit at the trial. If apparent on the face of the declaration, the defendant may demur, or move in arrest of judgment, or bring a writ of error. At common law, while the proceedings are on paper, amendments have frequently been allowed in penal actions. They are not ranked under the head of criminal Law or crimes. They are as much civil actions as an action for money had and received. *Cowper*, 382, *Archeson* v. *Everett.*

Yet motions for leave to amend as to striking out names of parties have sometimes been treated without much indulgence. Thus in *Treat et al.* v. *McMahon*, 2 *Greenl.* 120, the court refused to amend by striking out the name of one of the demandants which had been improperly inserted. And in a *qui tam* action, *Evans* v. *Stevens*, 4 *Term Rep.* 224, *Buller* Justice said, there was no instance in which the court had given leave to amend as to the parties to the writ in a *qui tam* action after demurrer.

In the case now under consideration, no demurrer is joined; but all the rights of the defendant are open to him on the motion, for all is apparent on the record on which it is grounded.

It is true also that a common informer cannot sue at Common Law for any penalty, but where power is given him for that purpose by statute, either in express terms or by implication. *Fleming qui tam* v. *Bailey*, 5 *East Rep.* 313.

And the doctrine in the English Law is, that where a penalty is created, and no particular mode pointed out in which it shall be recovered, nor any particular person specified to whom it shall be paid, it can only be sued for by the Sovereign. *Davis* v. *Ed-*

mundson, 3 *Bos. & Pul.* 382. In such circumstances *here*, the prosecution would be by the State.

In a neighboring State it has been decided, that where a statute prohibits an act under a penalty, and gives one moiety to the public and the other to a common informer, the State may prosecute for the whole, unless a common informer has commenced a *qui tam* suit for the penalty. *State* v. *Bishop*, 7 *Con. Rep.* 181. This too is the rule of the Common Law. *The King* v. *Hymen*, 7 *Term Rep.* 536; *Rex* v. *Clark et al.*, *Cowp.* 610.

The construction of a statute must be made in suppression of the mischief and in advancement of the remedy. 6 *Term Rep.* 20. And though penal laws are to be construed strictly, and are not to be enlarged by parity of reason, nor extended by equitable construction, yet even in penal laws the intention of the Legislature is the best method by which to construe the law. *The King* v. *Gage*, 8 *Mod. Rep.* 65.

And there is not wanting authority for some liberality of construction of the remedy sought on a penal statute. Thus in 7 *Term Rep.* 454, in the suit *Holmes & als. assignees of Brook, a Bankrupt*, v. *Walsh*, the action was debt on the stat. 5 *Geo.* 2, *ch.* 30, *sec.* 29, against the defendant to recover £2283. 15. 0, being double the amount of the sum which he swore was due to him under *Brook's* commission. The *statute* provided, that the penalty was to be recovered and levied as other penalties and forfeitures are upon penal statutes after conviction, to be levied and recovered — and such double sum shall be equally divided among all the creditors seeking relief under the commission.

One of the objections of the defendant was, that if any action could be brought, this action could not be supported by the assignees of the bankrupt. And the argument was, that the statutes, which vest the property of the bankrupt in the assignees, only authorize them to sue for debts due to, or on contracts made by a bankrupt. This action was not founded on a contract, nor was the sum to be recovered a debt due to the bankrupt; that though the assignees being creditors are some of the persons grieved, they alone were not entitled to sue in this case, inasmuch as the rest of the creditors ought also to have joined. *Lord Kenyon* observed that, when this act directed that the penalty,

when recovered, should be equally divided among all the creditors he should have no doubt but that this might be recovered by the assignees, who sue for the benefit of themselves and the other creditors.

It has also been asserted that the words of a statute giving the penalty, being to any person, or persons, who would sue for the same, a corporation could not sue.

The word persons, to whom under the statute in which the power of suing for the penalty was given, was taken in its common acceptation of the words describing them as natural persons only; and of course corporations did not come within the description of persons required by the statute.

But where power is given to a corporation *eo nomine*, to sue for the purpose of recovering penalties for their own use, or other purposes, there appears to be no legal objection to their suing. See *Rex* v. *Malland*, 2 *Str.* 928.

So if there be an appropriation of the penalty for the use of a corporation, distinctly made known by the statute, it would appear to be conformable to the rules of law that they might claim it directly.

And the construction which we make of the right to prosecute in the manner in which this suit is followed, we think has some support from the case, *Pegot* v. *Thompson*, 3 *Bos. & Pul.* 147. This was an action of *assumpsit*. By three statutes, certain persons by name, and all persons qualified as the Acts direct, were appointed commissioners for draining certain fen lands in the Isle of Ely, and empowered to erect certain toll gates and receive the tolls which were vested in the commissioners and their successors; and they let the tolls to the defendant for three years, and he signed a paper, acknowledging to have hired the tolls for three years, by private contract at £145 per an. to be paid to the treasurer of the commissioners, at his house in Ely, by twelve equal monthly payments in each year. This was on the 23d of *June*, 1798, and the plaintiff then was and still to the time of the decision in 1802, treasurer to said commissioners. The treasurer was the officer of the commissioners, appointed under the act of Parliament with an annual salary. The defendant continued to hold and receive the tolls during those three years, and during that

time paid to the plaintiff several sums on account of said rent; but £63.7.6 remained due, to recover which, the action was brought. A verdict was taken for the plaintiff for that amount, subject to the opinion of the court, on the question whether under the circumstances the plaintiff was entitled to recover. The court decided that the appointment to pay to the treasurer, was meant for the benefit of the commissioners. And they alone could sustain the action. That the contract was made with the commissioners, and to pay to them through the medium of their officer. See *Dutton and wife* v. *Poole*, 1 *Vent.* 318, *and* 332; *Martin* v. *Hende*, *Cowp.* 437; *Shaw* v. *Sherwood*, *Cro. Eliz.* 729.

It would seem to follow, that if there be a particular person specified to whom a penalty should be paid, that person would be justified in assuming the character of plaintiff, to recover it.

And we must look to the object and intention of our own legislature, in designating the persons to be benefitted by the penalty, and who ought to be plaintiffs: and also those agents, who are to prosecute in cases like the one under discussion.

The statute says, the whole of these penalties shall be for the use of the town. And it shall be the duty of the selectmen, treasurer, town clerk of towns, to prosecute. But the statute does not say that the prosecution shall be in their names, solely nor separately, as plaintiffs.

It is said, that the reason for sharing a penalty with an informer, is to make self-interest subservient to public convenience, by interesting a third person in bringing offenders to justice, whose ill deeds might otherwise remain undiscovered or neglected.

And in the statute in question, the smaller penalties are divided between the person suing and the town.

It is not to be supposed, that the legislature meant to diminish the existing means of punishing offences, where no reason could advise that policy. Therefore, it may well be asked, whether the duty imposed on the several officers named, was to be executed by either severally, or by all collectively. We do not mean to decide that it might not be performed by either of them. Nor would we be thought to approbate or recommend that course. In certain circumstances it might be the only way of carrying the law into effect, unless the suit may be instituted in the name of

the inhabitants of the town. And certainly, these several officers would be indictable, for omitting to prosecute upon having evidence of the infraction of the law. But that might not bring about the reformation of the victualler, innholder, or retailer, nor enable the town to have the benefit of the penalty.

It is always to be presumed, that the legislature intend the most reasonable and beneficial construction of their acts, so that the existing rights of the public or individuals be not infringed. And whenever the intention of the makers of a statute can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seem contrary to the letter of the statute. *Jackson ex dem. Scofield* v. *Collins*, 3 *Cowen*, 89; *The King* v. *Younger*, 5 *T. R.* 449.

The design of this statute was to invest the town with the right to realise the penalty from those who presumed to exercise the employment noticed in the statute, without being licensed.

The aid and countenance and vigilance of the municipal officers were required to prosecute the common victualler, innholder or retailer, who set those wholesome regulations at defiance.

And our construction is, that the prosecution ought to be in the name of the Inhabitants of the town, as the penalty is for their use.

It cannot vitiate the proceedings that the Selectmen, Treasurer and Clerk are stated in the writ as moving the prosecution for their principals, the Inhabitants.

Indeed, in our judgment, it is the most correct way of proceeding. The record ought to show, as this does, for the justification and protection of those officers, that they have performed their duty, by bringing the subject before the Court.

The motion to quash the writ is overruled. And as the motion on the part of the plaintiffs to amend, in the matter proposed, is unnecesary, we must direct the defendant to plead to the merits.

Bailey, for the plaintiffs.

Barnard, for the defendant.

LISBON *vs.* MERRILL.

The County Commissioners, under the provisions of *stat. ch.* 118, *sec.* 9, 10 and 11, are not restricted in the laying out a way, where the selectmen of a town shall unreasonably refuse, to a way exclusively *for the benefit of one or more individuals*, but the statute intended to embrace those cases also, where the way should be adjudged to be of *general benefit.*

The requirement of *stat. ch.* 500, *sec.* 5, is complied with by the County Commissioners, if they return an accurate plan *or* description of the way located; *both* are not necessary. Held further, that this provision was intended to apply exclusively to *County roads.*

By the provisions of *stat. ch.* 500, *sec.* 5, re-enacted in the law of *March* 9, 1832, any one aggrieved by the decision of the County Commissioners in estimating damages, may make his application for a committee and other proceedings, at any time within *one year* next after the return shall have been recorded.

A just construction of the *statutes, ch.* 118 and *ch.* 399, requires that the *town* litigant, and not the *county*, should be answerable for *costs* as well as damages, where an individual had appealed from the decision of the County Commissioners; and his damages had thereupon been increased.

THIS case, with the arguments of counsel, is sufficiently stated in the opinion of the Court, which was delivered by

PARRIS J.—This is an application for a *certiorari* to the county commissioners of this county, to send up the record of their doings on the petition of *William Merrill* and others, and also on the application of *Orlando Merrill. Certiorari* not being a writ which can be claimed as of right, but to be granted at the discretion of the Court, we have usually gone somewhat at large into an examination of the merits of the application, before granting the writ; and if, on such examination, it is made to appear that the proceedings have been substantially correct; that the party complaining, and all others interested, have had seasonable opportunity to be heard, and in fact that no injustice has been done, —the writ has been usually withheld.

On looking into the proceedings of the county commissioners, so far as they have been spread before us, we do not perceive that the furtherance of justice calls for the action of this Court, or that if we should grant the writ, the town of *Lisbon* would be ultimately relieved from the obligation of opening and making the road, petitioned for by *William Merrill* and others, or from paying such damages as may, in consequence thereof, be sustained

by the said *Orlando Merrill.* It is true, that if found to be incorrect, we might quash the proceedings thus far, but it by no means follows, that all proceedings relative to opening said road, would thereupon cease.

The county commissioners have already, on full hearing of the town and all other parties interested, adjudged the road to be of common convenience and necessity to the inhabitants of said town, and although the selectmen might now refuse to lay it out again, in case all previous proceedings should be quashed, still the county commissioners might, and probably would do it, under the 10*th sec.* of *stat. ch.* 118 — which provides a remedy in cases of unreasonable delay or refusal by the selectmen.

By the papers before us it does appear, that the inhabitants of the town of *Lisbon* have had seasonable notice of every application, both in relation to laying out the road and to the assessment of damages, and have been fully heard at every stage of the proceedings.

Upon these grounds, therefore, according to the usual practice of this Court, we should be inclined to deny the writ.

But, as the parties have intimated a desire that the Court would give an opinion upon the several points raised in the argument, we proceed to the examination, under an assurance that the effect of our opinion will be to suppress further litigation upon this subject between the parties.

For the town it is objected, that the road laid out is not such a road as the county commissioners had authority to accept and approve, under the 11*th sec.* of *stat. ch.* 118. By the term private way, in the 9*th* and 11*th sections* of the *statute*, is not meant, exclusively, a way laid out for the benefit of one or more individuals. This is apparent from the phraseology of the 10*th section*, which provides, that if the selectmen shall unreasonably delay or refuse to lay out *any such private way*, the Court of Sessions may cause the same to be laid out by a committee, &c.; which committee shall estimate the damages occasioned thereby, the damages to be *paid by the town, if the road be of general benefit.* From this phraseology it is manifest, that the Court of Sessions had, and as their successors, the county commissioners have power, under the 10*th sec.*, to lay out a way for the general

benefit of the town, when the selectmen unreasonably refuse to do it; and have also power, under the 11*th sec.*, to approve and allow of such way laid out by the selectmen, when the town unreasonably delay or refuse to approve and allow of the same. It is immaterial whether it be called town way or private way. Although denominated a private way it may be for the general benefit of the town, and as such the town will be answerable for all damages occasioned by the laying out.

By the record it abundantly appears, that the county commissioners laid out no new road, but merely exercised their authority under the 11*th sec.*, by accepting and approving the road, laid out by the selectmen, and ordering the same to be recorded in the town book. It then became a town or private way, legally laid out and established, and the commissioners adjudged it to be of common convenience and necessity to the inhabitants of the town.

We think that the commissioners, in no wise exceeded the authority conferred on them by statute.

The next objection, on the part of the town is, that the county commissioners did not make and cause to be recorded an accurate plan and description of said highway, and *stat. ch.* 500, *sec.* 5, is relied upon as requiring this to be done.

That section, in no case, requires a plan *and* description. It provides that the county commissioners "shall make a correct return of their doings under their hands, with an accurate plan *or* description of said highway, or common road, so laid out, altered or discontinued. A plan or description either, would answer this requirement, if it applied to such a case as the one under consideration. But the provision referred to, requiring a plan, has no application to this case. It relates wholly to county roads.

It is further objected by the town, that the application of *Orlando Merrill* for a jury to estimate his damages, was not entered within the time provided by *stat. ch.* 118, *sec.* 1.

By that section, any person aggrieved in the original assessment of damages, may apply to the Court of Sessions, "provided such application be made to the said Court, that shall be held in the same county, next after the acceptance of the return; and a jury may thereupon be appointed, &c. The accept-

ance of the return, which was in this case the acceptance and approval of the road by the county commissioners, was at the meeting of said commissioners holden on the *third* day of *September*, 1832, and the application for a jury to estimate damages was not until the meeting of the county commissioners on the *second* day of *September*, 1833, one meeting or more of said commissioners, having intervened between the acceptance of the road, and the preferring the application for a jury. It follows, therefore, that under the provisions of *ch.* 118, *sec.* 1, the application was not in season. But so much of this section as requires the application for a jury to be made at the court that shall be held *next after the acceptance of the return*, has been repealed by the provisions of a subsequent statute upon the same subject. By *stat. ch.* 500, *sec.* 5, it is provided that "any person or persons, corporation or corporations, aggrieved by the decision of said county commissioners in estimating damages, may have the same remedies and processes upon application to the county commissioners, at any regular session *within one year* next after such return shall have been recorded, as they now have upon application to the Court of Sessions; and by the 10th *sec.* all acts and parts of acts inconsistent with the provisions of this act, are repealed. The 5*th sec.* of *stat. ch.* 500, was repealed by the Act in relation to highways passed *March* 9, 1832, but the clause above extracted from said 5th *sec.* is reenacted in *totidem verbis*. Such was the law upon this subject in *September* 1832, when the county commissioners accepted and approved of the road; and in *September*, 1833, when *Orlando Merrill* applied for a jury to estimate his damages; and as that application was made within one year next after the return establishing the road had been recorded, we think the requirements of law were complied with in that respect.

The last objection urged by the town against the record and doings of the county commissioners is, that said commissioners awarded costs against the town. It is urged that if the petitioner be entitled to costs they should be paid by the county, because the county commissioners erred in assessing the damages, the jury having increased them from $50 to $162. An argument, substantially like this in principle, was urged upon us, unsuccessfully,

in *Emerson* v. *the county of Washington*, 9 *Greenl.* 88. We cannot consider the county commissioners so far the agents of the county, as to render the latter liable for all errors in judgment, or mistakes in law which they may fall into. They constituted the proper tribunal to estimate the damages between these parties, viz. the town on the one part, and the owner of the land on the other, subject to the right of appeal to a jury, if the owner of the land should be dissatisfied. The damages have been finally determined in the legal mode. The delay and expense incurred, have been wholly attributable to the opposition and refusal of the town. If the report and doings of the Selectmen in laying out the road had been accepted by the town, and the Selectmen had agreed with the owner of the land, as to damages, none of the proceedings, which have been had before the county commissioners, or the jury summoned by their order, would have been required. We think that the true and just construction of *stat. ch.* 118, and *ch.* 399, requires that the town, in this case, should be answerable for costs as well as damages.

Moody, for the petitioners.

Everett, for the respondents.

The State *vs.* Temple.

In an indictment under the provisions of *stat.* of 1821, *ch.* 4, § 2, for burning a meeting-house, it was held not to be necessary to allege in whom was *the property* of the house.

Nor, *the value* of the house:

Nor, that the offence was committed *vi et armis:*

Nor, that the meeting-house was then *continued* to be used as a place for public worship. If the house had been abandoned, or desecrated to other purposes, that would be matter of defence.

The defendant was indicted on the statute of 1821, *ch.* 4, § 2, for wilfully and maliciously burning a meeting-house, in the night time, and after conviction, a motion in arrest of judgment was made by his counsel, for causes particularly set forth in the opinion of the Court.

F. Allen, argued in support of the motion, and cited the following authorities: *Russ. on Crimes*, 1677; 2 *East's P. C.* 621; *Chitt, Crim. Law*, 1104; 3 *Inst.* 96; 1 *Leach*, 245; 2 *East's P. C.*, 1034.

Clifford, Attorney General, *e contra.*

EMERY J., delivered the opinion of the Court.

The defendant, after verdict against him on indictment, moves that judgment thereon may be arrested for five causes, which he has assigned.

"1st. Because it is not alleged in the said indictment whose "property the said meeting-house was, or that it was the pro- "perty of any person; nor that the owner of said meeting-house "was complainer.

"2d. Because it does not appear by said indictment but that "the property of the house was in the said *Temple* himself.

"3d. Because it is not alleged in said indictment what the "value of said meeting-house was at the time of the burning, nor "that it was of any value.

"4. Because it is not alleged, that the offence was committed "with force and arms.

"5. Because it is not alleged that the meeting-house was then "continued to be used as a place of public worship."

In the statute upon which this indictment is founded, the offence of wilfully and maliciously burning the *dwellinghouse of another* is one of the offences described. But it is not made a requisite of description of the offence as to burning a meeting-house, church, court-house, town-house, college, academy, or other building erected for public use, that it should be alleged either that it was the property of another, or whose property it was, nor who was the complainer.

It is in general sufficient to lay the offence in the words of the statute by which it is created. In cases of obtaining money or goods, by false tokens or false pretences, the tokens and pretences should be specified. See *Rex* v. *Muney*, 2 *Str.* 1127.

In the case of the *President and College of Physicians* v. *Salmon*, 1 *Ld. Raymond*, 680, which was debt for the penalty for having practiced physic. It was objected that it was too gen-

eral, and ought to have specified in what he exercised or practiced physic. And further, that *34th & 35th Henry, 8th*, gives power to particular persons, having knowledge of the nature of herbs, to practice some sorts of physic without incurring any penalty, and perhaps the defendant practiced within the act. But the Court said that the offence, made such by the act, is the exercising physic. And it is sufficient to lay it in the words of the act. As in an indictment upon *5th Eliz. ch.* 4, it is sufficient to say that the defendant exercised such a trade without shewing what particular act he did. And the generality of the charge is no inconvenience to the defendant, because the proof is incumbent on the plaintiff.

If a person be indicted for burning the dwellinghouse of another, it is sufficient if it be *in fact* the dwellinghouse of such person, his tenure or interest therein is immaterial. *The People* v. *Van Blarcum*, 2 *Johns. Rep.* 105.

But supposing the defendant was part owner with others, that circumstance, if it would do him any good, should have been shewn in evidence by him on the trial. But it would deserve great consideration, whether even that, would amount to an excuse, unless it was done with the approbation of all interested with him. It has been held that the part owner of a ship may be convicted of setting fire to it, with intent to injure the other part owners, although he has insured the whole ship, and promised that the other part owners should have the benefit of the insurance. *Phelps' case*, 1 *Moody, C., C.* 263.

The authorities cited by the defendant's counsel, as settling what is necessary to be alleged technically in indictments for the crime of arson, do not seem to prove that such technicality is necessarily to be required in the indictment against the defendant.

If it had appeared on the trial that the property of the house was in the defendant, we may safely conclude that no conviction would have been obtained.

It is not in general necessary, in an indictment for a statutable offence, to follow the exact wording of the statute. It is sufficient if the offence be set forth with substantial accuracy, and certainty to a reasonable intendment. 2 *Gal.* 15, *U. S.* v. *Batchelder.*

Under the Colony Law of 1652, *Anc. Char.* 113, any person of the age of 16 years and upward, who wittingly and willingly and feloniously set on fire any dwellinghouse, meeting-house, storehouse, whereby it cometh to be burnt, was adjudged to be put to death and to forfeit so much of his lands, goods or chattels as should make full satisfaction to the party or parties damaged: and so the law continued for about fifty-three years.

Under that law, possibly it might be deemed indispensable to allege in whom the property was, because it was part of the judgment that the criminal should not only be put to death but also forfeit so much of his lands, goods or chattels as should make full satisfaction to the party damnified, and therefore probably the party should be named. But we have no history of any prosecution under that old Colony Law.

In a note to *Davis's Justice*, 197, as to the form of complaint for malicious burning of any other building than a dwellinghouse in the night, it is observed, " that the same form may be adopted " describing the building in the identical words made use of in " the statute. If a public building," direction is given, " to set " forth the public use for which it is designed, as follows, *viz:* " a certain meeting-house there situate belonging to the first par- " ish in the said town of B., and erected for public use, to wit, for " the public worship of God. And so of any other public build- " ings erected for public use, as school-houses, court-houses, acad- " emies, &c."

There would seem to be in some of the English cases, a scrupulosity as to introducing certain words in an indictment, and in others considerable laxity.

Thus at common law the terms voluntary, or wilfully and maliciously, are requisite. And although the 9 *Geo.* 1, *ch.* 22, does not contain these words in the clause applicable to burning, it is necessary that they should be inserted. 2 *East's P. C.*, 1021. But there is no occasion to call the place a *dwellinghouse* as in the case of burglary, the term *house*, alone will suffice. 1 *Hale*, 567.

Neither is it necessary to describe the kind of building intended. It is sufficient to state it according to the language used in the act on which the indictment is founded.

And even if the proceedings be framed according to the words of 22, & 23, *Car.* 2, *ch.* 7, and aver the fact to be done in the night, and it be proved to be done in the day time, the allegation may be rejected as immaterial, and held good under 9 *Geo. ch.* 22, which does away all distinction as to the time within which the offence is committed. 2 *East's P. C.* 1021.

Still, it is in *England* considered necessary that the name of the owner of the house be stated, as in case of burglary. 2 *East's P. C.* 1034, or as unknown.

So a conspiracy by sinister means, to marry a pauper of one parish in *England,* to a settled inhabitant of another, is an indictable offence. If the marriage is by consent of the parties it is not indictable. When it is stated to have been by threats and menaces, it is not necessary to aver that the marriage was had against the consent of the parties, though that fact must be proved, *Parkhouse's Case,* 1 *East's P. C.* 462.

In a criminal charge, there is no latitude of intendment to include more than is charged. The charge must be explicit enough to sustain itself. 2 *Burr.* 1127.

An indictment need not ascertain more than shows the offence; not what aggravates it. 1 *Lev.* 203.

Neither needs there more certainty than the words of the statute import. 2 *Rol.* 226.

In this state of diversity of construction, and notions about precedents, we think the simple rule to hold, that the description of the offence in the words of the statute constituting it, or that the offence be substantially set forth, though not in the exact words of the statute, is generally safe and legal: and that neither for the 1st or 2d causes assigned by the defendant is the judgment to be arrested. We do not mean to disregard decisions as to the propriety of description required in cases of false tokens and pretences, and some other cases alluded to in *U. S.* v. *Batcheler.*

If this were an indictment for larceny in *England,* where it was considered important to appear whether it be grand or petit larceny, the *third* cause assigned might be of some consequence. Though it is said by respectable authority, 2 *Hawk. Pleas of the Crown, ch.* 25, § 75, that it is not clear that the worth of the

thing stolen is required to be set forth in an indictment for larceny, for any other purpose, than to show that the crime amounts to grand larceny: and the better to ascertain the crime in order for a restitution; or in an indictment for trespass, for any other purpose than to aggravate the crime. We do not perceive in the third cause assigned any ground for arresting the judgment.

As to the 4th cause. At common law, the words *vi et armis*, were necessary in indictments for offences which amount to an actual disturbance of the peace, as rescues, assaults, &c. but it seems that they were never necessary where it would be absurd to use them, as in indictments for conspiracies, slanders, cheats, because cheating is clandestine, escapes, and such like; or for nuisances in the defendant's own ground, &c.

And malicious burning is usually performed in secrecy. What is more difficult to trace than the stealthy steps and movements of the incendiary? They are like the pestilence which walketh in darkness.

But, however material these words may have been by the common law, by the *stat.* 37, *Hen. VIII, ch.* 8, it was enacted that indictments, lacking the said words, or any of them, shall be adjudged as effectual, to all intents, constructions, and purposes, as if the indictments had them. And *Hawkins* says, it is not easy to shew how exceptions for this cause, to indictments, ever could prevail since that statute, consistently with the manifest purport of it.

The provisions of this statute, so conformable to good sense, and in force in *England* before our ancestors came to this country, we conceive was incorporated into our common law, as so fully and elegantly stated by the late *Chief Justice Parsons*, 2 *Mass. Rep.* 534. "Our ancestors, when they came into this new world, claimed the common law as their birth-right, and brought it with them, except such parts as were judged inapplicable to their new state and condition. The common law thus claimed, was the common law of their native country, as it was amended or altered by English statutes, in force at the time of their emigration. Those statutes were never re-enacted in this country, but were considered as incorporated into the common law."

Some few other English statutes, passed since the emigration, were adopted by our courts, and now have the authority of law derived from long practice. To these may be added some ancient usages, originating probably from laws, passed by the legislature of the colony of the *Massachusetts* bay, which were annulled by the repeal of the first charter, and from the former practice of the colonial courts, accommodated to the habits and manners of the people.

So much, therefore, of the common law of *England* as our ancestors brought with them, and of the statutes then in force, amending or altering it; such of the more "recent statutes as have been since adopted in practice, and the ancient usages aforesaid, may be considered as forming the body of the common law of *Massachusetts*, which has submitted to some alterations by the acts of the Provincial and State legislatures, and by the provisions of our constitution."

This construction has also been recognized in this Court before.

The fifth cause assigned is, that it is not alleged that the meeting-house was continued to be used as a place for public worship.

No such allegation is made necessary by terms used in the statute describing the offence. Yet still it might become a material consideration in the defence. For although a building might have been originally erected for a meeting-house, it also might be changed so totally in its uses and appropration, as no longer to merit the appellation of a meeting-house.

So a building erected for public use, as a court-house, may be sold for private use and become a tallow chandlery, as is the fact in the city of *Portland*.

If, in fact, this building, for the burning of which the defendant is found guilty, was really and utterly abandoned as a meeting-house, totally desecrated, not erected *and sustained* for public use, for the public worship of God; proof of these facts on the trial would have disproved the allegations in the indictments, and resulted in the defendant's acquittal.

Many years ago the like defence was successfully made by the late Chief Justice, as counsel, against a charge of injury done to such a building in the county of *Cumberland*.

It cannot, however, be requisite to make the averment in the indictment more extensive than the statute description of the offence. And the Court, in a motion in arrest of judgment, can no more take notice of this objection, than they could on an indictment for assault and battery, that the government had omitted to state that the assault was not committed in self-defence.

It has been adjudged, that in an indictment against an officer for disobedience of orders, it is not necessary to aver that the orders have not been revoked, or that they are in force. They are deemed to continue, unless contradicted by proof to be made in the defence. 5 *Term. Rep.* 607, *The King* v. *Holland.*

We cannot, therefore, perceive in the five causes assigned by the defendant, any sufficient legal ground for arresting judgment.

COTTRILL *& al. vs.* MYRICK.

Whether it is competent for the legislature to provide for the removal of natural obstructions, or for the erection of artificial facilities in the bed of a stream, for the ascent of fish and the creation of a fishery, where they could not otherwise pass, without the consent of the riparian proprietor, and without making compensation to him, *quære.*

But streams in which alewives and certain other fish have been *accustomed to ascend,* are subject to the regulation of the legislature. No individual can *prescribe* against this right, which is held to belong to the public.

The opinions of persons, accustomed to witness the agility and power of certain fish, in overcoming obstructions in the ascent of rivers, and who have acquired from observation superior knowledge upon that subject, are admissible in evidence, to show that a stream, in its natural state, would or would not be ascendible by such fish.

The assent of an individual to an appropriation by law of his property to public uses, without making him compensation, may be proved by *parol;* or may be *implied* from a long acquiesence.

If public purposes and uses are to be promoted, it is no objection to the power of appropriation of private property by the legislature, that it contributes also to the emolument and advantage of individuals or corporations.

The act of the legislature of 1807, granting the emoluments arising from the fisheries in *Damariscotta river,* to the towns of *Newcastle* and *Nobleborough,* and authorising them to choose a committee with power by themselves, or any other person employed under them, "to keep open a sluice or passage way for the fish, and to go on, over, or through any land, or through any mill, or wheresoever it should be necessary for the purposes of the Act, without being considered as trespassers," was held to be no violation of the constitution.

Where, in trespass, the defendant justified as a town officer, and the record of the proceedings of the meeting at which he was chosen, shew that the constable, in his return of the warrant for calling the meeting, stated, that pursuant to the warrant, he had notified the inhabitatants, &c. without stating *how;* the defect was held to be insufficient to deprive the defendant of the protection under which he justified.

Such record was held to be sufficient for the purpose of the defendant's justification, it appearing that the individual making up and certifying to it, was a clerk *de facto,* acting in the discharge of the duties of that office.

If it was necessary for such officer to be sworn, although not required by the Act under which he was chosen, *parol* proof of the taking the oath held to be sufficient.

THIS was an action of trespass, for breaking and entering the plaintiffs' close, treading down the grass, and breaking and destroying a dam on the premises, belonging to the plaintiffs.

The general issue was pleaded and joined; and the defendant also filed a brief statement, setting forth a right to do the acts complained of, as one of a committee of the town of *Newcastle*, authorised by sundry statutes, referred to in said brief statement, to open a passage for alewives and other fish, through *New river* stream, a branch of the *Damariscotta* river, into *Damariscotta* pond, &c.

The facts were collected and reported by *Ebenezer Everett, Esq.*, who had been agreed on by the parties, for that purpose, and were very voluminous. In consequence, however, of the concise and clear statement contained in the opinion of the Court, the present report is much abbreviated.

The Acts of the legislature of *Massachusetts*, under which the defendant justified, were as follows: An act to regulate the fishery in *Damariscotta* river, in the county of *Lincoln*," passed *June* 20, 1807.

" An act in addition to and amendment of an act entitled an act to regulate the Fishery in *Damariscotta* river," passed *March* 5, 1810.

" An act to regulate the Fishery in *Damariscotta* river, passed *February* 15, 1816.

Another, with the same title, passed *February* 28, 1821.

" An act for the preservation of the Fish called Salmon, Shad, and Alewives, in the rivers, streams and waters within the counties of *Lincoln* and *Cumberland*," passed *March* 1, 1798.

These several statutes, as their titles import, were for the regulation of the Fishery, particularly in the *Damariscotta* stream, and, except the last, were objected to by the plaintiff as unconstitutional. Those parts however, to which the attention of counsel was more particularly directed, were the 1st and 8th sections of the Act of 1807. By these two sections, the emoluments arising from the fisheries were granted to the towns of *Newcastle* and *Nobleboro.'*; and they were also authorised to choose a committee with power by themselves, or any other person employed under them, " to go on, over, or through any land, " or through any mill, or wheresoever it should be necessary for " the purposes of the Act, without being considered as trespas- " sers."

The defendant, as one of said committee, did no more than the Act authorised, removing a sufficient portion of the dam, to enable the fish to ascend the stream.

The character of this stream, and a brief abstract of a mass of testimony in relation to it, and the Fisheries, will be found in the opinion of the Court.

The land bordering upon this stream was originally owned by *James Kavanagh* and *Matthew Cottrill*, under whom the plaintiffs claimed; and said stream not being navigable, was claimed by the plaintiffs to be their private property, including the fisheries, and not subject to the control of the legislature. There was also traditionary evidence of the existence of mills upon said stream, where the plaintiffs' mills now stand, prior to the year 1740.

It appeared that, in 1806, *John Borland* and others, petitioned the legislature to grant to the town of *Nobleboro'* the sole and exclusive right to take the fish in this stream, in consideration of certain expenditures which that town proposed to make, to facilitate the passage of the fish.

Against this petition, said *Kavanagh* and *Cottrill* and the town of *Newcastle*, remonstrated. But to the act of 1807, which resulted from the petition of *Borland* and others, *Kavanagh* and *Cottrill* assented — their assent being proved by *parol*, though objected to by the defendant.

The regularity of the proceedings of the town of *Newcastle*, or rather of the record of proceedings was questioned by the plaintiffs' counsel, as affecting the official character of the defendant. For the year 1830, in which the trespass was alleged to have been committed, there appeared to have been no certificate at the original making up of the record, of an oath having been administered to the town Clerk; but this omission was subsequently supplied by an *amendment* of the clerk, who also testified that such amendment was according to the truth, and that he was in fact sworn by *Daniel Walters, Esq.*, a justice of the peace, in open town meeting.

He further testified that he was first chosen clerk of the town of *Newcastle*, in 1829, and had been re-elected every year since.

The records shew the election of the defendant, and two others as the fish committee for that year, but contained no certifi

cate of their having been sworn. Whereupon the clerk was called, and testified that said committee were sworn in open town meeting by *Daniel Waters, Esq.*

The counsel for the plaintiffs denied the power of the clerk to alter his records in the manner stated — and insisted on the incompetency of *parol* evidence, of the clerk and fish committee having been sworn.

Several other objections were taken to the records both of *Nobleboro'* and *Newcastle*, of a like character with the foregoing.

The sufficiency of the return of the constable on the warrant, issued for the calling of the town meeting at which the defendant was elected one of the fish committee, was also objected to, inasmuch as it stated that the inhabitants had been notified, &c. without stating *the manner* in which it had been done.

The case was very elaborately argued in writing by *Fessenden*, for the plaintiffs, and *Sprague*, for the defendant. A brief abstract only is reported of that portion of the arguments which bears upon the points decided by the Court.

Fessenden, for the plaintiff.

1. All the acts upon which the defendant relies for his justification, except that of *March* 1, 1798, are unconstitutional and void. That act, it is contended, confers no such power as is claimed under it, but if it can be so construed by the Court, then it is insisted that this act is also unconstitutional and void.

1. They are a violation of the constitution of the *U. States, Art.* 1, § 10, by which a state is restrained from passing any law impairing the obligation of contracts. The counsel here adverted to the nature of the plaintiffs' title, the deeds, covenants and contracts under which they held, the terms of the acts of the legislature, and the powers which they conferred, and argued at length in support of the position taken, citing *Sergeant's Con. Law*, 359; *Fletcher* v. *Peck*, 6 *Cranch*, 135; *Town of Pawlet* v. *Clark*, 9 *Cranch*, 535; *Vanhorne's Lessee* v. *Dorame*, 2 *Dallas*, 304.

These Acts also violate the constitution of *Massachusetts*. The 10th *Art.* of the bill of rights provides, that each individual has a right to be protected in the enjoyment of his life, liberty

and property, according to standing laws. — And whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. Now how can it be affirmed with any show of truth or reason, that *Kavanagh* and *Cottrill*, have been protected in their property? Instead of protection they have been despoiled of it to enrich the towns of *Nobleboro'* and *Newcastle*. They are not only stripped of a property of great value which they had in the fisheries, but they are greatly restricted in the enjoyment of what is left to them.

These Acts granting and regulating this fishery, violate the article of the Constitution referred to, on two grounds. First, by the acts, the property of one individual is taken and given to other individuals, which the legislature has no right to do, even paying a compensation. Secondly, the property of individuals is taken without compensation. And without an adequate compensation to be settled by the verdict of a jury, the property of an individual cannot be taken for purposes strictly public. *Perry* v. *Wilson*, 7 *Mass.* 393; *Stevens* v. *The Proprietors of Middlesex Canal*, 12 *Mass.* 446; 1 *Kent's Com.* 451; *Bowman v. Middleton*, 1 *Bay's Rep.* 352.

The 10th article in the Bill of Rights, which authorises the appropriation of private property for public uses, on paying a reasonable compensation therefor, by implication, prohibits such an appropriation for any private use, or the use of any individual, or number of individuals or corporation. *Little* v. *Frost*, 3 *Mass.* 106; *Proprietors Kennebec Purchase* v. *Laboree*, 2 *Greenl.* 290; *The Inhabitants of the County of Hampshire* v. *The Inhabitants of the County of Franklin*, 16 *Mass.* 76; *The Inhabitants of Medford* v. *Larned*, 16 *Mass.* 215.

Is the case varied by any power which the legislature possesses to regulate and control the fisheries? We contend not. The power of the legislature, in this respect, is limited *by the common law* in this country, to *navigable waters*. Though it is not pretended that navigable waters here, as in *England*, are only considered such where *the tide ebbs and flows*. If the fact that fish pass and repass in a stream, in all cases give a power to the legislature to control such stream, there will hardly be found a

brook which irrigates a farm, that may not be obnoxious to the exercise of such a power. *Commonwealth* v. *Chapin*, 5 *Pick.* 199.

A stream, not navigable by ships, boats, &c. may by long public *use*, obtain the character of a public highway for the transportation of lumber; but the control of the legislature will be confined to this. It cannot give the public the right of soil in the bed of the river, or a right to take any thing from the river, in opposition to the rights of the riparian proprietor. He still continues the owner to the thread of the river. *Spring* v. *Russel & als.* 7 *Greenl.* 273; 3 *Kent's Com.* 411; *Berry* v. *Carle*, 3 *Greenl.* 269; *The People* v. *Platt*, 17 *Johns.* 195; *Angel on Water Courses, App.* 151.

A stream may also acquire a character other than that of a navigable stream, or a public highway, viz.: *a passage way for fish.* But this is acquired by the fact, *that fish have been accustomed to pass and repass up and down such stream*, and this alone forms the basis of all *constitutional* legislative enactments, regulating fisheries in streams which are private property.

The counsel here went into a particular examination of the history of legislation upon this subject, insisting that it supported fully the position taken, citing and commenting upon a great number of special statutes, and the following adjudged cases: *Randolph* v. *Braintree*, 4 *Mass.* 315; *Stoughton* v. *Baker*, 4 *Mass.* 522; *Nickerson* v. *Brackett*, 10 *Mass.* 212; *Commonwealth* v. *McCurdy*, 5 *Mass.* 324; *Commonwealth* v. *Ruggles*, 10 *Mass* 391; *Borden* v. *Crocker*, 10 *Pick.* 383; *Coolidge & al.* v. *Williams*, 4 *Mass.* 140.

The law of 1807 was passed in opposition to the remonstrance of *Kavanagh* and *Cottrill*, and any evidence of declarations by them, favorable to such a law, either prior or subsequent to the passage of it, was improperly admitted. Nor is the law any the less unconstitutional because *Kavanagh* and *Cottrill* did not, at the time, know, or consider it to be so. It is not a case where, through ignorance or misapprehension, their rights were, or could be compromitted and lost. For if the law was unconstitutional, it was merely void, and no acquiescence on their part could give

vitality to that which was merely a dead letter. *Bowman & al.* v. *Middleton*, 1 *Bay*, 252; 2 *Dallas*, 304; 1 *Kent's Com.* 451.

Again, where there is a mixed possession, the legal seisin is according to the title. *Codman & al.* v. *Winslow*, 10 *Mass.* 146; *Commonwealth* v. *Dudley*, 10 *Mass.* 403; *Norcross* v. *Widgery*, 2 *Mass.* 506.

The inhabitants of *Nobleboro'* and *Newcastle* could not, *under the statute of* 1807, disseise the plaintiffs. For as the commonwealth cannot be disseised, so it can commit no disseisin. *Tinkham* v. *Arnold*, 3 *Greenl.* 120, and the cases last above cited.

Again, an entry by the consent of the owner, cannot amount to a disseisin of the owner. *Porter* v. *Hill*, 9 *Mass.* 34.

The counsel for the plaintiffs, further insisted on the irregularity of the proceedings of the town of *Nobleboro'* and *Newcastle*, and the insufficiency of the records, — that it was not competent for them to make the alterations in the records which were made — to supply a new certificate of the administration of an oath, years after the transaction — to the *parol* proof of the fish committee's being sworn — and to the return of the constable of the warrant for town meeting in 1830. *Tuttle* v. *Carey*, 7 *Greenl.* 426.

Sprague, for the defendant, argued in support of the positions adopted in the opinion of the Court, citing the following authorities: *Ricker* v. *Kelly*, 1 *Greenl.* 117; *Davenport* v. *Mason*, 15 *Mass.* 92; *Lessee of Bellington* v. *Welsh*, 5 *Bin.* 131; 4 *Serg. & Rawle*, 241; *Boyd's Lessee* v. *Graves*, 5 *Wheat.* 513; *Spring* v. *Russell & als.* 7 *Greenl.* 273; *Commonwealth* v. *Breed*, 4 *Pick.* 460; *Clement* v. *Durgin*, 5 *Greenl.* 9; 8 *Wendell*, 85; *Noyes* v. *Chapin*, 6 *Wendell*, 461; *Charles River Bridge* v. *Warren Bridge*, 7 *Pick.* 531; *Vanderlitt* v. *Adams*, 7 *Cowan*, 349; *Coates* v. *The Mayor of New York*, 7 *Cowan*, 585; 12 *Wheat.* 19; *Winter* v. *Brockwell*, 8 *East*, 309; *Cook* v. *Stearns*, 11 *Mass.* 533; 14 *Serg. & Rawle*, 267; *Francis* v. *Boston & Roxbury Mill Corporation*, 4 *Pick.* 268; *Perry* v. *Wilson*, 7 *Mass.* 393; 2 *Serg. & Rawle*, 354; 14 *Serg. & Rawle*, 356; 1 *Stark. Ev.* 54; *Phill. Ev.* 226; 2 *Stark. Rep.* 258; 1 *Holt's N. P. Rep.* 283; *Davis* v. *Mason*, 4 *Pick.* 156;

Stoughton v. *Baker & al.*, 4 *Mass.* 522; *Vinton* v. *Welsh*, 9 *Pick.* 87; *Ingraham* v. *Wilkinson*, 4 *Pick.* 271; *Nickerson* v. *Brackett*, 10 *Mass.* 212; *Hooper* v. *Cummings*, 20 *Johns.* 90; *Cates* v. *Wadley*, 1 *McCord*, 580; *Callender* v. *Marsh*, 1 *Pick.* 418; *Thurston* v. *Hancock*, 12 *Mass.* 220; *Jackson* v. *Wright*, 4 *Johns.* 78; *Welles & al.* v. *Battelle & al.*, 11 *Mass.* 477; *Thayer* v. *Stearns*, 1 *Pick.* 109; 9 *Mass.* 312; *Sumner* v. *Tileston*, 7 *Pick.* 198.

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

The defendant justifies the act complained of, under certain statutes of the *commonwealth of Massachusetts* and of *Maine*. These, it is insisted by the counsel for the plaintiffs, afford him no protection, inasmuch as they are alleged to transcend the constitutional power confided to the legislature.

By the common law in *England*, fisheries in streams not navigable, belong to the riparian proprietor. In *Massachusetts*, from its earliest settlement, this principle has been modified. It was deemed most conducive to the public good, to subject the salmon, shad and alewive fisheries to public control, whenever the legislature thought proper to interpose. They were much relied upon, as among the means of subsistence, afforded by the common bounty of Providence, and some regulation became necessary for their preservation. Our ancestors were understood to have brought with them such parts of the common law, as were applicable to their circumstances, claiming, however, and exercising the right, through every period of their history, to change or qualify it. It was competent for the Colony, Province, or *Commonwealth of Massachusetts*, having a legislature of its own, to appropriate to private use, that which was held in common in the mother country, or to provide, that what is there private proprerty, should here be enjoyed in common.

In *Massachusetts*, then, by common consent, manifested by legislative acts, and by general acquiescence, the common law rights of the riparian proprietor, yielded to the paramount claims of the public. It was implied in all grants of land, made by them, and in all conveyances by individuals, upon streams through which

these fish passed, to cast their spawn. The right of the public to regulate the interior fisheries, is proved both by legislative acts, referred to in the argument, and by judicial construction. *Stoughton et als.* v. *Baker et al.* 4 *Mass.* 522; *Nickerson* v. *Bracket*, 10 *Mass.* 212; *Ingraham* v. *Wilkinson*, 4 *Pick.* 278; *Vinton et al.* v. *Welsh*, 9 *Pick.* 87.

It is urged that the legislature had no right to interfere, except in those streams, where these fish had been used and accustomed to pass. And the acts bearing upon this subject have been examined, and the state of the rivers and streams, upon which they were intended to operate, have been adverted to, with a view to establish this position. There could be no call for legislative regulation or enactment, except upon such streams, as were so situated as to invite the ascent of these fish, and into and through which from their nature and habits, they were accustomed to pass. Whether it is competent for the legislature to provide for the removal of natural obstructions, or for the erection of artificial facilities, in the bed of a steam, without the consent of the owner of the soil, and without providing a compensation for him, for the ascent of fish, and the creation of a fishery, where they could not otherwise pass, is a question, which we are not required in the case before us, to decide.

The *Damariscotta* river, a portion of which is under consideration, is fed by fresh ponds at its source, and after running a few miles, empties into the sea. There can be no doubt but alewives, by their instinct and habits, would ascend this stream, unless impeded by obstacles, which they could not surmount. Of this, the present state of the fishery there furnishes abundant proof. It is, however, said, that this favorite and inviting resort for this species of fish, was created by the act of 1807, and that it never was, or could be, enjoyed before.

The case finds, that for forty years anterior to that period, as far back as the memory of living witnesses extends, alewives did not ascend this stream to the ponds. It further appears, that during all that time, there existed artificial obstructions, impeding their ascent. The commissioner, who disclaims for himself, any knowledge, from observation, of their power to overcome obstacles, finds in the stream, natural impediments, which, in his

judgment, they could not have surmounted. But upon this point, although objected to by the counsel for the plaintiffs, he received the opinions of witnesses, who had noticed their agility and power; and if this species of testimony is admissible, he regards it as proved, that these fish might, and did ascend the stream, prior to the erection of dams, or other artificial obstructions thereon. We hold this testimony to have been legally admissible. The witnesses had acquired from observation, superior knowledge upon this subject. It appears to us to fall within that class of cases, in which the opinions of persons, skilled in any art, science, trade or business, are received in evidence. 1 *Starkie*, 74; *Phillips*, 226, and the cases there cited.

If then, at a former period, alewives were accustomed to ascend this stream, it was like others, which they frequented, subject to the regulation of the legislature. It is a power, which they exercise at discretion, at such times as they deem expedient. Statutes of this class generally provide for a passage through artificial obstructions, and sometimes grant certain privileges to towns, upon whom duties are imposed. The riparian proprietor may erect a dam upon such a stream, without providing therein a passage for fish, so long as he violates no existing law, but subject to the well established right of the legislature to interpose. No individual can prescribe against this right, which is here held to belong to the public. Obstacles created, may be overlooked or tolerated, but as the country settles, and the fisheries become more an object of interest, they may receive the fostering care of the legislative power.

With regard to the formation of this branch of the *Damariscotta* stream, at a period beyond human memory, of which some evidence was received from tradition, the competency of which has been questioned, if from natural or artificial causes, the stream was, at some remote period, diverted into new channels, through which these fish were accustomed to ascend, in our judgment, so far as the fishery is concerned, the right of public control would attach therein, as an incident as effectually, as if it had remained unchanged.

But suppose the act of 1807 was an appropriation of private property to public uses, it is most clearly proved to have been

done, by the consent and acquiescence of *Kavanagh* and *Cottrill*, under whom the plaintiffs claim. They remonstrated against the general prayer of the petition of *John Borland & als.* at whose instance the legislature were induced to interfere; but it appears that they were quite satisfied with the act, as it was finally modified. We perceive no sufficient reason, why their assent may not be proved by parol. When the constitution provides that private property shall not be taken for public uses, without just compensation, it must be understood to mean, a taking without the assent, or against the will of the owner. If given or dedicated by him to the public, it is rather received than taken.

If this was a case, where private property might be taken for public uses, although it might relate to an interest in land, no deed or instrument of conveyance from the owner was necessary, the appropriation being proved by an act of the legislature, which is matter of record. He would have a right to such damages, as would be a just compensation. That is an equivalent, which is not itself an interest in land, but a collateral matter. In the case of *Clement* v. *Durgin*, 5 *Greenl.* 9, it was decided, that the right to damage, for flowing land by the owner of a mill, might be waived or relinquished by parol. There is a striking analogy between that case, and the one under consideration.

In addition to the direct evidence of assent by the parties in interest, it may well be implied from their long acquiescence. If their rights were infringed by an unconstitutional act of the legislature, it afforded no protection to those, who presumed to act under it. They were trespassers; and the rights invaded might have been at once vindicated by a civil action. This acquiescence, which continued as long as *Kavanagh* and *Cottrill* lived, and the acts of co-operation, which are proved on their part, are ascribed in argument to their ignorance of the limitation of the legislative power. These gentlemen were not native born citizens, but they were merchants engaged in extensive business, men of high standing and consideration, in the part of the country in which they resided, possessed of great wealth, and largely interested in real estate. The sacredness of private property, and the protection which is thrown around it, could not have

been unknown to them; and they had it in their power, at all times, to command the services of eminent counsel.

It is said that private property was not here taken for public use; but that it was appropriated to the private use and emolument of other persons. The public had an interest in the preservation and regulation of the fishery, and in the removal of obstacles, by which it might be impaired or destroyed. This was best effected through the agency of persons, appointed by the neighboring towns, and by quickening and rewarding their diligence by a grant of the profits. It is a course of proceeding adopted by the legislature in many other cases, the authority of which has not been questioned.

If public purposes and uses were to be promoted, as they undoubtedly were in the case before us, it was no objection to the power of appropriation by the legislature, that it contributed also to the emolument and advantage of individuals or corporations. Many cases of this character exist, in which the legislative power is well established. Of this class is the right conferred on owners of mills, to raise a head of water necessary for their operation, although the lands of others are thereby injured and rendered unproductive. They are holden, as in other cases in which private property is taken for uses, in which the public are interested, to pay a just equivalent, unless the parties, affected by the flowing, consented thereto, without receiving damage, which, it was settled in *Clement* v. *Durgin*, might be proved by parol. And we are satisfied that there is equal reason for receiving the same testimony in the case in question.

From whatever source *Kavanagh* and *Cottrill* might have derived title to their land, and by whatever covenants it might have been protected, it was subject to the legislative power, either in the regulation of the fisheries, or by appropriation to public uses, if required by the public exigencies. The proprietors of the *Kennebec* purchase, if their patent covered this territory, and every successive owner, whether his title commenced by right or by wrong, held the land subject to this power. When, therefore, it was called into exercise, it cannot be deemed a violation of the constitution of the *United States*, which inhibits the passage of any law, impairing the obligation of contracts.

If the legislature had a right to regulate the fishery in this stream, either in virtue of their general powers, or by the consent of the riparian proprietors, we find nothing in the act of 1807, which may not be regarded as necessary to effect that object. The *8th section*, so much complained of, merely authorized the committee, by whose agency the regulations were to be carried into effect, or any other person in their employment, to go on to any land, through any mill, or wheresoever it might be necessary for them to go, to discharge the duties imposed upon them by the act, without being considered as trespassers. All the purposes of the act might have been defeated, if this protection had been withheld. We are not satisfied that any of the objections, taken to the authority of this act, or to any of the other acts, regulating the fishery in *Damariscotta* river, ought to prevail.

The official character of the defendant is controverted. It is urged that the warrants, for calling the town meetings in *Newcastle* and *Nobleborough*, introduced by him, do not appear to have been served according to law; and *Tuttle* v. *Carey*, 7 *Greenl.* 426, is relied upon in support of this objection. We cannot regard it as sufficient to deprive the defendant of the protection, under which he justifies. The same objection was raised, and upon the same authority, in *Bucksport* v. *Spofford*, which was overruled, for the reasons there stated, to which we refer.

It is said, that the acting town clerks of these towns were not legally qualified. If they were parties to this record, and called upon to justify their official acts, they might be required to show, that they were legally invested with the authority they claimed to exercise. It is proved that they were in office *de facto*, in the discharge of the duties thereto appertaining. Upon this point, we hold this evidence to be sufficient for the purposes of the defendant. *Phillip's ev.* 180; *Fowler* v. *Bebee et al.* 9 *Mass.* 231. As to the proof that the committee were sworn, we think it competent, if it was necessary that they should be sworn, which is not required by the statute, providing for their appointment.

Upon the whole, the opinion of the Court is, that the act, which is the subject matter of this act, has been justified.

Judgment for the defendant.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF KENNEBEC, JUNE TERM, 1835.

BAKER *vs.* RUNNELS.

In an action of trespass by the owner of land, over which a way had been located by the Court of Sessions, against the surveyor who made the road, the former was not permitted to take exceptions to the regularity of the proceedings of said Court: — that can only be done on *certiorari*.

Where a road had been established by the Court of Sessions, and the town in which it was located had opened and made a part of it, but as to another part, had only opened it by causing the trees to be felled and cut up, leaving it impassable, except for those on foot, for a period of more than six years, it was held that these facts did not bring the case within the provisions of *stat.* of 1831, *ch.* 500, which provides that a road, which shall not be *opened* within six years from the time when it should have been opened, shall be taken and deemed to be discontinued.

THIS was an action of trespass for breaking and entering the plaintiff's close, in the town of *Clinton*, and was tried before the present Chief Justice, *October Term*, 1834.

The general issue was pleaded, with a brief statement, setting forth that the *locus in quo* was a highway established by the Court of Sessions, *December*, 1824, — that, at the *December Term* of the Court of Common Pleas, 1831, an indictment was found against said town, for having neglected to open and make said highway, upon which said town was defaulted, *April Term*, 1832: whereupon a fine of $500 was assessed by said court, and *Thomas Brown* was appointed to expend said sum in opening and making said road, and that *Runnels*, the defendant, as the

servant of said *Brown*, entered upon the plaintiff's land, and there did the acts for which this suit was brought.

The proceedings of the Court of Common Pleas were proved as above pleaded. To the record of the Court of Sessions, showing a location of the road, the plaintiff took a number of exceptions, all which were overruled by the Judge, who instructed the jury that, though proper subjects for consideration on *certiorari*, they could not avail the plaintiff in this suit.

The plaintiff then contended, that the road, where the defendant entered and worked upon it, had been discontinued by operation of the statute of *March*, 1831, *ch.* 500, § 9, which provides that a road, which shall not be opened within six years from the time when it shall have been required to be opened, shall be taken and deemed to be discontinued.

It was in evidence that a considerable part of the road had been opened and used, but that a small part of it, including that on which the defendant worked, had only been opened by the felling and cutting up of the trees in 1826, by a surveyor to whom it had been assigned. Nothing further had been done toward making the road, until the defendant entered in *September*, 1832. Though it had been used some by persons on foot, after said cutting out, yet in consequence of its state, and the greater convenience for travellers by an old pathway, it had not been used, and became, in 1832, quite impassable, by a dense growth of young birches and poplars, intermixed with briar bushes that had sprung up.

The Judge instructed the jury, that the facts proved did not bring this road within the operation of the statute of 1831, *ch.* 500. The verdict was for the defendant. If upon the foregoing facts, the defence was not, in the opinion of the Court, sustained, the verdict was to be set aside, and a new trial granted; otherwise judgment was to be rendered thereon.

Redington, insisted for the plaintiff, that he might, in this action, take exceptions to the record of the Court of Sessions, relating to the location and establishment of this way. This is the only way in which he can do it, for it is too late to bring *certiorari*—the road having been made. He then argued at length, to show the defects in the records.

It was further contended, that the road had been discontinued under the operation of *stat.* of 1831, *ch.* 500. If it was a road at all, it was so when it was accepted, or at all events when the time expired for taking off the wood; and in either case, a sufficient time had elapsed to bring it within the statute of 1831. Can the term "opened," used in the statute, mean any thing less, than to have the road freed from obstructions so as to render it passable. We contend not.

R. Williams, for the defendant.

WESTON C. J. — If the existence of a town way is questioned, and it appears that the requirements of law have not been observed in laying it out, it is treated as void; towns having upon this subject only a special and limited power. But the Court of Sessions, to whom county commissioners have succeeded, had general jurisdiction in relation to roads. Hence an adjudication of theirs has been respected as operative, until annulled or vacated upon *certiorari*. We think great inconvenience would arise, in permitting an inquiry as to the regularity of their proceedings, to be made collaterally. It has never, that we are aware of, been attempted or sustained in our practice. We are of opinion, therefore, that the objections taken to the doings of that court at the trial, were properly overruled.

Another point raised is, that the road was discontinued, by the operation of an additional act in regard to highways, statute of 1831, *ch.* 500, *sec.* 9. That section provides, that a road, which shall not be opened within six years from the time, when it shall have been required to be opened, shall be taken and deemed to be discontinued. It may be presumed that this long neglect on the part of the town, without complaint, is full evidence that such road was not required by the public convenience, notwithstanding the adjudication of the court. The road in question was opened, with the exception of a short distance, where, however, the trees were felled and cut up by a surveyor of the town; but was afterwards neglected in consequence probably of an old pathway, which was used as a substitute. The town was indicted for a failure of duty in regard to this road, seven years after it was laid out. They did not interpose the objection now set up, but sub-

mitted to a default, and to a fine of five hundred dollars, more than a year after the passage of the law of 1831. It does not appear to us to present a case under that statute. The road, that is the whole road, did not remain unopened, upon any construction. The neglected part was not made, but it can hardly be said not to have been opened, and held out to the public as a road, by the official act of the surveyor. The road must be regarded as having been once legally established. If the plaintiff would avoid it, he must show clearly that it has been vacated by the operation of the statute. And we do not feel warranted in determining that this has been done.

Judgment on the verdict.

The Inhabitants of China *vs.* Southwick *& al.*

S. erected a dam at the outlet of a pond, and thereby raised a head of water, but not so high as to flow or injure C's. bridge, at the head of the pond. Afterward, by great rains and a violent wind, the waters were thrown upon the bridge and it was destroyed. *Held*, that S. was not liable therefor to C. in damages; although if the dam had not raised the water to a certain height, the rain and the wind superadded might not have done the injury.

This was an action of the case, brought to recover damages for an injury done to the plaintiffs' bridge, at the head of *Twelve mile pond*, by a head of water, raised, as they alleged, by the defendant's dam at the outlet of the pond.

It appeared, on trial before the Chief Justice, that the defendants raised the water, by means of their dam, from five to seven feet — that the injury complained of was done on the *9th* of *April*, 1831 — and that, from the latter part of *March*, in that year, through the month of *April*, the waters of the *Kennebec* were unusually high, and during a part of that period, higher than they had been known to have been for many years before. It was also proved, that at the time of the injury, and for some time before and after, the water at the head of the pond was higher than it had been known to have been before. There was positive testimony, that for a succession of years before and after the building of the plaintiffs' bridge, the defendants had, by their

dam, raised a head of water from one foot to nearly a foot and a half higher than it was raised by their dam in 1831, without flowing the plaintiffs' bridge, or doing any damage thereto — and there was testimony of an opposite tendency. It was further proved, that, at the time of the injury, there was a very violent southerly wind, which occasioned a heavier sea or swell in the pond, than had ever been noticed before, and which blew either directly or obliquely upon the bridge.

The counsel for the plaintiff requested the Judge to instruct the jury, that if they were satisfied from the evidence, that the defendants' dam was instrumental in producing the injury complained of, they were liable for such injury, although they should believe that the wind also contributed thereto. And further, that if they were satisfied that if there had been no dam whatever where the defendants' dam was in 1831, the injury would not have happened, the defendants were in that case liable for the injury.

But the Judge instructed the jury, that if the damage was occasioned by great rains, or by the violencce of the wind, the defendants were not liable, if the jury were satisfied that the head of water, raised by the defendants' dam in 1831, was not high enough to flow the plaintiffs' bridge, or to do damage thereto.

A verdict was returned for the defendants. If the instructions requested and withheld, should have been given, or if those given, were, in the opinion of the Court, errroneous, the verdict was to be set aside, and a new trial granted, otherwise judgment was to be rendered thereon.

Allen and *Wells*, for the plaintiffs.

The case finds the erection of the dam, raising of the water, and injury to the plaintiffs' bridge. To this injury the extraordinary wind and rains undoubtedly contributed, as well as the water raised by the dam — whether by the latter, more or less, was a question to be settled by the jury, — they were fully competent to find the proportions.

Every man is bound so to use his own property as not to injure another's.

In this case, the cause of the injury was *direct*, though these extraordinary rains happen at long intervals, and the defendants

are therefore liable. Suppose the case of a mill having a prior right to the stream, and one is erected below it, with a dam not high enough to injure the first mill, except at long intervals and during the occurrence of extraordinary rains. Would not the owners of the latter be liable? Or take a case of flowing, which occurs only once in ten years; would the long intervals between the injuries, exempt the owner of the dam from his liability to pay damages?

They also cited the following authorities: *Calais* v. *Dyer*, 7 *Greenl.* 155; *Commonwealth* v. *Stevens*, 10 *Pick.* 247.

Evans, for the defendants, cited 3 *Wood. Lec.* 203; *Salem Bank* v. *Gloucester Bank*, 17 *Mass.* 31; *Maxwell* v. *Pike*, 2 *Greenl.* 8.

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

The jury have found that the head of water, raised by the defendants' dam, was not, at the period complained of, high enough to flow the plaintiffs' bridge, or to do damage thereto. Its erection then was a lawful act, not in itself calculated to do any injury to the plaintiffs. Their loss was occasioned, as the jury have found, by great rains or by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind superadded might not have done the damage. It may have been one then of a series of causes, to which the injury may be indirectly ascribed. Their connection, however, was fortuitous, and resulted from an extraordinary and unusual state of things. Neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years, while the dam was higher than it was, when the bridge was carried away. Such an event could not therefore have been reasonably calculated upon or foreseen.

It would be carrying the doctrine of liability to a most unreasonable length, to run up a succession of causes, and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which is attempted to be charged, was in itself innocent. The law gives no encourgement to speculations of this sort. It rejects them at once. Hence the legal maxim, *causa propinqua non*

remota, spectatur. *Salem Bank* v. *Gloucester Bank,* 17 *Mass.* 31; *Walker* v. *Maitland,* 5 *Barn. & Ald.* 171. This principle has been extensively applied in insurance causes, 3 *Starkie,* 1164, and the cases there cited. And it is of great practical value, in settling the rights and liabilities of contending parties. Were it departed from, it would open a field of litigation, which might unexpectedly bring ruin upon persons engaged in lawful pursuits.

If there had been no dam, the injury might not have happened; but the defendants had a right to erect it, and that without being held answerable for remote and unforeseen consequences.

Thompson v. *Crocker et al.* 9 *Pick.* 59, cited for the plaintiffs, was brought to recover damages, occasioned, as was alleged, by the defendants' dam, whereby water was caused to flow back upon the wheels of the plaintiff's mills. *Morton J.* instructed the jury, that for any damage to be inferred "from the principle, that any obstruction of the water below, would prevent it from passing from the plaintiff's mill, so readily as it would without such obstruction, the defendants were not answerable." Exception was taken by the defendants to the direction of the Judge upon another point, but the Court held the instruction of the Judge, upon the question of damages, to have been correct.

The opinion of the Court is, that the cause was properly submitted to the jury by the presiding Judge, at the trial.

Judgment on the verdict.

Wheeler & *al. vs.* Fish.

The lien created by an attachment of goods on the original writ, will be dissolved, if the goods be not seised on the execution within thirty days after the rendition of judgment, under the provisions of *stat.* of 1821, *ch.* 60.

This was an action of *replevin* against an officer, for a quantity of hay, and the only question in the cause was, whether the lien created by an attachment of the hay on the original writ, was dissolved; the hay not having been seised on execution

within thirty days after rendition of judgment; though the execution was placed by the attaching creditor in the hands of the officer, within that time.

The Chief Justice instructed the jury that the attachment was dissolved, and a verdict was returned for the plaintiff. If the jury were not properly instructed, the verdict was to be set aside and a new trial granted; otherwise judgment was to be rendered thereon.

Bradbury and *Bridge*, contended that the suing out of the execution, and placing it in the hands of the attaching officer, within thirty days from the rendition of judgment, was sufficient to preserve the lien, and relied upon the case of *Webster* v. *Coffin*, 14 *Mass.* 196, in support of that position.

Emmons, for the plaintiff.

WESTON C. J. — The question presented to our consideration is, whether the lien, created by the attachment on the original writ, was dissolved; the property not having been seised on execution, within thirty days after the rendition of judgment. And we are of opinion that it was. The lien depends for its existence altogether on the act respecting the attachment of property. *Statute of* 1821, *ch.* 60. That provides, that the goods attached shall be held thirty days after final judgment, to be taken on execution. It is implied, of course, that the lien would have no efficacy after that period. But that there might be no room for misapprehension, as to the intention of the law, it is further expressly provided, that if the creditor shall not take the goods in execution within thirty days, the attachment shall be void. This was not done. We cannot, therefore, adjudge the hay further holden by the attachment, without directly violating the law. The creditor having put the execution seasonably into the hands of the officer, and he having failed in his duty, has an adequate remedy against him and him only; the hay having in the mean time been sold to the plaintiffs.

The case of *Webster* v. *Coffin*, cited for the defendant, differs essentially from this. *Coffin* had promised as receipter, to deliver the ship attached to the plaintiff on demand, without limitation as to time. As this, however, is taken for the officer's indemnity,

he is not permitted to charge the receipter, unless he is liable to the creditor. The officer's liability being fixed in that case, the court held it not necessary to charge *Coffin* upon his contract, that a demand should be made upon him, within thirty days after judgment.

Judgment on the verdict.

JEWETT *vs.* PATRIDGE.

A., by consent of B., a mortgagor in possession, built a house on the land mortgaged, which was subsequently taken and sold on execution as the property of A. *Held*, in an action by the purchaser under the execution, against C., who was in possession, claiming under a purchase from B., who had taken a bill of sale from A., (but which the jury found to be fraudulent, and that C. purchased with a knowledge of the fraud,) that it was not competent for him to resist the plaintiff's claim, by showing that *the mortgagee* had never consented to the erection of the house, but now claimed it, and forbid its removal. Whatever the rights of the mortgagee were, they were held not to be affected by the decision in that action.

Trover against such fraudulent purchaser, was rightly brought by the purchaser under the sheriff sale, instead of the officer, notwithstanding there had been a conversion by the defendant *prior to the sale.*

Where, in trover, actual conversion is proved, proof of *a demand* prior to bringing the action, is not necessary.

THIS was an action of *trover* for a dwellinghouse, and was tried before the Chief Justice, upon the general issue, *October Term*, 1834.

The house had been attached on a writ in favor of the plaintiff, and afterward in pursuance of such attachment, taken and sold on execution as the property of *Ichabod Patridge*, the plaintiff being the purchaser. The defendant, *Wilbert Patridge*, was in possession of the house at the time of the sale, claiming to hold it under a deed of the land and house from *William* and *Jeremiah Patridge*, sons of *Ichabod Patridge*, to the former of whom the frame and materials for finishing had been conveyed by the father, — and by whom, as the defendant alleged, the house had been built, and not by *Ichabod*, the father. This sale from the father to the son, the plaintiff contended was fraudulent,

so far as the father's creditors were concerned — and that the defendant purchased with a knowledge of the fraud; and further, that the house had been built by *Ichabod*, and not by *William*. Upon these points much evidence was introduced by both parties, which it is not deemed necessary to report.

The land upon which the house was built was formerly owned by *John Pitts*, of whom *Ichabod Patridge* had purchased it. But in 1822, finding himself unable to pay for it, said *Patridge* reconveyed it to *Pitts*. "*William Patridge* then applied to *Pitts* for a lease of it, who told him that he might keep possession of the lot, until he, *Pitts*, might wish to dispose of it at a reasonable rent; and thinking he wanted it for his father, told him he might put on whom he pleased. *William* failing to pay the rent, *Pitts*, in 1825 or 1826, gave them notice to quit the place, or make some definite arrangement about it, or he should resort to some legal measures to drive them off. No arrangement was then made, — and in 1826, *Pitts* agreed to execute a conveyance to one *Miller*, who however failed to comply with the terms on his part; and thereupon, *Pitts*, in *November*, 1827, conveyed the land to *William Patridge* and his brother *Jeremiah* — taking back a mortgage to secure the consideration, which remained unpaid at the time of the trial."

It appeared that the house was erected on lot No. 36, the "*Pitts* lot," by mistake; those concerned intending to have built it on No. 37, which belonged to *William Patridge*. The frame was erected in 1826 or 1827, and the house partially finished in 1828 and 1829. The attachment was in the fall of 1829, and the sale in the spring of 1830. The defendant, before the sale by the officer, had worked on the house, and after the sale, had occupied and repaired it. And he offered to prove that he had occupied by the permission of *Pitts*, and that he, *Pitts*, had always claimed it, and had forbidden its removal. But the presiding Judge ruled, that as *Pitts* was not a party to this suit, and could not be affected by this verdict, if the house had been erected and continued by *Ichabod Patridge*, by the consent of *William*, it remained the personal property of *Ichabod*, as between him and *William* and the defendant, the assignee of *William*,

and that the rights of *Pitts* were not in controversy, or to be settled in this action.

There was no evidence of any *demand* upon the defendant before the commencement of the action.

Upon the whole evidence, the defendant contended and requested the Judge so to instruct the jury, 1. That the house in question was not subject to such attachment and sale on execution, as the personal property of *Ichabod Patridge.*

2. That the conversion, if any, by the defendant, being previous to the sale on execution, the plaintiff could not sustain this action for the same.

3. That if any action could be sustained for the conversion alleged, it should be in the name of the attaching officer, and not of the plaintiff.

4. That a demand of the property in question, of the defendant, should have been made by the plaintiff, prior to the commencement of this suit.

But the presiding Judge instructed the jury, that if they were satisfied that the bill of sale from *Ichabod* to *William Patridge* was fraudulent, and that the defendant had notice of such fraud —and were further satisfied that this frame was erected, boarded, and shingled by *Ichabod Patridge,* by the consent of *William,* the defendant's grantor, and had not been *bona fide* sold to him, the house was subject to such attachment and sale as the personal property of *Ichabod Patridge.* That, this action was properly brought in the name of the present plaintiff, and could be sustained by him for the conversion alleged, against the defendant; although the defendant did acts which amounted to a conversion, before the sale on execution. That, no demand of the house, by the plaintiff, was necessary before the commencement of this action, because the use, occupation and repairs of the same by the defendant, after the execution sale, amounted to a conversion. That, if the jury should find for the plaintiff, justice would be done to him, by giving him the amount of his judgment and costs with interest thereon, although the house was proved to be worth a larger sum.

Whereupon the jury returned a verdict for the plaintiff. If the instructions, requested and withheld, ought to have been

given, or those which were given were erroneous, the verdict was to be set aside and a new trial granted; otherwise judgment was to be rendered thereon.

H. W. Fuller, argued for the defendant as follows:

1. This house was not liable to attachment and sale as the personal property of *Ichabod Patridge*.

John Pitts, being the legal owner of lot No. 36, is *prima facie* owner of all the buildings standing thereon; whether their foundations are sunk below the surface or not. *Waterhouse* v. *Gibson & al.* 4 *Greenl.* 230. Nothing will be *presumed* against him. The *onus probandi* is on the plaintiff. If this building has been erected by the *license* or *permission* of *Pitts*, it devolves upon the plaintiff to shew it.

This was a *voluntary erection*. *Pitts* never gave *William Patridge any license or permission to build* on his land. *William Patridge* was not known in the case until after *Ichabod* had released all his rights to *Pitts*, in 1822. He then solicited a lease from *Pitts*. No written lease or definite agreement was then made, and no license to *build* was ever given. *Pitts* was about to drive off both *William* and *Ichabod*, but, through compassion, merely consented that *William Patridge* might "keep possession" of the lot, until he, *Pitts*, wanted to sell it. This did not give any authority to *William*, or to any other person, to erect a building or to remove the same. It hardly amounts to a permission to use what was then on the land. An agreement to purchase land is not enough to authorise an entry upon it. *Ives* v. *Ives*, 13 *Johns.* 235. All the cases in the books tend to shew, that something equivalent to an express consent of the owner of the soil must be proved by the plaintiff, before he can recover. A *voluntary erection* becomes annexed to the freehold. *Washburn & al.* v. *Sprout, admr.* 16 *Mass.* 449; *Goddard* v. *Bolster*, 6 *Greenl.* 428.

It has generally been considered, that the right of removing erections made by tenants, is an *exception* to a general rule; and in favor only of *trade* and *manufactures*. *Waterhouse* v. *Gibson*, 4 *Greenl.* 230; *Elves* v. *Mawe*, 3 *East*, 38. However much this doctrine may have been questioned under our wiser

policy, there is no doubt that the right of removing such erections exists only *during the tenancy and for a reasonable time after its determination.*

The possession of *William Patridge* seems to have been not unlike that of a bailiff or a mortgagor, and he cannot be considered even as having been entitled by law to a notice to quit. *Ellis* v. *Paige*, 1 *Pick.* 43; *Coffin* v. *Lunt*, 2 *Pick.* 71; *Smith* v. *Stewart*, 6 *Johns.* 49; *Jackson on dem. of Vandenberg* v. *Brady*, 2 *Caine's*, 169; *Jackson on dem. of Phillips* v. *Aldrich*, 13 *Johns.* 106. He could not transfer any rights that he did not possess and could not assign to another person. His possession did not amount to a *tenancy at will*, as that phrase is commonly understood.

But a tenancy at will may be determined by either party, in various ways. If the lessor enter upon the land, or sell it to a stranger, or do any act inconsistent with the nature of the tenancy, he determines the tenancy: — So if the tenant is guilty of waste, or receives notice to quit. *Ellis* v. *Paige; Jackson on dem. Phillips* v. *Aldrich.* The digging of a cellar and the erection of a dwellinghouse might be regarded as waste — having been done without license, to the injury of the soil. If a tenant at will assigns or attempts to assign his estate, he thereby determines the tenancy. If, then, *William Patridge* had been a tenant at will to *Pitts*, he could not have assigned any right in the land to *Ichabod Patridge;* for such an assignment would have determined his estate. 1 *Cruise's Dig.* 280; *Little* v. *Pallister*, 4 *Greenl.* 209; 1 *Coke Litt.* 57, *a; Campbell* v. *Procter*, 6 *Greenl.* 12. And the same effect would follow if his lease was in writing. *Jackson on dem. of Hull* v. *Babcock*, 4 *Johns.* 413. And *Pitts* never had any dealings with *Ichabod Patridge*, after 1822; on the contrary, he refused to let him into possession of lot No. 36.

Pitts gave legal *notice to quit* both to *Ichabod* and *William*, in 1825 or 1826. They never negotiated for this lot again until *November*, 1827; and this house was probably then standing on lot 36. *Pitts* has never done any thing to do away the effect of that notice to quit: he agreed to sell to *Miller*, and that agreement proves that *Pitts* then deemed himself to be the *absolute*

owner of the property in question. *Ichabod Patridge* and *William* intended to avoid *Pitts*, after receiving notice to quit, and put up this house for a permanent building and as a refuge; but *in a few months* after its erection, the *mistake* was discovered. *Pitts*, then and ever since has claimed the building. The house cannot, at this late hour, be removed. If the right to remove it had ever existed, (and it never did) an unreasonable time elapsed before its sale on execution, and the property became a fixture. *William Patridge* or *Ichabod Patridge* or whoever placed this house on *Pitts'* land, was a trespasser; for notice to quit had been before given, and the tenancy, if any ever existed, was determined. *Brewer* v. *Knapp*, 18 *Mass.* 332; *Ellis* v. *Paige; Danforth* v. *Sergeant & al.* 14 *Mass.* 491. *Pitts* never has waived any of his rights. He was the *absolute owner* of this lot and house in 1827, and could convey it to whom he pleased. On the 9th day of *Nov.* 1827, he did convey the same by deed of warranty, to *William Patridge* and *Jeremiah Patridge*; and on the same day they mortgaged the property back to *Pitts*. This was in good faith; and it is not pretended that *Pitts* had knowledge of any fraud. He cannot be affected by any fraud of which he was ignorant, no matter how vile and fraudulent may have been the dealings between *William* and his father. *Jeremiah Patridge*, too, one of *Pitts's* grantees, was not conusant of any fraud, and the case in fact finds that he was an innocent purchaser of *Pitts*, for a valuable consideration. Even *William Patridge* had no fraudulent motive in buying *the land*. His former acts of fraud would not prevent him from purchasing a good title and holding the same. The fee was in *Pitts*, and the building belonged to him *independently of all writings*.

The bill of sale from *Ichabod Patridge* to *William Patridge*, however, may be properly considered.

If that sale from the father to the son *was fraudulent*, yet *William Patridge* could sell or mortgage the property to *an innocent purchaser* without notice, and the fraud would be purged. *Connecticut* v. *Bradish*, 14 *Mass.* 276; *Boynton* v. *Rees*, 8 *Pick.* 329. And such *innocent purchaser* could convey a good title to a person who had notice of the fraud. *Bartlett* v. *Henry*, 10 *Johns.* 105; *Bearce* v. *Smith*, 2 *Mason*, 252; *Dexter* v.

Harris, 2 *Mason*, 255; *Colden* v. *Walsh*, 14 *Johns.* 407; *Trull* v. *Bigelow*, 16 *Mass.* 406; *Knox & al.* v. *Silloway*, 1 *Fairf.* 201. It is not necessary for the defendant to contend for this point, *for he defends under the license and permission of Pitts.* The mortgage of lot No. 36 from *William Patridge & al.* to *Pitts*, revested the estate in *Pitts;* and if made after the erection of this house, would operate as a sale or mortgage of the house to *Pitts*. *Waterhouse* v. *Gibson*, 4 *Greenl.* 230. A *chattel* mortgaged cannot be attached without first tendering to the mortgagee the amount of his debt or claim. 1 *Pick.* 389; *Holbrook* v. *Baker*, 5 *Greenl.* 209; *Thompson* v. *Stevens*, 1 *Fairf.* 27. If the defendant knew that the sale was fraudulent from his father to *William Patridge*, he also knew that it was immaterial to *Pitts*, or that it had been purged by a sale or mortgage to *Pitts*. But this house always belonged to, and was claimed by *Pitts*, as a part of the freehold; and it is therefore unnecessary to pursue the question of fraud. If it was built *before Nov.* 9, 1827, it belonged to *Pitts*, as a *voluntary erection.* If it was built *after* that date, then *Pitts, as mortgagee*, may hold it; and in either case, the defendant could protect himself under *Pitts.*

In an action of trover, the plaintiff must shew a *property* in himself and a right to the *immediate possession* of the chattels converted. The Court was incorrect, therefore, in instructing the jury that *Pitts* was out of this case, and that his rights were not to be settled in this action. The defendant, under the general issue, in trover, may shew a paramount title in a stranger. *Schemerhorn* v. *Volhenberg*, 11 *Johns.* 529; *Rotan* v. *Fletcher*, 15 *Johns.* 207; *Kennedy* v. *Strong*, 14 *Johns.* 128. Or anything tending to prove a want of title in the plaintiff. And the general owner is a competent witness to prove a title in himself. *Ward* v. *Wilkinson*, 4 *Barn. & Ald.* 410; *Stark. Ev.* 1508; 9 *Cowen*, 53.

2. The conversion, if any, by the defendant, being *previous* to the sale on execution, the plaintiff cannot sustain this action for the conversion alleged; and if any action could be sustained, it should be in the name of the attaching officer.

A creditor has no such property in a chattel, *by virtue of a seizure on a writ*, as will enable him to maintain an action for the same. *Ladd* v. *North*, 2 *Mass.* 254. The sale on execution was on the 26*th* of *May*, 1830, and the conversion is alleged to have been on the day previous to the sale, when the plaintiff had no interest in the house. It cannot be said that this point is immaterial on account of the subsequent use and occupation by the defendant; because the defendant, under *Pitts*, held the officer out and did not and would not deliver possession to the officer, and consequently the officer could not deliver possession to the plaintiff. The wrong was committed against the officer, if anybody. The plaintiff is not the injured party; *for nothing passed by the sale on execution.* It matters not what was the situation of this house at the time of the *attachment;* the true question is, *what was its situation at the time of the sale to the plaintiff on execution?* If it was not then *personal property*, it could not pass by the sale to the plaintiff.

The verdict in trover changes the property to the defendant; but if this verdict is confirmed, no property passes to the defendant. This verdict cannot be given in evidence against *Pitts;* but *Pitts* can sue and recover this house of the defendant. The law will not compel this defendant to pay for property which he cannot hold.

Evans, argued at length in favor of the plaintiff, citing the following authorities: *Howard* v. *Osgood*, 6 *Greenl* 452; 2 *East*, 88; *Taylor* v. *Townsend*, 8 *Mass.* 411; *Bull. N. P.* 34; 1 *H. Bl.* 259; *Wells* v. *Bannister*, 4 *Mass.* 514; 4 *Pick. R.* 310; *Staples* v. *Emery*, 7 *Greenl.* 202.

Mellen, replied for the defendant.

Weston C. J. — To sustain this action, it is incumbent upon the plaintiff to show, that when he caused the house in controversy to be attached, it was the personal property of *Ichabod Patridge*, his debtor. The jury have found that it was built by him, by the consent of his son, *William Patridge*. The land was the property of *John Pitts*. The father had formerly purchased it of him, but in *March*, 1822, had reconveyed his interest, finding himself unable to pay for it. But *Pitts* told *Wil-*

liam, that he might keep possession of the lot, until he might wish to dispose of it, at a reasonable rent; and, thinking he wanted it for his father, told him he might put on whom he pleased. *William* failing to pay the rent, *Pitts*, in 1825 or 1826, gave them notice to quit the place, or make some definite arrangement about it, or he should resort to legal measures to drive them off. No arrangement was then made, and in 1826, *Pitts* agreed to execute a conveyance to one *Miller*, who, however, failed to comply with the terms on his part; and thereupon *Pitts*, in *November*, 1827, conveyed the land to *William* and his brother *Jeremiah*, taking back a mortgage to secure the consideration, which remained unpaid at the time of the trial.

Pitts had notified them to quit the land, or make a definite arrangement. They remained, however, in possession; and in *November*, 1827, an arrangement was made, to his satisfaction. This should be regarded as an acceptance of the alternative proposed, the intervening attempt to sell to *Miller*, having failed. The preceding possession was thereby ratified and confirmed.

It is said that *Pitts* gave no consent to the erection of the house, and that when built, it became his property. And cases have been cited, to show that when one builds upon the land of another, without his consent, such building enures, as a part of the freehold, to the owner of the land. And as to any consent by *William*, it is insisted that, being a mere tenant at will, he could not assign over his possession to another. But *Pitts* did give *William* permission to put on whom he pleased, supposing that he intended to put on his father. If he might be put on, it could not be expected that he would live there without shelter; and it is fairly to be implied from the permission, that when he went on he might provide something to cover him.

From the plaintiff's testimony it appeared, that the frame was erected by the father, in the fall of 1826 or 1827; but it must have been in 1826, — for in *December* of that year, the father gave a bill of sale of the house frame and the boards lying by it, to *William*; and in the same instrument, which was introduced by the defendant, stipulated to dig and stone the cellar. If the father built the house by the consent of the owner of the land, it is now well settled that it continued his personal property; and

as such was liable to be taken by his creditors. *Russell* v. *Richards & al.* 1 *Fairf.* 429, and the cases there cited.

But assuming that *Pitts* never assented directly, or by fair implication, to the erection of the house; after his conveyance in 1827, *William Patridge* was tenant in common with *Jeremiah*, in the land in possession, subject to the mortgage of *Pitts*, for the consideration. They thus became the owners of the land against all the world but him, and as against him they were entitled, while in possession, to the rents and profits without account. Suppose it to have been land, on which an available profit might arise from ground rents, shall a mortgagor in possession be precluded from turning it to account, by suffering others to make erections upon it? And if made, why should the lien of the mortgagee at once attach upon them? He may entitle himself to the rents by taking possession, or he may interpose to determine the tenancy. With these rights and powers, he may be benefitted, but cannot be injured, if buildings placed upon the land by others, with the consent of the mortgagor in possession, are held to be personal property. If the law were otherwise settled, a door might be opened to put property out of the reach of creditors, by collusion with the mortgagor or the mortgagee, or even without collusion. The most expensive erections, built with the consent of the mortgagor in possession, would be at once so placed, as not to be tangible by any course of proceedings, which any creditor could adopt, even though he furnished the funds to build them. He could have no remedy against the mortgagor, nor would he have any means of compelling him to redeem, either before or after the mortgagee had taken possession for condition broken. And having no right to redeem himself, he would be without any remedy, whereby to reach the property of his debtor, in the ordinary forms of law. The case before us, if the defence set up is sustained, is an illustration of the injurious effect of the principle contended for upon fair creditors. We have made these intimations, without however intending to decide upon the rights of a mortgagee in such cases.

The jury have found that *William Patridge* has attempted to defraud the plaintiff and other creditors, by covering the property of their debtor, and that the defendant claiming under him, was

privy to it, having purchased with full knowledge of the fraud, and yet we are called upon to give effect to these fraudulent practices, and to throw over them the mantle of legal protection, by suffering the defendant to invoke to his aid the title of *Pitts*, who has a mere lien upon the land, which he may never have occacasion to enforce. We forbear to give a definite opinion as to the claim of *Pitts*. He is no party to this suit, nor can his rights be in the slightest degree affected by our decision. The house will continue upon the land; and if he has any lien upon it, it remains unimpaired. But we hold that *William Patridge*, having been in possession as tenant in common, and as such the owner, subject to the lien of *Pitts*, as mortgagee, and having consented that the house should be built and continued upon the land by *Ichabod Patridge*, as against *William* and all claiming under him, it is to be regarded as the personal property of *Ichabod*. If judgment is rendered against the defendant, when satisfied, he will have by operation of law a title derived from him, who holds lawfully under the true owner; and when the land is paid for to *Pitts*, which the *Patridges* by their contract are bound to do, he may enjoy the property without further embarrassment.

The title, upon which the plaintiff relies, dates from the attachment in *September*, 1829. It is insisted that the action should have been brought by the officer, as there was evidence of a conversion by the defendant, before the plaintiff became the purchaser, under the execution. But the officer was not obliged to treat the defendant as a wrong doer. The property remained subject to the attachment, and virtually in the custody of the law. The officer had a right to sell it upon the execution, and to pass the title to the plaintiff, the purchaser, notwithstanding the plaintiff and his sisters were in the house. And the title having vested in the plaintiff under the sale, he had a right of action for the subsequent conversion. Actual conversion being otherwise fully proved, the case did not require evidence of a demand and refusal.

We are of opinion that the instructions requested were properly withheld; and we sustain the ruling and directions of the Judge at the trial.

Judgment on the verdict.

Inhabitants of School District No. 1, *in* GREENE *vs.* JOSEPH BAILEY.

A school district, under the provisions of *stat.* of 1821, *ch.* 117, *sec.* 8, which authorizes the raising of money for the purpose of erecting, repairing, purchasing, or removing a school-house, and of purchasing land upon which the same may stand, &c. may lawfully raise money to defray the expenses of litigation growing out of the exercise of these express powers.

If such district vote to raise money for purposes not within their authority, such vote would be a nullity; and whoever should presume to carry it into effect, would do so at his peril. But *the district* would not be liable, the vote being altogether aside from its *corporate* powers.

Whether a school district has power to build a school-house, while having one suitable and convenient for their purposes, *quære.*

The *stat.* of 1826, *ch.* 337, *sec.* 1, in addition to an act for the assessment and collection of taxes, imposing certain liabilities upon towns and other corporations, and exempting assessors therefrom, does not apply to school districts.

ERROR, to reverse the judgment of the Court of Common Pleas, in an action brought by the present defendant against the plaintiffs in error, before a Justice of the Peace, and from thence carried to the Court of Common Pleas, by appeal. The original action was *assumpsit* for money had and received, and was founded upon a claim of said *Bailey*, to recover a portion of the amount of certain taxes that had been collected of him, assessed for the benefit of said district.

It appeared, that in 1828, there was an assessment of $154 on the inhabitants of the district, for the purpose of building a school-house; and that the said *Bailey's* tax was $15,47, which he paid. In 1831, there was another assessment of $90,02, to pay the expenses of a suit pending between the district and said *Bailey*. His tax was $8,32, which was satisfied by a sale of property by the collector. In 1833, there was another assessment of $564,17, for the purpose of paying an execution which *Bailey* had recovered against the district, and to defray the expenses of the suit. *Bailey's* tax was $56,85, a portion of which, $40, was satisfied by a seizure and sale of property, and the balance was voluntarily paid by him.

On the introduction of the town records, it appeared that the certificate in regard to the town clerk, was, that he "was duly

sworn by the moderator;" but there was no certificate of the moderator. The sufficiency of this was objected to, as well as the admission of the clerk, who was called by the present plaintiffs to prove that he was sworn. But the objections were overruled, and the clerk testified that the oath was duly administered to him by the moderator.

At a district meeting, held *Nov.* 1831, it was voted to appropriate the tax of 1828, *viz.*: $154, to the building of a new school-house. And it was admitted that, at the time of passing this vote, an action was pending, brought by *Bailey* against the district, to recover for the building of a school-house, which was resisted by the district, on the ground that the house had not been built according to the contract; but in which defence the district failed, it appearing on trial that the house had been occupied by the district before the commencement of the suit.

The tax of $154 had been paid into the town treasury, and had been paid out upon the orders of the district committee, except $34,94, which had been paid to the committee. This last sum, it appeared, the inhabitants of the district agreed to divide among themselves in proportion to the tax. And the town treasurer testified that he offered to pay *Bailey* his proportion, but he refused to take it, saying, "let it lay in your hands."

No part of the $154, raised to build the school-house built by *Bailey*, was appropriated to that purpose, but was appropriated to build the school-house which was erected under the authority of the vote of 1831, excepting the $34,94, aforesaid.

The present plaintiffs offered to prove that there were still outstanding claims against the district, for the school-house built in 1831, but the evidence was rejected by the Court.

Upon this evidence the original defendants requested the Judge to direct a nonsuit, on the ground that this action could not lie against the district; such corporations, from their limited and peculiar character, not being liable to actions of this kind and under such circumstances. But the Judge ruled, and instructed the jury, that such action would lie, provided they should be satisfied that any unexpended money now remained in the hands of the town treasurer, for the use of the district, which had been raised by a tax upon the inhabitants of the district; in which case, the origi-

nal plaintiff was entitled to recover his share of it. He further instructed the jury, that the offer of the town treasurer to pay the plaintiff his proportion of such money, could not avail the defendants by way of defence to this action, as the money had not been brought into Court, as was necessary in cases of tender made by individuals.

The counsel for the defendants further requested the Judge to instruct the jury, that the action could not be maintained without proof of a demand prior to its commencement. But the Judge instructed the jury otherwise. Whereupon a verdict was returned for the original plaintiff for the sum of $3,60, being his proportion of the unexpended balance aforesaid.

To the foregoing rulings and directions of the Judge, the defendants tendered a bill of exceptions, and by writ of error brought the cause into this Court.

Wells, for the plaintiffs in error, insisted that the action could not be maintained, and cited *Mower* v. *Leicester*, 9 *Mass.* 247; *Stat. of* 1821, *ch.* 117, *sec.* 8; *Abbot* v. *Hermon*, 7 *Greenl.* 118; *Little* v. *Merrill*, 10 *Pick.* 543; *Stat. of* 1826, *ch.* 337, *sec.* 1.

He argued further, against the rulings and directions of the Judge, and to the point that there should have been a demand, cited *Varner* v. *Nobleborough*, 2 *Greenl.* 126; *Hosmer* v. *Clark*, 2 *Greenl.* 308; *Story on Bailments*, 82, *sec.* 107; *Joy* v. *The County of Oxford*, 3 *Greenl.* 131. That parol evidence of the clerk's being sworn was inadmissible, *Moor* v. *Newfield*, 4 *Greenl.* 44; *Abbot* v. *Hermon*, 7 *Greenl.* 118. As to the insufficiency of the record, *Colborn* v. *Ellis & al.*, 5 *Mass.* 427.

A. Belcher, for the defendant in error, contended that the district had no legal power to build the school-house of 1831, by a tax on the inhabitants, or to apply the money raised by the tax of 1828, for such purpose — a school-house having then just been built and accepted by the district; one every way suitable for the wants of the district. The committee were bound to appropriate the amount of tax of 1828, to the purposes for which it was assessed, and they could not apply it to any other purpose. *Stat. of* 1821, *ch.* 117, *sec.* 9.

The district has transcended its legal corporate powers, in the assessment of the tax of 1833, and the original plaintiff is consequently entitled to recover his proportion of that amount paid by him, viz. $15,47. *Bussey* v. *Gilmore*, 3 *Greenl.* 191.

1. At the meeting of 1833, the unexpended balance of the tax of 1828, viz.: $34,94, should have been deducted from the amount then to be raised; which would have diminished the plaintiff's tax of that year $3,60. As they did not make the deduction, it may be considered as included by mistake, which would entitle the plaintiff to bring this action for his proportion. *Whitcomb & al.* v. *Williams & al.* 4 *Pick.* 228.

2. The plaintiff was entitled to recover the $3,60, by virtue of the agreement to divide. *Todd* v. *Clough*, 8 *Greenl.* 334.

3. The action was rightly brought against the district, instead of the officers of the town or district. *Stat.* 1821, *ch.* 117, *sec.* 10; *Stat.* 1826, *ch.* 337, *sec.* 1; *Amesbury W. Company* v. *Amesbury*, 17 *Mass.* 461.

4. The offer to pay, by the treasurer, did not amount to a tender, and was not regularly pursued. *Benson* v. *Carmel*, 8 *Greenl.* 110.

5. The commencement of the action was a sufficient demand. *Coffin* v. *Coffin*, 7 *Greenl.* 298; *Whitcomb & al.* v. *Williams & al.* 4 *Pick.* 228.

6. Parol evidence as to the town clerk's being duly sworn, was rightly admitted. At all events, substantial justice has been done, and the Court will not now disturb the verdict.

WESTON C. J. — School districts are *quasi* corporations, with very limited powers. By the statute of 1821, *ch.* 117, *sec.* 8, they are authorized to raise money, for the purpose of erecting, repairing, purchasing, or removing a school house, and of purchasing land, upon which the same may stand, and of utensils for such school-house. In the discharge of these powers, litigation may arise. They may become liable to an action; and it may be necessary for them to bring one, to vindicate their rights. These rights and liabilities are incident to the powers conferred. And if suits arising in such cases should terminate unfavorably,

the district must necessarily suffer loss; and they may constructively possess the power to raise money to meet it. In the exercise of these powers and their incidents, at a regular meeting, the corporation may become bound, and the minority of the district subjected to the power of the majority. But if the district should undertake to transcend their powers, and should vote to raise money for purposes not within their authority, such vote would be a nullity; and whoever should presume to carry it into effect, would do so at his peril. But the district would not be liable, the vote being altogether aside from their corporate powers. So if they vote to raise a sum of money manifestly and clearly beyond what is wanted in the exercise of their powers, such vote is either entirely void, or valid only for the amount required. The corporation can be bound only by a legal vote, or by an act done in the discharge of their lawful authority. To decide otherwise, would be to put the property of the minority under the control of the majority, beyond the purposes for which alone they are clothed with corporate powers.

The district meeting may have undertaken to do more than can be justified. They had contracted with the original plaintiff to build them a school-house. He built one. Whether it was done in accordance with his contract, or whether if not, they had accepted it, was in a course of litigation. It was ultimately decided against the district. While that suit was still pending, it appears that in *November*, 1831, it was voted by the district to build another school-house, and to appropriate to this purpose the money raised in 1828, to build the house in controversy. The district has power to raise money to build a school-house. It does not appear to have been contemplated, that one district should have more than one school-house, and so long as they have one, suitable and convenient for their purposes, it may be questionable whether they have a right to build another. By the *9th section* of the act before cited, the money raised and assessed in virtue of the *8th section*, after being collected and paid to the treasurer of the town, is subject to the disposal of the committee of the district, to be by them applied in conformity with the vote, by which it was raised. It appears that the greater part of the money raised in 1828, was appropriated to build the school-house,

voted in 1831. After the suit for the first house had terminated, and it turned out to be the property of the district, it became necessary to provide for the execution of the original plaintiff. Assuming that what was paid for the second school-house was not misapplied, and upon this point we give no opinion, there remained unexpended of the first sum raised, nearly thirty-five dollars; and the sum necessary to meet the execution would only, it is insisted, be the balance remaining after deducting that amount. But a meeting of the district voted to raise the whole amount of the execution, without applying thereto the money previously raised. Suppose this to have been an unjustifiable course, how then would it stand? A meeting of the district vote to raise money for an object not authorized by law, or more than is required for any lawful purpose. As far as such vote is unlawful, it is not a corporate act, nor are the corporation answerable for the consequences. Their powers are special and limited. When a majority of the inhabitants of a district undertake to go beyond them, as far as they exceed their authority, they cease to act as a corporation.

The counsel for the original plaintiff contends, that this action may be supported by the statute of 1826, in addition to an act for the assessment and collection of taxes, *ch.* 337, *sec.* 1. It is a sufficient answer to this argument, that the statute cited does not apply to school-districts, but to towns, plantations, parishes and religious societies. Upon them certain liabilities are imposed, from which the assessors, who act faithfully and with integrity, are exempted. It could never have been intended that a town should be held answerable for any improper proceedings, wilful or otherwise, on the part of the majority of a school district. In *Little* v. *Merrill et al.*, 10 *Pick.* 543, the Supreme Court of *Massachusetts* took the same view of the subject, when commenting on a similar statute.

It is urged that the original plaintiff ought to prevail against the district, because the money he claims has been improperly extorted from him, or received by mistake, and detained against equity and good conscience. But a school-district, acting as a corporation, can never be chargeable upon these grounds. They can confer no agency to extort money unlawfully, or to receive

or to retain it without right. No vote of theirs, not authorized by law, could justify the demand or receipt of money in their behalf. And if it was received by persons, assuming to be their agents, or under color of authority from them, in a case not within their corporate powers, no promise would be implied on the part of the corporation to refund it, nor would it form a consideration, which would sustain an express promise by them to this effect.

Upon this view of the case, and upon the facts set forth in the exceptions, we are of opinion, that the Judge, in the court below, should have directed a nonsuit, or instructed the jury, that the original plaintiff had not sustained his action. We therefore reverse the judgment, but without costs; the error assigned and sustained being an error in law.

We have thus held, that the original plaintiff could not sustain an action against the district, upon the proof stated in the exceptions. But we do not intend to intimate that others are liable upon the facts. The assessors were doubtless justified in making the first assessment. The second was to sustain the suit, in which the district were defendants. In making the third, they found that judgment had been rendered against them, and an execution actually issued, for the amount they voted to raise. The unexpended balance, a portion of which is claimed by the original plaintiff, has grown out of the peculiar circumstances, in which the parties have found themselves placed. Further litigation in the affair, is certainly not to be encouraged. The original plaintiff might have received the amount, claimed and recovered by him in the court below, but he chose to let it remain in the hands of the treasurer of the town; and it is probably still ready for him on demand.

Judgment reversed.

PEASE *vs.* SIMPSON.

Replevin must be brought in the county where the original taking was, or where the chattel is detained.

The defendant obtained unlawful possession of the plaintiff's horse in the county of K., where the plaintiff resided, and carried him to the county of H. The plaintiff sued out his writ of replevin in the county of K., which was served on the defendant in H. *Held*, that the action was maintainable.

REPLEVIN for a chesnut colored mare. The facts in the case are sufficiently stated in the opinion of the Court. A verdict was rendered for the plaintiff, subject to be set aside, if this action was improperly brought in the county of *Kennebec;* otherwise judgment was to be rendered thereon.

D. Williams, for the defendant.

The action of replevin is local in its nature, and should be brought in the county where the cause of action has accrued. *Robinson* v. *Mead*, 7 *Mass.* 350.

In *Wyman* v. *Dorr*, 3 *Greenl.* 181, it is said, the action may be brought wherever the property is *detained.*

Since the case of *Badger* v. *Phinney*, 15 *Mass.* 359, the doctrine in relation to replevin is entirely changed. The taking is of no consequence; the *detention* is the gist of the offence. *Baker* v. *Fales*, 16 *Mass.* 147; *Story's Pleading, tit. Replevin, Seaver* v. *Dingley*, 4 *Greenl.* 306.

It may always be said that the property is taken where it is detained, but not that it is detained where taken.

Potter, for the plaintiff, cited 4 *Cow.* 46; *Bull. N. P.* 54; 5 *Dane's Abr.* 533.

EMERY J. — This is an action of replevin. The only question in the case is, whether the action should have been brought in the county of *Hancock*, rather than in *Kennebec.* And the reason for raising this question, is, that the plaintiff had become the owner of the mare by exchange with one *Priest.* Subsequently, *Priest*, having obtained possession of the mare and claiming to be the owner, exchanged her, at *China*, in the county of *Kennebec*, with the defendant, for another horse, and a small sum of money by way of boot; the defendant supposing *Priest* to have

been the owner of the mare. After taking a journey westward, the defendant returned with her to his residence at *Ellsworth*, in the county of *Hancock*. There he detained the mare, and there the writ in this action was served.

The action of replevin, by our statute, is local. That is, it must be brought either in the county where the original taking was, or where the chattel may be detained. It is not exclusively confined to the place of the last detention. The statute should receive a liberal construction, as it is a remedial statute. There is not readily discernible a reason for putting the action of replevin upon any different ground from that of all other personal actions of trespass for taking goods.

Even those actions, in cases between citizens of the State, must be brought in the county where one of the parties live. And the plaintiff having, in this case, elected to prosecute in the county where the original wrongful taking of his property was performed, as the jury have said, we feel bound to render

Judgment on the verdict.

BEAN, *plff. in equity vs.* HERRICK.

If a party make a false affirmation, although he has no interest of his own to serve, whereby another sustains damage, he is liable to an action.

Though the maxim *caveat emptor* is a sufficient answer to mere silence in regard to defects open to observation, yet where B. purchased of S. a large quantity of land, upon the strength of a written statement furnished by H., who held the legal title, giving a minute and particular description thereof, the land being one hundred miles distant, and which H. knew was not to be personally examined by B., he was held answerable in damages to B., on its appearing that the representations were false, and known by H. to be so when made.

THIS was a bill in equity, in which the plaintiff set forth a purchase of the defendant of a large quantity of land in the towns of *Kilmarnock* and *La Grange*, in the county of *Penobscot*. That he was induced to purchase, by the false and fraudulent representations of the defendant as to the quality of the land, quantity and quality of the growth upon it, &c., which representations, it was alleged, the defendant well knew to be false.

It appeared that the bargain was made with one *Smyth*, though the defendant gave the deed.

At the *July* term, 1834, in *Waldo*, the Court made the following order, *viz.*: "The Court, having examined the bill and "answer and the written testimony by the parties respectfully "adduced, do order that the parties make up an issue to be tried "by a jury in the county of *Kennebec*, at the next *October* term, "submitting it to them to determine — First, whether in the sale "made by said *Herrick* to said *Bean*, which resulted in the con- "veyance by the said *Herrick* to the said *Bean* on the 20th day "of *Oct.* 1832, of certain lands in the towns of *Kilmarnock* and "*La Grange*, fraud was practiced by said *Herrick* upon said "*Bean*. Secondly, if so, to what amount the said *Bean* has "been injured thereby. And it is further ordered that in the trial to "be had as aforesaid, there be submitted to the jury the following "testimony and none other, *viz.*: the bill and answer, with the "plan or plans and the written description of the land, made by "*Herrick*, and used or referred to at the time of the sale, the "depositions already taken, together with such other depositions as "may be taken by the parties respectively on or before the first "day of *September* next: in addition to which, each party is at lib- "erty to bring two witnesses to be examined at the trial *viva* "*voce*, together with any other written evidence pertinent to the "issue."

At the *October* term, the case was submitted to the jury upon the issue and upon the evidence directed by the Court.

The Chief Justice, who presided, was requested by the defendant's counsel to instruct the jury, that the defendant was not answerable for any misrepresentations he might have made as to the quality, condition or value of the lots, which the plaintiff might have seen by going upon them. That the plaintiff should have examined for himself or taken security that the lots were as represented; and the title to them having passed by the defendant's deed to the plaintiff, the latter has no remedy, except upon the deed. That the defendant was not liable for any representations made by him, unless proved to be false, and known by him to be so when made, and made with intent to defraud the plaintiff. That if the defendant believed his representations to be true

when made, although not true in fact, he was not answerable. That the defendant was not liable, if the jury believed the land was fairly sold by the defendant to *Smyth*, and that the deed was given by the defendant to the plaintiff, in execution of the contract between *Smyth* and the plaintiff.

Upon these points the Judge withheld the instructions requested, except as hereafter stated; but he instructed the jury that as the defendant knew the plaintiff was to purchase without seeing the land, which was one hundred miles distant from the place of sale, and from the residence of the plaintiff, if the defendant represented the land, or any part of it, to be heavily timbered; that, the growth upon it, or any part of it, remained green; that the land or any part of it, was not injured, or but little injured by fire; or that the land, or any part of it, was traversed with roads, when he knew that such were not the facts; or if he represented the land, or any part of it, to be good for farming when he knew it to be bog, or worthless for that purpose, and either of these representations was made with intent that the plaintiff, if he should become the purchaser, should be defrauded, and the plaintiff was thereby defrauded, the issue was maintained on the part of the plaintiff. But that it was not maintained by proof of an over-estimate by the defendant, of the value, or by a false estimate of the quality of the land, except as before stated; nor if the defendant believed the representations to be true. And that upon the foregoing principles, the issue would be sustained for the plaintiff, although the defendant had sold to *Smyth* if he aided in defrauding the plaintiff.

The jury returned a verdict for the plaintiff. If the instructions requested and withheld, ought to have been given; or those which were given, were erroneous, the verdict was to be set aside and a new trial granted; otherwise it was to stand for such decree, as the equity of the case might require.

R. Williams, for the defendant, argued in support of the positions taken at the trial, citing the following authorities: *Sugden's Vendors*, 2, 8, 195, 200; 2 *Kent's Com.* 428, note; *Newland on Cont.* 357; 2 *Dane's Abr.* 560, 562; *Roswell* v. *Vaughan, Cro. Jas.* 196; *Powell* v. *Clark*, 5 *Mass.* 355; *Dyer*

& al. v. *Lewis*, 7 *Mass.* 284; *Cro. Jas.* 386; 2 *Dane's Abr.* 543; *Harvey* v. *Young*, *Yelv.* 21; 2 *Dane's Abr.* 549, 558.

Allen, for the plaintiff, cited *Sugden's Vendors*, 197; 1 *Mad.* 208, 209, 212; 5 *Johns. Ch. R.* 174; *Broderick* v. *Broderick*, 1 *P. W.* 239; 5 *Mum. R.* 183; *Newland on Con.* 361; 1 *Brown's Ch. Cas.* 141; *Bliss* v. *Thompson*, 4 *Mass.* 488; *Morton* v. *Chandler*, 8 *Greenl.* 9; *Apthorpe* v. *Comstock*, *Hopk.* 143; *Irving* v. *Humphrey*, *ib.* 284; *Livingston* v. *The Peru Iron Co.* 2 *Paige's R.* 390; 3 *Paige*, 94.

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

It is contended, that the defendant had no interest in the sale to the plaintiff, having previously agreed to sell to *Smith*, and that he merely executed a contract of sale made by him. The jury, however, have found that he made representations which he knew to be false, with the intent that the plaintiff should be defrauded, and that he was thereby defrauded. In the leading case of *Pasley* v. *Freeman*, 3 *T. R.* 51, it was decided, upon great consideration, that if a party make a false affirmation, although he has no interest of his own to serve, whereby another sustains damage, he is liable to an action. The same principle was recognised in *Haycroft* v. *Creasy*, 2 *East*, 92, but it was there holden that, to charge the party upon such false affirmation, he must have known it to be false, and have made it with the design that another should be injured, although he himself had nothing to gain by it. These cases are noticed with approbation, by *Marshall Ch. Justice*, in delivering the opinion of the Court in *Russell's ex'rs.* v. *Clark's ex'rs.* 7 *Cranch*, 69, where he says, "if an act in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed." *Upton* v. *Vail*, 6 *Johns.* 181, adopts *Pasley* v. *Freeman;* but in *Young & al* v. *Covel*, 8 *Johns.* 23, it was held that deceit is the gist of the action, and that a fraudulent design must be proved in the party attempted to be charged. And we are of opinion that this objection cannot avail the defendant, even although his agreement with *Smith* may have been fairly made.

It is urged that the jury should have been instructed, that the defendant had not occasioned the plaintiff any injury, as his interference was after the contract, made by the plaintiff with *Smith.* But the false affirmations, made in writing under the defendant's hand, were used by *Smith*, before the contract was made. Afterwards, and before the deed, the truth of the affirmations in writing were re-asserted to the plaintiff, by the defendant in person. If he had then truly represented the state of the lands to the plaintiff, he would not have accepted the deed, and would have been furnished with matter of defence against the contract, which he could not, under such facts, have been compelled to execute.

It is further insisted that the charge is not supported, because the jury have found that the difference between the value of the lands, and the price agreed to be paid for them is not much over ten per cent. There may be a failure of proof of fraud from inadequacy of price, upon which the case did not turn, but upon other distinct and independent grounds.

But the main point, upon which the defence is placed, is, that upon the facts the plaintiff is without remedy, either at law or in equity. That he should have examined the land for himself, or taken covenants for his protection, and that if he is injured, it is the consequence of his own folly and imprudence. That he has sustained damage, occasioned by the fraud of the defendant, the jury have found; and if he is denied a remedy, it is withheld rather by the policy of the law, than the dictates of morality. The principle of *caveat emptor* has certainly been extensively applied in suits at law; especially in the sale of real estate. And it has not been without its influence, in the sale of personal chattels. It is not easy to reconcile all the cases upon this subject. Some of them have been more indulgent to fraud and misrepresentation, than is consistent with morals, or the common sense of mankind. The case of *Pasley* v. *Freeman* is distinguished for its high moral tone; and the general principles there laid down, if carried out, would sustain an action at law against the defendant.

One of the earlier cases, of an opposite character, is *Chandler* v. *Lopus*, *Cro. Jas.* 4, where a jeweller sold a stone, as and for a bezoar stone, for a high price, when it was not a stone of that

description. And the court held that the party injured was without remedy, even if the defendant knew at the time that it was no bezoar stone. This case is justly and pointedly reprobated by *Parker C. J.* in *Bradford* v. *Manly*, 13 *Mass.* 139, who insists that it cannot be received as law in this country, and would not at the present day be recognised in *England*. The case of *Bayley* v. *Merrill*, *Cro. Jas.* 196, was decided a few years after *Chandler* v. *Lopus*, in the same reign, where the plaintiff, a carrier, was injured by giving credit to the false affirmation of the defendant, that a quantity of madder, which weighed twenty-two hundred, was only of the weight of eight hundred pounds, for which it was holden that no action could be sustained.

The opinion of *Lord Rosslyn*, in *Outfield* v. *Round*, 5 *Vesey, jun.* 508, has been cited by the counsel for the defendant, from *Sugden*, where a contract had been made for the purchase of a meadow, without any notice of a foot way around it and across it. His Lordship decreed a specific performance, saying he could not help a purchaser, who did not choose to inquire. There the vendor was merely silent. It would doubtless have been otherwise decided, if he had falsely and fraudulently affirmed that there was no footpath; for it was a bill for specific performance; and the court would not have exerted its discretionary power, to aid such a party. As it was, *Lord Manners* said, in 1 *Ball and Beatty*, 350, that he believed the bar was not very well satisfied with that decision.

In *Powell* v. *Clark*, 5 *Mass.* 355, a tract of land was described in the deed as containing a certain number of acres; this was holden not to amount to a covenant that the land did contain that quantity. But it has been held, as it ought to be, a good defence to a bill for specific performance of a contract for the purchase of real estate, that there was not so much land, as the contract described. 3 *Page*, 94, *Veedor* v. *Fonby*. Of the same character was the case of *Dyer* v. *Lewis*, 7 *Mass.* 284, where a sloop was described in the bill of sale, as of greater tonnage, than she proved upon admeasurement.

Lysney v. *Selby*, 2 *Lord Raymond*, 1118, was an action at law, which was sustained against the vendor of an estate, for affirming that the rent of the estate was higher than it was in truth.

In *Bliss & al.* v. *Thompson*, 4 *Mass.* 488, the plaintiffs had been induced, by the false and fraudulent representations of *Thompson*, to sell their interest in certain *Kentucky* lands, and *Thompson* having realized, from a prior warrantor of the plaintiffs, a greater sum, was holden answerable to them, in an action for money had and received, for the difference. The court there say that, "not only good morals, but the common law requires good faith, and that every man in his contracts should act with common honesty, without overreaching his neighbor, by false allegations or fraudulent concealments." *Hill* v. *Gray*, 1 *Starkie's Rep.* 434, was an action brought to recover the price, which the defendant had agreed to pay for a picture. It did not prevail, because the plaintiff's agent had suffered the defendant to purchase, under an illusion, which he knew existed in his mind, which he did not remove, that it belonged to another individual.

The common law does not require the vendor to disclose defects, which are open to the observation of both parties. Nor does it afford a remedy for false assertions in regard to what is matter of opinion and judgment, as to the value of the property sold. 2 *Kent*, 381, and the cases there cited. In *Vernon* v. *Keys*, 12 *East*, 631, which related to the sale of certain buildings, &c. *Lord Ellenborough*, in delivering the opinion of the court, says, "a seller is unquestionably liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold, to be other than it is in some particulars, which the buyer has not equal means with himself of knowing; or if he do so in such a manner, as to induce the buyer to forbear making the inquiries, which for his own security and advantage, he would otherwise have done.

Sugden on Vendors, 221, *Phila. edition*, treating of defects in the quality of an estate, sold or contracted for, states that the rule, *caveat emptor*, generally applies; and therefore, although there be defects in it, yet if they are patent the purchaser can have no relief. Yet he cites several cases, where a false description being given, in relation to points open to detection, relief has been afforded in equity, by decreeing compensation to the purchaser.

In *Dale* v. *Rooservelt*, 5 *Johns. ch.* 174, relief was afforded where a false representation had been made by the defendant, of the existence of a valuable coal mine on the bank of the *Ohio* river, on a tract of land, which the plaintiff's testator had thereby been induced to purchase. And in *McFerran* v. *Taylor & al.* 3 *Cranch*, 270, in chancery, it was holden that he, who sells property, on a description given by himself, is bound in equity to make it good.

The rule of *caveat emptor* is useful in the community. It leads to vigilance and circumspection ; and servs to check litigation. It is a sufficient answer to mere silence, in regard to defects open to observation. And it is not every falsehood, against which common prudence might guard, which will entitle a party injured by it, to appeal to a court of law or equity for redress. The line which separates cases, where the rule of *caveat emptor* applies, from others which call for relief, is not defined with entire precision. Each one will rest, in some measure, upon its peculiar circumstances. In the case before us, we are of opinion that relief ought to be afforded, and that the jury were properly instructed. When *Smith* made the contract with the plaintiff, he did it upon the strength of a written document, furnished by the defendant, giving a minute and particular description of each lot. Before the deed was made, the defendant presented himself to the plaintiff, in the character of one, who having previously sold to *Smith*, had no interest in the conveyance, then about to be made. He was known to be a man of high standing and respectable character. Upon the earnest inquiry of the plaintiff, he re-asserted all that was contained in the written description he had before furnished, saying if he made any alteration, it would be to represent the land more favorably. That was in the wilderness, at the distance of an hundred miles. We cannot but say, that all this assurance, thus repeated, coming from a source, claiming to be disinterested, was calculated to put common prudence off its guard. The defendant, in his answer, says that he did believe that he was justified in the statement he made to the plaintiff, and that it was correct and fair, in his judgment, from the information he possessed. We hope for his sake, that this averment is true, although the jury have not given credit to it.

His character will call for a favorable interpretation of his acts, among those who know him.

The jury having found the issue, submitted to them, in favor of the plaintiff, and having settled the amount of damage sustained by him ; and the Court having taken the whole matter into consideration, do hereby decree and order, that the deed of conveyance, made by the defendant to the plaintiff, of the lands in controversy, be held good and valid ; that the plaintiff pay the amount of his notes given therefor, with interest ; and that the defendant pay to the plaintiff the amount of the damages awarded by the jury in his favor, with interest thereon from the time of the verdict to the time of rendering this decree ; and that he further pay to the plaintiff his legal costs.

GOODWIN *vs. The Inhabitants of* HALLOWELL.

In the case of an appeal to the Court of Sessions, on the refusal of a town to accept a road, laid out by the selectmen, the record shew that the road was laid out by a *majority* of the selectmen, at a meeting held at a particular time and place, in pursuance of notice in a public newspaper, published in the same town. *Held*, that the proceedings of the selectmen were valid.

The selectmen of a town having legally laid out a town way, which the town refused to approve and allow, and the parties aggrieved having appealed to the Court of Sessions, that court has *jurisdiction*, by virtue of the *11th section* of *stat.* of 1821, *ch.* 118.

The adjudication of the Court of Sessions, that a town *unreasonably* refused, is final and conclusive upon that point.

It is competent for a committee appointed by the Court of Sessions, adhering to the *termini*, to vary the way in other respects from the laying out of the selectmen.

Where no objection was taken that one of said committee was not a *freeholder*, either at the time of their locating the road, or at the Court when their return was accepted, it was held to be a *waiver* of the objection.

Irregularities appearing upon the face of the proceedings upon roads, within the jurisdiction of the Court of Sessions, can only be corrected upon *certiorari*.

Where a town way is laid out by the selectmen, but not approved and allowed by the town, and afterwards is located and established on appeal to the Court of Sessions by the parties aggrieved, its character is not thereby changed to a *county road*, and the payment of damages to individuals transferred from the town to the county.

The return of the selectmen, of the location of a way, denominated by them "*a town road or highway*," sufficiently shows for *whose use* it was made.

THIS was an action of *debt*, brought to recover the amount of damages that had been awarded to the plaintiff by a committee appointed by the Court of Sessions, for the location of a way, in part over the plaintiff's land, and was submitted for the decision of the court, upon the following agreed statement of facts.

By a recital in the record of the Court of Sessions, it appeared that on the first day of *December*, 1828, two of the selectmen of *Hallowell*, at a regular meeting, called by notice published in a paper printed at *Hallowell*, laid out the town road in question, and which was particularly described in their return. At a meeting of the inhabitants of *Hallowell*, on the 27*th* of *March*, 1828, an article having been inserted in the warrant to see if the town would accept the road aforesaid, a vote passed indefinitely post-

poning said article. The record then set forth the petition of *Asa Davis*, in which all the prior proceedings were stated, and asking that the Court of Sessions would accept the way as located by the selectmen, and order the same to be recorded in the town books, or that they would cause the way to be laid out by a committee of three disinterested freeholders, according to law, on the ground that the town had unreasonably neglected and refused to do it. After due notice and two continuances, the court adjudged that the town of *Hallowell* had unreasonably refused to approve and allow the road laid out by the selectmen, and thereupon ordered, that the road as prayed for in the petition of *Phillip Bullen* and others, to the selectmen of *Hallowell*, be laid out by a committee of three disinterested freeholders; and appointed *Nathaniel Robinson* and two others a committee for that purpose. Then followed the recital of the warrant to the said committee, and their report corresponding with the original location as to the *termini*, though otherwise materially varying from it — and in which damages were awarded to the owners of the land, over which the way was located, and among others, to the plaintiff the sum claimed in this action. It further stated that the town of *Hallowell* had notice and was fully heard.

It was agreed that it did not appear by the records of the town of *Hallowell*, or those kept by the selectmen of that town, that the road was laid out by them in pursuance of any application to them in writing. That one of the committee appointed by the Court of Sessions to locate said road and estimate the damages, was not a freeholder. That though both locations, that is, by the selectmen, and the Court of Sessions, passed over the plaintiff's land, yet that he should not have claimed damages if it had been established as first located. That no order or direction was ever made or passed by the Court of Sessions, for the town of *Hallowell* to pay the plaintiff the damages claimed in this action. That, the plaintiff demanded of the treasurer of *Hallowell*, payment of the sum now claimed, at least thirty days before the commencement of the suit. That the selectmen knew that the sum of forty dollars had been awarded to the plaintiff, and that the report of the committee had been accepted. That the town of *Hallowell* caused said road to be made by contract in 1830,

although they have always objected to its location; and have ever since continued to keep it in repair, regularly assigning it to the highway surveyors.

A default or nonsuit it was agreed should be entered according to the opinion of the Court upon the whole case.

Lombard, for the plaintiff, maintained that the proceedings in the location of the road were regular, and that the plaintiff therefore was entitled to recover the amount of damages awarded by the committee.

Clark, for the defendants, contended that on the location by the Court of Sessions the road became a *county road*, and that therefore the town of *Hallowell* was not liable in this action. He contended further, that the location was not in conformity to the requirements of law, and that therefore the plaintiff was not entitled to recover.

The record does not shew, as it should, for *whose use* the road was laid out.

There should have been an order of the Court of Sessions for the payment of the damages. The remedy under the *stat.* of 1828, *ch.* 399, is merely cumulative — the remedy by warrant of distress still exists. *Gedney* v. *Tewksbury*, 3 *Mass.* 307; *Commonwealth* v. *Bluehill Turnpike*, 5 *Mass.* 420; *Commonwealth* v. *Milford*, 4 *Mass.* 446; *Commonwealth* v. *The Justices of the Court of Sessions, County of York*, 5 *Mass.* 435; *Rice* v. *Barre Turnpike Corporation*, 4 *Pick.* 130.

The proceedings show a want of jurisdiction in the Court of Sessions; and that the defendants may avail themselves of this objection in defence of this action, cite *Smith* v. *Rice*, 11 *Mass.* 513; *Com. Dig. Error, D;* 2 *Mass.* 207; 1 *Cowp. Rep.* 26; 4 *Burr.* 2244.

The Court had no jurisdiction, because the petition does not set out for *whose use* the road is to be laid out. It should appear in the petition, and this is the only way to distinguish the character of the way.

If there was an application originally to the selectmen in writing, that should have been made a matter of record — not competent to prove it by parol — and no person is entitled to ap-

peal to the Court of Sessions but the petitioners. *Howard* v. *Hutchinson*, 1 *Fairf.* 341; *Commonwealth* v. *Peters*, 3 *Mass.* 230.

The Court of Sessions can only locate where the selectmen did. In this case they adhere merely to the *termini*, but vary in all other respects. Now it does not appear that the town of *Hallowell* would not have been willing to have accepted a road located where this was by the court. And it is contended, that the Court of Sessions have power only to say whether the town has acted *unreasonably* in refusing to accept the road *as laid out by the selectmen.* In this way only can congruity be given to the statute regulating this subject.

The court had no jurisdiction, because but *two* of the selectmen acted. *Clark* v. *Cushman*, 5 *Mass.* 505; *Commonwealth* v. *Ipswich*, 2 *Pick.* 70.

The proceedings are void also, inasmuch as one of the locating committee was not a *freeholder*, which the statute requires.

Nor does it appear that there was any adjudication of the necessity of the road, as there should have been. *Commonwealth* v. *Egremont*, 6 *Mass.* 491; *Commonwealth* v. *Cummings*, 2 *Mass.* 171.

The proceedings of courts of inferior jurisdiction are void unless in conformity to the statute, and may be avoided collaterally as well as on *certiorari*. *Wales* v. *Willard*, 2 *Mass.* 120; *Sumner* v. *Parker*, 7 *Mass.* 79; *Cutts & als.* v. *Haskings*, 9 *Mass.* 543; *Smith* v. *Rice*, 11 *Mass.* 507; *Haskell* v. *Haven & al.*, 3 *Pick.* 404; 2 *Cowp.* 640; *Bigelow* v. *Stone*, 19 *Johns.* 39; *Ex parte Watkins*, 3 *Peter's Rep.* 205; 3 *Peter's C. R.* 1; 4 *Johns. R.* 198; 1 *Dall. R.* 68; 2 *Wilson*, 386.

Weston C. J.—In the proceedings of the Court of Sessions, set forth in the warrant to their committee, it is stated that *Philip Bullen* and six others, had, under their hands, petitioned the selectmen of *Hallowell* to lay out the road under consideration, and the petition is recited at length. And this is evidence, under the authority of the court, of the facts thus stated.

It is urged, that only two of the three selectmen located the road, and certified their laying out to the town, under their hands;

and that there is no evidence that the third was present, or that he was notified of their meeting. And authorities have been cited to show, that a meeting of two only, without notice to the third, was not such a meeting as would authorize them to act. Their return states the proceedings to have been had, at a meeting of the selectmen; from which it might be contended that it was a valid and competent meeting. It further states, that it was a meeting holden at a certain time and place, in pursuance of notice previously published, in a public newspaper printed in *Hallowell.* It was an official notice, of which it cannot be presumed that either of the selectmen was ignorant. That the selectmen of *Hallowell* did lay out the road, which the town had unreasonably refused to approve and allow, is found by the Court of Sessions.

The selectmen having duly and legally laid out the road, and the town having refused to approve and allow it, and parties aggrieved at that refusal having petitioned the Court of Sessions for relief, that court had jurisdiction of the subject matter expressly given to them, by the eleventh section of the act of 1821, in relation to highways, *ch.* 118. And this is a sufficient answer to the authorities, cited by the defendants' counsel, in support of the doctrine, that the acts of a court of special and limited powers, upon a matter not within their jurisdiction, are void.

The adjudication of the court, that the town unreasonably refused, is final and conclusive upon that point; and is all which, under the statute, this part of the case requires. It was then competent for the court, under the section before cited, to accept and approve of the road laid out by the selectmen, and to direct the same to be recorded in the town book; or to lay it out by a committee of their own appointment. It is the road petitioned for, that they are thus authorized to lay out. The original petition to the selectmen set forth the *termini,* and submitted, as it ought, the location to their discretion. The petition to the sessions prays, that they would direct the road laid out by the selectmen, to be recorded in the town book, or that they would cause the same to be laid out by three disinterested freeholders, according to law. We are very clear, that the committee have a discretion in the location, between the *termini.* The alternative

given by the statute, could have no other effect, than to create a useless waste of expense, if the committee were not at liberty to vary from the location made by the selectmen.

Every member of the committee was appointed as a freeholder; and they are all described as freeholders. The town had notice, and were fully heard. If any one of the committee was not a freeholder, they might have objected to his appointment at the time. They had a further opportunity after the committee had made their return. The court would doubtless have listened to the objection, and would have made further inquiry as to the fact. Then was the time to have taken the exception; and it would be very inconvenient to bring it into controversy collaterally. There are many objections, which, if made at a proper time, and in the proper stage of judicial proceedings, would be sustained, which are otherwise regarded as waived. And of this character, in the opinion of the court, is the point now taken, that one of the committee was not a freeholder.

The sufficiency of the notice is objected to. It is such, as has been holden proper, upon an original petition. But if insufficient, it could be taken advantage of only upon *certiorari*. Irregularities appearing upon the face of the proceedings upon roads, within the jurisdiction of the sessions, can only be corrected upon this process, according to our practice.

It is contended, that the damages, sustained by the individuals, in whose favor they are awarded in this case, are a proper charge upon the county. Their liability was first created by the statute of 1823, *ch.* 227, and extends only to county roads. It is said, that in this statute, roads are thus described for the first time. A county road originates with the county authorities; and usually passes through more than one town. In common language, it is a mode of distinguishing such a road from a town or private way. The way provided for in the eleventh section of the statute first cited, under which this way was located, is called a private way throughout. It is a private way, which the committee are to lay out. The court exercise in this case a revising or appellate jurisdiction. It may be for the town generally, or it may be for one or more individuals; but it can in no proper sense be called a

county road. The county, therefore, are not made chargeable with these damages.

It is further insisted, that the town is not liable, first, because it is not found for whose use the way is laid out; and secondly, because there is no order of the court, that they should be paid by the town. A town way is frequently in the statute called a private way; but in common parlance, a way laid for one or more individuals is termed a private way; and it is believed very rarely denominated a town way. The selectmen laid out the way in question, as a town road or highway. They do not describe it as a way located for private use. The term highway used by them, means a public road. This road, thus laid out, the sessions adjudge that the town of *Hallowell* unreasonably refused to approve and allow; and they accordingly authorized and empowered their committee "to lay out said road or highway;" and when located, they ordered it to be recorded and known as such. It does then, in our judgment, sufficiently appear, that the road in question was laid out for the use of the town; and it results that it devolves upon them to pay the damages. And they were finally determined and ascertained, when the sessions accepted the report of their committee. By the sixth section then of the act of 1828, *ch.* 399, a demand having been made by the plaintiff for the damages awarded to him, upon the treasurer of *Hallowell*, more than thirty days before the suit, he was entitled to maintain an action of debt against the town. The defendants are to be defaulted; and judgment is to be rendered, according to the agreement of the parties.

Defendants defaulted.

HERRICK *vs.* KINGSLEY.

A. exchanged a carriage with B. for land, the latter making false and fraudulent representations in regard to the quality of the land, and which he knew to be so at the time. On ascertaining the fraud, A. refused to deliver the carriage, it not having been delivered at the time of the bargain, and offered to return to B. the deed he had received from him, which had not been recorded; but B. insisted upon having the carriage, and carried it away notwithstanding the resistance of A. Afterwards B. sold the carriage to C. who had notice of the fraud, and on its again falling into the hands of A. he refused to permit C. to take it again. *Held*, that under these circumstances A. was entitled to rescind the bargain and retain the carriage.

THIS was *replevin* for a carriage and harness, which one *Robert M. N. Smyth* purchased of the defendant, in *November*, 1832, paying therefor in two lots of land in *Kilmarnock*, and sold to the plaintiff in the following *December*. The counsel for the defendant contended, that the sale of the carriage and harness by the defendant to *Smyth*, was made under such false and fraudulent representations of the quality and condition of the land given for the carriage and harness, as rendered the sale void, and entitled the defendant to retain them as his property.

It appeared in evidence, that at the time of the sale or exchange of the land for the carriage, *Smyth* represented the land, as having "a fine growth of timber on it," and as never having been "burnt over" — declaring that if the land had ever been burnt over, it should be no sale; and made other similar representations. It appeared, further, that the land had in fact been burnt over, much of it twice, and was nearly valueless.

The carriage was not taken by *Smyth*, at the time of the bargain and execution of the deed. And when, in *January* afterward, *Smyth* went after the carriage, the defendant informed him that he had ascertained that the land was not what it had been represented to be, that he might have the deed of it back again, and that he should not permit him, *Smyth*, to take the carriage. *Smyth*, however, still insisted that the land had not been burnt over, repeated his affirmations in regard to the value, and said that he would have the carriage. He then went to the stable where the carriage was deposited and carried it off, though resisted by the defendant. The carriage and harness afterward com-

ing to the possession of the defendant, he refused to give them up; whereupon the present suit was commenced.

The counsel for the plaintiffs contended that there was no such fraud proved in the case, as would authorise the defendant to vacate the sale of the carriage and harness; and if it would in regard to *Smyth*, it would not as regards the plaintiff, unless proved to have had notice of the bargain between *Smyth* and the defendant — and that if the defendant would have rescinded the contract on the ground of fraud, he should have returned to *Smyth* the deed of the land, or have re-conveyed it within a reasonable time.

It appeared, that in *June* following the taking of the carriage by *Smyth*, at *Augusta*, and the pretended sale to the plaintiff, he, *Smyth*, was found to be in possession of it at *Bangor*.

The Chief Justice, who presided at the trial, admitted in testimony whatever was proved to have been said by *Smyth* to the defendant, while treating with him for the sale of the land, provided the jury should be satisfied that the plaintiff had notice of the fraud, if there was any, or that there was any privity between the plaintiff and *Smyth*, by which the plaintiff would be implicated by his acts or declarations. But he instructed the jury that the subsequent admissions of *Smyth*, by way of narration of what he had said or agreed was not competent testimony to affect the cause.

The presiding Judge further instructed the jury, that, if they were satisfied from the testimony, that *Smyth* represented to the defendant that the land conveyed by him had a fine growth of timber, and that it had not been burnt over, and this was untrue, within the knowledge of *Smyth*, as the land had not been seen by the defendant, and was at the distance of about 100 miles from *Augusta*, where the bargain was made, if the defendant purchased, confiding in such false and fraudulent affirmations on the part of *Smyth*, as between them, *Smyth* had no title to the carriage in question, and that he had done enough to avoid the sale on the ground of fraud, and that no further act or ceremony was necessary on his part to produce this effect; especially as *Smyth* had persisted in taking the carriage against his will; unless the defendant had subsequently elected to abide by the bargain.

That, however, this testimony would not affect the plaintiff, unless he purchased with notice of the fraud, or unless there was some secret trust or confidence between him and *Smyth*. And he left it for the jury to determine, how far the fact that, notwithstanding the bill of sale made by *Smyth* to the plaintiff, in *December*, 1832, *Smyth* took the carriage himself in *January*, and was found in possession of it in *June* following, would justify such an inference.

The jury returned a verdict for the defendant, which was to be set aside and a new trial granted if the foregoing ruling and instructions were not correct; otherwise judgment was to be rendered thereon.

R. and *D. Williams*, for the plaintiff.

If the defendant would avoid the sale to which he was a party, for fraud, he must not retain any part of what he has received. *Kimball* v. *Cunningham*, 4 *Mass.* 502; 5 *East*, 542; *Woodward* v. *Cowing*, 13 *Mass.* 317; *Norton* v. *Young*, 3 *Greenl.* 30.

In this case, the defendant has never made a deed re-conveying the land to *Smyth*. By the first conveyance the title passed, and it may at any time be taken for the debts of the defendant. A mere offer to return the property is not sufficient. Nor would a mere tender back of the first deed be sufficient to re-vest the property. *Marshall* v. *Fiske*, 6 *Mass.* 24; *Parsons* v. *Dickinson & al.* 11 *Pick.* 352.

They contended further, that there was no such fraud in the bargain between the defendant and *Smyth*, as would vacate the sale as between them; but that if it were otherwise the plaintiff was not to be affected by it, there being no evidence in the case of notice to him, or of any privity between him and *Smyth*. They cited further, 2 *Stark. Ev.* 407; *Cross* v. *Peters*, 1 *Greenl.* 376; *Chit. on Con.* 112; 3 *Chit. Crim. Law*, 156, 307; *Buller's N. P.*, 31; *Pickering* v. *Dawson*, 4 *Taunt.* 779; *Pollard* v. *Lyman*, *Day's Cas.* 156.

Vose, for the defendant, controverted the positions taken on the other side, citing the following authorities: *Winchell* v. *Stiles*, 15 *Mass.* 230; *Potter* v. *Wheeler*, 13 *Mass.* 507; *Stone* v. *Davis*, 14 *Mass.* 360; *Bridge* v. *Eggleston*, 14 *Mass.* 251;

Davenport v. *Mason*, 15 *Mass.* 90; *Sugden on Vendors*, 223; *Camp. Cas.* 337; 14 *Ves. Jr.* 144; 1 *Salk.* 28; *Merrill & al.* v. *Colden*, 13 *Johns.* 395; 1 *Day's Rep.* 250; 1 *Day's Rep.* 156; v. *Sumner*, 17 *Mass.* 110.

PARRIS J. — We are to keep in mind that *Herrick* stands in no better situation, in this case, than *Smyth*, his vendor. The jury have found that the purchase of the land by the defendant was induced by false and deceitful representations on the part of *Smyth*, and that the plaintiff either had notice of the fraud, or that there was such a secret trust and confidence between him and his vendor, as to exclude him from the position of an honest purchaser without notice. We are to consider the case then as if it were between *Smyth* and the defendant. From the depositions which are referred to in the report of the Judge it abundantly appears that the most gross misrepresentations were used by *Smyth*, in relation to the growth and quality of the timber on the land; that, according to his representations, there was a fine growth, more than sufficient to pay for the land, and that the timber had not been destroyed or injured by fire; — and that, being pressed by the purchaser on that point, he continued his asseverations that the land had not been burnt over, adding, "if it had it is no sale." The proof is that the land had all been burnt over once and the greater part of it twice, excepting some low wet places where there was no timber save only a few cedars; and that the timber had all been cut off or blown down and decayed on the ground. The jury have found that *Smyth* knew that these representations were false, at the time he made them. The land was at a distance from the parties, and the defendant relied upon the representations of *Smyth* as to the timber; and for the correctness of those representations, especially that no injury had been sustained by fire, he must be held answerable.

On ascertaining the deception that had been practised upon him, the defendant offered to return the deed, and requested *Smyth* to return that portion of the consideration which he had received. *Smyth* not only declined to do this, but taking the carriage, which is the subject of this action, from the possession of the defendant, carried it away — the defendant resisting him and

endeavoring to prevent its removal. We do not perceive what more *Kingsley* could well have done to rescind the contract. It is said the surrender of the deed would not have reconveyed the land, so that its prior attachment as *Kingsley's* would have been avoided. Neither would a reconveyance by deed. There is no evidence of any attachment or any incumbrance created by *Kingsley*. The deed remained unrecorded, and when the defendant notified *Smyth* that the bargain was rescinded, the latter virtually refused to acquiesce, making no objection to the mode, or that the estate was encumbered, or that his rights were prejudiced by any thing the defendant had done; but claimed a fulfilment of the bargain by carrying away the carriage, to which he could acquire no title without the consent of *Kingsley*, the owner. This consent was never given, and consequently the property never vested in *Smyth*, or in the plaintiff, his grantee. We might, perhaps, have found more difficulty in this case, if the action had been brought to recover back that portion of the consideration actually paid. But we view the conduct of *Smyth*, in taking the carriage from the defendant's possession against his will, as clearly without legal justification. Even if the contract had been perfectly fair on the part of *Smyth*, and he had been promised the carriage in writing, *Kingsley* might have withheld it; and the property not having passed to *Smyth*, his only remedy would be by an action for damages. And herein is this case distinguishable from *Kimball* v. *Cunningham*, and other similar cases, where the property had been actually delivered, and consequently could be reclaimed only by annulling the contract.

MELODY *vs.* CHANDLER.

A mortgagee of personal property can maintain an action against one attaching the goods as the property of the mortgagor, though there be a stipulation in the mortgage, that the mortgagor shall *retain the possession* of the property and sell it for the purpose of paying the mortgage debt.

THIS was an action of *trover* for the conversion of certain goods, which had been taken as the property of one *O'Reilly*, by the defendant, an officer having legal process against him.

The plaintiff claimed under a mortgage bill of sale from *O'Reilly*, made to secure a debt due to the plaintiff, and which contained a stipulation that *O'Reilly* should retain the possession of the goods — make sale of them in the regular course of his business, render an account of sale — and appropriate the proceeds to the payment of the mortgage debt.

The defendant's counsel contended, and requested *Perham J.*, who tried the cause in the Court of Common Pleas, so to instruct the jury, that the right of possession was not in the plaintiff at the time of the commencement of the action, and therefore that it could not be maintained. The Judge declined so to instruct the jury, but did instruct them, that if the mortgage was made for a valuable consideration, and in good faith, and a conversion by the defendant had been proved, the plaintiff was by law entitled to maintain the action; and the jury accordingly returned a verdict for the plaintiff. To these instructions the defendant filed exceptions, and thereupon brought the case up to this Court.

D. Williams, for the defendant.

Wells, for the plaintiff.

Parris J. — We fully assent to the position of the defendant's counsel, that property leased may, during the continuance of the lease, be attached by the lessee's creditors; and the lessor, until the expiration of the term, cannot maintain either *trover* for the conversion or *replevin* to regain the possession.

When the lessee is entitled to the beneficial use of the property, that right is liable to attachment and to be sold on execution. The use is so much property of his, of which his creditors may avail themselves during the existence of the lease, and the lessor is not presumed to be injured, as he has parted with his right for that term, and, at its expiration is to be reinstated in the same manner as if the possession of his lessee had not been interrupted.

Both parties treat this case as a mortgage by *O'Reilly* to the plaintiff, and the jury have found that the property was mortgaged for a valuable consideration and in good faith, and for the purposes specified in the instrument of conveyance. By this transaction the property passed to the plaintiff, and he acquired a

legal title thereto, subject only to the condition or right of redemption. *Lunt* v. *Whitaker*, 1 *Fairf.* 310. Having the title he could make a sale which would be perfect, except against the mortgagor during the continuance of his rights. But the mortgagor could make no sale, because the right of property had passed from him and he had no power to convey it again, unless thereto authorised by the mortgagee, who held the legal title. Keeping these principles in view the case presents no difficulty. It is that of the owner of property employing another to make sale, and holding him accountable for the proceeds. *O'Reilly* does not stand in the relation of tenant or lessee to the plaintiff. There was no tenancy created, no lease executed or contemplated between the parties. *O'Reilly* had no interest in the goods except as mortgagor, and that was not attachable. Under his authority to the plaintiff to make sale he acquired no rights in the property to be sold, either to its use or its proceeds. He is then to be considered as the agent or servant of the plaintiff, employed for a specific purpose, and invested with no other power than what is requisite to enable him to execute his agency. His possession of the chattels entrusted to him is the possession of his principal, and whenever that possession is unwarrantably interrupted to the injury of the owner, the law affords a remedy.

A trader employs his agent or servant to travel the country and make sale of commodities; are they liable for the agent's debts? A farmer sends his team with a load of produce to market; in whom is the legal possession? Will it be pretended that it is liable to be attached by the teamster's creditors, because the care and custody of it is entrusted to him for a special purpose and a limited period? A manufacturer puts his goods into the store of a commission merchant for sale; has he thereby so parted with the possession that they can be attached by the creditors of the latter, and the owner have no remedy? Clearly not. The course pursued by the defendant in this case, if of any benefit to him, would wholly defeat the plaintiff's mortgage. He does not pretend that he can, under his attachment, hold any thing more than *O'Reilly's* attachable interest. And what was that? As mortgagor, nothing. What other interest could he have? He was to account for all his sales until the mortgage was paid off.

Now if the defendant could attach this right to make sale, this agency of *O'Reilly's*, what benefit would be derived from it? The authority to make sale of a quantity of goods, would be acquired under a corresponding obligation to account for every dollar of the proceeds. Surely, a creditor would make very little advance in the collection of his debt, by such a procedure. And yet, if he could do any thing more, or derive any further benefit from the goods attached, it would be defeating the express terms of the mortgage.

The error, into which the defendant has fallen, arises from considering *O'Reilly* as lessee of the property entrusted to him for sale. Viewed in this light, perhaps the case might not be wholly free from difficulty. But viewing him as he was, merely an agent or servant to make sale, and the whole difficulty vanishes. The exceptions must be overruled and judgment entered on the verdict.

CARTER *plff. in error vs.* CARTER.

To compel one to perform military duty in a company of light infantry, his *enlistment* in such company must be shown: and his signature to the *agreement of association* is sufficient evidence of such enlistment, though the record of the company roll, of itself, would be insufficient.

It is not necessary that there be a particular entry of the time of enrollment on the company roll, as corrected on the first *Tuesday* of *May*, excepting where the enrollment is subsequent to that time.

The statute requiring commanding officers of volunteer companies to give notice of enlistments to the commanding officers of the standing companies, in which such persons enlisting *were liable to do duty*, does not apply to cases, where, by reason of permanent disability, such persons were not liable to be enrolled.

ERROR to reverse the judgment of a justice of the peace, in an action of *debt*, brought by the clerk of the *Augusta Light Infantry* against the plaintiff in error, to recover a penalty for neglect to appear at a training of said company, and of which he was alleged to be a member.

By the bill of exceptions sent up it appeared, that, to prove the enlistment of the plaintiff in error, the clerk introduced a

paper bearing the names of a number of persons, and among them that of the present plaintiff, admitted to have been signed by him *March* 5, 1834, under the following caption, *viz*: "The under- "signed do hereby voluntarily enroll themselves as members of "the *Augusta Light Infantry*, and agree to be governed by its "laws and regulations." The introduction of this paper was objected to by the counsel for the original defendant, but was allowed by the magistrate.

As additional evidence of enlistment and enrollment, the clerk introduced a book in the common printed form, running as follows, *viz.*: "Record of the Roll of the company of Light In- "fantry in the first Regiment, first Brigade, and second Division "of the Militia under the command of *William H. Chisam*, as "corrected on the first *Tuesday* of *May*, 1834." After which followed seventy-five names, and among them that of the original defendant, and to this succeeded the attestation of the clerk. After the signature of the clerk followed sundry other names of persons, purporting to have enlisted after the said first *Tuesday* of *May*, 1834, the dates of whose enlistments were set against their names. The defendant contended that this roll was not sufficient evidence of enlistment, as it did not appear when the defendant enlisted — that the company roll of enlistments should be produced, and that this should contain in the proper column the date of enlistment. But the justice ruled that this shew the defendant duly enrolled on the first *Tuesday* of *May*, and his signature to the enlistment roll, shew the time of his enlistment to be the 5*th* of *March* preceding.

It appeared that the notice of enlistments, given by the commanding officer of said company to the commanding officer of the standing company, which contained the defendant's name, did not exhibit the times of the several enlistments, nor was it given to the commanding officer of the standing company within the time required by law. The clerk, thereupon, introduced evidence to show that the present plaintiff was laboring under a permanent disability, to wit, a rupture, and contended, that not being liable to be enrolled, or to do duty in the standing company, no notice to the commanding officer thereof was necessary; and so the magistrate ruled.

To all the foregoing rulings and decisions of the justice, the plaintiff in error excepted, and brought this writ to reverse the judgment rendered by him.

Vose, for the plaintiff in error.

The enlistment was not duly proved. It should have appeared by the company roll, containing an entry of the time of his enlistment or enrollment. *Sawtel* v. *Davis*, 5 *Greenl.* 439.

The first paper introduced does not purport to be, nor is it pretended by the counsel on the other side, that it is a *company roll.* The record, next introduced, is defective; inasmuch as *the time of enlistment* does not appear thereon.

2. The enlistment, if one be proved, is void, because the commanding officer of this company did not give notice in writing to the commanding officer of the standing company, of the enlistments, according to the requirements of law. The notice was defective in not stating the respective times of the enlistments, and was entirely nugatory, inasmuch as it was not furnished within the time required by the statute.

3. This positive requisition of the statute is not affected by reason of any permanent disability in the person enlisting. The statute makes no such exceptions; but expressly declares that the enlistment shall be void, unless such notice be given as is therein prescribed. If the position taken by the other side be sustained, it as well might be said, if the maker of a note is insolvent, a demand upon him previous to notice to the endorser is unnecessary, because such a demand would be of no avail. But it has been repeatedly decided otherwise. *Bond & al.* v. *Farnham*, 5 *Mass.* 170; *Crossen* v. *Hutchinson*, 9 *Mass.* 205; *Sanford* v. *Dillaway*, 10 *Mass.* 52; *Farnum* v. *Fowle*, 12 *Mass.* 89; *Woodbridge & al.* v. *Bridgham & al.* 13 *Mass.* 556.

4. But it was not competent for the clerk to prove the disability of the original defendant. It was a *personal* privilege, of which he alone could avail himself. But so far from doing this, he had represented himself as able-bodied, by the performance of military duty.

5. The evidence was incompetent to prove the fact, if the clerk had a right to prove it.

Bradbury, argued for the defendant in error, and was sustained in his positions by the opinion of the Court. He also cited the following authorities: *Commonwealth* v. *Smith*, 14 *Mass.* 374; *Pitts* v. *Weston*, 2 *Greenl.* 349; *Hume* v. *Vance*, 7 *Greenl.* 158; 2 *Esp. N. P.* 688.

PARRIS J. — The act of congress, passed *May* 8, 1792, establishing an uniform militia throughout the *United States*, provides that there shall be formed for each battalion at least one company of grenadiers, light infantry, or riflemen; and that to each division there shall be, at least, one company of artillery and one troop of horse. By the law of this state, passed *March* 8, 1834, which, in this respect, is similar to the act thereby repealed, provision is made for raising these companies at large by voluntary enlistment. As was said by this Court in *Bullen* v. *Baker*, 8 *Greenl.* 390, no man is bound to join any light or volunteer company, or company raised at large, unless by voluntary enlistment, and the proper evidence of such enlistment is the signature of the person enlisting. In order to render an enlistment valid, it is by no means necessary, nor would it be the most proper mode for the person enlisting to sign the record of the roll of the company. He may sign the agreement of association, or the by-laws and regulations of the company and thereby become a member. But his enlistment must be proved. There must be evidence of the proper kind that the individual charged voluntarily became a member of the company; and the company roll, which is the work of the clerk, is not that evidence.

The clerk is required to keep a fair and exact roll of the company, together with the state of the arms and equipments belonging to each man, which roll he is annually to revise on the first Tuesday of *May*, and correct the same from time to time as the state of, and alterations in the company may require. But the entry of the name by the clerk does not constitute the enlistment: that is effected only by the voluntary act of the person enlisting. He cannot be *duly* enrolled unless he has voluntarily enlisted, and it has been held that an admission by a person charged, that he had always done military duty in the company and was *duly* enrolled, was equivalent to direct proof of enlistment. *Bullen* v.

Baker, before cited. But the enrolment itself unaided by any other proof, would not amount to evidence of voluntary enlistment. To prove the enlistment of the plaintiff in error, a paper was introduced in the following words: "The undersigned do hereby voluntarily enrol ourselves as members of the *Augusta* Light Infantry, and agree to be governed by its bye-laws and regulations." This paper bore the names of a number of persons as members of the company, and among them that of the plaintiff in error, who admitted that he signed it on the 5*th* of *March*, 1834, at which time it bears date against his name. We have no hesitation in saying that this is sufficient evidence of enlistment, and according to our views of the law comes fully up to all that the statute requires upon this point.

The clerk then proceeded to prove the enrolment, and that was necessary, if the law relating to enrolment applies to companies raised at large. *Johnson* v. *Morse*, 7 *Pick.* 251. To do this he produced the "record of the roll of the company, as corrected on the first Tuesday of *May*, 1834." On this roll, which was attested by the clerk, were borne the names of seventy-five persons as members of the company, and among them that of the plaintiff in error. After the attestation and signature of the clerk, followed sundry other names of persons purporting to have enlisted after the said first Tuesday of *May*, 1834, the dates of whose enlistments were set against their names. We are to keep in view that enrolment is the act of the clerk, and is distinct from enlistment, which is the act of the individual in uniting with the company. The plaintiff in error contends that the evidence of his enrolment is defective, because the time of his enrolment is not entered on the roll, and he relies on the decision of this Court in *Sawtel* v. *Davis*, 5 *Greenl.* 438. In that case it did not appear by the roll that the person charged had been enrolled so long as to be liable to do military duty in the company, and the Court held that parol evidence was inadmissible to supply the defect. Not so here. The record does show that the plaintiff in error was enrolled as early as the first Tuesday of *May*, 1834, for his name is borne on the roll as corrected on that day; and this was a sufficient length of time previous to the training which he

is charged with having neglected to attend, which was on the 26*th* of *August* following.

There are *dicta* in the opinion of *Sawtel* v. *Davis* which have been somewhat modified and explained by subsequent decisions. The Court there speak of the form of a *return* of an enrolment, containing a column designated as the one in which the time when any citizen shall be enrolled, is to be entered. We have never been able to find any such form either in the possession of clerks of companies or at the Adjutant General's office. There is furnished by the Adjutant General a form or blank for the company roll, and a book for the record of such roll, corresponding with each other. But in neither of these blanks or forms is there a column for the entry of the time of the enrolment of each member. It is only such as are enrolled after the first Tuesday in *May*, which are called additional enrolments, where the time must be particularly entered. Accordingly we find a column, in the form of a company roll, and in the record of the company roll, headed "Time of *additional* enrolments made after the first Tuesday of *May*," and this is the only column in the form for the entry of the time of enrolment. Giving to the form prescribed by the Adjutant General all the efficiency and sanctity which is yielded to it in *Sawtel* v. *Davis*, which is no less than the force of law itself, and we find nothing that requires a particular entry of the time of enrolment, excepting where the enrolment is subsequent to the first Tuesday of *May*.

To prove the enrolment of the plaintiff in error, at the time when he was called upon to perform military duty, it was necessary that the roll of the company or the record thereof, as it then existed, should be produced. It was produced, and it affords record evidence that his name was on the roll as corrected on the first Tuesday of *May*, 1834. If he had been enrolled subsequently to that time, the date of such enrolment should have been particularly entered in the column designated for that purpose. But as his name was on the roll on the first Tuesday of *May*, no particular entry of the time of enrolment was necessary, or could have been made without adding another column to the form prescribed by the Adjutant General. This is the view we took of a similar question presented for decision in *Potter* v. *Smith*, 2 *Fairf.* 31, and we feel satisfied of its correctness.

But it is contended that the enlistment of *Emerson Carter* was void because the commanding officer of the Light Infantry company did not give notice thereof to the commanding officer of the standing company within whose bounds the said *Emerson* resided.

The statute requires that whenever any person shall enlist into any company of cavalry, artillery, light infantry, grenadiers or riflemen, the commanding officer of the company into which such person may enlist, shall give notice thereof, in writing, to the commanding officer of the standing company *in which such person is liable to do duty*, within five days from the time of such enlistment, and state in such notice, the date of enlistment, otherwise the same shall be void.

In answer to this objection it is replied that *Emerson* was not an able bodied citizen, and, thorefore not liable to do duty in the local militia. Suppose that a person over the age of forty-five years or an officer who had held a commission in the militia for the term of five years should enlist into a company raised at large, would it be necessary for the commanding officer of such company to give notice thereof to the commanding officer of the standing company within whose bounds the person so enlisting should reside? Undoubtedly not, because the person enlisted is not "*liable to do duty*" in such standing company.

The commanding officer thereof has no interest or concern in his enlistment, as it neither diminishes or affects the standing company. The same principle is applicable to this case. If *Carter*, the plaintiff in error, was not an able bodied citizen he was not liable to be enrolled in any standing company of militia, and it was a matter of no concern to the commanding officer of any such company, whether *Carter* did or did not enlist into the *Augusta* Light Infantry; and, as by law, the commanding officer of the Light Infantry is not bound to give notice of *Carter's* enlistment to any one excépt the commanding officer of the standing company in which he is liable to do duty, and as he is not liable to enrolment or to do duty in any standing company, it follows that no notice of his enlistment is required to be given. The law itself as well as the reason of the law both point to this conclusion. This Court has repeatedly decided that a person who is

not able bodied is not liable to be enrolled and that it is not necessary for such person to produce the certificate of a surgeon, nor offer an excuse to the commanding officer for omitting to perform military duty, but that, in an action for such omission, he may defend himself at the trial by showing that, by reason of permanent bodily disability, he was not liable to be enrolled. *Pitts* v. *Weston*, 2 *Greenl.* 349; *Hume* v. *Vance*, 7 *Greenl.* 158.

That such was the situation of the plaintiff in error there can be no doubt. In the first place, he admitted it, and made use of the usual remedy for such disability. In the second place, it was proved by distinct, positive testimony.

With such proof before him we do not perceive how the Justice could have decided otherwise than that he, *Carter*, was not an able bodied citizen. It is unnecessary to go into speculations about the possibility or probability of a cure in such cases of injury, which are known to be always attended with more or less danger. It is sufficient that no surgeon, of experience and reputation, would pronounce a person able bodied while laboring under an injury of the kind proved to exist in this case, and which is known to be rarely cured.

We think the Justice had proof sufficient that the plaintiff in error, at the time of his enlistment, was not able bodied within the meaning of the militia law, even without his own admissions, and it consequently becomes unnecessary to decide upon their admissibility.

We do not intend to be understood as deciding that *Carter* is to be holden to perform military duty in the Light Infantry, if he be *now* unable to do so by reason of bodily infirmity. That question is not presented in the exceptions. But we do decide that the proof is sufficient to show that he voluntarily enlisted and was duly enrolled, notwithstanding any of the objections raised in his behalf; and those are substantially, the only questions now submitted to our decision.

We are not to go out of the case, or to decide upon any question not raised by the exceptions; and whether a man who, although not liable to enrolment by reason of bodily infirmity, yet voluntarily enlists into a company raised at large is liable to per-

form military duty in such company, the infirmity still continuing, is a question not presented by the exceptions or discussed in the argument.

We think the exceptions are not sustained. They are accordingly overruled.

NORRIS *vs. School District No.* 1, *in* WINDSOR.

Where one party has entered into a special contract to perform work for another and furnish materials, and the work is done and the materials are furnished, but not in the manner stipulated in the contract, yet if the work and materials are of any value and benefit to the other party, he is answerable, to the amount whereby he is benefited.

Debt will lie in such case, as well as *assumpsit*.

Where the inhabitants of a school district, in a suit against them for the building of a school-house, repudiated the special contract on which the action was founded, denying that it had ever been accepted by them, though executed by the plaintiff, and it was proved that the district had agreed to build the house, raised money for the purpose, chose a committee to superintend the building, and said committee and inhabitants had seen the work progress without objection, it was held that the inhabitants of the district were liable to pay what the house was reasonably worth, though not built agreably to the terms of the special contract.

The circumstance that the district did not own the land upon which the house was erected, was held not to affect the plaintiff's claim — it appearing that the house had been erected on the spot designated by a vote of the district for that purpose.

THIS was an action of *debt*. The writ contained several counts, the principal one being founded upon a contract under seal, executed by the plaintiff in favor of the defendants, in which the plaintiff covenanted and agreed to build a school-house according to certain stipulations therein contained. The plaintiff read this contract in evidence, after having called it out of the hands of one of the defendants for that purpose. In regard to the acceptance of it by the defendants, there was evidence on both sides, and the jury found that it had never been accepted.

It was proved that the defendant had erected the house upon the place designated for that purpose by a vote of the district,

though the land was not owned by the district. In some other respects the house was not built in conformity to the terms of the special contract; and the action was commenced before the time fixed in the contract when the house should be finished.

During the progress of the building no objection was made to the work or materials by either of the defendants, or by the committee who had been chosen by the district for the purpose of superintending the building, except in one instance, when one of the committee complained of the quality of the shingles.

No notice appeared to have been given to the defendants that the house had been finished, or demand made on them for payment, prior to bringing the action.

The counsel for the defendants contended, 1. That *debt* would not lie for unliquidated damages, but that the plaintiff must recover, if any thing, $260, the sum alleged to have been agreed to be paid on the part of the defendants. But the Chief Justice, who sat in the trial, overruled the objection.

2. That if an *express* contract had been made, the plaintiff could not recover upon an *implied* undertaking, on the part of the defendants, nor until he had shown a performance of the contract on his part, and that as the plaintiff had opened the case upon this ground, and all the testimony upon both sides had been directed to that point, the defendants were at liberty to deny that any contract had been proved, without thereby giving the plaintiff a right to change the ground of his claim.

3. That if there was proof of an *express* contract on the part of the plaintiff, the defendants could not be holden on an *implied* agreement on their part, until the plaintiff had shown a performance of his express agreement.

4. That if the plaintiff had entered into an obligation for a given sum to build a house of a specific description, he could not recover that sum, without showing a performance on his part. Nor could he recover any less sum, without showing an acceptance by the defendants of the work and labor furnished by him, upon which an implied obligation would arise.

5. That no proof had been offered to show at what time the payment was to be made, and that as the action was commenced prior to the day when, by the terms of the plaintiff's ob-

ligation, the building was to be finished, he could not maintain his action, without proving notice to the defendants that the building was completed, and a demand of payment, and giving a reasonable time for the money to be drawn from the town treasury upon warrants from the selectmen.

6. That an objection by one of the committee to the materials used, was a sufficient notice to the plaintiff that the building would not be accepted, unless a majority of the committee should authorise the use of them.

The presiding Judge instructed the jury as to the law of the case, if the plaintiff had not fully complied with the special contract, as the work had proceeded under the eye of the superintending committee, as no objection had been made by them, except by *Keene*, in regard to the shingles, in which it did not appear that any other member of the committee had concurred, and as he witnessed the other and the greater portion of the work go on without making further objection, there might well be implied an obligation on the part of the district to pay, what under all the circumstances, as far as the building was, or might have been beneficial to them, in the opinion of the jury, justice might require. And that in so doing, they would make all reasonable and proper deductions in favor of the defendants. That, they would consider whether the plaintiff did not intend to have fulfilled his contract, as *Clary* and *Cottle*, to whom the business had once been confided, appeared to have been satisfied with what the plaintiff had done. The Judge left it to the judgment and experience of the jury, in cases of this kind, to determine whether the plaintiff was entitled to anything in justice and equity, and if anything, how much. And upon a contract thus implied, he instructed them that no special notice or demand prior to the bringing of the action was necessary.

A verdict was returned for the plaintiff for $216. If they were properly instructed, judgment was to be rendered thereon, otherwise it was to be set aside and a new trial granted.

Evans and *Vose*, argued in support of the positions taken at the trial, citing the following authorities: *Taft* v. *Montague*, 14 *Mass.* 282; *Faxon* v. *Mansfield*, 2 *Mass.* 147; *Story on Bailments*, 287; *Jennings* v. *Campbell*, 13 *Johns.* 94; 1 *Dane's*

Abr. 223; 2 *Dane's Abr.* 45; *Ellis* v. *Hammond*, 3 *Taunt.* 52; *Stark* v. *Parker*, 2 *Pick.* 267; *Willington* v. *West Boylston*, 4 *Pick.* 101; *Whiting* v. *Sullivan*, 7 *Mass.* 109; *Cutter* v. *Powell*, 6 *T. Rep.* 320; *James* v. *Bixby & al.* 11 *Mass.* 40; 1 *Com. on Con.* 5; *Phelps* v. *Townsend*, 8 *Pick.* 392; *Brazier* v. *Clark*, 5 *Pick.* 96; *Bonniface* v. *Walker*, 2 *T. Rep.* 126; *Clark* v. *Ins. Co.* 7 *Mass.* 371; *Colley* v. *Sampson*, 5 *Mass.* 312; *Reed* v. *Davis & al.* 8 *Pick.* 514; 1 *Chit. Pl.* 106; 5 *Dane's Abr.* 101, 103,104, 326, 327.

Emmons, for the plaintiff, cited *Smith* v. *First Congregational Meeting-house in Lowell*, 8 *Pick.* 178; *Hayward* v. *Leonard*, 7 *Pick.* 181; 2 *Saund.* 117, notes *a, c, d;* 1 *Chit. Pl.* 105.

Parris J. delivered the opinion of the Court.

It may now be considered as the settled law that where one party has entered into a special contract to perform work for another and furnish materials, and the work is done and the materials are furnished, but not in the manner stipulated in the contract, yet if the work and materials are of any value and benefit to the other party he is answerable to the amount whereby he is benefited. *Hayward* v. *Leonard*, 7 *Pick.* 181; *Cutler* v. *Close*, 5 *Carr. & Payne*, 337; *Roscoe's ev.* 221

In the case at bar it was proved that the defendants, at a legal meeting, voted to build a school-house, raised money for that purpose and appointed a committee to superintend the building, and also determined upon the place where the house should be erected. With this committee the plaintiff entered into an agreement, under seal, to erect the house. The defendants contend that no contract was made that could bind or affect them, inasmuch as the written instrument was never accepted or ratified by them or their committee. If it were so, and there was no mutuality in the written contract, then the case stands as if no special agreement had been made, and the written instrument has no operation in the case.

The plaintiff, under the superintendence of the committee appointed for that special purpose, erects the house on the spot designated by the district, expends his money in providing materials, his labor in accomplishing the work; the committee give

directions; occasionally some member expresses doubts or dissatisfaction as to the quality of the materials, but still acquiescing they permit the work to go forward, and after the whole is completed, attempt to avoid payment, contending that they have derived no benefit from the plaintiff's work or materials, because the district did not own the land where the building had been erected, in pursuance of the vote of the district and the directions of the committee.

But the plaintiff's claim to remuneration is not to be met in this manner. To him it is of no consequence who owned the land. It is sufficient for him to show who set him at work, and when he proves that the defendants agreed in a legal manner to erect a house on that spot, and appointed a committee to superintend its erection, and that he was employed by such committee, in pursuance of their authority, to perform the labor and furnish the materials for which he now claims pay, it must be some obstinate principle of sheer law, wholly untinctured with equity, that would debar him from a just compensation for the materials furnished and labor performed. The assent of the owner of the land to all that was done may be presumed, and the inhabitants of the school district be in the unmolested enjoyment and occupancy of the house so long as he will permit it to remain; or if he should object, they may lawfully remove it. At this inconvenience they have no cause for complaint. It was their business to secure the title to the site before they erected the building, and having failed to do so, on them must fall the loss, if perchance loss may happen.

It is urged that debt will not lie, except upon the written contract; and as the defendants have succeeded in avoiding that, they now contend that this form of action cannot be sustained. It is undoubtedly true, that since *indebitatus assumpsit* has come into use, the action of debt is rarely resorted to in cases on simple contract. But until *Slade's case*, 4 *Co.* 91, on all simple contracts for money demands, actions of debt were in general use, and it was not without a contest between the courts in *Westminster Hall*, that assumpsit was ever permitted in such cases. By the ancient common law all matters of personal contract were

considered as binding only in the light of debts, and the only means of recovery in a court was by an action of debt. 1 *Reeves' Hist.* 159. It was said by the court in *Walker* v. *Witter*, 1 *Doug.* 1, that "wherever *indebitatus assumpsit* is maintainable, debt also is." *Chitty* says, debt is a more extensive remedy for the recovery of money than assumpsit; that it lies to recover money due on legal liabilities, or upon simple contracts express or implied, whether verbal or written, or on a *quantum meruit* for work, or for goods sold. 1 *Chitt. Pl.* 101, 102. "Debt lies if the sum be not certain, if it may be ascertained, as to pay a tailor *quantum meruit* for making garments and finding necessaries for them." *Com. Dig. Debt, A*, 8. So it lies though there be only an implied contract. *Ibid, Debt, A*, 9. And it is now settled, that the plaintiff in an action of debt, may prove and recover less than the sum demanded in the writ. 2 *Bl. Rep.* 1221. *McQuillin* v. *Cox*, 1 *H. Bl.* 249; 2 *Bl. Com.* by *Chitty*, 155, *note*. In *Massachusetts* it has been decided that debt lies on a simple contract as well as on a specialty, and even on a *quantum meruit* and *quantum valebant*. *Smith* v. *The Proprietors of the first Congregational Meeting-house in Lowell*, 8 *Pick.* 178.

It is contended that the action was prematurely brought, that notice and demand were necessary before the plaintiff was legally entitled to payment. It is to be kept in mind, that the defendants resist the validity of the special contract, on the ground that they never assented nor were they parties to it, and they have thus succeeded in avoiding it. They are not, therefore, to call it in aid for any purpose. The plaintiff has performed certain beneficial services, and furnished sundry materials for the erection and finishing a school-house for the defendants, having been employed so to do by their agents. The law thereupon implies a contract by which they became indebted to the amount of these services, and the plaintiff is no more required to give notice, or demand payment of the debt, than he would be of a note of hand.

The defendants have filed a motion in arrest of judgment, alleging that in the declaration are joined counts in debt and in assumpsit. In the case before referred to, of *Smith* v. *The Proprietors of the First Congregational Meeting-house in Lowell*, the court decided that counts on a special contract under seal, and

a *quantum meruit* for labor done and materials found, may be joined in an action of debt. Perhaps, in the case at bar, the second, third, and fourth counts are not in the most approved form as counts in debt; but we think them sufficient to support the verdict, and that judgment may be properly rendered thereon. A declaration would be sufficient if it contained an allegation that the defendant is indebted to the plaintiff for certain work and labor done and performed, without alleging any express contract, for the law will imply the contract. In *Emery* v. *Fell*, 2 *T. R.* 28, which was debt for goods sold and delivered, the first count in the declaration stated that the defendant was indebted to the plaintiff in the sum of £2, 12s. 6d. for divers goods, wares and merchandize, by the plaintiff before that time sold and delivered to the defendant at his special instance and request. There were other counts for work and labor, money paid, laid out, and expended, and money had and received, in the same form on special demurrer the declaration was held sufficient. In *The Union Cotton Manufactory* v. *Lobdell*, 13 *Johns.* 462, which was an action of debt, the declaration contained several counts: 1st, on a judgment — 2nd, counts for goods sold, money lent, and advanced; paid, laid out, and expended; and had and received. The defendant demurred to the declaration. The court say, the rule is invariable, that causes of action which admit of the same plea and the same judgment may be joined; but the converse of this proposition is not invariably true. Debt on specialty or debt on judgment may be joined with debt on simple contract, although they require different pleas.

In the case under consideration, the plaintiff alleges that the defendants, being indebted, promised to pay. This is setting forth a contract, upon which the law says either *debt* or *assumpsit* will lie. If the indebtedness only had been alleged, it would have been sufficient in an action of debt. Is it so insufficient as to be the ground of arresting the judgment, because of the allegation that the indebtedness was admitted by an express promise? If the indebtedness had been directly alleged, the declaration would be good on special demurrer. As it is, we think it not so defective as to require us to sustain this motion. The Court will not arrest a judgment, unless it be perfectly clear that the plaintiff is not entitled to retain it.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1835.

LOWELL *vs. The Inhabitants of* MOSCOW.

Where one year was allowed to a town in which to open a new road, constituting an alteration of an old one, said town was held not to be liable for injuries happening on said new road, through defects therein, before the expiration of the year, though the town had opened and partially made the road.

THIS was an action of the case upon the statute, brought to recover damages for an injury sustained by the plaintiff in his horse and sleigh in travelling over a road in the town of *Moscow*, on the 5th day of *March*, 1834, which road the plaintiff alleged, the defendants were bound to keep in repair.

On trial of the action in the C. C. Pleas before *Smith J.*, it appeared that an established road in the town of *Moscow*, had been altered by the county commissioners, *October*, 1833, and a new one substituted, and that upon this new part of the road the injury complained of, happened. The term of one year from the first day of *October*, 1833, was allowed by the commissioners to open the new road — and a part of the old road was to be discontinued in two years.

The plaintiff offered to prove that the new road had been opened by the defendants, and at the time of the occurrence of the injury complained of, was the only one travelled, — a log having been placed across the old road, thereby rendering it impassable, — and that by reason of a neglect to put up railings in proper places, and the road being in other respects defective, the injury complained of was occasioned.

But the court being of opinion that the defendants were not bound to complete and keep said road in repair, until the year allowed for opening it had expired, rejected the evidence, and directed a nonsuit. To this ruling of the Judge the plaintiff excepted.

Wells, for the plaintiff.

The time allowed for the making of the road was for the benefit of the town, and might therefore be waived by the town. In this case they did waive it, by actually opening and making the road before the expiration of the year. *Stat. of* 1821, *ch.* 118, § 12; *Stat. of* 1831, *ch.* 100, § 7.

The town had the right to make the road earlier than the time allowed, and when made, all the obligations attaching to any other road would attach to this. And here, the case finds that the old road was stopped up — but if it had not been, it would have been discontinued by operation of law. The new road therefore, was made and dedicated to the public use, and the defendants were bound to keep it in repair.

F. Allen & Tenney, for the defendants, cited *The State* v. *Kittery*, 5 *Greenl.* 259; *Bigelow* v. *Weston*, 3 *Pick.* 267.

Parris J. — If, at the time the plaintiff sustained the injury, the town of *Moscow* was, by law obliged to keep in repair the road where that injury happened, as a public highway, then the exceptions to the decision of the court below must be sustained. By statute, *ch.* 500, *sec.* 7, it is made the duty of the county commissioners to fix the time within which the several towns through which any highway may be laid out, shall open and make the same. Although this is not the precise phraseology of the former statute, upon the same subject, *ch.* 118, *sec.* 12, yet there can be no doubt but the meaning of the words, "*open and make the same*," in the late statute, was understood by the legislature to be the same as those used in the earlier statute, viz.: "to make the road passable, safe and convenient for travellers and others passing with their teams, waggons, or other carriages."

The county commissioners, in laying out the road where the injury happened, acted under the last statute, *ch.* 500, and, no doubt, intended, by allowing the town one year to "open" the

new road, that the road was to be *opened and made* within that time; that is, they intended to exercise the power granted them by the statute, under which they acted, to fix the time within which the town should open and make the road. The old road was not immediately discontinued. That was to remain for the public accommodation, for the period of two years, and whoever should, within that time, encumber it to the annoyance of the public, would be liable for a nuisance; and so also would the town be holden to keep it in safe and convenient repair. But the town was not required to make the new road until the expiration of the year, that is, until the first day of *October*, 1834. That road was laid out in *October*, 1833, and the injury to the plaintiff was on the fifth of *March*, following. There had been no opportunity, subsequent to the laying out, for the inhabitants to expend any of their highway tax on the road. The ensuing season was the time for making it, as understood by the county commissioners, when the town would provide specially for opening and making it, or the selectmen would assign it to a surveyor, and the inhabitants within the district would expend their taxes upon it. It probably was opened, within the popular meaning of opening, when the injury happened; that is, it was not obstructed by trees or fences, and was in progress of being made. No doubt it had been used for a winter road, as the plaintiff was upon it with his sleigh, when the accident occurred; but the case itself shews that it had not been completed, it had not been made safe and convenient for travellers with their teams and carriages. If the year allowed by the county commissioners had expired, the town would have been in fault, but it would be most unreasonable that a town should be held answerable for all injuries that might occur to those who see fit to pass over a road before it is completed, and while the proper authorities are in the progress of making it. People, who will thus travel, must do it at their peril, and if they suffer injury they have no ground for redress against the town, either in justice or in law.

The placing the log across the old road and stopping it up, was an infringement upon the rights of the public, but it does not affect the plaintiff's case. If a public highway be incumbered, the town, whose duty it is to repair, is answerable for neglecting

to do it; and the law affords a remedy. But the liability is not so extended as to hold such town answerable for injuries that may occur where there is no road, or on roads which the town is not, by law, required to have in repair.

It was said, in the argument, that the town had dedicated the road to the public, and ought to be liable for damages arising from neglect to repair. There is no evidence of any dedication, that we can perceive, in the case; and no such continued user as throws any liabilities on the town. *Todd* v. *Rome*, 2 *Greenl.* 55; *Rowell* v. *Montville*, 4 *Greenl.* 270. Upon the whole, we think the judge below decided correctly, that the town was not, by law, bound to complete and keep said road in repair, until the year allowed for opening the same had expired, and consequently, that the evidence offered was properly excluded.

The exceptions are overruled and the nonsuit confirmed.

WARE *Ex'r. vs.* PIKE.

Debt will lie as well as *scire facias*, on a judgment which has been nominally satisfied by a levy of the execution on real estate, the title to which was not in the debtor: the remedy provided by *stat.* of 1823, *ch.* 210, being merely cumulative.

THIS was an action of *debt* on a judgment recovered against the defendant by the plaintiff's testator, and which had been nominally satisfied by a levy of the execution on real estate, the title to one half of which, turned out not to be in *Pike*, and from which the plaintiff's testator had been evicted by one having an elder and a better title. The only question made by the pleadings which resulted in a demurrer, was, whether the remedy of the plaintiff should be sought in *debt*, or by a writ of *scire facias*.

Wells, for the defendant, insisted that debt would not lie. The remedy provided by the statute of 1823, *ch.* 210, is by a writ of *scire facias*. The distinction is not merely technical, but is one of much importance. If *debt* can be maintained, *interest* will be recoverable; otherwise on a *scire facias*. *Clark* v. *Goodwin*, 14 *Mass.* 237.

If debt could have been maintained at common law, why should the legislature have provided this remedy. Interest was not provided for, because until evicted the occupation of the estate would be an equivalent for loss of interest.

But if debt can be maintained, why should not the plaintiff be required to apply to the Court before the issuing of the writ, as provided in the statute for *scire facias*? *Kendrick* v. *Wentworth*, 14 *Mass.* 57; *Lane* v. *Smith*, 2 *Pick.* 281; 1 *Ld. Raym.* 720.

Boutelle, for the plaintiff, cited *Storer* v. *Storer & al.* 6 *Mass.* 390; *Gooch* v. *Atkins*, 14 *Mass.* 378; *Hatch* v. *Green*, 12 *Mass.* 195.

Emery J. — This is an action of debt on a judgment in favor of the plaintiff's testator recovered on the 1st Tuesday of *November*, 1827, for $1169,81 damages, and ten dollars and nine cents costs. And the declaration alleges that this judgment is unsatisfied in part, to wit, for $550, but it takes no notice of the issuing of any execution on the judgment.

The writ was served by arresting the defendant, and he gave bail. The defendant pleads that there is no such record, concluding with a verification and praying judgment if the plaintiff ought to have his action against him and for his costs — and the plaintiff likewise. And the defendant in a brief statement filed according to the statute, denies the plaintiff's right to maintain the action because he, the said *Pike*, after the recovery of the debt and damages aforesaid and before the commencemeut of this action, paid the plaintiff's testator the said debt and damages in form aforesaid recovered.

The plaintiff, in his brief statement, in answer to that of the defendant, says he ought not to be precluded from his action, because on the 10th of *Nov.* 1827, the plaintiff's testator took his execution on the judgment and delivered it to *Isaiah Dore*, a deputy-sheriff, who at said *Athens* on the 15th of the same *Nov.* took in execution, a certain tract of land describing it, in part satisfaction of said execution, appraised at the sum of $1100, of which seizin was delivered, and that since the decease of the testator, he being in possession and claiming under the will of said

testator, one *John Moor*, commenced a writ of entry against the plaintiff, returnable to the Court of Common Pleas at *Norridgewock*, on the second Tuesday of *March*, 1833, wherein he demanded one undivided half of the premises so described as taken on execution, claiming under a prior deed from said *Moses H. Pike*. And *Moor* entered his action and recovered against the plaintiff, judgment for possession of said undivided half part and appurtenances; and afterward, on the 18*th* of the same *March*, took out his writ of possession, and on the 30*th* day of said *March*, delivered it to *Robert Evans, Jr.* a deputy sheriff of said county, who on the same day caused *Moor* to have quiet possession of said undivided moiety; whereby the plaintiff lost the benefit of said levy, in regard to one undivided half of the property set off on said execution. To this the defendant demurs, and the plaintiff joins in the demurrer.

In this case, the counsel for the defendant does not contend but what there ought to be some remedy for the plaintiff, who as executor has been deprived of the half of the property which was taken by the testator, in part satisfaction of his judgment; but that the remedy should be, not to get a judgment for the sum unsatisfied and interest, but to obtain a new execution by the process of *scire facias* only, under our statute of 1823, *ch.* 210. That statute provides, "that whenever any execution has been or may "be extended and levied upon real estate, for the purpose of sat- "isfying the same, and after such levy, it shall appear that the "real estate, thus levied upon, did not belong to the debtor, up- "on the application of such creditor to the court from which such "execution issued, said court may order a writ of *scire facias* to "issue against such debtor, requiring him to appear before said "court and shew cause, if any he has, why an alias execution "should not issue against him for debt and costs; and if such "debtor, being duly summoned, shall neglect to appear, or ap- "pearing, shall not shew sufficient cause why an alias execution "should not issue against him, the court shall thereupon order an "alias execution against such debtor, for the sum justly due and "costs; and the doings, by virtue of the former execution, so far "as relates to such levy upon real estate, shall be considered as

" void and of no effect in law ; but if it shall appear to said court " that the creditor had no just cause for such application, the " debtor shall recover against the creditor double costs, and the " court shall award execution accordingly."

By acceptance of livery of seizin from the sheriff, of lands taken in execution, the creditor acquires a vested right and perfect title to them, as between him and the debtor, which the creditor cannot afterward waive and resort to debt on his judgment. But whenever a recovery by adverse suit against him has occurred, and he has been deprived of the benefit expected from the levy, and can clearly make this appear, it would seem that he ought to be entitled to sustain an action for the balance, which is truly unsatisfied.

It must be recollected, that the *Massachusetts' statute, ch.* 6, passed *June* 14, 1785, providing a speedy method for doing justice, when through mistake executions were levied on real estate not belonging to the debtors, is almost exactly like our *statute* of 1823, *ch.* 210. It had a proviso, limiting the application to two years after the levy. This proviso was repealed on the 7*th* of *March*, 1791. But notwithstanding this, actions of *debt* were sustained, and in the case of *Gooch ex'r* v. *Atkins*, 14 *Mass.* 378, cited by defendant's counsel, the action was debt on judgment; payment was pleaded in satisfaction, on which issue was joined. The defendant also pleaded, that an execution which was issued on the judgment, had been duly levied on certain real estate and returned fully satisfied, setting forth particularly the execution and the officer's return thereon. By this return it appeared that the execution was levied in part on a certain dwellinghouse and land, appraised at $4700, of which the defendant was seized in fee, and concerning which there was no question in this action; and for the residue on the dower which the said *Hannah Atkins* hath in the brick dwellinghouse, situate, &c. in which she now dwells, together with all the rights and privileges belonging to the dower of said *Hannah Atkins* in said estate, which last was appraised at $1047,84. But the defendant was not endowed and had no estate in dower therein; and the plaintiff having discovered this before the return day of the execution, directed the offi-

cer not to return it, and it never was returned into the clerk's office, and this was replied by the plaintiff.

In the rejoinder, the defendant averred that the execution was fully satisfied, and tendered an issue to the country to which there was a demurrer and joinder.

The Court, in giving judgment in this case, observe that it was decided in the case of *Hatch* v. *Green*, that a judgment creditor, who had been evicted of part of the land taken in execution, might maintain an action of debt on the judgment for the appraised value of that part. They make this remark with the full recollection of the case of *Kendrick* v. *Wentworth*, 14 *Mass.* 57, decided at the previous *March* term, that a *scire facias* to obtain an alias execution, after a levy on real estate, was not a writ of right, which the party may take from the clerk's office at his pleasure.

And yet, if the statute provision for application to the court for a *scire facias* was the exclusive remedy, it cannot be easily credited that it should escape the observation of the court and the bar.

In the action, *Steward* v. *Allen*, 5 *Greenl.* 103, which was *scire facias* to obtain a new execution on a judgment, which had been apparently satisfied by a levy on land mortgaged beyond its value, of the existence of which mortgage the plaintiff was ignorant when he levied, the late *Chief Justice Mellen* says, it seems by the two cases cited from the 12 and 14 *Mass. R.* that in such a case as this an action of debt would lie on the judgment by reason of the failure of the supposed title.

We conclude, therefore, that the remedy under the statute of 1823, *ch.* 210, is cumulative and not exclusive; and that the action of *debt*, on such a state of facts as disclosed in these pleadings, may well be sustained. The undivided half of the premises taken in execution, was recovered from the plaintiff, by reason of the defendant's own deed; and the whole was appraised at $1100. There is, therefore, no difficulty in ascertaining the sum which remains due as principal.

Our statute, regulating judicial process and proceedings, *ch.* 59, *sec.* 36, directs that in the action of debt which shall be duly maintained upon any judgment, lawful interest shall be allowed as well upon the costs as upon the debt or damages, or the bal-

ance thereof due and recoverable, and judgment shall be rendered thereon accordingly. And as the executor in this case will be responsible to *Moor* for the mesne profits, we do not perceive that interest should be withheld against this defendant.

A very material alteration has been made in regard to the process of *scire facias*, by our *statute* of *March* 10, 1830, *ch.* 463, *sec.* 2. By that *stat.* in all writs of *scire facias*, the persons or property of those against whom they issue, shall be liable to be taken and held to respond to the judgment which may be rendered for the plaintiff, as in other actions. So that the mode of dealing with the defendant, in this suit, by holding him to bail, is not more severe than might have been adopted had a *scire facias* issued.

BOIES *vs.* MCALLISTER.

In an action for breach of promise of marriage, the opinion of witnesses not possessing any professional or peculiar skill, that the plaintiff was once in a state of pregnancy, was held to be inadmissible.

Evidence also that she was once *reputed* to have been in a state of pregnancy and endeavored to procure an abortion, held to be inadmissible.

Certain letters from the plaintiff to the defendant held not to amount to a discharge of the latter from his promise of marriage.

The Court refused to disturb a verdict in favor of the plaintiff for $1200, on the ground of its being excessive; the defendant's property being estimated by the witnesses at from $1000 to $5000.

THIS was an action of *assumpsit*, to recover damages for an alleged breach of a promise of marriage. In defence, the defendant attempted to prove that the plaintiff had been in a state of pregnancy and that she had taken measures to procure an abortion. In some of the defendant's depositions, the deponents, none of whom were professional men, from having seen her person, expressed an opinion that the plaintiff had been in a state of pregnancy. This being objected to, was rejected by the presiding Judge; though he admitted all the facts upon which that opinion was founded. In going into the plaintiff's character, the Judge also excluded evidence that the plaintiff was *reputed* to have

been in a state of pregnancy, or to have procured an abortion; but admitted testimony as to the general character of the plaintiff for chastity.

The Judge was requested by the defendant to instruct the jury, that the plaintiff in her written correspondence with him, (recited in the opinion of the Court,) had discharged him from his promise, but the Judge declined so to instruct them.

A verdict was returned for the plaintiff for $1200, which the defendant moved to have set aside on the ground of its being excessive. The property of the defendant was estimated by the witnesses at from $1000 to $5000.

If the testimony excluded ought to have been received, or the instructions requested ought not to have been withheld, the verdict was to be set aside and a new trial granted; otherwise judgment was to be rendered thereon, unless the verdict should be set aside on the ground of excessive damages.

F. Allen, for the defendant, argued in favour of the admissibility of the evidence rejected. The opinions alone, it is admitted are not evidence, but are so when accompanied by the facts upon which those opinions are founded. *Dickinson* v. *Barber*, 9 *Mass.* 225; *Buckminster* v. *Perry*, 4 *Mass.* 593.

The evidence also as to the repute of her having been pregnant, should have been received. This would have gone to affect the question of damages, independent of its justification for a breach of the contract.

The defendant's council also examined minutely the written correspondence between the parties, and endeavoured to show, that the defendant had been discharged from his promise.

He also contended that the damages were excessive.

Tenney, for the plaintiff, to the point of the inadmissibility of the opinions of the witnesses, cited, 1 *Phill. ev.* 227; *Hathorne & al.* v. *King*, 8 *Mass.* 371; *Dickinson* v. *Barber*, 9 *Mass.* 227.

That the evidence of the plaintiffs having been reputed to have been pregnant was properly rejected, 2 *Stark. ev.* 896; 1 *Stark.* 429; 1 *Bing.* 266; 2 *T. Rep.* 760; 4 *East*, 604; *Bass* v. *Bass*, 8 *Pick.* 187; *Parks* v. *Hall*, 2 *Pick.* 206; *Wightman* v. *Coates*, 15 *Mass.* 1.

The letters of the plaintiff were no discharge of the defendant, nor did he at the time consider them as such.

The question of damages, is one entirely for the jury. *Clark* v. *Binney*, 2 *Pick.* 113; *Bodwell* v. *Osgood*, 3 *Pick.* 379; *Taunton Man. Co.* v. *Smith*, 9 *Pick.* 11; *Ayer* v. *Bartlett*, 9 *Pick.* 156.

WESTON C. J. — As to the supposed pregnancy of the plaintiff, the jury had all the facts bearing upon that question. We are not aware of any principle of law, which would justify receiving the opinion of the witnesses, that such was the fact. It does not appear that they had any professional or peculiar skill, which might have warranted the admission of such testimony.

Still more exceptionable was the evidence offered and rejected, that there were rumors, that she had been in that condition. They may have originated in slander, or may indeed have been set on foot, with a view to answer the defendant's purposes. Rumor is entitled to very little respect as a test of truth.

There may be found some cases of slander, which are based altogether upon an injury to character, in which evidence has been received, that the plaintiff had been suspected of certain crimes, by way of mitigation of damages. It may be difficult to reconcile these cases with the law of evidence; and in *Bodwell* v. *Swan et ux.* 3 *Pick.* 376, which was an action of slander, testimony of this kind was, upon consideration, rejected; although evidence of general character is undoubtedly admissible in such cases. If this had been an action of that class, we are by no means prepared to say, that evidence of rumors as to particular charges, could have been received; but in an action of the kind now under consideration, we are referred to no precedent, nor do we believe that any exists, which would justify its admission.

The presiding Judge was requested to instruct the jury as matter of law, that the plaintiff had discharged the defendant from the obligation of his promise. We have looked into the correspondence, relied upon as having this effect. In her letters, she uses the language of expostulation. She speaks of her wounded feelings and disappointed hopes, and sometimes the stirrings of female pride are manifest, at his long neglect. In her letter of

the 12*th* of *July*, there does escape from her pen an intimation, that if he has no inclination to marry, it was her sincere wish, that he should not come for her. She then speaks of her bitter disappointment, and of her blighted prospects, and remonstrates with him for his unkindness. She closes by saying, "I do not wish to have you think I am impatient to be married. I feel perfectly willing to wait; but the idea of being kept in suspense is no ways agreeable." In that of the 7*th* of *September*, she says, "I shall never get married — don't wish to — shall never be married, unless I marry you." Take the correspondence together, it is so far from manifesting a willingness to give him up, that she seems never to have entirely abandoned the hope, that he would fulfil his engagement.

With regard to the damages, we cannot pronounce them to be excessive. The defendant had violated his plighted faith with the plaintiff, trifled with her affections, and cruelly and without cause, attempted to asperse and destroy her character, in which he persevered, by way of defence, at the last trial in this court.

Judgment on the verdict.

COPP *vs.* LAMB.

In a writ of right, the demandant may count as well upon his own seizin as upon that of his ancestor.

Where certain persons assumed to act as a propriety more than 40 years ago, and having fulfilled the object of their association, had ceased to hold meetings and act as a propriety for more than 30 years, it was held that a stranger could not dispute their capacity thus to associate, and to controvert rights derived from, and held under, them.

David Copp, and seven others, his associates, as early as 1793, claimed title to a township of land and organized themselves into a propriety. Subsequently in 1799, said *Copp* and others took a deed of the same township from the trustees of *Berwick Academy*. They continued their corporate connexion, and in 1802, at a meeting at which *Copp* was moderator, passed a vote confirming all prior proceedings. Neither *Copp*, nor any one of his associates under said deed, ever claimed any part of said land beyond their interest in the propriety. *Held*, that a claim under the residuary devisee of *Copp*, to a part of the land by virtue of the deed to him and his associates, independent of the propriety, could not be sustained.

After the lapse of 40 years, and a long exercise of corporate acts, the fact that a regular warrant, issued from a magistrate, calling the first meeting under a statute of *Massachusetts*, may well be presumed.

The proceedings at such meeting could not be regarded as illegal and void, though held by the appointment of a magistrate, in the state of *New Hampshire*, where the proprietors resided, the statute not prescribing any place of meeting.

THIS was a writ of right, brought to recover lot No. 57, in the town of *Athens*, in which the demandant counted upon his own seizin within twenty years next before the commencement of the action. The general issue was pleaded and joined.

The demandant claimed under the proprietors of *Athens*, and the tenant under *David Copp*, one of the members of said propriety; to whom, with seven others, his associates, the trustees of *Berwick Academy*, in 1799, had conveyed said township.

The jury returned a verdict for the demandant, which was to be set aside and a new trial granted, if the whole Court should sustain the objections raised at the trial by the tenant, otherwise judgment was to be rendered on the verdict. The material facts in the case are sufficiently stated in the opinion of the Court which was delivered by

WESTON C. J. — It was objected at the trial, that a writ of right could not be maintained upon the demandant's own seizin.

It has been conceded in argument, that the objection has no foundation in law. A writ of right is usually brought upon the seizin of an ancestor; but it is not an ancestral action. In the proceedings in a writ of right, to be found in the appendix to the third volume of *Blackstone's Commentaries*, which the author introduces for the purpose of illustration, the demandant counts upon his own seizin.

In 1793, *David Copp* and others claimed title to the township, which now constitutes the town of *Athens*. How early that claim commenced does not appear; but prior to the *25th* of *November* of that year, when the lot in question was drawn to the right of *David Copp, Jr.* they had caused the township to be surveyed into lots, and a plan to be made of it. It was a business which required time; being then in the wilderness, at a great distance from those who assumed to be proprietors; and must have been before the fifteenth of the same month of *November*, when *Copp* and others entered into the written agreement with the trustees of *Berwick Academy*, which is in evidence in the case. What prior understanding had existed between the parties, does not appear; or what other claim or title the proprietors may have had from a more questionable source. Their organization, as the proprietors of this township, and the actual ownership, which they exercised over it, by causing it to be surveyed, was both a claim and exercise of right. There was no conflict between them and the trustees of *Berwick Academy;* or none which was not compromised and arranged.

These proprietors entered upon this land by themselves or their agents, claiming to be seised of it as tenants in common, and organized themselves as a propriety under the statute. The trustees of *Berwick Academy*, who were probably the true owners, conveyed to them their interest a few years afterward in 1799. Their deed was made to *David Copp* and seven others, his associates. These same proprietors, to whom the deed from the trustees of *Berwick Academy* was thus made, continued their corporate connexion; and at a meeting in 1802, voted to confirm all that had been previously done. Under grants from this propriety, the township has been settled, and now contains upwards of one

thousand inhabitants. More than forty years have passed, since they assumed their corporate form, and more than thirty, since the objects of their association having been fulfilled, they have ceased to hold meetings, and to act as a propriety. Shall a stranger at this distance of time be permitted to dispute their capacity thus to associate, and to controvert the rights, which have been derived from, and are held under them? We think not.

It is insisted that the tenant holds under *David Copp*, one of the grantees of *Berwick Academy*, in 1799. But he was one of the proprietors, who organized in 1793, and who acted from time to time as a member of the corporation, and was actually moderator of the meeting held in 1802, at which all the previous doings were confirmed. *Copp* and others understood and acted under their deed from *Berwick Academy*, as intended for the use of the propriety. They received it as their representatives. We must understand that *Copp* and others was one of the names, by which the propriety was known. There was an identity of interests between them. It does not appear that any one of the proprietors ever set up a title of his own, independent of the propriety. The tenant holds under the residuary devisees of *David Copp*, the elder; but there was no evidence at the trial, that he in his lifetime claimed any portion of these lands, except what he derived from his interest in the propriety.

The objection taken at the trial was, that the proprietors had no title, when they organized; another raised in argument is, that it does not appear that they organized under the statute of *Massachusetts*. Their right to take this exception, after the trial, is controverted. But if it were open, after a lapse of more than forty years, and the long exercise of corporate acts, upon which very important and extensive interests are held, the fact that a regular warrant issued from a magistrate, having competent authority in *Massachusetts*, may well be presumed. The statute did not prescribe where the meeting should be holden, or that it should be holden in the commonwealth. He consulted their convenience, by appointing a place within the limits of *New Hampshire*, where the proprietors resided. We do not feel warranted in declaring, that the proceedings were illegal and void, upon this ground.

The proprietors having organized under the statute, however feeble their right might have been to the land, upon which they had entered, and their title having been subsequently confirmed by the only parties, who appear to have had any interest to question it, and they having afterwards continued to act in their corporate capacity, and finally ratifying, by a formal vote, all their preceding acts, we are of opinion that, at this late period, it is not competent for strangers or for the individual proprietors, or their heirs or assignees, to question their corporate powers or the interests held under them.

Judgment on the verdict.

Allen and *Boutelle*, for the demandant.

Hutchinson, for the tenant.

VICKERE *vs.* PIERCE.

Where, one under indentures to learn the trade of a house-carpenter, entered into with a person resident in this State, refused to go with his master to work in a *foreign jurisdiction*, such refusal was held to be no violation of his covenant that he would "well and faithfully serve" his master "as an apprentice."

THIS was an action of *covenant broken*, in which the plaintiff alleged, that the defendant, on the 19th of *March*, 1829, by an instrument under his hand and seal, covenanted that one *Seth Bean* should well and faithfully serve the plaintiff for the term of three years as an apprentice at the trade of a house-carpenter; and averred a breach.

The breach relied on was the refusal of the apprentice to go with the plaintiff to *Mirimachi* in the Province of *New Brunswick*.

The contract was executed in this State, where all the parties resided.

The Chief Justice, before whom the cause was tried, being of the opinion that the act complained of constituted no breach of the contract, directed a nonsuit. If the whole Court should be of a different opinion, it was to be set aside and a new trial had,

otherwise it was to be confirmed and the defendant allowed his costs.

Tenney, argued the case for the plaintiff, insisting that it was the duty of the apprentice to have obeyed the plaintiff's directions in the particular named, citing *Davis* v. *Colburn*, 8 *Mass.* 306; 3 *Danes' Abr.* 587; *Hall & al.* v. *Gardner*, 1 *Mass.* 172; *Hobart's Rep.* 134; *Commonwealth* v. *Hamilton*, 6 *Mass.* 273; *Story's Conflict of Laws*, 417, 390; *Coffin* v. *Basset*, 2 *Pick.* 357.

Boutelle, for the defendant, cited the following authorities: *Butler* v. *Hubbard & al.* 5 *Pick.* 250; *Randall* v. *Rotch*, 12 *Pick.* 107; *Nickerson* v. *Easton*, 12 *Pick.* 110.

Emery J. — The question to be decided in this case is, whether the opinion of the Judge that the refusal of *Bean* to serve the plaintiff in a foreign jurisdiction did not constitute a breach of the covenant declared on, be correct, and his direction of a nonsuit for that cause ought to be confirmed.

From the brief statement to which reference is made in the report, it would seem that when the agreement declared on, was made, the said *Seth Bean* had a father and mother living; and for some cause, not apparent in the papers, the defendant, the brother in law of *Bean*, the apprentice, united with *Bean*, in the agreement that the latter should well and faithfully serve said *Vickere*, for the term of three years, commencing the 15th day of *January*, 1829, as an apprentice at the trade of a house-carpenter, and said *Pierce* and *Bean* agreed, that in case said *Seth* should not fulfil the above agreement, *Pierce* should be holden for all damages to *Vickere;* and the latter agreed on his part to instruct said *Bean* in the trade according to the best of his abilities, and clothe him as well as apprentices are generally clad, and give him four months schooling. The covenant was executed in this state, where all the parties resided. *Bean* became of age in *January*, 1831. In *May*, 1831, the plaintiff required *Bean* to attend him to *Mirimachi*, in the province of *New Brunswick*, which *Bean* refused and neglected to do; and this was relied on by the plaintiff as constituting a breach of the covenant.

The contract, into which *Bean* and *Pierce* entered, was with reference to employment as apprentice to learn the trade of a house-carpenter within this State. No provision is made for pursuing the business or giving instruction in any other government. And unless it is distinctly communicated in the agreement, it must be deemed a violation of the spirit of the contract, to transport the apprentice out of the State. It had once been done by the plaintiff to the apprentice as appears by the deposition of *James Boies;* and was again attempted. The report says, the plaintiff *required him to go.*

In the case of *Coventry* v. *Woodhall, Hob. Rep.* 134, it is stated that generally no man can force his apprentice to go out of the kingdom except it be expressly agreed, or that the nature of his apprenticehood doth import it; as if he be bound apprentice to a merchant adventurer, or a sailor, or the like. The same doctrine is maintained in *Hall* v. *Gardiner,* 1 *Mass.* 172; *Commonwealth* v. *Hamilton,* 6 *Mass.* 273; *Davis* v. *Colburn,* 8 *Mass.* 299. The like construction has also been adopted in *Pennsylvania, Commonwealth* v. *Edwards,* 6 *Bin.* 262.

We are now called upon to say, that resistance to an unlawful requisition on the apprentice, affords a just ground for the support of an action against the defendant. He had never stipulated nor expected, that such an illegal requirement should be complied with, nor that personal service, out of the protection of our own laws, should be performed by *Bean.* But we cannot give countenance, by our judgment, to such a perversion of the objects of the agreement. Here is the most distinct evidence of the attempt on the part of the plaintiff, to take *Bean,* the apprentice, with him into the *British dominions,* and this circumstance supplies what was wanting in *Coffin* v. *Bassett,* 2 *Pick.* 357. The nonsuit therefore is confirmed, and the defendant must recover his costs.

SHED *vs.* MILLER *& al.*

Miller & al. gave their note or promise in writing to *Shed*, to pay him $462,41 "as soon as his contract for making the *Canada road* should be completed, to the acceptance of the agent, appointed by the Governor and Council, to inspect said road." The contract referred to, was to make the road around the base of *Bald Mountain*, to the acceptance of said Agent. The road was made *over* the mountain, but was nevertheless *accepted by the agent of the State. Held*, that an action on the note was maintainable.

ASSUMPSIT on a promissory note. On the evidence stated in the opinion of the Court, the defendants were defaulted by consent. If, in the opinion of the whole Court, the action was maintainable, judgment was to be rendered on the default; otherwise it was to be taken off and a nonsuit entered.

F. Allen, for the defendants.

The note, bond, and resolve constitute one transaction — and all the conditions must be complied with before the note can be collected. Though the certificate of the agent is *prima facie* evidence, it is not conclusive that the road has been made according to the contract. Indeed, as a matter of fact, the defendants were compelled to make the road over again before they could obtain their pay from the State, notwithstanding the acceptance by the agent.

Tenney, for the plaintiff, cited the resolves alluded to in the contract, and the case of *Dow* v. *Tuttle*, 4 *Mass.* 414.

EMERY J. — This is an action upon a note of hand, signed by the defendants, of the following description: "We, *Charles Miller* and *John C. Glidden*, hereby bind and obligate ourselves "to pay *Amos Shed* or order, four hundred and sixty-two dollars "and forty-one cents, as soon as said *Shed's* contract for making "the *Canada Road* shall be completed to the acceptance of the "agent, appointed by the Governor and Council of the State to "inspect said road. Witness our hands this twentieth day of "*May*, 1830. *Charles Miller.*
"$462,41. *John C. Glidden.*
"Witness, *William Allen, Jr.*"

There is also a count for money had and received.

By the terms of this contract the payment is not made to depend upon any thing but that the contract of the plaintiff, for making the *Canada road,* shall be completed to the acceptance of the agent, as above specified. And in the absence of any fraud on the part of the plaintiff, we do not perceive that we can make any new contract for the parties, or adopt any new measure of evidence, that the plaintiff has done what he engaged to do; for it is admitted that on the first day of *November,* 1830, that road was duly accepted by *Searle,* the State's agent, though the road was made over the height, and not round the base of *Bald Mountain,* and though the consideration of the note was a bond, given by the plaintiff to the defendants; and the resolve, to which reference was made in said bond, required the road to be made round the base of said *Bald Mountain.*

The case cited by the plaintiff's counsel, *Dow* v. *Tuttle,* 4 *Mass.* 414, we consider pertinent. And in connection with the resolve of 7*th* of *March,* 1834, made part of the case, we cannot but believe that the cases, *Hayden* v. *Madison,* 7 *Greenl.* 76, and *Abbot* v. *Third School District in Hermon,* 118, go far to shew the propriety of the defendant's conduct in submitting to a default. We are fully satisfied that the action is maintainable, and that the default must stand.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE

COUNTY OF PENOBSCOT, JUNE TERM, 1835.

CALL, *Petitioner for partition vs.* BARKER *& als.*

A tenant in common, in possession, can maintain process for partition, under the provisions of *stat.* of 1821, *ch.* 37, *sec.* 2, though he be only an owner of an equity of redemption. *Aliter*, where the mortgagee has entered for condition broken.

So one interested in an estate, though out of possession, if he have a right of entry, may maintain this process.

Monuments, named in a deed, control courses and distances.

THIS was a petition for partition, filed at the *June* term of this Court, 1833, in which the petitioner alleged that he was seised in fee simple and as tenant in common, of an undivided half part of a tract of land in *Bangor*, bounded as follows: Beginning at a stake and stone on *Maine* street, thence running south 33° 30′ west, 32 rods to the line of lot No. 8, thence north 45° west, 42 rods, thence north 33° 30′ east, 32 rods, thence south 45° east, 42 rods to the first bound; that he held said tract in common with persons unknown to the petitioner, and prayed partition thereof.

Barker, one of the respondents, alleged in his plea, that he was sole seised of the northeasterly half of said tract, separated from the southwesterly half thereof, by a line drawn from the middle of the end of said tract, on the county road or *Maine* street, northwest to the middle of the opposite end of said tract; and traversed the seizin of the petitioner, as to said northeasterly half; and thereupon issue was joined.

Howe and *Pope*, the other respondents, alleged that they were sole seised of the residue of said tract, to wit, the southwesterly half thereof; traversed the seizin of the petitioner as to said southwesterly half, and thereupon issue was joined with them.

The petitioner, to support these issues on his part, introduced a deed, dated *June* 28, 1803, conveying, for a consideration of $400, the said tract of which partition was claimed, to the petitioner and said *Barker*, as tenants in common. The southwesterly line of said tract, was, in this deed, described as running from the county road on *William Hammond's* line, to a stake and stone, one rod back of a small stream, back of the old county road.

The respondents, to maintain the issues on their part, introduced a deed, dated *Sept.* 14, 1812, from the petitioner, to *Henry Rice*, conveying in fee, and in mortgage, lot numbered 100 in *Bangor*, and one undivided sixth part of the premises of which partition is claimed, securing the payment of two notes of even date, each for $275, payable with interest, one in nine, the other in twelve months.

Also a deed from the petitioner, to one *James Thom*, dated *Feb.* 12, 1813, purporting to convey in fee, and in mortgage, and with the usual covenants of seizin, and warranty, one undivided third part of a certain lot of land, situate in *Bangor*, containing eight acres more or less, bounded as follows; beginning at a post on the county road leading from *Kenduskeag* bridge to *Hampden;* thence running southwesterly on said road thirty-two rods to land owned by *Zadoc Davis*, then north 48°, west, fifty rods to a stake one rod beyond a small stream; thence northeasterly parellel with the road, 32 rods to a stake; thence south 42°, east, fifty rods to the bound first mentioned; securing payment of a judgment, on which was then due from said *Call*, $381,50, on or before *Feb.* 12, 1814.

On the 9*th* of *April*, 1814, *Rice*, by his attorney, *Samuel E. Dutton, Esq.* duly appointed and authorised, and having with him said mortgage deed from *Call* to *Rice*, entered upon the lot of land, described in said mortgage deed, and of which partition was claimed, in presence of two witnesses, and took possession of the same, for the purpose, as was then stated by said attorney,

in the presence and hearing of said witnesses, of foreclosing said *Call's* equity of redemption in said mortgage.

Rice conveyed his interest in said undivided sixth part of said lot to *Zadoc Davis*, by deed, dated *Feb.* 5, 1822.

On the 24*th* of *May*, 1822, *James Thom*, by his attorney, *Jacob Adams*, duly appointed and authorised, and having with him said mortgage deed from *Call* to *Thom*, entered upon the lot of land described in said mortgage deed to *Thom*, in presence of said *Davis* and three other witnesses, and took possession of the same, for the purpose, as was then stated by said attorney, in the presence and hearing of said witnesses, of foreclosing said *Call's* equity of redemption in said mortgage, and a certificate thereof, subscribed by said four witnesses, was then annexed to said mortgage deed.

On the back of said mortgage deed, by assignment dated *May* 13, 1823, said *Thom* conveyed to said *Zadoc Davis*, his interest in said mortgaged estate and judgment.

The premises, on the 9*th* of *April*, 1814, were unfenced and unoccupied, and continued so for four or five years afterwards. On the 24*th* of *May*, 1822, said *Davis*, having previously hauled a house on to the premises, then lived on and occupied a part thereof; and in 1828, *Davis* and *Barker* having, with the consent of the owners of the adjoining land, set down stone posts at the four corners of the tract of land of which partition is prayed, after a survey by deed of partition dated *Sept.* 10, 1828, between said *Davis* and several others then claiming under him, of one part, (all of whose titles to said mortgaged premises had subsequently been conveyed to said *Howe* and *Pope*) and said *Barker* of the other part, the same was divided in manner stated in the pleas. The parties to said indenture, thereby covenanting and agreeing each with the other, to hold in severalty; the said *Barker* the said northeasterly half thereof; and the said *Davis* and others and their assigns the southwesterly half thereof; after which the respondents and the parties to said indenture had occupied, improved and fenced the same in severalty, in manner stipulated in said indenture.

It was agreed, that on the 17*th* of *August*, 1818, an auctioneer made sale of said estate, mortgaged to *Rice*, at public auction at

Bangor, by direction of *Rice's* attorney, and the same was bid off on a credit of two and four months, for one hundred and five dollars. Of this sale, previous notice was given by publication, three weeks successively, in a newspaper then printed in *Bangor*, the last publication being on the 6*th* of *August*, 1818, and by posting advertisements thereof in *Bangor*, and the two adjoining towns, *Orono* and *Hampden*.

At the *November* term of the Supreme Judicial Court at *Boston*, in the year 1818, a verdict was returned for said *Rice* against *Call*, in an action there pending upon the two notes secured by said mortgage to *Rice*, for $463,12 debt. Previous to the trial, *Call* had taken depositions to be used therein, tending to shew, what he set up as a defence to said action, that the estate mortgaged to *Rice* was worth double the amount secured by the mortgage; and that *Rice* having taken the land had thereby received full satisfaction for his debt. And after said trial, *Call* frequently acknowledged and complained that *Rice* had taken the land mortgaged, and that in said trial the amount allowed him was not its value, but only the proceeds of the sale aforesaid.

In 1826, an execution in favor of *Rice*, against *Call*, issued on a judgment recovered in *Cumberland* county, in 1823, for $575,85, the balance due on the judgment rendered in *Boston*, on said verdict, was settled by *Call* paying said *Rice*, in full therefor, $275.

No part of the judgment, secured by *Call's* mortgage to *Thom*, had been paid.

Call's residence was in *Bangor*, after 1812, except about two years residence in *Ohio*, between the years 1817 and 1820; and until 1834, his residence was within half a mile of the land in controversy, except as above.

There was no evidence, except as above, that the petitioner had notice of either of said alleged entries for foreclosure, or of said auction sale; or that he was present at either, or that he had ever been in actual occupation of the mortgaged estate, after said two mortgages were given, said land being in 1812, and for some years afterwards, unfenced and unoccupied. *Davis* had lived on

and occupied the southwesterly half of said premises, after the 24*th* of *May*, 1822.

Upon this statement of facts, it was submitted to the Court to decide whether the petitioner could maintain his petition for partition of any part or all of the described premises; it being agreed that the Court might infer any facts which it would be competent for a jury to infer, and judgment was to be rendered according to the opinion of the Court.

F. Allen and *J. Appleton*, for the petitioner.

1. Partition may be had, though the petitioner be out of possession, if the right of entry remain. *Baylies & al.* v. *Bussey*, 5 *Greenl.* 157; *Brougham* v. *Clapp*, 5 *Cowan*, 298.

2. So partition may be had, not only of the fee but of any lesser portion of the fee. As a lessee for years, *Baring* v. *Nash*, 1 *V. & B.* 553; *Wells* v. *Slade*, 6 *Ves.* 498; *Mussey* v. *Sanborn*, 15 *Mass.* 155. So as to the owners of the use merely, *Mitchell* v. *Starbuck*, 10 *Mass.* 5. The interest of the owners of an equity is divisible: 7 *Johns. Ch. Rep.* 140; 17 *Ves.* 542; 1 *Hopk.* 505; 1 *Paige*, 469; *Colton* v. *Smith*, 11 *Pick.* 315.

3. There is a subsisting equity in the petitioner, no *notice* having been given to him of any entry to foreclose. An entry without notice is insufficient. *Pomeroy* v. *Winship*, 12 *Mass.* 520; *Scott* v. *McFarland*, 13 *Mass.* 313; *Thayer* v. *Smith*, 17 *Mass.* 431; *Gibson* v. *Crehore*, 5 *Pick.* 151; *Hadley et ux.* v. *Houghton*, 7 *Pick.* 29; 4 *Kent's Com.* 135, (2d ed.); *Greene* v. *Kemp*, 13 *Mass.* 519.

No notice can be *implied* from the possession, by hauling on a house and occupying it in 1822. Possession was not then taken in the presence of two witnesses, and with the avowed intention of foreclosing the mortgage. If it were otherwise, it is denied that *implied* notice is sufficient; the courts have never gone thus far.

But the petitioner is entitled to partition in the gore, if no farther. The parties must be bound by the language of their deeds. By these it appears that less was mortgaged in one than in the other, leaving the petitioner's title clear to the difference.

Starrett, for the respondents, cited the following authorities: *Hill* v. *Payson & al.* 3 *Mass.* 559; *Parsons* v. *Wells & als.* 17

Mass. 419; *Pomeroy* v. *Winship*, 12 *Mass.* 514; *Newhall & al.* v. *Wright*, 3 *Mass.* 138; *Erskine* v. *Townsend*, 2 *Mass.* 493; 4 *Dane's Abr.* 185, 888; *Thayer* v. *Smith*, 17 *Mass.* 431; 3 *Johns. Ch. Cas.* 145; *Vose* v. *Handy*, 2 *Greenl.* 322; *Purrington & al.* v. *Sedgley & al.* 4 *Greenl.* 213; *Cate* v. *Thayer*, 3 *Greenl.* 71.

WESTON C. J. — The respondents, admitting the original title of the petitioner, as set forth in his petition, claim notwithstanding to be sole seised, depending on the proof introduced by them, that his title has been conveyed to others, under whom they hold. The first inquiry which presents itself is, whether the deeds made by the petitioner, cover all the land of which partition is prayed. He was the owner of one half, in common and undivided. He conveyed in fee, and in mortgage, one sixth of the whole, in *September*, 1812, to *Henry Rice*, by which his moiety was diminished to one third.

In *February*, 1813, he conveyed also in fee, and in mortgage, one undivided third of a tract of land described in his deed to *James Thom*. If this tract is the same with that described in the petition, after the execution of these deeds, his only remaining interest was a right to redeem the land so conveyed. His counsel contend, that his deed to *Thom*, does not cover a gore on the northeasterly part of the land in controversy, two rods and a quarter in width at the northerly end, and terminating in a point at the southeasterly corner of the tract. If the land described in the deed, to *Thom*, is to be located according to the courses there given, the petitioner is right in this part of his claim. And these courses must be pursued, unless a monument or monuments are to be found, by which they may be controlled; for it is a settled principle of law, that courses and distances yield to monuments. Thus, if a line is to run in a certain course, a given number of rods, from one stake or stone to another, if these can be found or located, a strait line is to be drawn between them, although it may vary both in course and distance, from the line given in the deed.

There is no controversy as to the point of beginning, in the deed to *Thom*, or as to the point on the county road, thirty-two

rods southwesterly therefrom, at which the first line terminates. The next line described, is to run north, forty-eight degrees west, fifty rods, to a stake one rod beyond a small stream. If that stake, or the point where it stood, can be found, the parties made it, and the law establishes it, as the termination of the second line. It does not appear from the case, that the stake referred to, is still in existence, nor is it expressly agreed where it stood; but as the court are to draw such inferences from the facts found, as it would be competent for a jury to do, it becomes important to inquire, whether from the facts, the location of the stake can be deduced. The east line and the southerly corners of the land, described in the deed to *Thom*, correspond with that described in the petition. The end lines of each are to extend thirty-two rods, and the side lines of both are parallel.

The deed of *June*, 1803, which the petitioner adduces to prove his title, describes his southwesterly line, as running from the county road, on *William Hammond's* line, to a stake and stone, one rod back of a small stream, back of the old county road. There are so many coincidences between the land set forth in the petition, as proved by the deed to him, and that described in the deed to *Thom*, that we have no hesitation in deciding, that a jury would be warranted in finding, that the stake one rod back of a small stream, back of the old county road, mentioned in the deed to the petitioner, is the same with the stake described, one rod beyond a small stream, in the deed to *Thom*. As the line there given run from the county road, "beyond," in that deed, has the same meaning with "back of," in the other. By this construction, the land conveyed to *Thom*, will be located, according to the petitioner's title, whereas by disregarding that, and adhering to the courses, there is conveyed to him a gore of land on the southwesterly side, which his grantor did not own, while a corresponding gore is reserved upon the opposite side, of a most inconvenient shape and form, if owned in severalty, and still more so, if owned in common with others. It is not found or pretended, that there ever existed more than one stake, set up as a corner in that direction. In the petition, that line is described, as running north, forty-five degrees west, and one set up at the end of fifty-rods, the distance given in the deed to *Thom*, would be

ten rods, instead of one, beyond the brook. In the deed of 1803, the same side is bounded on *Hammond's* line. As that deed is relied upon by the petitioner, *Hammond's* line must be understood to run the course given in the petition.

If the stake, referred to in both deeds, is the same, can the point where it stood be ascertained? It was one rod, measuring north, forty-five degrees west, which coincides with *William Hammond's* line, from the point at the brook, where that line crossed. The course and distance from this point, which is a monument referred to, being given, the location of the stake can be fixed with great precision. By both deeds, the next line was to extend thirty-two rods, and there is no controversy about the course, which is parallel with the first line. The line in both deeds would then terminate at the same point. The closing line, by the deed to *Thom*, ran from that point to the point of beginning. But to effect this, the course given in that deed must be varied three degrees, as it was in the second line by the same rule, and upon the same principle. The result is, that both deeds from the petitioner embrace the gore, which he contends was reserved to himself.

Any person, interested with others in any lot, tract of land, or other real estate, may, by the second section of the act for the partition of lands, *statute* of 1821, *ch.* 37, have this process. And if a tenant in common in possession resorts to it, it may be no objection, on the part of the other co-tenants, that he is the owner only of an equity of redemption. A mortgagor in possession, is a tenant at will to the mortgagee. But after the latter has entered for condition broken, the mortgagor has at law no interest whatever in the estate. Before foreclosure, he may, upon tender of the money due, again entitle himself to the land, but if his right is resisted, his only remedy is by a bill in equity. *Parsons* v. *Wells & al.* 17 *Mass.* 419, and the cases there cited. If the entries of the mortgagees in the present case, after condition broken, were not effectual for the purpose of foreclosure, at an earlier period, there being, as it is contended, no notice, actual or constructive, to the petitioner, their assignees did in *September*, 1828, if not before, take actual possession of the land, which they have continued ever since. A tenant inter-

ested in the estate, although out of possession, if he has a right of entry, may maintain this process, as was decided in the case of *Bailies & al.* v. *Bussey*, 5 *Greenl.* 152, but the petitioner has no right of entry against the respondents, who hold under the mortgagees, nor has he any interest in the estate, which can be recognized at law. And this is decisive of the case, as it is presented to us, against the petitioner.

Whether he has any remedy by a bill in equity, or whether his rights have been foreclosed by the entries first made in behalf of the mortgagees, upon the ground that upon the facts, notice is to be inferred against him, or whether the continued possession of those, who claim under them, since 1828, is to have that effect, are questions which, under this process, it is not necessary for us to decide.

Petitioner nonsuit.

Carr *vs.* Farley.

Where an officer had attached a horse on a writ against A., and then permitted the horse to remain in the hands of A., taking a receipt from A. and another, in which they promised to deliver the property to him on demand, and A. absconded with the horse and sold him to a *bona fide* purchaser, it was held, that the officer might reclaim the possession of the horse, though judgment had not been rendered in the suit in which the horse was attached.

F., one of the receiptors, having requested permission of the officer to pursue the debtor and to reclaim the property attached, for the purpose of delivering it to the officer, and such permission being given in writing, saving all rights then existing against said receiptor, it was held to be equivalent to *a demand* upon F.

Trover for a horse. On trial it was admitted, that the horse was originally the property of one *Hasty;* that the plaintiff, being a deputy sheriff, on the 12*th* of *February*, 1833, attached said horse on divers writs against *Hasty*, and suffered it to remain in his possession, taking a receipt from him and one *Farrington*, in which they promised to re-deliver the horse *on demand.*

It was admitted, that the writs were duly entered at the term of the Court of Common Pleas at which they were returnable, judgments rendered therein, the executions placed in the officer's

hands and a demand made upon *Farrington*, one of the receiptors, for the horse, within thirty days.

Geo. Starrett, Esq., called for the plaintiff, testified, that prior to the rendition of judgment in said suits, *Carr* and *Farrington* being in his office, the latter requested permission of *Carr* to go and get the horse in controversy, if he could find him, and deliver him to *Carr*, in order to save himself harmless on his receipt, said *Hasty* having absconded with the horse. A copy of the receipt was then made, on the back of which the plaintiff authorised *Farrington* to take the horse for the purpose aforesaid, saving all rights then existing against the receiptors. Under this authority, it was admitted that the horse had been duly demanded of the defendant, who it was proved was a *bona fide* purchaser, but he refused to give it up.

The writ in this case was sued out before judgment had been obtained in the suits in which the property was attached.

It was contended by the defendant's counsel, that the facts testified to by *Mr. Starrett*, did not show a demand by said *Carr* on *Farrington*, under the receipt, and that this action could not be maintained until a demand had been made. But the jury were instructed by *Parris J.* that if the testimony was believed, the plaintiff had done all in this particular that the law required him to do.

It was also contended by the defendant's counsel, that *Carr*, having taken a receipt for the safe keeping of said horse, could not maintain this action until judgment had been obtained in the suits in which the horse was attached, and the executions delivered to him; but the Court ruled otherwise; and a verdict was returned for the plaintiff, 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.

W. P. Fessenden, for the defendant, contended that no suit could be maintained by the officer until judgment had been obtained in the suit in which the attachment was made, and the execution delivered to him.

The *stat. ch*, 60, *sec.* 34, authorising the officer to leave the property attached in the hands of the debtor, on taking a re-

ceipt, was manifestly intended for the benefit of the debtor; as he could thereby have the use of the property until execution should be issued against him, and avoid the expense of having the property kept by the officer. This is admitted in *Woodman* v. *Trafton*, 7 *Greenl.* 178, in which the reasoning of the Court is adverse to the maintenance of this suit. To permit, then, an officer to retake the goods attached, at any time before judgment and execution, would be doing away with the whole beneficial intention of this statute, and would enable officers to harass and oppress debtors, contrary to the spirit of the law.

Nor is this view of the case affected by the words "on demand," in the receipt. They must receive a reasonable construction. They should be construed by the circumstances of the case and nature of the transaction, 3 *Dane's Abr. ch.* 101, *art.* 5, in which case they must mean *on demand after judgment.*

The general property remained in the debtor, subject only to the officer's lien: *Denny* v. *Willard*, 11 *Pick.* 519. And he could make a valid transfer of it, subject only to this lien. *Bigelow* v. *Wilson*, 1 *Pick.* 485.

2. No action can be maintained until after a demand, and the evidence in the case does not show one. But if it did, it would be ineffectual, being made prior to the obtaining of judgment.

Starrett, for the plaintiff, relied upon the case of *Trafton* v. *Woodman*, 7 *Greenl.* 178.

Weston C. J. — That the attachment of the horse in question, was not dissolved by the receipt given, and the possession retained by the debtor, even against a *bona fide* purchaser, without notice, was decided in the case of *Woodman* v. *Trafton et al.* 7 *Greenl.* 178. There can be no occasion to repeat the reasons there given, to which we refer.

By the terms of the contract, made between the plaintiff and the receiptor, the latter was to deliver up the horse on demand. The facts testified to by *Mr. Starrett*, may be regarded as equivalent to a demand on the part of the plaintiff. But we are not now discussing the liability of the receiptor. He is the keeper for the officer, and may give up the property confided to his care, if the officer will accept it. The contract gives to the latter the

power to reclaim the property at any time. But the liability of the receiptor has been constructively limited; and he has not been charged, where the officer is not liable to the creditor. Hence, generally, unless judgment has been rendered, and the execution put into the hands of the officer, or the property demanded of him within thirty days, his action against the receiptor is not sustained. A wanton and unnecessary interference by the officer, is not to be encouraged. But there may be cases, in which a re-seisure of the property by him, pending the attachment, may be justified. As where the receiptor has become insolvent, and the officer in danger of being held liable to the creditor, without indemnity. So, as in this case, where the debtor has attempted to defeat the attachment, by selling the property taken in another county, where the authority of the officer does not extend. We perceive nothing which forbids his interposition for the protection of the receiptor, where he is in danger of suffering. And we are of opinion that he had a right to make a demand of the horse of the defendant, and that the latter was not justified in withholding him; and further, that this demand might be made through the agency of *Farrington*, the receiptor. And it appears that he was clothed with sufficient authority for this purpose.

Judgment on the verdict.

SMITH & *al.* *vs.* JONES.

Where A. covenanted with B. and C. to convey to them certain timber lands on payment of a stipulated sum, a part in money and the remainder in their notes payable at a future day, with satisfactory security by mortgage, and B. tendered the money and notes signed by himself in the *partnership name of B. and C.*, and demanded a deed from A., it was held that the tender was, in this respect, sufficient; it appearing that B. and C. were partners in the business of purchasing real estate, dealing in timber lands, &c., and that they were recognised as such by the community.

Held further, that it was not incumbent on B. and C. to tender a mortgage of the land, with the money and notes, A. refusing to convey it to them.

It was further stipulated in the condition of the bond, that said money, notes and deed, were "to be deposited with W. T. P. of *Bangor*," until report made by a surveyor as to the quantity of timber on said land. *Held*, that a tender of them to A. himself at *Portland*, was insufficient.

THIS was an action of *debt* on bond. The defendant having craved oyer, pleaded, *non est factum*, and filed a brief statement alleging general performance. To which the plaintiff replied, setting out as a breach, the non delivery of the deed mentioned in the bond declared on.

The condition of the bond was in the following words, *viz:* "The condition of this obligation is such, that whereas I, the said "*Amasa Jones*, upon the terms and conditions hereinafter speci- "fied, have agreed to sell and convey to the said *Edward Smith* "and *Samuel Smith* by deed of warrantee, one undivided half "of the south half of township No. one, in the sixth range of "townships, lying and situate on *Salmon Stream* in said county "of *Penobscot*, and being the same I purchased of *Waldo T.* "*Pierce* and *Hayward Pierce*, and have also agreed to guarantee "to the said *Edward* and *Samuel*, that there shall be at the rate "of three and one quarter thousand feet of large, sound pine tim- "ber, equal to that which has been cut on said half township, "the present winter, by *Ira Wadleigh* and *Jesse Wadleigh*, of "*Orono*, aforesaid, to each and every acre of said half township; "which timber is to be appraised upon said half township, by "*Hiram Rockwood*, of *Belgrade*, within sixty days from the "day of the date of the deed to be given by me as aforesaid; "and have also agreed to release and assign to said *Edward* and "*Samuel*, one half of all the stumpage for logs, which have been

" up to this date, or may hereafter, be cut upon said half town-
" ship; and have also agreed, that if upon the appraisal to be
" had as aforesaid, it shall appear that there is not timber on said
" half township, at the rate above stipulated, to allow to said *Ed-*
" *ward* and *Samuel*, for whatever deficiency there shall be, at the
" rate of three dollars for each thousand feet, the amount to be
" deducted, in equal sums from the cash and notes to be given to
" me by the said *Edward* and *Samuel*, as hereinafter specified;
" and have further agreed, that at the time I shall give the deed
" as aforesaid, the premises shall be free and clear of all incum-
" brances; the terms and conditions upon which the above sale is
" to be made are as follows, viz.: the said *Edward Smith* and
" *Samuel Smith* are to pay to the said *Amasa Jones*, the sum of
" seventeen thousand nine hundred and seven dollars and fifty
" cents, within twenty days from the date hereof, in manner fol-
" lowing, viz. one third part in cash, at the time of the sealing
" and delivery of the deed to be given as aforesaid, one third part
" in one year, and the residue of said sum in two years from said
" sealing and delivery, and interest, with satisfactory security by
" mortgage, and notice given by either of the parties to this obli-
" gation to the said *Rockwood* to make the appraisal aforesaid, to
" be binding on all; the report of the appraisal to be made by
" the said *Rockwood*, to be sworn to by him, and the charge and
" expense of making the said appraisal and report, to be paid one
" half by the said *Jones*, and the other half by the said *Edward*
" and *Samuel;* The deed, money, and notes given for the pur-
" chase money, to be deposited in the hands of *Waldo T. Pierce*,
" of *Bangor*, until the report of the said *Rockwood* of the ap-
" praisal of the timber shall be made: Now if I the said *Amasa*
" *Jones*, on the payment of the said sum of seventeen thousand
" nine hundred and seven dollars and fifty cents, to me by the
" said *Edward* and *Samuel*, in manner aforesaid, shall make, ex-
" ecute, and deliver to the said *Edward* and *Samuel*, a good and
" sufficient deed of warrantee as aforesaid, and in all things shall
" comply with, fulfil, perform, execute and discharge all and sin-
" gular the covenants, agreements, and promises by me to be per-
" formed, herein before recited, then this obligation to be void;
" otherwise to be and remain in full force and virtue."

The plaintiff proved, that on the 14*th* of *January*, 1833, the bond being dated the 10*th* of the same month, *Edward Smith*, one of the plaintiffs, being then at *Portland*, tendered to the defendant $5969,17 in cash, and also two notes of that date, signed by the said *Edward*, in the name of *E.* and *S. Smith*, promising *Jones* to pay him or order $5969,17 in one year, with interest, and the like sum in two years with interest, and demanded the deed. They also proved that *E.* and *S. Smith* were partners in the business of purchasing real estate, dealing in timber lands, &c. and that their notes signed by either partner, as the above were signed, were uniformly discounted at the banks in *Bangor*, and duly paid.

When the tender was made, and the deed demanded, the defendant replied that he should not receive the money or notes, as they were going to *Mr. Pierce* at *Bangor*, and also added that he should not give a deed at present.

The plaintiffs both resided at *Bangor*, and there was no evidence that *Samuel* was at *Portland*, during the said month of *January*.

The defendant contended, 1. That it was not sufficient for the plaintiff to make a tender of the money and notes at *Portland*, but that he should have deposited them with *Mr. Pierce* at *Bangor*. 2. That the plaintiffs should both have been present and ready to execute the mortgage mentioned in the bond. 3. That the notes were insufficient, being signed by one, in the name of the firm. But intending to reserve these questions for the consideration of the whole court, and for the purpose of making progress in the trial, *Parris J.* ruled *pro forma*, and instructed the jury that the plaintiffs had a right to make the tender at *Portland*. And that if *Edward Smith*, at *Portland*, within twenty days from the date of the bond, did tender to *Jones* the money and notes aforesaid, and *Jones* had no reason to doubt that the notes were binding upon both *Edward* and *Samuel Smith*; and that upon the facts proved, if believed, the notes were legally binding upon both, the plaintiffs had done all that it was necessary for them to do, in performance of the condition to be by them performed precedent to becoming entitled to a deed from *Jones*.

If this ruling was incorrect, the verdict, which was for the plaintiff, was to be set aside and a new trial granted.

Mellen and *Kent*, for the defendant, maintained the positions taken at the trial, and cited the following authorities: *Rodd* v. *Montgomery*, 20 *Johns.* 18; 2 *Burr.* 899; 2 *Doug.* 684; *Gardiner* v. *Corson*, 15 *Mass.* 500; 1 *Saunders*, 4, *note* 4; *Dana* v. *King*, 2 *Pick.* 115: *Couch* v. *Ingersoll*, 2 *Pick.* 292; *Hunt* v. *Livermore*, 5 *Pick.* 395; 20 *Johns.* 24; *Goodwin* v. *Richardson*, 11 *Mass.* 469; *Pitts* v. *Waugh*, 4 *Mass.* 424; 3 *Kent's Com.* 15, 23, (second edition); 4 *Kent's Com.* 120; 1 *Vern.* 83.

Rogers, and *F. H. Allen*, for the plaintiffs, contended that the provision in the bond relative to depositing the notes with *Mr. Pierce* was intended for the benefit of the plaintiffs. This, they could waive, and did waive, by making the tender at *Portland.*

2. It was not necessary for the plaintiffs to tender a mortgage at the time of the tender of the notes and money. It would have been wholly inefficacious if they had. The refusal on the part of the defendant to convey, superseded the necessity of offering a mortgage on the part of the plaintiffs. *Howland* v. *Leach*, 11 *Pick.* 155; *West* v. *Emmons*, 5 *Johns.* 181; 8 *Cowen*, 297; 3 *Stark. Ev.* 1393; *Barstow* v. *Gray*, 3 *Greenl.* 409; *Nourse* v. *Snow*, 6 *Greenl.* 208.

Besides, it does not appear but that *Edward Smith* had the mortgage deed prepared and in his possession at the time, ready to hand over to the defendant, nor that he had not a power from *Samuel* to execute one if necessary.

It is said, that the bond contemplated a mortgage of other property. No such question can now be properly raised, not having been made at the trial. But it is manifest that such a position is inconsistent with a fair construction of the bond.

They argued further as to the sufficiency of the notes, the right of one of the plaintiffs to bind the other, and replied to the authorities cited on the other side.

EMERY J. — The plaintiffs have sued the defendant for not delivering a deed mentioned in the condition of the bond declared

on, and with the plea of *non est factum*, is a brief statement made by the defendant, alleging general performance.

The plaintiffs proved that on the 14th *January*, 1833, *Edward Smith* and the defendant being at *Portland*, said *Smith* tendered to the defendant, $5969,17 in cash, and two notes signed by the said *Edward*, in the name of *E. and S. Smith*, payable to the defendant or order for $5969,17 in one year with interest, and the like sum in two years with interest; and proved, that the said *E. and S. Smith* were partners in the business of purchasing real estate, dealing in timber lands, &c., and that their notes, signed by either partner, as the aforesaid notes were signed, were uniformly discounted at the banks in *Bangor*, and duly paid. Having made the tender, said *Edward* demanded the deed, to which the defendant replied he should not receive the money or notes as it was going to *Mr. Pierce* at *Bangor*, and also added that he should not give a deed at present. *Edward Smith* and *Samuel Smith*, both resided at *Bangor*, and there was no evidence that *Samuel* was at *Portland* during said month of *January*.

As to the binding efficacy of the notes tendered, it is objected, that there can be no partnership in the purchase of land, and the case *Pitts* v. *Waugh, et al.* 4 *Mass. Rep.* 424, is selected and pressed upon us as decisive of this. That was an action of the case against *John Waugh and Joseph Greely*. The note offered in evidence was signed by *John Waugh* alone.

"On the plaintiffs offering to read this to the jury, and to prove "also that before and at the time of making and signing said note, "the defendants were partners jointly negotiating together in the "way of merchandizing, particularly in the purchase and sale of "divers tracts of land, for their mutual advantage, and that said "note was made and signed by the said *Waugh*, on the partner-"ship account aforesaid, and for lands purchased for the joint "benefit of the defendants, but conveyed to said *Waugh*. This "evidence the Judge refused to admit; exceptions were taken, "and the motion for a new trial was submitted without argu-"ment." In the course of the opinion delivered by the late *C. J. Parsons*, as reported, he is made to say, that "there was no "evidence offered that the land was conveyed by the plaintiff to

" *Waugh* and *Greeley*, or that *Greeley* in any manner authorised " *Waugh* to bind him to the payment of the note: or that the " plaintiff sold the land on *Greeley's* credit, or knew that he had " any interest in the purchase, or did or could derive any benefit " from it. This is decisive; for by the law merchant a man is " holden a dormant partner, who is not known in the partnership, " because he is interested in the profits of the trade. And as " the conveyance was made to *Waugh*, *Greeley* can derive no " benefit from it," and the Judge repeats, " however, to prevent " mistakes, that the law merchant does not extend to speculations " in land," and that in that case, " there was no colour for con- " sidering *Waugh*, as an authorised agent of *Greeley*, within the " statute of frauds."

This opinion was made known at the *May* term, 1808. A marked difference between that case and this is, that this bond is given directly to the two *Smiths*, and the condition plainly indicates that the notes are to be given by them to the defendant. It is well settled that real estate, by the rules of law, is not governed by the principles applicable to the disposition of partnership property. One partner can convey only his own share in land, though held for the purposes of partnership, unless authorised by his partner, by deed to make conveyance of his portion. The use may be regulated by particular agreements and covenants. In equity, such property obtained by partnership funds, would be treated as stock of the partnership.

Now, by *statute* of 28*th* of *February*, 1829, *ch.* 431, the interest which any one has by virtue of a bond or contract in writing, to a conveyance of real estate upon conditions to be by him performed, whether he be original obligee or assignee, may be attached on mesne process, or on execution, and sold, and the purchaser have remedy to compel conveyance, by bill in equity.

Unquestionably there must be a mutual interest in the capital, whether it consists in credit, labor, money, or other property, as well as in shares in the profits, to constitute a partnership, *as between the parties*. And one who contracts for a share of the profits of a particular trade or business, as profits, has, upon principles of public policy as applied to commercial contracts, been

holden to be a partner, *as to third persons.* They would be liable for debts contracted in the regular prosecution of their business. And in this view of the transactions of *Edward* and *Samuel Smith*, as proved in the case, we think the direction of the Judge was correct, that upon the facts proved, if believed, the notes were legally binding upon both. They held themselves out to the world as partners. And they have ratified the acts of *Edward* in the very step of prosecuting this action, if any such subsequent ratification were required. As no intimation was made that security in mortgage was to be made upon other property than that contemplated to be conveyed, and as there was no objection on that account raised by the defendant, and indeed could not well be raised, until the first deed should be made by him, we do not consider the ground good, now insisted on, that the plaintiffs should have both been present at *Portland*, and ready to execute the mortgage mentioned in the condition of the bond.

There is more difficulty in coming to a conclusion as to the tender and the alleged refusal. In *Leatherdale* v. *Sweepstone*, 3 *C. & P.* 342, it was observed by *Lord Tenterden*, that a plea of tender, in practice was very seldom successful, and on that account, he was always sorry to see such a plea on the record. Here is no formal plea of tender, but the plaintiffs ground their claim upon such a state of facts, as they affirm would do them all the service that a plea of tender, in any allowable case, if thoroughly sustained, would give to any party.

If a condition be to pay, &c. at a place certain, without limiting any certain time, if the party to do this, meet the obligee or feoffee at the place, at any time, he may pay. *Co. Litt.* 211, *a.* Or if the obligee receives the money at another place, it is sufficient, though he *need not. Co. Litt.* 212. If a place certain be limited for payment, he is not bound to pay at another place. 1 *Roll.* 443, *L.* 20; *Com. Dig. Condition*, 9. *Neither need the other accept it at another place.* 1 *Rol.* 446, *L.* 5.

Jones "agreed that if, upon the appraisal to be had by *Hiram* "*Rockwood*, within sixty days from the date of the deed to be "given by said *Jones*, it should appear that there is not timber "on said half township at the rate of three and one quarter

" thousand feet of large sound timber to each acre, to allow to " said *Edward* and *Samuel*, for whatever deficiency there should " be, at the rate of three dollars for each thousand feet; the " amount to be deducted, in equal sums, from the cash and notes " to be given to said *Jones* by the plaintiffs. The deed, money, " and notes given for the purchase money, to be deposited in the " hands of *Waldo T. Pierce*, of *Bangor*, until the report of the " said *Rockwood*, of the appraisal of the timber shall be made." Then comes the final proviso: " if I the said *Amasa Jones*, " on the payment of the said sum of seventeen thousand nine " hundred and seven dollars and fifty cents to me by the said *Ed-* " *ward* and *Samuel, in manner aforesaid*, shall make, execute, " and deliver to the said *Edward* and *Samuel*, a good and suffi- " cient deed of warrantee, as aforesaid," &c.

The plain and natural import of the terms, " in manner afore- " said," and " as aforesaid," in relation to this subject, is, that the payment would be good to him, the defendant, by depositing the money and notes in the hands of *Waldo T. Pierce* of *Bangor*, their mutually appointed depositary, and that depositing the deed with him, would be the delivery " as aforesaid," to the plaintiffs.

It is said that, " the plaintiffs had a right to waive this provi- " sion, which was intended for their benefit." Had *Mr. Jones* accepted the money and notes, ought it not to be inferred that by the principles of good faith, he would have been bound to deposit them in the hands of *Waldo T. Pierce*? But according to the stipulation, he had a right *to decline becoming insurer of the money and notes from Portland to the hands of Mr. Pierce of Bangor. This act was to be performed in season by the plaintiffs.* The reply of the defendant, that " he should not receive " the money or notes, as it was going to *Mr. Pierce*, at *Bangor*," was a full warning to the plaintiffs of the course they should pursue; and we cannot consider the additional remark, that " he " should not give a deed at present," as so direct, peremptory, and unqualified a refusal, as would dispense with the performance by the plaintiffs of their part of the contract. For although *Edward* demanded the deed, the defendant would have performed that part of his contract by depositing it in the hands of *Mr.*

Pierce, on the leaving there, by the plaintiffs, of the money and notes, within the twenty days. The case, at present, does not show that this duty on the part of the plaintiffs has been performed. If it has been, and it should not be proved that the defendant deposited his deed within the proper period with *Mr. Pierce*, and has done also what appertained to him to do, the result of a further trial may settle the merits of the case.

Upon the facts now disclosed, we think that the *pro forma* ruling of the Judge for the purpose of the last trial, by instructing the jury "that the plaintiffs had a right to perform or tender "performance at *Portland*," cannot be sustained. The verdict is therefore set aside.

Remick *v.* O'Kyle *& al.*

In an action on a promissory note payable at a particular time and place, it is unnecessary to aver or prove a presentment at such time and place, but if the defendant was ready to pay according to the terms of the note, that is matter of defence.

And when such averment is made, if it may be stricken out and leave a sufficient declaration, the plaintiff may still recover without offering proof in support of it.

Assumpsit on a promissory note for $67 26, payable at the maker's house, on a particular day. There was an averment in the writ of a presentment according to the terms of the note, but no evidence was offered in support of it, and *Parris J.* ruled that none was necessary. Whereupon the defendant was defaulted, with leave to have the default taken off, if in the opinion of the whole Court, proof of presentment was necessary.

Kent, for the defendants, insisted that inasmuch as the plaintiff had averred a presentment at the time and place named in the note, he was bound to prove it, and cited *Yelv.* 195; *Sir Francis Leakes' case, Dyer* 365; 2 *Saund.* 206; *Bristow* v. *Wright*, 1 *Doug.* 665; *Savage* v. *Smith*, 2 *Blk. R.* 1101.

W. P. Fessenden, for the plaintiff, cited *Carley* v. *Vance*, 17 *Mass.* 389; 1 *Chit. Pl.* 306; 2 *East*, 452; *ib.* 502; 4 *East*,

400; 3 *Cranch*, 208; *Tucker* v. *Randall*, 2 *Mass.* 283; *Stevens* v. *Bigelow*, 12 *Mass.* 436; 3 *Stark. Ev.* 1540.

WESTON C. J. — In the case of *Bacon* v. *Dyer*, argued and determined in the county of *Cumberland*, *ante* 19, it was decided by this Court, that where a note is made payable at a certain time and place, no averment or proof of a demand at the time and place appointed need be made, in an action brought thereon by the holder; but that if the maker had the money ready, and no demand was made, it should be made to appear by way of defence. We refer to that case for the reasons and authorities, upon which the decision was founded.

Another question raised is, whether, although such averment be unnecessary, yet being made, it ought not to be proved. It is a point in this case of very little importance; for under leave to amend, which would not be refused, the unnecessary averment might be stricken from the declaration. We have however looked into the cases cited, and are satisfied that where, as in this case, the whole averment may be stricken out, and still leave the declaration sufficient to entitle the plaintiff to recover, such averment need not be proved.

Judgment for plaintiff.

TIBBETTS *vs.* TOWLE *& al.*

A. sold a yoke of oxen to B. for a stipulated price, to be paid at a future day, *A. to hold the oxen till paid for.* A. permitted them to pass into the possession of B., who sold them to C., and the latter to D., for good consideration and without notice of A's lien. *Held*, that the lien was not thereby defeated, but that A. could maintain trover against D. for the conversion of the cattle; and that, without waiting the expiration of the term of credit.

THIS was *trover* for a yoke of oxen, and was submitted for the decision of the Court upon certain agreed facts, which are stated in the opinion of the Court. A nonsuit or default was to be entered, according to the opinion of the Court.

Rogers, for the plaintiff, cited *Woodruff* v. *Halsey & al.*, 8 *Pick.* 333; *Brooks* v. *Powers*, 15 *Mass.* 244; *Badlam* v.

Tucker, 1 *Pick.* 389; *Haskell & als.* v. *Greely*, 3 *Geenl.* 425; *Smith* v. *Dennie* 6 *Pick.* 262; *Sawyer* v. *Shaw, & als.* 9 *Greenl.* 47; *Lunt* v. *Whitaker*, 1 *Fairf.* 310.

J. Appleton, for the defendants. The words in the contract merely describe a lien which the law itself prescribes, and confer no greater rights than would have existed without the written contract. And although in a sale of this kind, the vendor has a lien for the price while the property remains in his hands, yet it is otherwise when he permits the property to pass out of his possession. *Yelv.* 67; 6 *Chan. Cas.* 437; *Chapman & al.* v. *Searle*, 3 *Pick.* 38; *Parks* v. *Hall*, 2 *Pick.* 206; 1 *Hall's Rep.* 155; *Gallop* v. *Newman & al.* 7 *Pick.* 283.

He argued from the terms of the contract, and from the circumstances in the case, that it must have been understood by the parties, that the property should go into the hands of *Norton*, and remain until a forfeiture of the condition occurred by non-payment of the price; in which case, the action, it was insisted, was prematurely brought. *Wheeler* v. *Train*, 3 *Pick.* 258; *Wyman* v. *Dorr*, 3 *Greenl.* 183.

The law is well settled, that if one obtain goods by false and fraudulent pretences, he acquires no title as against his vendor, though he may pass the property to an innocent and *bona fide* purchaser. 8 *Cowan*, 238; 7 *Taunt.* 62; 2 *Caines*, 182; 5 *T. Rep.* 175; *Seaver* v. *Dingley*, 4 *Greenl.* 306. By a much stonger reason should it be so, where there is no fraud, but a conditional sale merely. That no distinction in favor of the former class of cases should obtain, cite *Hussey* v. *Thornton*, 4 *Mass.* 405; *Harris* v. *Smith*, 3 *Serg. & Rawle*, 20; 2 *Paige's Ch. R.* 769; 8 *Cowan*, 238; 3 *Caines*, 132; 5 *Term R.* 175; 2 *Paige R.* 172; 1 *Paige R.* 315.

Emery J. — The case is submitted to us on an admitted state of facts. The plaintiff's title to the yoke of oxen is exhibited in an agreement, dated the 5*th* of *Nov.* 1832, wherein one *Reuben B. Norton*, who signs it, says, "This may certify that I promise to pay *Mr. James Tibbetts* of *Dexter*, one hundred and twenty-two dollars and fifty cents, in *June* next, for a pair of oxen five years old — one red and the other brindle; likewise a

" black mare eight years old, fifty dollars — and this certifies " that the said *Tibbetts* holds the above cattle and mare till the " above debt is paid, and the interest. The above cattle and " mare are to be paid for in *June* next."

A demand and refusal are admitted, and also that the defendants purchased for a valuable consideration the oxen of one *Henry Robinson*, who had bought the same of said *Reuben B. Norton*, to whom they were delivered *Nov. 5th*, 1832, and in whose possession they remained till the time of his sale to *Robinson*, and had paid a valuable consideration for the same without a knowledge on the part of said *Robinson* or the defendants of the claim of the plaintiff.

This suit was commenced on the *16th* of *May*, 1833, more than a month previous to the time appointed for the payment of the purchase money.

Before us the parties are by the statement of this case to be considered as fair and honest men.

The defendants' counsel contends, " that this agreement is an ordinary note of hand with a few words added, " *Tibbets* holds," &c., and that the papers indicate that the property sold was to remain with *Norton*, the vendee, till the time of payment elapsed. That therefore, the action is brought prematurely, and with much force and ingenuity maintained, that if the sale be conditional, still, the law applicable to such sales, regards them as fraudulent, provided the rights of *bona fide* purchasers, without notice, come in conflict with the claims of the original seller.

That such purchasers are the defendants, and ought to be protected, because the first seller enabled *Norton* to hold out false colors. But we think the reply of the plaintiff's counsel to these suggestions, carries with it the greater strength of reason, that, " in the case of conditional sale no property passes but sub- " ject to the condition."

It is hardly right to consider this an open question. Priority of title must settle this matter. And upon recurring to authorities of established reputation we shall find that our Court have only studiously and steadily maintained the ancient limits of the law. — In *Shepard's Touchstone*, 118, 119 and 120, we are informed that, " It is a general rule, that when a man hath a thing

" he may condition with it as he will. A contract or sale of a " chattel personal, as an ox or the like, may be upon condition, " and the condition doth always attend and wait upon the estate " *or thing* whereunto it is annexed; so that although the same " do pass through the hands of a hundred men, yet it is subject " to the condition still."

The statement discloses, that the plaintiff's right was asserted to continue upon the property till the debt and interest should be paid. Perhaps no better term could be used than that, " he " holds *the cattle and mare*," *until the payment should be accomplished.* The *delivery*, therefore, must have been *made on that condition.* In the case cited by the defendants' counsel from 2 *Paige's Ch. Rep.* 172, the *Chancellor* makes it a subject of particular notice, that the delivery was not conditional nor considered to be so by either party. There is nothing then to prevent the plaintiff from resuming the possession at any time, unless there is distinct and unequivocal proof that he absolutely contracted with *Norton*, that he should have the exclusive possession of the cattle and mare, till the month of *June* had elapsed, independent of the plaintiff's right. That proof has not been communicated.

Henry Robinson and the defendants may have dealt incautiously with *Norton*, but they can gain no better title than he possessed. The sales to them are subject to the original right of the plaintiff. 1 *John. R.* 471; *Wheelwright* v. *Depeyster.*

It is not for the Court to presume any fraudulent design against either. When the plaintiff found the property passed away to persons claiming under sales from *Norton*, it was highly proper that he should require its restoration. He was for preserving his *hold* upon it according to the stipulation. On the refusal to comply with his request, he was entitled to commence his suit. It is not prematurely brought. It is only carrying out the principles of the case of *Emerson* v. *Fisk, et al.* 6 *Greenl.* 200, and *Lunt et al.* v. *Whitaker*, 1 *Fairf.* 310, to decide as we do, upon the facts submitted, that the defendants must be defaulted, and judgment be rendered for the plaintiff to recover his damages and costs.

BURRILL *vs.* MARTIN *& al.*

In a case of complaint under the statute for flowage, commissioners were appointed by the Court, who, upon a view of the premises, reported the yearly damages at $12. The defendants claimed a trial by jury, who returned a verdict for $6,87 only, as the yearly damage. *Held*, that the complainant was nevertheless entitled to costs.

THIS was a complaint under the statute of 1821, *ch.* 45, against the defendants for flowing the complainant's lands by means of the erection and continuance of a certain dam and mills. Commissioners were appointed by the court, who, upon a view of the premises, reported the yearly damages at $12. The defendants claimed a trial by jury, and offered evidence to impeach the report of the commissioners. The jury awarded by their verdict the sum of $6,87, as the yearly damages. And thereupon a question arose as to the costs. *Whitman C. J.* in the C. C. Pleas allowed costs to the complainant, to which the defendants excepted.

Rogers, for the defendants, contended that as they had succeeded in reducing the commissioners' report, they were to be regarded as the prevailing party. If it were not so, this class of cases must always be litigated at the expense of the defendant, which could not have been the design of the statute. It was probably intended that both parties should abide by the report of the commissioners, or appeal from it at their peril. *Maine Stat. ch.* 261, § 1; *Stat. ch.* 45, § 6; *Harding* v. *Harris*, 2 *Greenl.* 162; *Kavanagh & al.* v. *Askins*, 2 *Greenl.* 397.

Kent, for the complainant.

WESTON C. J. — The statute of 1821, *ch.* 45, for the support and regulation of mills, allows full costs to the complainant, if he prevail, although the damages he recovers be less than twenty dollars. The additional statute of 1824, *ch.* 261, authorizes the court to appoint commissioners to estimate the damages. But their award is not conclusive. Either party may require that the question may be referred to a jury; in which case the

report of the commissioners may be given in evidence. But if their report is not objected to, it is to be accepted by the court, and judgment rendered accordingly. In the one case their inquiry is preliminary, and to be used as evidence; in the other it becomes, by acceptance, the foundation of the judgment. The issue to to be determined is, what yearly damages the complainant has sustained, if any, and whether the flowing is necessary, and for what portion of the year. If the jury award any damages to the complainant, he prevails. Neither party is bound to abide the judgment of the commissioners, at the peril of costs; but costs are to be adjudged in favor of him, who is ultimately the prevailing party, upon the final trial of the issue. A party is in no fault, who chooses to submit his cause to a jury. He is merely in the exercise of a legal and constitutional right. The complainant is still the prevailing party; although the jury gave him less than the commissioners.

Judgment affirmed.

BENNOCK *vs.* WHIPPLE.

An unconditional conveyance of land from A. to B., with an obligation back, to reconvey on the payment of certain notes as they fell due, must be of even date, and parts of one transaction, to constitute a mortgage.

Parol testimony that the grantee agreed that the grantor should retain possession of the land, if he continued to pay at the times specified, was held to be inadmissible, as it had the effect to interpose a new condition not found in the bond.

Lessee for a year, holding over, becomes tenant at will merely, and this tenancy may be determined by his doing anything inconsistent with his tenure — as by receiving a deed from a stranger and causing it to be placed upon the record.

In a writ of entry the tenant cannot set up any special right to the occupancy or possession of the demanded premises, under the plea of *nul disseizin;* it being necessary in all cases, under the statute, to file a brief statement, where a special plea was formerly required.

THIS was a writ of entry, in which the demandant counted upon his own seizin within twenty years, and a disseizin done by

the defendant, and was tried upon the general issue by *Emery J. October* term, 1834.

The plaintiff, to prove his title, read a deed from *John Barker* and *Stephen S. Crosby*, to *Joseph H. Read* and *Abraham Read*, dated *Oct.* 20*th*, 1819; and a mortgage from the two latter, back to *Barker* and *Crosby*, of the same date, to secure the payment of $350. Also an assignment of the mortgage from *Barker* and *Crosby* to *Edward Tuckerman*, dated *Dec.* 31, 1830, and an assignment from *Tuckerman* to *John Barker*, dated *Nov.* 8, 1832; and a deed of release and quitclaim from *Barker* to the plaintiff, dated *April* 29, 1834. Also a deed from *Joseph H.* and *Abraham Read* to the plaintiff, dated *Oct.* 18, 1831. And it was admitted that *Tuckerman* entered to foreclose the mortgage, prior to his assignment to *Barker.*

The defendant gave in evidence a lease from *John Barker* to the defendant, dated *May* 1, 1833, to hold for one year. Also a bond from the plaintiff to *Abraham Read*, dated *May* 7, 1833, conditioned to convey the demanded premises to *Mercy Read*, wife of the said *Abraham*, on payment by him of four notes of hand, payable in one, two, three and four years, and an assignment of said bond by said *Abraham* and wife to the defendant, with a power of attorney to him, authorising him to pay said notes and to demand a deed of the plaintiff, dated *February* 6, 1834. Also a deed of the premises from *Abraham Read* and wife, to the tenant, dated *March* 31, 1834.

The tenant then called *Abraham Read*, to prove that the design and purpose of giving said deed by the *Reads*, to the plaintiff, of their right in equity of redemption, was to secure the plaintiff for paying the debt due to said *John Barker*, secured by said mortgage. That it was agreed, at the time of the giving of said deed by the *Reads* to the plaintiff, that the latter should give the bond, which he afterwards did give and which is mentioned above. That the reason why the bond was not given at the time of giving the deed, was, that it was not known how much was due on *Read's* notes to *Barker*, but that it was agreed, when that should be ascertained by the plaintiff, he should give the bond aforesaid. The tenant also offered to prove by oral testimony, that it was agreed by the plaintiff, at the time of giving

the bond, that *Abraham Read* should continue in possession until the first of the notes became due, and that if that was paid at the time, he should continue in possession so long as he continued to pay the notes as they fell due. He also offered to prove by *John Read*, that when he applied to the plaintiff to purchase, after *Read's* conveyance to him, that the plaintiff replied that he could not sell it to him, for that *Abraham Read* had an interest in the land, and that he must have it.

But the presiding Judge rejected all this parol evidence.

The tenant then proved, that he tendered to the plaintiff the amount of the first note on the day it fell due, and exhibited to the plaintiff the assignment of *Read* and wife to him, with the power of attorney.

He also proved, that he had continued to occupy the premises after the expiration of the lease, *May* 1, 1834, as he had before.

The counsel for the defendant contended, that as the tenant held under a lease, which by the terms of it extended to the first day of *May*, 1834, and had continued to occupy after the expiration of the lease, without objections from the plaintiff, the legal presumption was, that his occupation was with the consent of the plaintiff, and upon the same terms as those prescribed in the lease. That the continued occupancy of the defendant was no disseizin of the plaintiff. That, before the plaintiff could legally commence this action, he should have put an end to the defendant's tenure, by giving him notice to quit, and that the tenant should have a reasonable time after such notice; and so requested the Judge to instruct the jury. But he declined giving such instructions, and directed a verdict for the plaintiff.

If, in the opinion of the Court, the foregoing ruling was correct, judgment was to be entered upon the verdict; otherwise the verdict was to be set aside and a new trial granted.

Abbott, for the defendant.

Inasmuch as the defendant was in by right, the plaintiff cannot maintain this action without giving notice to quit. 4 *Kent's Com.* 112, 113; *Jackson* v. *Salmond*, 4 *Wend.* 327; *Rising* v. *Stanard*, 17 *Mass.* 285; *Ellis* v. *Paige et al.*, 1 *Pick.* 45; *Coffin* v. *Lunt*, 2 *Pick.* 70; 4 *Cowen*, 349; 11 *Wend.* 616.

2. The parol testimony should have been admitted, whereby the right of the defendant to possession would have been fully established. 9 *Wend.* 227; *Richardson* v. *Field,* 6 *Greenl.* 37; *Davenport* v. *Mason,* 15 *Mass.* 85; 1 *Day's Rep.* 139.

Kent, to the point that the tenant's defence could only be shown under a brief statement, cited *Dunbar* v. *Mitchell,* 12 *Mass.* 373; *Pray* v. *Pierce,* 7 *Mass.* 381.

WESTON C. J. — The demandant has made out a title to the premises demanded, and judgment is to be rendered in his favor, unless the testimony rejected ought to have been received, and would, in connection with the other facts proved, have sustained the defence. The bond given by the demandant to *Abraham Read,* conditioned to convey the premises to *Mercy,* his wife, and which has been assigned to the tenant, was given nearly two years after the date of the deed from *Joseph H.* and *Abraham Read* to the demandant. That bond was altogether matter of contract, and passed no interest in the land. The demandant did not thereafterwards by our law, hold the land conveyed in fee and in mortgage. To produce this effect, the bond relied upon by way of defeasance, must have borne even date with the conveyance to the demandant, and both must have been parts of one transaction. *Hale* v. *Jewell & al.* 7 *Greenl.* 435. *French* v. *Sturdivant,* 8 *Greenl.* 246. Nor can parol testimony be received to vary the effect of these instruments. Testimony of the same kind was rejected in the case first cited. The testimony offered, that the demandant agreed that *Read* should retain possession of the land, if he continued to pay at the times specified, may be regarded as equally objectionable, as it had the effect to interpose a new condition, not to be found in the bond. But if it were admissible, not being in writing, it could give to *Read* no higher interest than a mere tenancy at will, and if such an interest is assignable, which may be questioned, no higher interest, under that permission, could pass to the tenant. 1 *Cruise,* 280.

Another ground of defence set up is, the lease from *Barker* to the tenant, and the renewal of it by the demandant by implication. The lease from *Barker* expired by its own limitation, on the first day of *May,* 1834. In the mean time, *Barker's* title

passed to the demandant. The continued possession by the tenant, after the expiration of the lease, he held as a mere tenant at will, according to the opinion of *Wilde J.* in *Ellis* v. *Paige & al.* 1 *Pick.* 43; but a tenancy at will, with the privilege of holding through the second year, according to the opinion of *Putnam J.* in a note subjoined to the case of *Coffin* v. *Lunt*, 2 *Pick.* 70. But whether of the one kind or the other, a tenant at will is bound to do nothing inconsistent with his tenure; and if he does, his tenancy is determined. *Campbell* v. *Procter*, 6 *Greenl.* 12. On the thirty-first of *March*, 1834, the tenant took a deed from *Abraham Read* and wife, conveying to him the demanded premises in fee. Now if *Read* was before tenant at will to the demandant, and if such an interest was assignable by a proper instrument, an attempt to convey in fee would determine the tenancy held by *Read*, and constitute a disseizin of the lessor, at his election. So the continued holding by the tenant, after his lease from *Barker* had expired, must be presumed to have been under his dead from *Read;* for he caused that deed to be recorded, does by his plea claim to be tenant of the freehold, and offered the deed at the trial as evidence of title. This, certainly, is a course of proceeding, entirely inconsistent with his duty as tenant at will.

We have thus taken a view of the defence upon its merits, aside from any objection, arising from the pleadings. By the plea, the tenant in effect admits that he is tenant of the freehold; but denies that he has disseised the demandant. The question at issue then is, whether the demandant has a right to be seised of the freehold, which has been very clearly established. If the tenant would have resisted the action, on account of any right to the occupancy or possession, he should formally have set up that interest by an appropriate plea, or as the law now stands, in a brief statement, which is essential, wherever a special plea was before necessary. This the tenant has not done; and we are clearly of opinion, that the testimony rejected had no tendency to maintain the issue on his part.

Judgment on the verdict.

WARREN & al. vs. THACHER.

The defendant gave D. a permit to cut logs upon his land, for an agreed price per thousand; the lumber to be holden to pay stumpage, and all supplies furnished by the former. D. employed the plaintiff to cut under the permit; and after the latter had labored two months, the defendant gave him a memorandum in writing, agreeing to pay him his wages out of the nett proceeds of the lumber, when sold. The logs sold for more than enough to pay the stumpage, but not enough to pay for both stumpage and supplies. *Held*, that the defendant was liable on this promise, and that he could make no deduction for the supplies from the proceeds of sale, and thus defeat the plaintiff's claim for his wages.

THIS was an action of *assumpsit*, upon the following promise or memorandum in writing, *viz.* "Whereas *Artemas Warren* and "Son are hauling lumber for *Hatcil Delano*, the present season, "I hereby agree to pay said *Warrens* their wages of twenty-eight "dollars per month, for a team of four oxen and driver, out of "the nett proceeds of said lumber, when sold by me.

"*Samuel Thacher, Jr.*

"*February* 4, 1832."

It was admitted that the plaintiffs worked two months, commencing *Dec.* 1, 1831. That, the defendant, or *Thacher & Parker*, who were to be considered as representing him, received in *May* or *June*, 1832, 547 logs, which he sold for $536.

The logs were cut under the following "permit," *viz.* "*Hat-*"*cil Delano* has permission to enter upon and cut and haul pine "logs from lot No. 18, west side of the *Bennock* road, provided "he shall pay one dollar per thousand for the stumpage thereof; "the same to be scaled at the joint expense of the parties. The "lumber holden to pay stumpage and all supplies furnished by "the grantors of this permit: To expire *April* 1*st*, 1832.

"*Thacher & Parker.*

"*July*, 1831."

It was agreed that *Thacher & Parker* furnished *Delano*, and one *Willis*, whom he had associated with him, and who represented *Delano*, supplies to the amount of $735,21, to enable them to carry on their business under the foregoing permit. The stumpage on the lumber was $126,20. The plaintiffs were originally employed by *Delano*.

Upon these facts the case was submitted for the opinion of the Court.

Kent, for the defendant, argued that no action could be maintained upon the promise of the defendant, for it was to pay the debt of another, and was without consideration. The work was all done before the promise was made, the former commencing 1*st* of *December*, 1831, while the latter was dated *February 4th*, 1832. This case comes within the second class of cases mentioned by *C. J. Kent*, in *Leonard* v. *Vandenburg*, 8 *Johns.* 29. And the cases of *Waine* v. *Walters*, 5 *East*, 10; *Sears* v. *Brink*, 3 *Johns.* 211; *Packard* v. *Richardson*, 17 *Mass.* 120, and numerous other cases, establish the position that there must be a consideration either expressed or proved, although the agreement is in writing. And that where the collateral undertaking is subsequent to the creation of the debt, a new consideration between the parties must be proved. See also, *Cook* v. *Bradley*, 7 *Con. Rep.* 57; *Mills* v. *Wyman*, 3 *Pick.* 207.

2. But viewing it as an accepted order, the defendant still is not liable. He was not to pay absolutely, but "out of the nett "proceeds" of the lumber received. And as the lumber was insufficient to pay the charges upon it, no right of action accrues to the plaintiffs.

In support of his general reasoning in the case, he further cited, *Campbell* v. *Pettingall*, 7 *Greenl.* 126; 2 *Wheeler's Abr.* 236; *Storer* v. *Logan*, 9 *Mass.* 60.

J. Appleton, for the plaintiff.

Emery J. — This is an action of *assumpsit* on the following engagement of the defendant: "Whereas *Mr. Artemas Warren* "and *Son* are hauling lumber for *Hatcil Delano*, the present "season, I hereby agree to pay said *Warrens* their wages of "twenty-eight dollars per month, for a team of 4 oxen and driver, "out of the net proceeds of said lumber, when sold by me.

"*Samuel Thacher, Jr.*

"*Feb. 4th*, 1832."

It was admitted, that the plaintiffs worked two months, commencing 1*st December*, 1831, and were originally employed by *Delano*.

Whatever may have been the agreement of *Thacher & Parker* with *Delano*, we cannot think, under the contract with the plaintiffs in this case, that their right should be restricted by any other charges than the stumpage on the lumber, which was $126,26. The nett proceeds of the lumber, when sold, are to be ascertained by deducting that sum from the $536,60, for which the 547 logs sold, and which was received by *Thacher & Parker*, whom the defendant represents.

There was then four hundred and ten dollars, thirty-four cents nett proceeds in the hands of the defendant, and as the demand was seasonably made, we are all of the opinion, that as the defendant, after the labor was done by the plaintiffs, voluntarily engaged to pay their wages out of the nett proceeds, that he must perform the engagement. For there is nothing in the case to show that the defendant made any qualification to the plaintiffs, that they should be subject to any deduction on account of supplies to *Delano* and *Willis*. No allusion is made to the matter. And if supplies have been so extensively made to them, the defendant must look to *Delano*, or *Delano* and *Willis*, for indemnity. The plaintiffs here make no claim to the logs against the defendant's lien. But they claim only remuneration for their labor, from the nett proceeds of the sale, which the defendant has effected.

And as the case is referred to the opinion of the Court, the defendant must be defaulted, and judgment rendered for the plaintiffs.

CRAM *vs. The* BANGOR HOUSE PROPRIETARY.

Where A. and others, *as directors of a proprietary*, acting within the scope of their authority, contracted with one, under *their own seals*, to pay him a stipulated price for certain materials to be furnished by him, it was holden that when furnished, he might maintain *assumpsit* against the *proprietary* for the price.

Where the directors of a corporation have power to bind it by their contracts, that power may be exercised by a *majority*.

It is not necessary that all the doings of such directors should be entered on their records; but the corporation will be bound by any verbal order or direction, in which a majority of such directors concurred, in relation to any business deputed to them.

A provision in the act incorporating certain individuals for the purpose of erecting a house for public accommodation, admitting the members as witnesses in all cases in which said corporation should be a party, was held not to be clearly a violation of the constitution.

This objection could not be made, however, by one named in the act of incorporation, and who subsequently expressed his assent by taking stock.

THIS was an action of *assumpsit*, brought in the name of the plaintiff for the benefit of his assignees, for goods sold and delivered according to an account annexed, which was for a quantity of glass, amounting to $1136,31.

The defendants introduced the clerk of the proprietary, and certain others who were members thereof and directors, for the purpose of proving that the glass was received by the company towards the assessments of the plaintiff, who was then also a member, and at his special request in writing. The admission of these witnesses was objected to by the plaintiff, but as the act of incorporation expressly authorised the admission of members as witnesses, in all cases in which the corporation should be a party, the presiding Judge permitted them to testify.

No record was shown of any vote of the directors of the proprietary, acceding to the proposition of the plaintiff to permit the glass, furnished by him, to go in payment of his assessments.

The plaintiff objected to the evidence of the acts of the directors or corporation, except by vote duly passed and recorded. But the Judge instructed the jury that no formal vote, accepting the proposition of *Cram*, was necessary to be passed by the directors, and recorded. That if they believed the witnesses, the

proposition was accepted by the directors, and bound the corporation as effectually as if formally passed by them altogether and recorded; and that the notice given to *Cram* by *Mr. Rawson*, the clerk, was sufficient. That an acceptance of *Cram's* proposition in this matter, by the directors, might legally be inferred from the acts proved.

The defendants further exhibited in defence, a contract between the plaintiff, and *a majority* of the directors of said proprietary, under *their own seals*, but professing to act in said capacity, by which the former agreed to furnish all the glass that should be wanted for the public house, then being erected by the defendants, and for which the directors agreed to pay a stipulated price. The defendants contended, that if the glass was delivered under this contract, *assumpsit* would not lie against them, and so the Court instructed the jury. It appeared that the plaintiff was one of those named in the act of incorporation, and subsequently subscribed for stock.

The jury returned a verdict for the defendants, which was to be set aside and a new trial granted, if the ruling and directions of the presiding Judge were erroneous.

Kent, for the plaintiff.

The plaintiff could not maintain an action against these defendants, upon the covenants of the special contract, because it did not bear the *corporate seal.* This is the only way in which a corporation can *covenant.* And where the private seals of the directors or individuals are used, *indebitatus assumpsit* will lie against the corporation. *Bank of Columbia* v. *Patterson*, 7 *Cranch*, 299; *Randell* v. *Van Vechten*, 19 *Johns. Rep.* 65; *Tippets* v. *Walker*, 4 *Mass.* 597. These authorities also go to show, that no action in this case could have been maintained against the directors.

2. The informal acceptance of *Cram's* proposition did not bind him. A corporation can only contract by vote. And although a sole agent may have power to bind the corporation by his verbal contracts, it is otherwise, where there is a board of directors. There they must vote, and make a record of their votes. 2 *Kent's Com.* 290; 8 *Wheat.* 357. The acceptance of the plain-

tiff's offer should at least have been in writing, as the offer was thus made, that he might have evidence by which to charge the corporation.

3. The directors had no authority to make this contract with the plaintiff; and as the defendants were not bound, there was no mutuality in the contract, and so not binding on either. *Essex Turnpike* v. *Collins*, 8 *Mass.* 292.

4. The provision in the act of incorporation making the members of the corporation witnesses, is unconstitutional and void. It is in contravention of the principle of equal and impartial laws, as it dispenses with a *general law* in favor of a *particular individual or corporation.* By the established law of the land, every party is excluded from being a witness. *Fox* v. *Whitney*, 16 *Mass.* 118. But the individual members of this corporation are the parties. *Bank of U. S.* v. *Deveaux & als.* 5 *Cranch*, 61.

There are many cases where persons interested, have been admitted as witnesses. But in those cases the law was *general*, and applied to all the citizens falling within a particular class. Here it is in favor of a particular corporation, and for that cause is void. 5 *Cranch*, 61; *Lewis & al.* v. *Webb*, 3 *Greenl.* 326; *Durham* v. *Lewiston*, 4 *Greenl.* 140; *Lunt's Case*, 6 *Greenl.* 412; *Piquet, Appellant, &c.* 5 *Pick.* 65; *Portland Bank* v. *Apthorpe*, 12 *Mass.* 252.

F. Allen, for the defendants.

1. No formal vote was necessary to accept the plaintiff's proposition. Corporations may act by parol. *Proprietors of Canal Bridge* v. *Gordan*, 1 *Pick.* 297.

2. The instructions of the Court, that assumpsit would not lie where there was a contract *under seal*, was correct. But at all events, the Court will not order a new trial where they see that substantial justice has been done.

3. The directors were rightly admitted as witnesses. The act expressly authorised it. And it is not competent for the plaintiff to say it was unconstitutional, he being one of the original corporators, and having also expressed his assent to it by subscribing for stock in the company. Besides, when he contracted with the company, he knew that the members could be witnesses. But

the law is not unsconstitutional. There is nothing extraordinary in provisions of this kind. It is so with regard to towns and parishes. If it be a peculiar privilege, so every corporation has some peculiar privilege annexed to it, otherwise there would be no inducement to be incorporated.

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

The object of this proprietary was, the erection of a convenient building, with suitable accommodations for travellers. They confided their business to a board of directors. This board contracted with the plaintiff to furnish, upon certain stipulated terms, the glass necessary for the house. It was a contract directly in aid of the purposes, for which the corporation was created, and clearly within the authority of the directors. The contract is not in terms made with the proprietary, but with the agents, who represented them. The directors, who are individually named, covenant to pay to the plaintiff the price agreed, at the time limited. And they affix to the contract their names and their several seals. It is not under the seal of the corporation; and is therefore not their deed. *Tippets* v. *Walker et al.* 4 *Mass.* 595. It is objected that the parties, having respectively contracted by deed, there is no promise on either side, express or implied, which will support an action of assumpsit; and that the plaintiff's only remedy is by an action of covenant broken. The first inquiry arising in the case is, whether the plaintiff has any claim upon the defendants; and if so, secondly, by what form of action it may lawfully be enforced. There can be no doubt but the defendants would be liable, but for the express contract made with the directors.

In the *Bank of Columbia* v. *Patterson*, 7 *Cranch*, 299, one of the points considered was, whether the bank could be bound by a contract not made by the corporation, but by their committee, acting in their own names, who had personally and expressly agreed to pay the stipulated price. And it being a contract made for the benefit of the corporation, and the committee having authority to make it, it was holden that the corporation were bound. *Story J.*, by whom the opinion of the court was delivered, states that, " it would seem to be a sound rule of law, that wherever a

corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts, made by its authorized agents, are express promises of the corporation." It is a parol contract, which thus creates and is evidence of a promise; for if the agent has authority to contract by deed, and does so in the name, and affixes the seal of his principal, it is the covenant and not the promise of the latter. But suppose the agent, clothed with power to contract by a corporation, affixes to the instrument his own name and seal, and not theirs, although it is not the deed of the corporation, yet if it would bind them as an agreement, if it were not under seal, there is no reason for its ceasing to bind them, the agent's seal being affixed thereto, except what is purely technical. The agent has superadded a more solemn authentication, which usually converts it into an instrument of a higher character. But as the corporation cannot be affected by this additional quality, it not being their deed, shall it cease to be evidence of their agreement? They authorized it, their agent made it, and if he added formalities, which were useless and inoperative, they may be disregarded, and the corporation stand charged, as if they had been omitted. A covenant is a promise, and something more. It is a promise under seal. If the seal affixed, is not that of the party, who substantially makes the promise, and who is to be charged by it, the promise remains, and is not changed into a contract of a higher nature.

Randall v. *Van Vechten et al.* 19 *Johns.* 60, is an authority directly in point. An authorized committee of the corporation of the city of *Albany*, setting forth their appointment and power, entered into a contract for the benefit of the corporation, and for corporate purposes, and signed thereto their names, and affixed their individual seals, covenanting to make certain payments and advances to the other contracting party. Upon covenant broken, against the individual members of the committee, the court decided that they were not holden, but that the corporation was; and as they could not be charged in covenant, it not being their deed, that they were liable in assumpsit. And the authority of the committee being conceded, they held the instrument executed by them, evidence of a promise by the corporation, disregarding the seals. In deducing the power of the committee, they refer

to certain acts of recognition, on the part of the corporation. No such evidence is necessary here, where the agency exercised results from their office and character as directors. In *Tippets* v. *Walker et al.* before cited, where a committee of the directors of the *Middlesex Turnpike Corporation* were held liable upon their covenant, in regard to corporate objects, one reason assigned by the court was, that the directors, who were the immediate agents of the corporation, had no right to contract by the substitution of other agents, from which a strong implication arises, that it might have been otherwise holden, if the contract had been made by the directors. It is a doctrine, well settled at the present day, that a corporation may contract by vote, or by agents; and the old rule, that they could do so only by their corporate seal has been exploded. The authorities upon this point are cited and examined in the case of the *Columbia Bank* v. *Patterson.*

It being the opinion of the Court, that the defendants might be charged in assumpsit, for the glass delivered under the contract with the directors, and the jury having been otherwise instructed, a new trial is granted upon this ground.

As the other questions presented may again arise, we have considered them. It is insisted that a majority of the directors could not bind the corporation. But we cannot regard the presence and concurrence of all essential to the validity of their acts. It would be nearly impracticable for them to fulfill the objects of their appointment, under such a restriction. It would so clog and retard their operations in the business, with which they may be daily and hourly charged, as to defeat the beneficial exercise of their powers. So universal is the the usage, for a majority of the directors of banks, insurance companies, and other corporations of this description, to act for the whole, that a power to do so may by general consent, be understood to be implied by their appointment. Nor do we hold it to be necessary, that every direction of theirs, within the scope of their authority, should be recorded by their clerk. In purchasing materials, in giving directions to workmen, and in many of the multiplied details of the business confided to them, it would be a formality more burdensome than useful. It may be left to them, or to the corporation to prescribe what part of their doings shall be entered on their re-

cords. We doubt not that the corporation are bound by any verbal order or direction, in which a majority of the board concurred, in relation to any business deputed to them.

An argument has been urged against the constitutionality of that provision in the act incorporating the defendants, which admits a member as a witness, where the corporation is concerned, notwithstanding his corporate interest. A privilege is thus given to these defendants, which has not before been conferred on corporations of this class. It is a law for all the citizens, who may litigate with this corporation; and is not made to apply to a particular case. Yet it does give them an advantage, not enjoyed by the adverse party. The same right has been given by a general law, to the inhabitants of counties, towns, and parishes. There the general law, which excludes interested witnesses as incompetent, is partially modified. But as all the citizens sustain these relations, all being inhabitants of counties, and most of towns and parishes, the law bears equally and generally.

The law under consideration, establishes the competency of the witness, but the objection remains to his credibility, which is to be submitted to the jury. And this may be a sufficient protection to the party to be affected. Every immunity conferred on a corporation, is in the nature of an exclusive privilege, as is the corporate character itself. The law operates upon all, who may have legal controversies with this corporation, as well upon those who enacted it, as others. It cannot be disguised, however, that it approaches near to that interference with the judicial tribunals in particular cases, which does not belong to the legislative power; although we are not prepared to say that it transcends the line, which separates the two departments.

In the case before us, the plaintiff was one of those in whose favor the act passed; he being named therein as a corporator. He further manifested his assent, by becoming a subscriber to shares in their stock. Upon these facts, we are of opinion that it is not competent for him to object to the operation of a law, the passage of which he must be presumed to have solicited, and which he subsequently accepted. The objection of interest may always be waived by the party to be affected. But it is insisted that the rights of a third party, the assignees of the plaintiff are

in controversy. They succeeded to his rights, such as they were, at the time of the assignment. If, therefore, matter of off-set, or of payment, could at that time be made out by competent proof against the plaintiff, he ought not to be permitted by his own act, to place the defendants in any worse situation. Nor is this demanded for the protection of the equitable claims of the assignees.

New trial granted.

The State *vs.* John Godfrey *& als.*

By the charter of the "Penobscot Mill Dam Company," they were authorised to erect a dam "*between* the foot of *Rose's* or *Treat's* falls in *Bangor*, and *McMahon's* falls in *Eddington*," on the *Penobscot* river. *Held*, that *McMahon's* falls were *excluded*, and that an erection above the foot of these falls, which obstructed the public navigation and use of the river, was a nuisance.

The indictment charged the offence as having been committed in *Bangor*, though in fact a portion of the dam was in the town of *Eddington*, both in *Penobscot* County. *Held* to be well enough; the place being laid merely by way of *venue*, and not constituting any part of the description of the offence.

This was an indictment against the defendant for a nuisance, to wit, for erecting and continuing across the *Penobscot* river, a certain dam, whereby the free navigation of the river was obstructed. The defendants justified under the authority of an act of the Legislature, incorporating "The Penobscot Mill Dam Company," and as riparian proprietors.

By this act, the Company were authorised to erect a dam across the *Penobsot* river, "between the foot of *Rose's* or *Treat's* falls in *Bangor*, and *McMahon's* falls in *Eddington*, for the purpose of flowing the water a sufficient height for the safe and convenient passage of rafts and boats," &c.

The Chief Justice, before whom the case was tried, was requested by the counsel for the defendants, to instruct the jury in the following manner: 1. That a dam built any where between the foot of *Treat's* falls in *Bangor*, and the head of *McMahon's* falls in *Eddington*, would be within the limits of the charter of

the *Penobscot Mill Dam Corporation.* This the Judge declined, instructing them that the corporation was restricted to the *foot of McMahon's falls.* 2. That the words in the charter, " between the foot of *Treat's* falls and *McMahon's* falls in *Eddington*, give the corporation a right to go to that pitch of the falls which is highest up the river, on the *Eddington* side, and that they have a right to run their dam from that point in a direct line across the river, and are not bound to follow the course of the falls. And the Court so instructed them, with this qualification, that they might run their dam from the *foot*, but not from the *head* of these falls. 3. That this being a criminal prosecution, the statute giving a right to erect a dam, must have a liberal construction; and therefore, if the corporation cannot go above the foot of *McMahon's* falls, in *Eddington*, yet if there is a doubt where the foot of these falls is, and they acted prudently and carefully, and had good reason to believe, that they were not beyond the limits of their charter, they are not guilty of wilfully erecting and continuing a nuisance. But the Judge instructed the jury, that the defendants were not justified by the charter, if they were clearly satisfied that the dam was without the limits prescribed. 4. That the defendants, being owners of the land on both sides of the river, had a common law right to erect such dams as they chose, within their own limits, and therefore, if they have gone beyond the limits of their charter, but have not exceeded their own limits, they are not guilty, if they have left all their legal rights, to the public. Upon this point, the Judge's direction to the jury was, that the indictment was not sustained, unless the erection was proved to be an annoyance to the public right. 5. That an alteration in the course of the current of the river, is not an interference with the public rights, unless those rights are impaired. And they were so instructed. 6. That the public had no other rights in the river, than to as good a passage as they had been accustomed to enjoy; and therefore, if such a passage was left, the corporation had a right to confine the public to such a passage, and to exclude them from other parts of the river, within their limits; and they were so instructed. As they were also, *Seventhly*, that such an alteration of the current, confinement, and exclusion, are contemplated by the words of the char-

ter. 8. That if the jury should find, that the river is of no value to the public, for any other purpose than rafting, the defendants are not guilty on the ground of injuring the navigation of the river for boats. And the jury were instructed, that the defendants were not guilty, if the public navigation was not injured. 9. That under the provisions of the charter, the defendants are not liable to this indictment, if the jury should find, that at the time they were indicted, they had not completed their erections, that they had used reasonable diligence, and that such erections as they had made, were clearly such as were consistent with the object of improving the navigation by erecting a sluice and lock or locks. But the Court instructed the jury that the defendants had no right for the time charged to impede the navigation more than they improved it. 10. That if the jury should find that when the defendants were indicted last *October*, the erections were not completed, this indictment cannot be sustained, but the Court ruled and directed as under the ninth request. 11. That if any part of such erections is not in *Bangor*, the defendants cannot be found guilty, under this indictment, for any such part, and that if such part of said erections as is in *Bangor*, is not a nuisance, then the defendants are not guilty. Intending to reserve this question, the Court declined the instruction. 12. That the allegation in the indictment, that the defendants did continue, and still do continue the nuisance, is a material allegation, and therefore, if the defendants did not continue the nuisance, they are not guilty ; and that the testimony does not show a continuance by the defendants, but by the corporation. The Chief Justice left this point to the jury upon the evidence, stating to them, that the defendants, might be found guilty of the erection only. 13. That if the jury should find that the rights of only a part of the public, and not of the whole, are affected, this indictment being for a public nuisance, cannot be sustained ; and that the testimony in the case, does not show a public, but a private injury. The Judge instructed the jury that it was a public nuisance, if to the annoyance of all persons, having occasion to navigate the river. 14. That if there is any doubt as to any or all the material points in the allegations and charges, in the indictment, the defendants are entitled to the benefit of that doubt,

this being a criminal prosecution. And so the Judge instructed them if the doubt be reasonable. 15. That the defendants cannot be found guilty, for not improving or trying to improve, the navigation of the river, but that the remedy for this would be a *quo warranto*, and not an indictment. They were instructed that the defendants might be found guilty if they had impaired the navigation.

At the time the cause was summed up to the jury, certain questions were propounded to them, to all of which answers were returned. They found that a portion of the dam was not only above the foot of *McMahon's* falls, but above the head of the falls. That at the time of the finding of the indictment in *October*, the free passage of *Penobscot* river with boats and rafts, which is of great value to the public, was obstructed by the upper cross dam. That two thirds of this dam was in *Eddington*, and the remainder in *Bangor*. That said erections are inconsistent with the object of improving the navigatiou of the river for boats and rafts. That it was within the power of the defendants to erect a lock or locks and a sluice which would render the navigation of the river for boats and rafts as good as it was before, or better, but it was not their intention to make such locks and sluice way, or to make the navigation of the river good at all events. That at the time of the finding of the indictment the corporation had used reasonable diligence in order to complete their plan. That the falls, where the dam is built, is called *Mansell's* falls, on the west side of the river, and *McMahon's* falls on the east side. That all the upper cross dam is above the foot of the main pitch of *McMahon's* falls. That a dam built at the lowest part of *McMahon's* falls would be more likely to improve the navigation of the river, than a dam built on any part of the falls above.

The jury found the defendants guilty. If the instructions withheld, ought to have been given, or those given, were erroneous, except where the jury had negatived the facts upon which they were founded, the verdict was to be set aside and a new trial granted.

The case was very elaborately argued in writing, by *F. Allen* and *Rogers*, for the defendants, and by *Clifford*, Attorney General, and *R. Williams*, for the State.

The defendant's counsel, to the point that the terms of the charter did not necessarily exclude *McMahon's* falls, cited *Whitney* v. *Whitney*, 14 *Mass.* 88; *Holbrook* v. *Holbrook*, *& al.* 1 *Pick.* 248; 7 *Mass.* 524 *(Appendix;)* *Windsor* v. *China*, 4 *Greenl.* 303; *Pugh* v. *The Duke of Leeds*, 2 *Cowp.* 714.

That the place named in the indictment is material, and must be proved as laid, and that a new trial should be granted for the instruction withheld on this point, they cited, *Hawk. Pl. of the Crown*, 435; 4 *Black. Com.* 306; *Com Dig. title Judgment, G.* 2, *(in notis;)* 1 *Chitty's Cr. Law*, 201, and cases there cited; *Commonwealth* v. *Hall & al.* 15 *Mass.* 240; *Aylwin* v. *Ulmer*, 12 *Mass.* 22; *Tyler* v. *Ulmer*, 12 *Mass.* 163; *Dudley* v. *Sumner*, 5 *Mass.* 488.

That the right of the public on this river is subject to the control of the legislature, *Commonwealth* v. *Charleston*, 1 *Pick.* 180; and that for violating its charter, the proper remedy against this corporation, is by information in the nature of a *quo warranto*, or *scire facias*, they cited, *Commonwealth* v. *Fire & Mar. Ins. Co.* 5 *Mass.* 230; *Chester Glass Company* v. *Dewey*, 16 *Mass.* 94; 19 *Johns. Rep.* 456; *Enfield Toll Bridge Co.* v. *Con. River Co.* 7 *Conn. Rep.* 46; 2 *Kent's Com.* 251.

The Attorney General cited the following authorities as to the construction of the charter, *Reeve* v. *Leonard & al.* 1 *Mass.* 91; *Hatch* v. *Dwight & al.* 17 *Mass.* 289; *Com. Dig. title Grant, G.* 7, 12.

As to the rights of the public on this river, *Corsan* v. *Blazo & al.* 2 *Bin.* 475; 14 *Serg. & Rawle*, 71; *Cates* v. *Waddington*, 1 *McCord*, 580; *Canal Commissioners* v. *The People*, 5 *Wend.* 423; *Vooght* v. *Winch*, 2 *Barn. & Ald.* 662; *Miles* v. *Rose*, 2 *Taunt.* 705.

That the erection by the defendants was a nuisance, 2 *Com. Dig. Tit. C. Art.* 1, 31; *Berry & al.* v. *Carle*, 3 *Greenl.* 269; *Exparte Jennings*, 6 *Cowen*, 519; *Palmer* v. *Mulligan*, 3 *Caines' R.* 387; *Hooker* v. *Cummings*, 20 *Johns.* 90; *Commonwealth* v. *Ruggles*, 10 *Mass.* 391; *Shaw* v. *Crawford*, 10 *Johns.* 236; 2 *Danes' Abr.* 688 to 712; 3 *Kent's Com.* 334; *Adams* v. *Pease*, 2 *Conner's R.* 481; *Ingraham* v. *Hutchinson*, 2 *Conner's R.* 591; 1 *Hawk. P. C. c.* 76, § 1; 2 *Com. Dig.* 397.

WESTON C. J. — delivered the opinion of the Court.

The defendants justify the act, charged as a nuisance, under a statute to incorporate the Penobscot Mill Dam Company, and also as riparian proprietors. The first question raised has reference to the limits prescribed by their charter. The language is, "between the foot of *Rose's* or *Treat's* falls in *Bangor*, and *McMahon's* falls in *Eddington*." That which lies between one given place and another, is something distinct from the place given on either side. Perhaps no word in our language has a more precise and definite meaning, than between. It indicates an intermediate space, which excludes, and cannot include that to which it refers. If land is granted between one township and another, both are excluded from the grant. If land is conveyed, lying between lot number one and number three, it could not be pretended that either of these lots passed by the deed.

The force and effect of this term is so well understood, that we have been referred to but one case, in which any attempt has been made to give it a different meaning. In *Revere* v. *Leonard & al.* 1 *Mass.* 91, it was contended by counsel that, *if the words of the grant could not be otherwise satisfied*, it would be reasonable and equitable to construe the words in the deed in question, "between the slitting mill and the forge dam," so as to include the forge dam; but the whole court were of opinion that these words did not admit of that construction.

We have been referred to a class of cases, in which there has been much discussion, as to the computation of time from one day or date to another. Many of them are noticed in *Windsor* v. *China*, 4 *Greenl.* 298, cited in the argument. There is a want of uniformity in the decisions, whether the date or the day of the date, shall or shall not be included in the estimate. The analogy between these cases, and the one before us, is not sufficiently strong to give them an authoritative application, and if it was, their want of uniformity is such, as to afford us little aid in determining the point under consideration.

It is urged that the foot of *McMahon's* falls not being in express terms made the boundary in that direction, as the foot of *Treat's* falls is in the other, the implication arising from the omission is, that the legislature did not intend to limit the corporation

to the lower part of *McMahon's* falls. If the corporation had been authorized to make their erections between those falls, both would have been excluded. The public object contemplated avowedly was, to improve the navigation of the river. To do this the more perfectly, it might be necessary to flow out *Treat's* falls; and this affords a sufficient reason for authorizing the corporation to erect a dam below them, and to appoint the foot as a boundary there, which did not apply to *McMahon's* above. If the use of the term foot was necessary to include *Treat's* falls within their limits, of which we think there can be no reasonable doubt, it was equally necessary to designate the head of *McMahon's* falls, to include them within the charter. If the whole of the falls, given for the commencement and termination of their limits, were constructively included, there was no occasion for referring them expressly to the foot of *Treat's*. But by using that term, it is fairly to be understood, that in the judgment of the legislature, those falls would not otherwise have been included. The same reason, which induced them to designate the foot of *Treat's*, would have suggested the necessity of referring to the head of *McMahon's*, if they intended to extend the limits thus far in that direction.

Nor do we perceive that the subject matter, or the object contemplated, calls for a different construction, if we were at liberty to depart from the plain meaning of the language used. The power was conferred on the corporation, "for the purpose of flowing the water a sufficient height, for the safe and convenient passage of rafts and boats, from the foot of *Ayer's* falls in *Orono*, to *Bangor*." Although the corporation are authorized to erect more than one dam within their limits; yet, one across the river would create a water power quite sufficient for all their purposes. It is hardly probable that more than one was within their plan of operations, as the whole real and personal estate, they were permitted to hold, was not to exceed two hundred thousand dollars. If erected below *Treat's* falls, it would flow them out, and if below *McMahon's*, it would have the same effect upon them, if the dam was of sufficient height; but if above both, they would both be left unimproved. However much we may regret the error committed by the corporation, in erecting their dam without

their chartered limits ; yet such appears to be the fact, upon the finding of the jury, holding, as we feel constrained to do, that the foot of *McMahon's* falls is the point, to which they are restricted in that direction.

This renders the inquiry, as to the correctness of the ninth instruction, which has been made the subject of complaint, unimportant. If an impediment to the navigation, during the progress of their erections, was essential to their operations, and therefore warranted, as is contended, by necessary implication, no such implied power could attach to the operations of the corporation, or of individuals under them, beyond their chartered limits.

If the erection of the dam was an annoyance to the right of the public, to navigate the river, as the jury have found, the defendants are guilty, unless justified by the charter, under which they claim to have acted; and the burthen of proof is thrown upon them to make out this justification. They proceeded under the statute at their peril. If they erred, their justification fails, although they may have intended to keep within their limits, and although reasonable doubts might have existed as to their extent. And the jury, in our judgment, were properly instructed to this effect.

The Judge was requested to instruct the jury, that the indictment charging the nuisance as in *Bangor*, the defendants could not be found guilty of erecting that part of the dam, which is in *Eddington*, nor of that part which is in *Bangor*, unless it was of itself a nuisance. This he declined, intending to reserve the question.

Sergeant Hawkins, in his treatise upon pleas of the crown, *book* 2, *ch.* 46, § 34, lays it down as a settled rule of law, that a place, laid only for a *venue* in an indictment, is no way material upon evidence, and that proof of the offence in any other place in the same county maintains the indictment, as well as if it had been proved in the very same place. But he further states, that where a certain place is made part of the description of the fact, which is charged against the defendant, the least variance as to such place, between the evidence and the indictment, is fatal. *Blackstone* regards a mistake in the place unimportant, unless

where it is laid, not merely as a *venue*, but as part of the description of the offence. 4 *Bl. Com.* 306. In the *King* v. *Hammond*, 1 *Strange*, 44, the defendant was indicted for a nuisance in the common highway, without any averment, describing from, or to what points the way passed; and the court upon demurrer held it unnecessary, deeming it sufficient, that it was charged in the highway generally.

In *Senhouse* v. *Christian & als.* 1 *T. R.* 561, *Buller J.* says, "it is true that in ancient proceedings, an highway is stated as a road, leading from one rill to another; but that is done only for the purpose of showing that it is a highway. And it has been settled of late years, that it is not necessary so to state it in an indictment; for if it be laid to be an highway, that is sufficient."

An objection similar in principle, was taken in the company of proprietors of the *Mersey and Irwell navigation* v. *Douglas et als.* 2 *East*, 497, which was an action of the case for a nuisance in the river *Irwell*, at *Preston*, in the county of *Lancaster*. If *Preston* was matter of local description it was wrong, and the Judge accordingly ordered a nonsuit at the trial. A rule nisi having been obtained for setting aside the nonsuit, and granting a new trial, the court made the rule absolute, holding that *Preston* was used merely as a venue, and not as a part of the local description, where the nuisance was committed.

In the *Commonwealth* v. *Hall et als.* 15 *Mass.* 240, the court held it to be sufficient to aver that the nuisance was in the highway. Upon an objection that the termini were not stated, the court overruled it, saying, that as the nuisance was averred to have been erected at *Sutton*, in the county of *Worcester*, and the highway was alleged to be there, the way was sufficiently described. But they did not hold this to have been essential, nor was a question raised whether *Sutton* was used merely as a venue, or as descriptive of the offence. Judgment was there arrested upon another point. In an indictment against a town for not repairing a highway, it is of the essence of the charge, and necessarily descriptive of it, to aver that the highway is in that town.

Whether this objection can prevail or not, depends upon the question, whether *Bangor* is laid as a venue, or as part of the

description of the offence charged. The offence would have been the same, whether committed in *Bangor*, *Eddington*, or any other town, through which the *Penobscot* runs. It seems therefore to us that *Bangor* is not laid as descriptive of the charge, or as in any manner essential to it, but as a venue, which is necessary in compliance with legal forms, long settled and established. If a venue as such had not been essential, it would have been sufficient, according to the cases, to have charged the defendants with having erected a nuisance in the *Penobscot* river, with the proper averments as to the right of the public to use the same as a navigable river and public highway.

The truth of the averment in the indictment, that the *Penobscot* river is, and has been, a navigable river and common highway, for all the citizens of the state, with their boats and rafts to pass and repass at their free will, has been found by the jury. The defendants, as riparian proprietors, may make any use of the river, consistent with the public right, but this they cannot lawfully obstruct or impair. But it is insisted that the defendants cannot be held liable to an indictment, but should be called upon by a *quo warranto*. A *quo warranto*, or an information in the nature of it, is the proper course of proceedings, by which to ascertain in behalf of the government, whether a charter has been abused, with a view to declare it forfeited. This indictment can have no such effect. It leaves the charter, under which the defendants have attempted to protect themselves, unimpaired. It is conceded that a civil action might be sustained for an injury to an individual, but it is denied that an indictment can be prosecuted for the public injury. We cannot perceive sufficient ground for this distinction. The legislature have the power to authorize an erection in a navigable river, which would otherwise be a nuisance. If thus justified, neither a civil action nor an indictment could be maintained for the erection. If the extent and limitations of the charter cannot be controverted collaterally, but only upon a *quo warranto*, it is an objection, which may be interposed with as much propriety in bar of a civil action, as of a criminal prosecution. In our opinion, this objection cannot prevail. The defendants were authorized by the legislature to erect a dam or dams between certain points. They have erected one above

both. The charter then affords them no protection; and they must be regarded merely as wrongdoers.

Upon a view of the whole case, the opinion of the Court is, that the indictment has been sustained.

ELDRIDGE *vs.* WADLEIGH.

Though as a general rule, a vendor cannot be called as a witness for the vendee, to sustain his title, when that title is called in question, yet he may be thus called, in cases where his interest is balanced.

As where goods are attached as the property of the witness and replevied by his vendee. If the vendee prevails, the warranty, actual or implied, is satisfied; if the creditor prevails, the value of the goods is applied to the payment of the witness' debt.

Whether a vendor would or would not be liable to his vendee, for *costs* incurred in defending the title, as well as for the value of the goods, on receiving *notice of the suit*, and being called upon to take upon himself the defence of it, he would not be liable for costs *without such notice*.

THIS was *replevin* for a yoke of oxen, and was tried upon the general issue and a brief statement of the defendant alleging property in himself.

The defendant proved that he put the oxen into the possession of one *Waterman*, under an agreement to be returned when called for.

The plaintiff claimed under a purchase from *Waterman*, whom he offered as a witness, and who was permitted to testify, subject to the opinion of the whole Court upon his admissibility. *Waterman* testified, that the defendant let him have the oxen to keep, under an agreement that if he paid for them in hay by a certain time, the oxen were to be his; and that he did pay for them by the delivery of the hay, but that the defendant gave him credit for the hay on his general account, and upon a settlement of accounts between them, subsequent to the sale to the plaintiff, the hay was inadvertently allowed to his credit on the general account, in which the oxen were not charged.

If, in the opinion of the Court, the testimony of *Waterman* was inadmissible, the verdict which was for the plaintiff, was to

be set aside and a new trial ordered; otherwise judgment was to be rendered thereon.

Rogers, for the defendant, insisted that a vendor was inadmissible as a witness, to sustain the title of his vendee, and cited 1 *Strange*, 445; 3 *Stark. Ev.* 1647, and cases there cited; *Scott* v. *McLellan & al.* 2 *Greenl.* 199.

In this case, the interest of the witness is not balanced, inasmuch as if the plaintiff does not prevail, he will be liable to the plaintiff for the costs of this suit.

Garnsey, for the plaintiff, cited 2 *Stark. Ev.* 744, 745, 751; *Cushman* v. *Loker*, 2 *Mass.* 106; *Hale* v. *Smith*, 6 *Greenl.* 416; *Nix* v. *Cutting*, 4 *Taunt.* 17; *Descadillas* v. *Harris*, 8 *Greenl.* 298; 13 *East*, 175.

Weston C. J. — Whoever sells personal property as his own, becomes by implication of law a warrantor of the title, and cannot therefore be received as a witness for the vendee, when that title is called in question. *Hale* v. *Smith*, 6 *Greenl.* 416. The ground of his exclusion is, the interest he has to maintain his warranty. But the effect of such interest may be balanced or neutralized by an equal interest in favor of the opposite party. In that case the witness has nothing to gain or lose by the event of the cause. The amount of his liability is not affected, whether one party or the other prevail. If the witness was in that situation, although he was the vendor of the plaintiff, by whom he was called, he had no interest to be promoted by his recovery, and was therefore not incompetent on that ground.

If the plaintiff fails, the witness is answerable to him upon his warranty. What would be the amount of damages? The value of the oxen, which the plaintiff may have failed to hold. It is urged that he would be further answerable for the costs, incurred by the plaintiff in this action. The warrantor, in the conveyance of real estate, is bound to indemnify the grantee or his assigns, if the title fail, against the costs incurred in attempting to defend it, if he has notice of the suit, and is called upon to take upon himself the defence. Every reason, upon which this rule of notice is founded, applies with equal force to the warranty implied upon a sale of personal chattels. Without determining that the vendor

of such property would be liable for the costs, upon such notice, we are very clear that he would not be without it, and none appears to have been given in this case. Suits are very common in our courts between an attaching creditor, or the officer who represents him, and the vendee of the debtor, turning upon the question, whether the sale was or was not fraudulent. The debtor, in these cases, is received as a witness for either party. He is most generally called by the vendee; and yet no objection has been sustained to his admission. His legal interest is balanced. If the vendee prevails, his warranty is satisfied; if the creditor, the value is applied to the payment of his debt. Thus there is in the eye of the law an equipoise of interest, although subject to the contingency, that the value may turn out to be more available to the debtor, in the one case than in the other.

Waterman, the witness, although he testified that he had purchased the oxen of the defendant, at the same time stated that he had never paid for them. If then the plaintiff holds them, the witness is bound to pay their value to the defendant, upon his purchase; if the defendant recovers them, the witness is liable for their value to the plaintiff upon his warranty. Upon these facts, it does not appear to us, that there was any balance of interest in the case, which would render the witness incompetent.

Judgment on the verdict.

Fisk *& als. vs.* Briggs.

Where one entered upon lands belonging to the *Commonwealth* of *Massachusetts*, lying within this State, and continued there for more than six years, erecting a house, planting an orchard, and making other improvements, it was held in an action to recover the possession brought by the grantees of the *Commonwealth* within six years from the time of their purchase, that the tenant was entitled to the benefit of the provisions of *stat.* of 1821, *ch.* 47, commonly called the "Betterment Act."

This was a writ of entry, brought to recover possession of 100 acres of land, in which the demandants counted upon their own seizin and a disseizin done by the tenant.

The tenant pleaded the general issue, and put in a claim for *betterments*, under the provisions of the statute of 1821, *ch.* 47.

The demandants derived title from the *Commonwealth* of *Massachusetts;* the *locus in quo*, being part of a township, that, by the Act of separation of *Maine* from *Massachusetts*, became the common and equal property of said states, and which in a division of lands by the agents of the respective states in 1832, was assigned to *Massachusetts*. The deeds to the demandants from the agents of *Massachusetts*, were given at a period within six years prior to the commencement of this action.

The tenant proved that he entered upon the premises in 1822, and had continued in possession thereof to the then present time, having cleared 30 or 40 acres, erected buildings, planted a small orchard, dug and stoned a well and made other improvements. He then consented, which consent was recorded, that the increased value of the premises, by virtue of the buildings and improvements, be assessed and set at the sum of $300, — and that the value of the land demanded, without the buildings and improvements, be estimated at $300. To this offer the demandants acceded, still denying the right of the tenant to betterments at all, inasmuch as the *Commonwealth* of *Massachusetts*, could not be disseized, and as six years had not elapsed since the demandants purchased.

The presiding Judge being disposed to reserve this question for the consideration of the whole Court, the cause was taken from the jury ; the parties agreeing, that if in the opinion of the whole Court, the tenant had not such possession as to entitle him to betterments, judgment was to be rendered in accordance with the offer and acceptance aforesaid ; otherwise the tenant was to be defaulted.

Starrett, for the demandants, cited a part of the first article in the terms and conditions of the act of separation between *Maine* and *Massachusetts*, which is as follows : " All the lands belonging to the *Commonwealth* within the *District of Maine*, shall " belong the one half thereof to the said *Commonwealth*, and the " other half thereof to the state to be formed within said *District*, " to be divided as hereinafter mentioned. And the lands within " the said *District* which shall belong to the said *Commonwealth*,

" shall be free from taxation, while the title to the said lands re-
" mains in the *Commonwealth*. And the rights of the *Common-*
" *wealth* to their lands within said *District*, and the remedies for
" the recovery thereof shall continue the same within the pro-
" posed state and in the courts thereof as they now are within said
" *Commonwealth*, and in the courts thereof."

Massachusetts could not be disseised at the time of the conveyance to the demandants. *Weed* v. *Bartholomew*, 6 *Pick.* 407; *Hill* v. *Dyer*, 3 *Greenl.* 441. Nor could a settler on her lands within that state, by a possession of any length of time, acquire a right to betterments. It therefore follows, by the terms of the act of separation, that no such rights could be acquired on her lands, lying within this state.

W. D. Williamson, for the tenant, cited 2 *Black. Com.* 105, 261; *Co. Litt.* 13 *a*; *Frothingham* v. *March*, 1 *Mass.* 250; 3 *Black. Com.* 257, 307; 1 *Black. Com.* 247; 1 *Plow.* 236, *a*; *Bacon* v. *Callender*, 6 *Mass.* 303; *Hart* v. *Johnson*, 7 *Mass.* 472; *Little* v. *Hasey & al.* 12 *Mass.* 329; *Shaw* v. *Bradstreet*, 13 *Mass.* 241; *Runey & als.* v. *Edmonds*, 15 *Mass.* 294; *Newhall* v. *Saddler*, 17 *Mass.* 350; *Russell* v. *Blake*, 2 *Pick.* 507; *Heath* v. *Wells*, 5 *Pick.* 145; *Brackett* v. *Norcross*, 1 *Greenl.* 92; *Proprs. Ken. Purchase* v. *Kavanagh*, 1 *Greenl.* 351.

WESTON C. J. — By the terms and conditions of the act, by which *Massachusetts* gave her consent to the separation of *Maine*, and which are made a part of our constitution, it is provided that the rights of that *Commonwealth* to their lands here, and the remedies for their recovery shall continue the same within this state and the courts thereof, as they before were within the *Commonwealth* and the courts thereof. The fulfilment of these terms is required by the constitution, which is the paramount law, and by the obligations of good faith to *Massachusetts*. It is contended that they cannot be literally carried into effect; that for instance, certain remedies, which might be suitable and proper for her, while in the actual exercise of the sovereign power here, are not adapted to the relation, in which she now stands to the new state. It is not necessary to discuss this question, as the remedy

sought by the demandants is one which is open to all, who have a right to litigate in our courts.

It has been holden, as the established law of both states, that the State or *Commonwealth* may convey lands, notwithstanding they may be in the possession of others, who have intruded thereon without right. And this upon the ground of prerogative; which may be necessary, whether a king or representative bodies are charged with the duty of upholding and preserving the rights of the public. In *Hill* v. *Dyer*, 3 *Greenl.* 441, this right is considered as resulting from the principle, that the commonwealth or sovereign power could not be disseised; which was also a prerogative of the king in *England*. 3 *Bl. Com.* 257. And in *Ward* v. *Bartholomew*, 6 *Pick.* 409, the court lay it down as a rule, which they state they have always understood, that the principle that a person out of possession cannot convey a title, does not apply to the government. And we are clearly of opinion, that the right to convey, unimpaired by the intrusion of others, which before existed in the Commonwealth, is under the protection of the act of separation. The free right of alienation, when purchasers present, is of great value. The lands of *Massachusetts* are from time to time in the market for sale. They constitute an important portion of their fiscal resources. That the party has a right to convey, is a covenant deemed necessary for the security of the purchaser, in the usual formularies of conveyance. It is one of the covenants in the deeds of the agents of the *Commonwealth*, from which the demandants deduce title. If it was a right which existed before the separation, not liable to be defeated by the possession of others, of which we entertain no doubt, the deeds of the agents of the commonwealth operated to convey their title to all the lands therein described, notwithstanding the intrusion of the tenant.

The equitable claim of the tenant to be reimbursed the value of his improvements, is of a different character. The protection of interests of this kind have not, for nearly thirty years in *Massachusetts*, been regarded as inconsistent with the just rights of the proprietor. A law of that *Commonwealth*, which passed as early as 1808, lends its aid to vindicate his title, and to restore to him his possession; but upon the condition that he pay for the

additional value, derived from the labor and expense of those, who may have held the land for the period of six years or more. The proprietor may, at his option, claim to receive the full value of the land, if unimproved; or if he choose to retain it, he is not to enrich himself at the expense of the occupant, but is held to pay for its increased value, arising from the improvements. This law, which has been re-enacted here since the separation, has become a rule of distributive justice, which has commended itself to the favor of the public, for the equity of its provisions, and has received a liberal construction, in the highest courts of both States. It relaxes the rigor of extreme right; and is intended generally to extend some indulgence to those who penetrate the wilderness, subdue the soil and render it productive, and who usually have families, depending upon the fruits of their labor. It has not accorded with the moral sense and enlightened justice of either State, to suffer a proprietor to strip the occupant of these fruits, so far as they had given additional value to his land, without compensation. This increased value is not considered as of right belonging to him. If, therefore, in this suit we award it to the tenant, as our laws and their laws require in ordinary cases, we do not impair the rights of *Massachusetts*, either according to our sense of right and justice or their own. It is not to be presumed that the value of these improvements constituted any part of the price, which they received. Their existence was probably unknown.

It may be contended, that the act for the equitable settlement of certain claims, arising in real actions, in *Massachusetts*, does not bind the *Commonwealth*, and that the corresponding act here does not bind the State, because not named in either act. It is among the prerogatives of the king in *England*, for the preservation of his political power, that he is not bound by an act of parliament, unless expressly named, which may tend to restrain or diminish any of his rights or interests. 1 *Bl. Com.* 262. Yet this position is there qualified by the same author, who says that an act of parliament, for the preservation of rights and the suppression of wongs, is holden to be binding upon the king, if it does not interfere with the established rights of the crown. And

this doctrine is sustained by the case of the *Master and Fellows of Magdalen College*, 11 *Rep.* 66. In *Willion* v. *Berkley*, 1 *Plowden*, 223, it was holden, that the king was bound by the statute *de donis*, 13 *Edw.* 1, *c.* 1, although not expressly named in it. If the act under consideration is extended to *Massachusetts*, it impairs no rights, which can be asserted consistently with justice, as she requires it to be administered between suitors in her courts.

The law, under which the tenant claims equitable relief, binds the demandants, unless it impairs the rights of *Massachusetts*, under the act of separation. And we are of opinion that it does not have this effect. The tenant is therefore to be allowed for his improvements, and the estimates are to be made in conformity with his offer made and accepted, and judgment is to be rendered accordingly.

Bussey *vs.* Leavitt.

The *statute* of 1831, *ch.* 501, *sec.* 2, by which the requirements before then existing, in regard to the evidence to be adduced by a purchaser in support of a title derived under a collector's sale of non-resident proprietors' lands, for taxes, are much relaxed, was held to operate upon sales made subsequently to the passage of the law, though the taxes were assessed before.

The provision in the *stat.* of 1826, *ch.* 377, *sec.* 8, that the notice of the sale of such lands "to be published in the public newspapers three weeks successively, shall be published three months prior to the time of such sale," was construed to mean, that the three weeks should be completed three months prior to the sale, and not that the publication should be three successive months.

But where the law required such publication to be in the newspaper of the public printer to the State, and before the last publication, such paper had ceased to be the state paper, the notice was held to be insufficient.

This was a writ of entry, to recover possession of several lots of land in the town of *Newburgh*, in this county, and was resisted by the tenant under a title derived from a sale by the collector of taxes in that town, the plaintiff being a non-resident proprietor.

The tax was assessed in the year 1830, and the sale was in *April*, 1831. And one question in the case was, whether the statute passed *March* 12, 1831, in relation to the evidence to be

adduced in support of a title derived under a collector's sale for the nonpayment of taxes, applied to this case.

Prior to the sale there was a publication of notice three weeks successively, the last being three months prior to the sale. But before the last publication in the paper published by the printer to the State, such paper *ceased to be the State paper.*

It was agreed by the parties, that if in the opinion of the whole Court, the proof offered by the tenant shew a sufficient defence, the demandant was to become nonsuit, otherwise the cause was to stand for trial.

Rogers and *T. P. Chandler*, for the plaintiffs, argued against the constitutionality of the law of 1831, if it was intended to apply to sales made by collectors for the nonpayment of taxes, assessed prior to the passage of the law, and cited *Foster & al.* v. *The Essex Bank*, 16 *Mass.* 245; *Brunswick* v. *Litchfield*, 2 *Greenl.* 28; *Hampshire* v. *Franklin*, 16 *Mass.* 76; *Medford* v. *Learned*, 16 *Mass.* 215; *Proprs. of Ken. Purchase* v. *Laboree.* 2 *Greenl.* 275; *Ligonia* v. *Buxton*, 2 *Greenl.* 102.

2. Legal notice of the sale was not given. The publication was of three weeks only, when by the statute of 1826, *ch.* 337, *sec.* 8, it should have been three months.

3. The doings of the collector should have been returned to the town treasurer, and by him recorded, which was not done. This is not merely directory in the statute, but indispensible. Without it the sale is void. The debtor could not otherwise know who was the purchaser, at what time the sale was made, and for how much.

Godfrey, for the defendant.

Weston C. J. — By the *statute* of 1831, *ch.* 501, *sec.* 2, the law of evidence, before applied to the sale of the lands of non-resident proprietors, for the nonpayment of taxes, was changed. Prior to that time, great strictness of proof, in relation to the preliminary proceedings, had been required of purchasers, to which they were generally strangers, and over which they had no control. It was competent for the legislature, by a general law, to prescribe that, so far as the transfer of the land was in question, proof of the due execution of the collector's deed, and of certain

other of the previous steps required by law, should to that extent, conclusively justify the inference, that every thing had been done necessary to give the purchaser a title. It is founded upon the confidence reposed by law in officers, who are charged with the performance of public duties. That confidence may be abused, and the officer held answerable, while effect is given to his acts, which on their face are legal and regular.

Thus in the levy of an execution upon real estate, when the title thence derived is called in question, the return of the sheriff, specifying the steps taken by him in pursuance of law, cannot be controverted. They may nevertheless be false, and a party thereby be deprived of his land, in a manner not authorised by statute, but the only remedy afforded by law for redress, is by an action against the sheriff, for a false return.

It may be urged, that money may be voted by a town, at a meeting not legally called, without an article justifying it, or for a purpose not authorised by law. Such a vote would not justify an assessment made in pursuance of it, and the assessors would be holden personally liable. This responsibility would generally be sufficient to keep them within the path of duty; and where it did not, would afford an adequate remedy to the party injured. Nor would he be under any necessity of losing his land. He has five years, within which to redeem it, holding the authorities of the town, who may have abused their trust, liable to him for an indemnity. There does not appear to us therefore any objection to the plain and obvious terms of the act, which are made to apply to sales thereafter to be made. Nor can we find in the act, or in the policy upon which it is founded, any authority to exclude from its operation lands subsequently sold, upon taxes previously assessed.

But it is contended, that the tenant has failed in the proof required by the act. The *statute* of 1821, *ch.* 116, concerning the assessment and collection of taxes, *sec.* 30, prescribed that the collector should advertise in the public newspapers of the printer to the State, for the time being, three weeks successively, but did not specify how long prior to the sale that should be done. By an additional act of 1826, *ch.* 337, *sec.* 8, it is provided, that the notice of sale, "to be published in the public newspapers three

weeks successively, shall be so published, three months prior to the time of such sale." And it is insisted that weeks are thereby enlarged to months, and that notice should now be published for three successive months. But we understand the provision to mean that the notice, by advertising three weeks successively, shall be completed three months prior to the sale. Upon another ground however we are of opinion, that the law in regard to notice is not proved to have been complied with. The statute of 1831 provides that the party, claiming under a collector's sale, must prove that he complied with the requisitions of the law, in advertising the real estate, he undertook to sell. Evidence of this fact is essential to the purchaser's title. On the 12*th* of *January*, 1831, as appears by the resolve of the legislature of that day, the "Portland Advertiser and Gazette of Maine" ceased to be the public newspaper of the printer to the State. The subsequent publication in that paper, necessary to make out the three successive weeks, was not in pursuance of the statute. If the tenant however has any additional proof upon this point, he is at liberty, as the case is reserved, to offer it at a further trial.

Trustees of the Ministerial and School Fund in DUTTON *vs.* KENDRICK.

By the statute of 1824, *ch.* 254, *sec.* 2, the selectmen, town clerk, and treasurer for the time being, of every town in the State, where other trustees for the same purpose had not been previously appointed, are made trustees of the ministerial and school funds in such towns forever. This being a general law of which the Court are bound to take judicial notice, it is not necessary in an action brought by such trustees in that capacity, to prove by a record their regular organization as a corporation.

By pleading the general issue, however, the defendant waives the right to make such an objection to the competency of the plaintiffs.

A note *not negotiable*, given for a subsisting account, is no bar to an action on the account.

If the defendant would object that another should have been made co-defendant, it should be by plea in abatement.

ASSUMPSIT upon the following note of hand, *viz.*

"*Bangor, April* 14, 1828.

"For value received, I promise to pay the treasurer of the town "of *Dutton* thirty dollars in six months, and interest.

"*Joseph Kendrick.*"

There was also an account annexed to the writ, in which the defendant was charged with stumpage on the ministerial and school lands in *Dutton*, for the years 1827 and 1828. The writ also contained the usual money counts.

The defendant pleaded the general issue and filed a brief statement relying upon the statute of limitations.

The plaintiffs, to maintain the action, read the note, and called *Elisha Gibbs* as a witness; who testified that the plaintiff and himself, in the winter of 1827 and 1828, logged on the ministerial and school land in *Dutton;* that in the spring of 1828, *Robert Harvey*, agent of the town of *Dutton*, called on *Gibbs* for the stumpage, and by arrangement between them, *Harvey* took the note of the defendant for $30, being the whole amount of the stumpage, and gave a receipt in full discharge therefor. He testified further, that said trustees had acted as a corporate body, and had usually chosen the treasurer of the town, treasurer of said trustees. No other evidence of the existence of the corporation was offered.

Upon this evidence, by arrangement between the parties, *Perham J.* ordered a nonsuit, to which exceptions were filed by the plaintiffs, and the cause brought into this Court.

J. Appleton, to show the action rightly brought in the name of the plaintiffs, cited *Pigot* v. *Thompson*, 3 *B. & P.* 147; *Bowen* v. *Morris*, 2 *Taunt.* 374; *Cumberland* v. *Cadington*, 3 *Johns. Ch. R*, 255; 4 *Barn. & Ald.* 437.

The note may be given in evidence under the money counts. *Foster* v. *Shattuck.* 2 *N. H.* 447; *Weston* v. *Gould*, 4 *Wendell*, 680.

The action may be maintained on the account annexed or money counts, the note not being payment. *Thurston* v. *Paine*, 5 *Johns.* 70; *Cornell* v. *Lamb*, 20 *Johns.* 407; *Putnam* v. *Lewis*, 8 *Johns.* 390; *Schemerhorn* v. *Lewis*, 7 *Johns.* 310; 15 *Johns.* 249; *Corliss* v. *Cummings*, 6 *Con. R.* 187; 7 *Taunt. R.* 312; 5 *Wend.* 15; 9 *Con. R.* 23; 7 *Term R.* 64; *Green-*

wood v. *Curtis*, 4 *Mass.* 93; *Thatcher* v. *Dinsmore*, 5 *Mass.* 299; *Maneely* v. *McGee*, 6 *Mass.* 145.

The defendant cannot take advantage of the nonjoinder of a co-defendant, except by plea in abatement. *Robinson* v. *Robinson*, 1 *Fairf.* 240.

The objection also to the want of organization, comes too late after the general issue pleaded. *Proprs. of Ken. Purchase* v. *Call*, 1 *Mass.* 485; *Gilbert* v. *Nantucket Bank*, 5 *Mass.* 97; 1 *Mass.* 159; 3 *Pick.* 245; 13 *Mass.* 199; 10 *Mass.* 91; 10 *Wend.* 269.

Kent, for the defendant, contended that the case shew no sufficient evidence that the plaintiffs were a corporation. *Maine Stat. ch.* 254. The defendant has not recognised them as such by his contract, for he promised to pay the *treasurer of the town of Dutton*. That the plaintiffs were bound to show the organization, he cited *Jackson* v. *The Trustees of Union Academy*, 8 *Johns.* 378. Notwithstanding the general issue had been pleaded. *Bank of Auburn* v. *Weed & al.* 19 *Johns.* 300. They are not trustees by mere force of the law. They cannot be regarded as such until after organization, or until the contingency named in the *stat. ch.* 254, has occurred, viz. that no others have been appointed.

In this case there is no evidence of a promise to the plaintiffs. The promise is to the treasurer of the town of *Dutton*. And an action in the name of that town might be maintained on the note, but in the name of no other corporation or person. *Medway Cotton Manufactory* v. *Adams*, 10 *Mass.* 360.

The plaintiffs cannot resort to the original cause of action, because that has been discharged. And if they could, this action cannot be maintained, because it should have been against both. The plaintiffs having declared on the note, renders a plea in abatement unnecessary.

WESTON C. J. — The legal capacity of the plaintiffs to maintain the action is controverted. By the *statute* of 1824, *ch.* 254, *sec.* 2, the selectmen, town clerk, and treasurer, for the time being, of every town in the State, where other trustees for the same purpose had not been previously appointed, are made trus-

tees of the ministerial and school funds in such towns forever. It does not appear, nor is it suggested, that other trustees had ever been appointed in the town of *Dutton*. It is a trust confided, and a duty imposed, by law upon certain officers of each town respectively. They became trustees, by the acceptance of the offices. They are inseperably connected. No individual can accept the one, and decline the other. There is evidence in the case, not objected to, that they had acted as a corporation. Their existence as such is declared by a public law, of which we are bound to take judicial notice.

But by pleading the general issue, the defendant has by our law, waived that objection, and admitted the legal existence and competency of the plaintiffs. The law is otherwise understood in *New York;* as appears by the cases cited for the defendant. In the *Proprietors of Monumoi beach* v. *Rogers*, 1 *Mass.* 159, and in the *Proprietors of the Kennebec Purchase* v. *Call.* 1 *Mass.* 483, it was holden that the existence of the plaintiffs as a corporation, could be questioned only by a plea in abatement. And in the *First Parish in Sutton* v. *Cole*, 3 *Pick.* 232, the same rule of law is recognised as a settled principle ; and that, by pleading the general issue, the defendant thereby admits the capacity of the plaintiffs in the character, under which they have assumed to act. And such we understand to be the law and practice of this state.

The note declared on, was given to the treasurer of *Dutton*, one of the trustees, and as the plaintiffs were the party in interest, it is insisted that the promise expressed therein enures to them, and authorizes an action in their name. And cases, tending to support this position, have been cited. As, however, we sustain the action upon another ground, it is unnecessary to give an opinion upon this point.

If the note given to the treasurer of *Dutton*, if negotiable, would have been payment of the plaintiffs' debt, which might be questionable, unless it enured to their use, not being negotiable, it was no payment. By the common law, a simple contract debt was not discharged by any other promise. The law of *Massachusetts*, and of some other States, holding the same doctrine, is peculiar, in regarding a negotiable note as payment of a prior

debt. It is founded upon its negotiable character, and does not apply to other instruments. It is true, the treasurer of *Dutton* gave a receipt in full for the stumpage due to the plaintiffs. But if it was competent for him alone to discharge their debt, it is testimony open to explanation; and must be understood to operate effectively only upon payment of the note.

If the note was no payment, the plaintiffs had a claim for stumpage upon the defendant, and upon his associate, *Elisha Gibbs*. For this they have sued the defendant alone. If he would have availed himself of the nonjoinder of *Gibbs*, he should have pleaded in abatement. Not having done so, this objection cannot be taken under the general issue. The case of *Robinson v. Robinson*, 1 *Fairf.* 240, is directly in point.

With regard to the statute of limitations, relied upon in the brief statement, it appears that both *Gibbs* and the defendant acknowledged the existence of the debt, within six years before the commencement of the action.

The exceptions are sustained, the nonsuit set aside, and a new trial granted.

Bangor House Proprietary *vs.* Hinckley.

Where tenants in common of a lot of land, on their petition, were incorporated for the purpose of erecting a public house thereon, the character of the property was thereby changed from real to personal; and the owners, instead of holding as tenants in common, with the rights, privileges, and liabilities incident to that relation, held as corporators subject to the rules and regulations prescribed in the Act.

The Act of incorporation contained the following provision: "Nor shall the "proprietor of any share or shares be liable in his person or property for any "tax, assessment, or demand, beyond his interest in said corporation; though "every share shall be perpetually pledged and holden to the corporation for "all the assessments made and all debts due thereto." *Held*, that *assumpsit* could not be maintained to recover the amount of an assessment, but that the only remedy for non-payment, was by a sale of the delinquent proprietors' shares.

This action, which was *assumpsit* to recover the amount of sundry assessments on the defendant's shares in the *Bangor*

House Proprietary, was submitted for the decision of the Court upon the following agreed statement of facts.

In *January*, 1833, the defendant was an owner in common and undivided, with divers other persons, in lots No. 6 and 8, in *Bangor*, he owning one one hundredth part. And on the same day, he, with the other owners, joined in a petition to the Legislature, to be incorporated for the purpose of erecting a public house on said lots. In pursuance of which, an act was passed by the Legislature, *February* 26, 1833, entitled "An Act to incorporate the Bangor House Proprietary." The act was duly accepted, and the corporation organized under it by the choice of officers. Sundry assessments had been made at legal meetings of the corporation, for the purpose of erecting said house, which at the time of this action, had been nearly completed; but the defendant had not attended said meetings. He had paid assessments on his one share to the amount of $20, and the amount of assessments unpaid and claimed in this action was $710.

F. Allen, for the plaintiffs.

The case finds, that the defendant was, and is, an owner in common of lots No. 6 and 8, in *Bangor*, upon which the splendid edifice of the "Bangor House" is erected; and it follows, independent of the incorporation, that he becomes an owner in common of the building, the same having been built for him as well as the other owners. This distinguishes the present case from those where the subscribers became interested solely in consequence of their subscriptions for stock. This is like the ordinary case of a man having a house, or store, or wharf, erected on his land by his assent and direction, and for his use, in which case he is liable for the value of the labor and materials. And where the erection is by a third person and not by one of two or more tenants in common, each one would be liable for the whole. It was to limit this liability that the clause in the *4th section*, relied upon by the defendant, was introduced.

The case of *Davenport* v. *Mason*, 15 *Mass.* 85, is somewhat similar to this. There was, to be sure, in that case, no act of incorporation, but there was the same benefit to the proprietor.

The remedy provided in this case, by a sale of the share, is cumulative merely. It is not an exclusive remedy. 1. Because

it is not declared to be so. 2. Because if it was so, there would be no occasion for introducing the provision recited from the *4th section.*

W. Abbot, argued for the defendant, and cited the following authorities: *Andover and Medford Turnpike* v. *Gould,* 6 *Mass.* 40; *New Bedford and Bridgewater Turnpike* v. *Adams,* 8 *Mass.* 138; *Ripley* v. *Sampson & al.* 10 *Pick.* 371; *Franklin Glass Co.* v. *White,* 14 *Mass.* 286; *Melody* v. *Reab,* 4 *Mass.* 471; *Gibson* v. *Jenness,* 15 *Mass.* 205.

Weston C. J. — The counsel for the plaintiffs contends, that the defendant is owner of a one hundredth part of the land, upon which the Bangor house is built, as tenant in common, and consequently of the house in the same proportion, and as an erection upon his land. We cannot assent to the correctness of this position. Prior to the act incorporating the plaintiffs, he was the owner of the land as tenant in common in the proportion stated. The effect of that act was to change the character, under which he and his associates held the land. Instead of holding as tenants in common, with the rights, privileges and liabilities incident to that relation, they thereafterwards held as a corporation, and the interest of the corporators, of whom the defendant was one, was converted from real, into personal estate. And that estate was made subject to the rules and regulations, prescribed in the act.

The case finds, that the incorporation was granted upon the petition of the defendant and others, and that he has made a payment upon the assessments, duly and regularly imposed upon his share. The act is binding then upon the defendant, and the question of his liability to this action must depend upon its provisions, and not upon his former interest as tenant in common, which had ceased and assumed a new shape, under the sanction of the legislative power.

The right to impose assessments depended altogether upon the act, by which it was created, and in which it had its origin. And there is provided therein a remedy for its enforcement.

It is urged that the action may be maintained under a clause in the *4th section.* It is in these words: "nor shall the propri-

"etor of any share or shares, be liable in his person or property "for any tax, assessment, or demand beyond his interest in said "corporation; though every share shall be perpetually pledged "and holden to the corporation for all the assessments made, and "all debts due thereto." No remedy is there affirmatively given, or liability imposed. The terms used are those of limitation. Had no special remedy been provided by the act, to enforce payment of the assessments, a liability might be implied to the extent of the interest, held by each corporator. Now the interest of each corporator depends for its value upon the assessments, by him actually paid. If he had paid nothing, it might be of no value whatever. The third section had provided a mode, by which that value, whatever it might be, might be made available to the corporation, and the part of the fourth section cited, declares expressly, that the liability of a corporator shall not be further extended.

We find nothing in the case to distinguish it from that of the *Andover and Medford Turnpike* v. *Gould*, 6 *Mass.* 40, where the rule is stated and enforced, that when a statute gives a new power, and at the same time provides the means of executing it, those who claim the power, can execute it in no other way. The mode provided there, as here, was by a sale of the delinquent's shares. And the authority of that decision has been since adopted and enforced in other cases, cited in the argument.

The opinion of the Court is, that the action is not sustained, upon the facts agreed.

Plaintiffs nonsuit.

WHEELER *vs.* HATCH.

Where a subscribing witness to a deed, testified that he had no distinct recollection of its execution, or of attesting it; but that the hand writing resembled his, and from this, with other circumstances, he was of the opinion that he did witness the execution of the deed, it was held to be sufficient to entitle the deed to be read to the jury.

An action may be maintained on the covenant of *seizin* in a deed, where one conveyed with covenants of seizin and warranty, land which he had *in possession* but to which he claimed *no title.*

THIS was an action of covenant broken, in which the plaintiff declared upon a breach of the covenant of seizin in the defendant's deed, purporting to convey to the plaintiff a certain lot of land in *Bangor.*

To prove the execution of the deed, the plaintiff introduced the deposition of one of the subscribing witnesses, who deposed that she had no distinct recollection of its execution, or of attesting it; but that the handwriting resembled hers, and from that and other circumstances, she was strengthened in the opinion, that she did witness the execution of the deed. This, the defendant's counsel contended, was not sufficient to entitle the plaintiff to read the deed to the jury; but the Judge overruled the objection.

It was proved that a strip of land, included in said deed, two feet wide and seventy feet long, on the back part of the lot, the defendant was not seised of at the time of the conveyance. It was also proved, that of a triangular piece of land, included in the deed, the defendant was in possession at the time of the execution of her deed; but it was proved by another witness, that she did not claim it as her own.

The cause was taken from the jury by consent of parties; they agreeing that the Court should render such judgment as, upon this evidence they should deem proper.

T. P. Chandler, for the plaintiff.

A. and *C. Gilman,* for the defendant.

WESTON C. J. — The subscribing witness to the deed in question, has no distinct recollection of its execution, or of attesting it; but she says the handwriting resembles hers, and from that

and other circumstances, she is strengthened in the opinion, that she did witness the execution of the deed. This is as much as most witnesses can say, after many years have elapsed, and when the execution was unattended with circumstances, which might fix it in the memory. No suspicion whatever has been thrown upon the deed; and all the witness did say, is calculated to produce in the minds of others, as it did in her own, that she saw it executed. It warranted the reading of the deed to the jury, to whom it belonged to pass upon the fact. As the parties, however, have desired to refer that question to the Court, we do not hesitate to state, that the deed appears to us to be sufficiently proved, in the absence of all counter proof, and there being no suggestion of fraud.

With regard to the strip of land, seventy feet long and two wide, it is not pretended that the defendant was seised when she made her deed. And we hold it to be equally clear, that she was not seised of the triangular piece in controversy. For, although she was in possession of that piece, it appears that she did not claim it as her own. She has shown no title to either; and as both were included in her deed, her covenant of seizin is broken as to them, and the plaintiff is entitled to judgment for such a sum in damages, with the interest of it, as the value of those pieces, compared with the whole consideration paid, bears to the whole purchase.

SAWYER *& als. vs.* HAMMATT *& als.*

A. gave B. and others, a bond, conditioned for the conveyance of a township of land, reserving the right to take off 3,000,000 feet of board logs, without limitation as to time; and subsequently made a conveyance to them without condition, but still went on to cut the 3,000,000 feet of timber. While he was doing this, B. sold his interest in the township, taking from the purchasers a writing acknowledging that they took the land, "*subject to a permit from former owners to A. to cut and obtain* 3,000,000 *feet of timber on said township the present year,*" *and agreeing that A. might take without hindrance from them. Held,* that A., as between him and said purchasers, was entitled to take the 3,000,000 feet of timber, and was not limited in taking it off to the year or winter succeeding the making of the contract.

Parol evidence, or contracts in writing between other parties, were not admissible, to show the understanding of the parties in regard to the meaning of the bond or subsequent writing.

THIS was an action of *trover*, for a quantity of logs, the facts in which are sufficiently stated in the opinion of the Court, which was delivered by

EMERY J. — This is an action of trover, for a quantity of logs cut on township No. 1, in the 8th range, previously to the 1*st* of *January*, 1834, but a part of which were removed after that time. On the 26*th* of *December*, 1832, *William Hammatt* agreed to sell the township, and became bound to *Robert Treat*, *Waldo Peirce*, *Hazen Mitchel*, *Nathaniel Treat* and *Elihu Baxter*, in the penal sum of fifty thousand dollars, to produce to them good and sufficient deeds, in the proportions in which they had severally paid for the township, reserving to the said *Hammatt*, the right to cut and take from the same, 3,000,000 feet of board logs. We are to ascertain whether the admissible evidence, together with that to which no objection has been made, furnish sufficient grounds for supporting the verdict, which was for the plaintiffs; and we must look to the situation of the parties in the origin and progress of the concern. In the order of time, we notice the first act succeeding the execution of the bond. It is the conveyance made by *Hammatt* on the 17*th* of *January*, 1833, of the whole township, in his deed of that date, to *Pierce* and *Treat*, *Hazen Mitchell* and *Elihu Baxter*, one quarter to each. This conveyance, being unconditional, were there nothing more in the case to qualify the rights of the parties, would extinguish

the reservation antecedently made in the bond, and operate by way of estoppel against *Hammatt's* claim under that reservation. But on the 25*th* day of *January*, 1833, *Mitchell* conveyed his quarter to *Sawyer & Little*. On the 1*st* of *March*, 1833, *Pierce & Treat* conveyed their half to *Sawyer*, and on the sixteenth of *March*, 1833, *Baxter* transferred his interest in the township to *Sawyer*. This made *Sawyer & Little* proprietors of the whole, *Sawyer* owning seven eighths. On the 16*th* of *March*, 1833, *Sawyer* sold one eighth of the land to *Chamberlain*. And on the 13*th* of *April*, 1833, *Sawyer* also disposed of another eighth of the territory to *Crabtree*, who are the plaintiffs in the present suit.

Hammatt is still mortgagee of an undivided quarter, to secure about four thousand dollars of the purchase money, no part of which was then, or at the time of the trial, payable.

Before the execution of the bond made by *Hammatt*, containing the reservation, it would seem that a certificate was drawn up on the 24*th* of *Dec.* 1832, marked D. and signed by *Elihu Baxter, W. T. & H. Pierce, Nathamiel Treat* and *Hazen Mitchell*, by which they agreed to buy Township No. 1, in 8th Range, for $30,000 of *Hammatt*, he deducting therefrom, $3,000 for stumpage of 3,000,000 feet timber to be obtained by him the present winter. But we exclude this evidence, not only because there is no proof that it was delivered to *Hammatt*, and by him accepted, but if it had been, it was superseded by the execution of *Hammatt's* bond on the 26*th* of *December*, 1832, containing the reservation, and by their acceptance of it. This must be considered as disclosing the true views of the parties. The paper marked D. we therefore deem inadmissible evidence. The bond to *Samuel Moor* from *Waldo Pierce* and *Robert Treat*, dated the 12*th* of *January*, 1833, conditioned to convey to him a part of this township, is also inadmissible. It was between other parties. And although *Elihu Baxter* is called to speak about it, he is indistinct as to his knowledge whether *Hammatt* saw it. He rests only in impressions. They may have been well founded. From the relationship of *Carr*, the draftsman, to *Hammatt*, some slight grounds of probability may arise that the fact was so. But even had he seen it in the act of being written, he might have been very inattentive to its details, and not

have known any thing of the restriction. There is no proof that he assented to it.

We think his rights ought not to be affected by this paper, and we exclude it. If any additional reason were required, we perceive that this was assigned to *Sawyer*, on the 23*d* of *January*, 1833, more than thirty days before the paper, hereafter to be noticed, was written.

The papers marked A. and B. being contracts of *Sawyer* and *Ellis B. Usher*, to purchase of *Mitchell* and others, must also be excluded, being executed the 24*th* of *January*, 1833. Though, if the bond, certificate or agreement, signed by *M. P. Sawyer*, of that date, to *Hazen Mitchell*, were admitted, it would disclose that *Sawyer* and *Usher* say, it is understood that we have no claim on account of the 3,000,000 feet of lumber permitted to be obtained in the present winter. The bond of 26*th* of *December*, 1832, from *Hammatt* to *Mitchell* and others, is in evidence without objection. It is not necessary to be shown that either of the plaintiffs had seen the bond at the time or before they became purchasers. The purport of it might have been otherwise communicated. *Baxter*, the plaintiffs' witness, rather thinks *Sawyer* understood the bond. If he did understand it, all the plaintiffs must be affected by the result of that information, were it a prerequisite to the establishment of the defendants' right. For the plaintiffs have associated for a joint recovery of damages. Unless there were fraudulent concealment or deceptive representation practised toward *Sawyer*, or the plaintiffs, on the part of *Hammatt*, the Court do not perceive, upon a consideration of all the facts legally admissible, which have been presented in this case, that *Hammatt* can fairly be deprived of the benefit of the reservation.

Baxter says, there was no express agreement between *Hammatt* and the purchasers, that if the timber was not taken off during that season, that it should be forfeited, though he understood him to be restricted to that season. We are not satisfied that *Baxter* can, by his testimony, be admitted to vary or explain the written evidence hereafter to be mentioned. In addition to reserving to the said *Hammatt*, in the condition, the right to cut

and take from the township 3,000,000 feet of board logs, it is worthy of remark, that there is the following writing on the bond: "I guarantee that there is pine timber, such as is usually cut for "mill logs, on the said tract of land, to the amount of 30,000,000 "feet of boards, provided the aforesaid purchasers request, within "four months. The same shall be surveyed and estimated by "persons mutually appointed by them and me. And if the same "shall fall short of that amount, I will pay back to them at the "rate of one dollar per thousand, for what it may so fall short, "and also the expense of surveying the same. But if it shall "amount to 30,000,000 feet, then the said purchasers shall pay "all expense of surveying as aforesaid. For all timber I may "cut, more than 3,000,000 feet, I will pay a stumpage of two "dollars per thousand. "*William Hammatt.*"

It is strongly to be presumed that this bond and stipulation, on the part of *Hammatt*, would be a subject of notice and commentary by sellers and purchasers of timber lands. The certificate marked A., written on said bond and signed by *Waldo Peirce*, *Robert Treat*, *H. Mitchell*, and *Elihu Baxter*, giving their understanding of its meaning, is not admissible in evidence for any purpose, but to contradict testimony which is given by either of the signers. Because it was not written till after the paper of the 25*th* of *February*, 1833. The effect of the writing marked C. dated *February* 25, 1833, considered with regard to the reservation in the bond, to which reference is indirectly made, must necessarily have an important bearing in deciding this case. It commences by way of recital: "We having bought of *Hazen* "*Mitchell*, three eighths of township No. 1, in the eighth range, "subject to a permit from former owners to *William Hammatt*, "*Esq.*, to cut and obtain 3,000,000 feet timber on said township "in the present year," and then goes on to say, "hereby agree "that said *Hammatt* may there get said 3,000,000 feet timber "without hindrance or claim from us, but shall pay to us for "stumpage two dollars per thousand for all he shall obtain over "said 3,000,000 feet. Signed by *M. P. Sawyer*, and "*J. S. Little.*"

These gentlemen are two of the plaintiffs. Reference is made in this paper to a permit from former owners. And *Mitchell*

says, the reservation in the bond was that permit, which we do not find to be qualified there with any limitation of time as to that quantity. The reference then is to the bond, and revives it. And if any mistake were committed by wrongly referring to it as a permit, in a court of equity it would be corrected by the writing referred to. *Argenbright* v. *Campbell & wife*, 3 *Hen. & Mumf.* 144.

The 3,000,000 feet are most distinctly admitted to be the property of *Hammatt*, that he may get it without hindrance or claim from them; and even if he should obtain a greater quantity, he shall pay for stumpage only $2 per thousand. The defendant, *Hammatt*, has really purchased and paid for this quantity, and was rightfully entitled to the possession of the portion of it, for which the verdict has been rendered against the defendants. It was urged, that even if *Hammatt* might have cut and taken the timber before the 1*st* of *January*, 1834, he could not do so after that period. And the cases of *Stowell* v. *Pike*, 2 *Greenl.* 387, and *Pease & al.* v. *Gibson*, 6 *Greenl.* 81, have been pressed upon our consideration. Those were actions of trespass. This is trover. This is a purchase of a definite quantity, with an implied right to take more at the price of two dollars per thousand, should it so happen that he should have cut more than the three millions feet.

The case is so distinguishable from those cases, that without going more minutely into the examination and comparison, we see nothing in them to justify the claim of the plaintiffs to the timber which *Hammatt* had severed from the freehold, in which he, too, was interested as mortgagee. As he had not entered for condition broken, we do not place the decision on that ground. Nor do we dismiss it from our recollection. He was the rightful owner of the timber cut. And, inasmuch as the evidence does not disclose that there has been taken by the defendants a greater quantity than 3,000,000 feet, the verdict must be set aside and a new trial granted. But unless the evidence be materially changed, the action cannot be supported.

F. Allen, and *W. P. Fessenden*, for the plaintiffs.

Rogers, for the defendants.

SARGENT & *al. vs.* CARR.

Whether, prior to *stat.* of 1835, *ch.* 188, the personal property of a debtor, under pledge to one creditor, could be attached at the suit of another, after paying or tendering to the former the full amount of his lien, *dubitatur.*

THIS was an action of trespass for taking and carrying away a horse, alleged to be the property of the plaintiffs, who claimed him under a sale from one *William Byrne*, to secure them for a liability entered into for him. The defendant justified as an officer, he having taken the horse on a writ against *Byrne*, in favor of one *Nicholas Coffee*, the latter having tendered to the plaintiffs, before his attachment, a sum intended to cover the whole amount of the plaintiffs' lien upon the property. And the principal question, raised upon the exceptions to the ruling of the Judge in the Court of Common Pleas, was, whether *Coffee's* attachment, under the circumstances, was valid and sustainable at law; though the jury found that *Coffee* was not a *bona fide* creditor.

J. Appleton, and *F. H. Allen*, for the defendant, insisted that after the tender and the attachment, the defendant had the same rights, so far as it regarded the claim of the plaintiffs, that *Byrne* himself had, citing *Badlam* v. *Tucker*, 1 *Pick.* 399; *Van Antwerp* v. *Newman*, 2 *Cowen*, 543; 4 *Dane's Abr.* 466.

By the tender and refusal, the lien of the pledgee was dissolved. 2 *Kent's Com.* 450; *Yelv.* 179; *Story on Bailments*, 231; *Jarvis* v. *Rogers*, 15 *Mass.* 389.

They also argued upon other points, citing authorities, upon which no opinion was given by the Court.

Rogers, for the plaintiffs.

WESTON C. J. — In *Badlam* v. *Tucker & al.* 1 *Pick.* 389, the Court say, that it is only by statute, that equities, or rights to redeem, are subject to attachment by ordinary process; and that no statute had authorised the attachment of such an interest in personal property. They decide, therefore, that it cannot be done by a creditor, adding, "unless, perhaps, he may first remove

the incumbrance, and then lay an attachment on the property, as to which, however, we give no opinion."

In *Holbrook* v. *Baker*, 5 *Greenl.* 309, the late Chief Justice, in delivering the opinion of this Court, says, "we know of no law, which authorises a creditor to attach or seize on execution a right to redeem a chattel. Our statute relates only to the right of redeeming real estate." And he adverts to the case of *Badlam* v. *Tucker*, as an authority, "at least in those cases, where the money due to the mortgagee has not been paid or tendered." From these cases, the law is very clearly laid down, that such an interest is not attachable. It is true there is an intimation, that possibly, upon payment or tender of what is due, an attachment might be sustained. But in the one case, the court expressly withhold giving any opinion to this effect; and the other merely notices the suggestion in referring to that case. We are not aware of any authority, in which an expedient of this sort has been the subject of discussion; or that it has been sustained by any direct decision. It seems to have been generally regarded as too doubtful and uncertain, to attempt its enforcement at law.

The sense of the community rather seems to have been, that to make property of this description accessible to creditors, some interposition was necessary on the part of the legislature. Accordingly by the *statute* of 1835, *ch.* 188, provision is made to enable a creditor to avail himself of his debtor's property pledged or mortgaged, first securing to the pledgee or mortgagee, what is fairly due to him. The tender in behalf of the plaintiffs in the writ, under which the attachment was made in the case before us, was before the passage of the law referred to. The right to do so, to say the least of it, before the law, is of so doubtful a character, that we do not feel warranted, upon its assumption, to disturb the verdict rendered for the plaintiffs. It does not appear to us that there was, prior to the law, sufficient authority for declaring this an exception to the principle of law, which had been previously fully settled, that an interest of this kind was not attachable. Upon this ground the verdict is right; although the Judge, in the court below, took a different view of the law. It is a result little to be regretted, as the jury have found that the party, for whom the defendant acted, was not a *bona fide* credit-

or. If the note, upon which the attachment was made, was without consideration, and the holder was apprized of that fact, we are not prepared to say, that the plaintiffs were obliged to yield to the demand of such a pretended creditor, or that they might not resist at law his right to interpose. But upon this point we give no decisive opinion, holding as we do, that the attachment, under which alone the defendant could justify in any view of it, must be regarded as without legal validity.

Exceptions overruled.

The President and Trustees of WILLIAMS COLLEGE *vs.* SAMUEL T. MALLETT.

Where the subjects to be acted upon at a meeting of proprietors of land, organized into a propriety under the provisions of *stat.* of 1821, *ch.* 43, were enumerated in the application to a Justice of the Peace, for the calling of the meeting, and the application was annexed to the warrant, it was held to be as well as if those subjects had been particularly stated in the warrant itself.

The interest of each proprietor, while he continues such, is subject to the control of the majority: but he may have partition against the corporation, and thereby withdraw from it. The propriety, however, are under no obligation to suspend their proceedings, in order to give opportunity for the exercise of this right.

A mortgagee of the interest of a proprietor, would be bound by a partition duly made by the corporation, the mortgage attaching to the share set off to his mortgagor, as it did to the undivided interest.

THIS was a writ of entry, brought to foreclose a mortgage, and was tried upon the general issue, and a brief statement, in substance a disclaimer.

The demandants read a mortgage deed from the tenant to them, dated *June* 5, 1827, conveying six thousand acres of land, in common and undivided, in township No. 3, second range, north of the *Penobscot* Bingham purchase, referring to *Nathaniel Ingersoll's* deed to him of the same. *Ingersoll's* deed contained a reservation of lots, marked as settlers' lots, on *John Webber's* plan. It was also proved that the tenant lived on lot No. 11, in the 5th range in said township, at the time of the commencement of the action.

The tenant read a deed from himself to one *Joseph Mallett*, of all his interest in the township, dated *May* 31, 1830, and recorded the 4*th* of *June* following. And also the record of the proprietors of said township; by which it appeared that the proprietors of said township, on the 6*th* of *April*, 1828, made application to a Justice of the Peace to call a meeting of said proprietors, for the purpose of organizing as a propriety under the provisions of *statute* of 1821, *ch.* 43, and for other purposes therein specified. This application was annexed to the warrant calling the meeting, and was referred to in the warrant as specifying the purposes of the meeting.

There was also a division of lots among the proprietors; lot No. 11, in the 5th range, being set off and assigned as a *settler's lot.*

Several questions arose out of these proceedings, as to their regularity and effect, which are particularly stated, as well as the positions of counsel, in the opinion of the Court.

A default was entered by consent, which was to be taken off and a new trial granted, if, in the opinion of the whole Court, upon this evidence the defence was made out.

T. P. Chandler, for the tenant, cited the following authorities: *Crosby* v. *Allyn*, 5 *Greenl.* 453; *Hayward* v. *Carby*, 1 *Paige*, 471; *Jackson* v. *Peirce*, 10 *Johns.* 414; *Wilkinson* v. *Parrish*, 3 *Paige*, 653; *Cheesman* v. *Thom*, 1 *Edward's Ch. Rep.* 629; *Wills* v. *Slade*, 6 *Ves. Jr.* 498.

Rogers, for the demandants, cited *Keith* v. *Swan*, 11 *Mass.* 216; *Stearns on Real Actions*, (2d ed.) 234; *Olney* v. *Adams & al.* 7 *Pick.* 31; *Folger* v. *Mitchell*, 3 *Pick.* 396; *Chamberlain* v. *Bussey*, 5 *Greenl.* 164; *Tuttle* v. *Carey*, 7 *Greenl.* 426; *Worthington & al.* v. *Hylyer & al.* 4 *Mass.* 205.

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

The tenant, having conveyed all his interest in the township in controversy, by a deed duly executed, acknowledged and recorded, prior to the commencement of this action, must prevail upon his disclaimer; unless proved to have been in possession of some part of the land, upon which the demandants' mortgage attached. The case finds that he was in possession of No. 11, in the fifth

range in the township. Had the demandants an existing lien upon that lot, when they commenced their action? As evidence of title, they rely upon a deed, dated *June 5th*, 1827, from the tenant, in fee and in mortgage. By that deed, he conveyed to them the same land which *Nathaniel Ingersoll* had conveyed to him, by deed dated the same day, to which he referred. From *Ingersoll's* deed, there was reserved and excepted the lots marked as settlers' lots, on a plan of said town, made by *John Webber.*

It appears, from the records of the propriety, that No. 11, in the fifth range, was set off and assigned as a settler's lot. And as such, it is insisted by the tenant's counsel, that it is not within the demandants' claim. It would not, if it was marked as a settler's lot on *John Webber's* plan; for lots of that description were excepted from the operation of *Ingersoll's* deed. That it was so marked is probable, from the fact of its being subsequently assigned as a settler's lot. Assuming that it was so, the disclaimer is sustained. We therefore take off the default; and if upon a further trial, No. 11, in the fifth range, should not turn out to have been one of the excepted lots, that objection to a recovery by the demandants will be removed.

There are, however, other points taken in the cause, which it may be useful to consider; that the rights of the parties may be the better understood.

It appears that the proprietors of this township, in virtue of a warrant, issued on the application of five of their number, did, on the *9th* day of *June*, 1828, proceed to organize themselves as a propriety, under the act for the better managing lands, wharves and other real estate, lying in common, *stat.* of 1821, *ch.* 43; and that they thereupon made partition of the greater part of their lands. To these proceedings, and to their operation and effect upon the demandants, a number of objections are taken.

The warrant, it is said, has not in itself any enumeration of the subjects to be acted upon at the meeting; but the application has, which is annexed to the warrant; and the warrant authorizes a meeting at the time, place, and for the purposes, therein specified. This is the usual mode; and the effect is the same as if particularly stated in the warrant. The notice which follows, apprizes all persons interested, by a reference to the application and

warrant, both of which are published. The extracts from the records, furnished at the trial, do not show such a publication of the notice, as the statute requires; but no objection of this sort appears to have been raised at the former trial; and it may be removed by the competent proof.

If notice was duly published, the proceedings of the propriety operated upon the interest of the demandants, who had an opportunity to have been represented at the meeting. Their interest, as well as that of every other proprietor, is subject to the control, which the law has given to a majority. A proprietor may have partition against the corporation, and thereby withdraw from it; as was decided in *Mitchell* v. *Starbuck et al.* 10 *Mass.* 5, and in *Chamberlain* v. *Bussey*, 5 *Greenl.* 164. But the propriety are under no obligation to suspend their proceedings, in order to give opportunity for the exercise of this right.

The first section of the statute before referred to, after providing in what manner a meeting of the proprietors may be called, points out what they may do when assembled; and among other things, they may pass votes for dividing their common lands. In the case before us, the fourth article in the application, which was adopted as part of the warrant was, to see what measures the proprietors would adopt to divide and apportion their lands. Being thus regularly brought before them, it was as much within their statute powers to act upon this subject at their first meeting, or at any adjournment thereof, as at a subsequent meeting. The statute does not require that they should divide the whole, if they divide any. They may divide, from time to time, such portion as they may deem it expedient to do, leaving a part undivided as long, as in their judgment, their interest may require. This has been the uniform practice; and we perceive nothing, either in the statute, or in public policy, which forbids it.

Under the assignment in severalty, voted to *Samuel T. Mallett*, the interest of the demandants, holding under him as mortgagees, must be regarded as included. Their lien would attach to the lands of *Mallett*, when severed and divided, as much as it did, while held in common. *Mallett* was the tenant in possession. The land, divided and set apart in his name, enured, as far

as the lien was concerned, to an incumbrancer under him. The value of the interest was not diminished by the partition, and it might be more beneficially enjoyed. The cases cited for the tenant, maintain the position, that the lien attaches to the land when divided, and that the incumbrancer is bound by the partition. If the demandants were not represented at the meeting, where these proceedings were had, they might have been.

The lands were divided by a designation of the number of each lot in certain ranges, indicated also by number. The deed from *Ingersoll* refers to a plan of the town, made by *John Webber;* and the division by lot and range, implies that there was a survey and plan. If this was done or adopted by the proprietors, their votes must, by a reference to such survey and plan, be applied to their proper subject matter. All doubt may be removed upon this point, at a further trial. By the plan, and the survey upon the face of the earth, one or both, the metes and bounds of each lot may be ascertained.

By the division, the demandants' claim in the number of acres conveyed to them, instead of being extended over the township, except with regard to a small portion of it left undivided, is to be taken from what has been assigned to their grantor. If he has more land thus assigned, than was mortgaged to them, they will be entitled to such portion of it in common and undivided, as their claim bears to the whole of his interest.

The demandants may have leave so to amend their declaration, as to set forth their seizin, as it stood at the commencement of their action; and if at that time the tenant was in possession of any part of the land, then covered by their mortgage, they will be entitled to judgment. But if the tenant had previously conveyed his interest, and was in possession of no part of the lands subject to their lien, his disclaimer will be sustained; and he will be entitled to judgment for his costs.

WADLEIGH *vs.* GILMAN *& al.*

By the Act incorporating the City of *Bangor*, authority was conferred "to ordain and establish such acts, laws, and regulations, not inconsistent with the constitution and laws of the State, as shall be needful to the good order of said body politic." *Held*, that an ordinance of the city government, prohibiting the erection of wooden buildings in the City, within certain limits, was within the authority conferred.

Held further, that *a removal* of a wooden building to the inhibited district, or even from one part of such district to another, was within the meaning of the term *erection*, used in the ordinance.

THIS was an action of trespass, for breaking and entering the plaintiff's close in *Bangor*, and taking down a certain building thereon standing.

The defendants justified under an ordinance of the City government, prohibiting the erection of wooden buildings within certain limits in said City; one of the defendants being Street Commissioner, and the other City Marshall.

It was admitted that, at the time of the passing of said ordinance, said building, which was built of wood, stood on a lot within the limits described in the ordinance; and that a few days before it was taken down by the defendants, the plaintiff had removed it to another lot within the same inhibited district.

The Act incorporating the city of *Bangor*, conferred authority "to ordain and establish such acts, laws, and regulations, not inconsistent with the constitution and laws of this State, as shall be needful to the good order of said body politic."

The plaintiff's counsel hereupon contended, that said ordinance was illegal, unconstitutional, and void, as it was not within the legitimate powers conferred by the charter; and also that the *removal* of this building to the lot where it was taken down by the defendants, was not a violation of said ordinance, not being an *erection*, within the plain and obvious meaning of that term, and that the defendants were therefore not justified.

But for the purpose of settling the damages, *Parris J.* ruled, *pro forma*, these points in favor of the plaintiff, and thereupon the jury returned a verdict against the defendants for $154,07, which was to be set aside and a nonsuit entered, if, in the opinion of the

whole Court, the defendants were justified under said ordinance; otherwise judgment was to be rendered thereon.

Kent, City Solicitor, argued on the part of the defendants, and cited *Maine Stat. ch.* 24, *sec.* 1; *Vanderbelt* v. *Adams*, 7 *Cowen*, 349; *Stuyvesant* v. *The Mayor, &c. of New York*, 7 *Cowen*, 588; *Baker* v. *Boston*, 12 *Pick.* 184; *Village of Buffalo* v. *Webster*, 10 *Wendell*, 99.

Rogers, for the plaintiff, argued at length in support of the positions taken at the trial, replying also to the authorities cited on the other side.

WESTON C. J. — By the statute of 1834, incorporating the city of *Bangor*, the inhabitants thereof are continued a body politic and corporate, by that name. And among other powers and privileges conferred upon them, they are authorized to ordain and establish such acts, laws, and regulations, not inconsistent with the constitution and laws of this State, as shall be needful to the good order of said body politic.

Without limiting and defining the extent of this power, it may be understood to embrace all necessary police regulations. These are essential to the well ordering of the body politic. It is an object, in the highest degree worthy of the attention of the city authorities, to take such measures, as may be practicable, to lessen the hazard and danger of fire. No city, compactly built, can be said to be well ordered or well regulated, which neglects precautions of this sort. And it appears to us, that ordinances, establishing regulations to secure the city against fire, are authorized by the charter. Nor can a doubt be entertained, but the ordinance in question is a discreet exercise of this power.

Erections of wooden buildings, within the limits prescribed, are declared unlawful; and every violation of this ordinance is an unlawful act. But the penalty, which the city government can impose, for the breach of any of their laws, is not to exceed fifty dollars. Is this all they can do? After exacting the penalty, must they submit to the continuance of a mass of combustible matter, erected in defiance of their ordinance, in the heart of the city? We think not. If it was lawful for them to forbid the erection, we hold it lawful for them to cause it to be removed,

when erected. A salutary and lawful regulation may otherwise be defeated, and rendered ineffectual. The removal is made to prevent the hazard of the continuance of the combustible matter in a dangerous position; and not with a view to punish the wrong-doer, or subject him to loss. If he thereby sustains a loss, it is the direct consequence of his unlawful act, of which he has no just right to complain.

The regulation in question is a measure for the general benefit. It adds to the value of property, by lessening the hazard from fire, which operates as a tax upon it, whether the owner is his own insurer, or procure others to take the risk for a valuable consideration. And economy, as well as safety, is really consulted by building with durable materials. Nor is there any danger, that the power to pass ordinances of this character, will be wantonly or unnecessarily exercised. The city authorities are annually elected by the citizens, from among themselves. No law of theirs, not acceptable to the majority, would be tolerated or suffered to remain.

Police regulations may forbid such a use, and such modifications, of private property, as would prove injurious to the citizens generally. This is one of the benefits which men derive from associating in communities. It may sometimes occasion an inconvenience to an individual; but he has a compensation, in participating in the general advantage. Laws of this character are unquestionably within the scope of the legislative power, without impairing any constitutional provision. It does not appropriate private property to public uses; but merely regulates its enjoyment. A portion of this power may be assigned to a city government, within its own jurisdiction. In *Vanderbelt* v. *Adams*, 7 *Cowen*, 349; and *Stuyvesant* v. *The Mayor, &c. of New York*, 7 *Cowen*, 585, and in *Baker* v. *Boston*, 12 *Pick.* 184, cited in the argument, this doctrine is fully sustained by the court. In the first of these cases, *Woodworth J.* illustrates the efficacy and necessity of this power in cities, by their right, which he considered as uniformly conceded, to make regulations, the object of which is security against fire. Where the owner of a city lot intends to build of wood, he holds it to be clearly within the competency of the constituted authorities, to say to him, "you must

not exercise that right, it is dangerous to all. You may build of brick or stone; because the safety of all is, in this way, promoted."

It is insisted, that if the city ordinance has any legal efficacy, it applies only to buildings raised and erected within the limits prescribed, after its passage. But we regard this as too limited a construction. It would justify the removal there of wooden buildings at will from other quarters. For although in this instance, the building was removed from a part of the territory, to which the ordinance applied, where its continuance was lawful, to another, yet if to remove is not to erect, a removal from without those limits, where such erections are lawful, would be no violation of the law. To erect, is literally to raise up or to build; and if it might admit of question, whether a building removed from one place to another, is not there raised up or built, yet we are to understand the term according to its plain and obvious meaning, in the connection in which it was used. The mischief did not consist in the act of erecting; but in the continuance of the erection. The ordinance did not meddle with the erections as they stood. This would have transcended their power. But it extended to new erections, in the place of such as then existed; and it protected all places then vacant, from the annoyance and danger of wooden buildings. If it were not so, any barn, stable, wood or chaise house, from any part of the limits prescribed, might be removed to the most central part of the city; and there converted into stores or dwellinghouses.

The construction, which appears to us best calculated to prevent the mischief, and effect the salutary purposes, contemplated by the ordinance, is, to regard as within its operation, wooden erections placed where none existed before, whether newly built, or removed there from some other quarter. The hope might well be encouraged, that as the lands became more valuable, wooden buildings would give place to better and more durable erections. Little would be gained in this way, if instead of taking them down, they should only be removed from one site to another.

With regard to that part of the ordinance, which subjects the party, causing the erection, to the payment of the expenses in-

curred in taking it down and in its removal, we are not satisfied that it can be sustained. It might exceed the penalty, which the city is authorized to impose, which is the only punishment, directly operating as such, to which the wrongdoer is rendered liable.

The justification being made out, in the opinion of the Court, on the part of the defendants, according to the agreement of the parties, the verdict is to be set aside, and a nonsuit entered.

BUTMAN & *al.* *vs.* HUSSEY.

Where one wrongfully diverted water from the plaintiff's mill, the latter being the lawful owner of the stream, such wrongdoer was held to be answerable in *nominal damages*, though *no actual injury* to the plaintiff's mill resulted from the act complained of.

THIS was an action on the case for diverting water from the plaintiff's mill, and was tried upon the general issue, before *Parris J.*, at the last *October term* in this county.

On trial it appeared, that the plaintiff was the owner of a saw mill on one side of *Martin stream;* and that the defendant was the owner of a grist mill on the other side of the same stream, with a common dam to raise a head of water for the use of both mills. Both parties derived title from *Isaiah Thomas.* The first conveyance was from *Thomas* to one *Means*, the defendant's grantor, and was of a grist mill and "also the privilege of using and improving water from the mill pond above said mill dam for the use of the grist mill forever; said grist mill to draw water from said mill pond in preference to any other mill or machinery now erected, or which may be hereafter erected, taking water from said mill pond." The grist mill, conveyed by *Thomas*, had been altered and the floom extended in width by the defendant's grantor — and the defendant had also made alterations by inserting an additional set of stones, and a cleanser, and in several other particulars.

The plaintiff introduced evidence, tending to show that the defendant, in consequence of alterations made by himself, had withdrawn from the dam more water than he was entitled to.

He also introduced evidence (the defendant's counsel objecting,) tending to show that the defendant had withdrawn from the dam more water than he was entitled to by reason of the enlargement of the flume and other alterations made by *Means*, the defendant's grantor, — more water being expended in propelling the mill than was required for the use of the mill conveyed by *Thomas*.

Upon the question of damages, the Judge instructed the jury, that if they should find that the defendant had withdrawn from the pond, water belonging to the plaintiff and necessary for propelling his mill, he was entitled to nominal damages, even if he had failed to prove actual damages; and if he had proved actual damages, he would be entitled to their verdict for that amount. But if they found that the defendant had withdrawn no more water than he was entitled to, their verdict should be for him. The jury returned a verdict for the plaintiff for nominal damages only. And such judgment, it was agreed, should be rendered, as in the opinion of the whole Court, would be proper upon the facts reported.

W. P. Fessenden, for the defendant, contended that no other right could be acquired in flowing water than such as was acquired for some beneficial purpose by actual appropriation; and consequently, that no action could be maintained for any appropriation of that water which did not injure the exercise of that right — and cited *Williams* v. *Morland*, 2 *Barn. & Cres.* 910; *Blanchard & al.* v. *Baker*, 7 *Greenl.* 253. And though a contrary opinion seems to be intimated by *Angell* in his *Treatise* on *Watercourses*, p. 17, yet it will be found on examination that his opinion is not supported by the cases which he cites.

2. The verdict does not find whether the diversion of the water was caused by the erections of the defendant himself or of *Means*, his grantor. If the evidence therefore as to the latter was inadmissible the verdict should not stand. That it was not, he cited 3 *Stark.* 1527, 1531, 1563, 1564, 1583; 1 *Chitt. Pl.* 380; *Doane* v. *Badger*, 12 *Mass.* 65; *Bull. N. P.* 232; *Baxter* v. *M. I. Co.* 6 *Mass.* 207; *Robinson* v. *Jones* 8 *Mass.* 536; *Smith* v. *Whitney*, 4 *Mass.* 445; *Larned* v. *Buffington*, 3 *Mass.* 552; *Langdon* v. *Potter*, 11 *Mass.* 313.

F. Allen, for the plaintiffs, cited the following authorities: *Rich* v. *Penfield*, 1 *Wend.* 380; *Whittemore* v. *Cutter*, 1 *Gall.* 476; *Hatch* v. *Dwight*, 17 *Mass.* 289.

WESTON C. J.—*Isaiah Thomas*, under whom both parties claim, was the owner of *Martin stream* on both sides. He erected a dam across the stream, to create a reservoir and head of water, which might be turned to beneficial purposes. On one side he had erected a saw mill, and on the other side a grist mill. The power thus raised was more than these mills required. But the unoccupied power, thus raised and appropriated, had a value, which was as much under the protection of the law, to the owner, as the banks through which the stream passed. It was capable of propelling other mills, which the owner might erect, and which may have been within his contemplation, when he built the dam, or it might have been sold to others, for a valuable consideration. If a stranger had inserted a flume in the dam, and had thus withdrawn a portion of the water, when called upon by the owner for this invasion of his rights, it would be no sufficient answer for him to prove, that the owner had still enough left to work his mills.

A riparian proprietor on one side, or above or below, may use the water, or avail himself of its momentum, and may for this purpose create a head of water; provided he does not thereby impair the rights of other proprietors. If he thereby injure or destroy a privilege previously appropriated, he may be held answerable, although the mill or mills, depending on such privilege, may be out of repair, have gone to decay, or been destroyed by flood or fire, unless the same has been abandoned by the owner. *Hatch* v. *Dwight et al.* 17 *Mass.* 289. There an action was sustained for impairing a water power, the actual enjoyment of which by the owner had been sometime suspended. It may admit of more question, whether an action could be maintained by the owner of a privilege, which had never been occupied, for the erection of a dam below, which may have impaired or destroyed its value. There are authorities which sanction the doctrine, that the first occupant thereby acquires exclusive rights, which cannot

be affected by operations upon the stream above or below. Of this opinion was *Parker C. J.*, by whom the opinion of the court was delivered, in the case before cited. At a subsequent period, *Story J.*, in the case of *Tyler & al.* v. *Wilkinson & al.* 4 *Mason*, 397, after an elaborate view of the authorities in *England* and in this country, maintains the opinion that such exclusive right is not sustained by occupancy alone, for a period short of twenty years. The weight of authority appears to be with *Mr. Justice Story;* but the case before us does not require a decision of this point. It is not the conflicting rights of proprietors, above or below, or upon opposite sides, that we are called upon to determine.

The question is, how far a party having no right of his own, can divert the water which the owner of the stream has already appropriated, provided enough is left for his immediate purposes, without being liable to the suit of the party injured. Upon this point we cannot entertain the least doubt. To suffer such an invasion of the rights of another, without redress, would be to put this species of property out of the protection of the law. Several of the cases cited for the defendant, may maintain the position they were adduced to support, that a party, through whose land water passes, who has sustained no damage from the use of it by another, can maintain no action therefor. We do not consider it necessary to go into a consideration of these cases, or to discuss the principles upon which they are founded, being satisfied that it is and must be a damage to a party, to abstract a water power, of which he is the owner, which he has raised and erected at his own expense, and which he is at liberty either to use or to sell.

The grist mill was sold to *Means*, under whom the defendant claims, with a restricted and qualified right as to the quantity of water which he might withdraw from the dam. All that was not thus conveyed was reserved by the grantor, to whose interest the plaintiff has succeeded. The grist mill being located on one side of the stream, and passing with the site by the deed, if there might have passed with it, by implication, the water to the thread of the stream, there is no room for such implication, where the right to the use of the water power is expressly limited by the deed. It was a valuable right, sufficient for the use of the mill

conveyed, and to that extent the grantee was to have a preference over all other mills, depending on the same power. Beyond that he cannot be regarded as having any other right than a mere stranger. For any interference with the plaintiff's dam, or the water therein, beyond what was expressly secured to him, his deed furnished him no protection. And we are clearly of opinion, that the case made out for the plaintiffs entitle them to judgment on their verdict, provided there is no legal objection to the evidence upon which it was founded, in regard to the admissibility of a portion of which, a question was raised at the trial, and which has been pressed in argument.

The gravamen in the plaintiffs' writ is, that the defendant had withdrawn, and continued to withdraw, more water than he had a right to do. Whatever had a tendency to prove this fact, was competent evidence. Of this character was the proof that the flume had been extended, and other alterations made by the defendant's grantor, by means of which, together with other changes made by himself, more water was withdrawn from the dam than was necessary to propel the mill, when it was conveyed. There was no attempt to charge the defendant with what was done by his grantor, or with damages for the use of the water in his time, but to show that an excess was taken beyond the quantity conveyed, it was proved first, that the passage, through which the water passed, had been enlarged, and whether that was done before or after the defendant purchased, it did not affect or enlarge his right; and that secondly, by extending the capacity of the mill, a greater water power was necessary to propel it. It does not appear to us that any evidence was received, which did not bear directly and substantially upon the issue to be tried. The jury were instructed that the defendant was answerable only for the excess of water, which he had withdrawn; and they have found only nominal damages.

Judgment on the verdict.

GILMORE *vs.* BOWDEN *& al.*

In a suit against two defendants, one of them was defaulted; after which his deposition was taken by the other, who defended on the ground of minority, and offered it as evidence in the case. *Held*, that it was inadmissible.

ASSUMPSIT on a promissory note, signed by *Robert G. Bowden* and *Henry Frost*. After the *default* of the latter, *Bowden*, who made defence on the ground of minority, took the deposition of *Frost*, his co-defendant and offered it as evidence in the cause, but the plaintiff's counsel objected to its admission. It was thereupon agreed, that a default should be entered, which was to be taken off and the case stand for trial, if, in the opinion of the whole Court, the deposition was legally admissible.

J. Appleton, for the defendant, insisted that *Frost's* testimony was admissible, he having no interest in the suit. He had been defaulted, and judgment must go against him, at all events, whatever may be the result as to *Bowden*. If he had any interest it was adverse to the party calling him.

Wherever there is a personal defence by one of the defendants, judgment may be several, though the action be *assumpsit;* hence *Frost* would not be liable for the costs accruing after the default.

The reason for rejecting a party as a witness has been on the ground of his interest — but *cessat ratio, cessat lex.*

To show that *a plaintiff* had been admitted as a witness, he cited, 2 *Dallas*, 172; 4 *Dallas*, ; 3 *Bin.* 306; 3 *Rawle*, 409; *Hermon* v. *Drinkwater*, 1 *Greenl.* 27.

A *defendant* has also been admitted as a witness, 4 *Esp. R.* 198; 2 *Esp. R.* 552; 9 *Conn. Law Rep.* 127; 2 *B. & C.* 558; 20 *Com. Law Rep.* 77.

Brown, for the plaintiff, cited the following authorities: *Spaulding* v. *Smith*, 1 *Fairf.* 364; *Fox & al.* v. *Whitney*, 16 *Mass.* 118; *Nason & als.* v. *Thacher*, 7 *Mass.* 398; *Adams & al.* v. *Leland & al.* 7 *Pick.* 62; *Sawyer* v. *Merrill*, 10 *Pick.* 16; *Scott* v. *McLellan*, 2 *Greenl.* 199.

WESTON C. J. — It is a general rule of law, that a party to the record, plaintiff or defendant, cannot be received as a wit-

ness. To this there are some exceptions; as where the party who sues the hundred under the statute of *Winton*, is admitted as a witness, from the necessity of the case. And the case of *Herman* v. *Drinkwater*, 1 *Greenl.* 27, was placed upon the same principle. Another exception well established is, where in an action founded on tort against several, and there being no evidence against one, after a verdict passes in his favor, he may be a witness for the other defendants.

The reason usually given by elementary writers for the general rule is, the interest which a party has in the cause, if brought or prosecuted for his benefit; or in the costs, if he be merely a nominal party. Accordingly in the cases cited from *Pennsylvania*, where the objection of interest did not exist, a nominal party has been received as a witness; for which, however, the court give as an additional reason, that they have there no courts of equity.

In *Ward* v. *Hayden*, 2 *Esp. Rep.* 552, one defendant in trover, who suffered judgment to go against him by default, was received as a witness; although *Lord Kenyon*, who tried the cause, at first thought the witness incompetent, and continued to entertain doubts upon the point. *Doe* v. *Greene*, 4 *Esp. Rep.* 198, was an action of ejectment, which is a fictitious proceeding, and there conducted upon principles not known to our practice. In *Moody* v. *King and Porter*, 2 *Barn. & Cress.* 558. *Porter* pleaded bankruptcy and a certificate, whereupon the plaintiff entered a *nol. pros.* as to him; and he, having then ceased to be a party to the case, was received as a witness. In *Worrall* v. *Jones*, 7 *Bingham*, 395, the plaintiff called the defendant, who consented to be sworn. It was done therefore by mutual consent, and is no precedent, where the measure is restricted by one of the parties. Besides, what the defendant testified was good by way of admission, and none the less so for being under oath. And this is the reason assigned by *Mansfield C. J.* for receiving similar testimony, in *Norden* v. *Williamson et al.* 1. *Taunt.* 378.

But interest is not the only ground, upon which a party is excluded from being a witness. If it was, a party might always be called by his adversary, to testify against his interest. The

exclusion of parties is a distinct and independent rule of the law of evidence, and not a branch of, or derived from another very important rule of the same law, which regards interest as a valid objection to the competency of witnesses. The rejection of parties is founded in a deeper policy. To avoid the temptation of perjury, it is laid down by the common law, that *nemo testis esse debet in propria causa.* 3 *Bl. Com.* 371; 3 *Starkie,* 1061. The few exceptions, which have obtained, admit the generality of the rule. It is not that a party to the record shall not be permitted to testify in his own favor; but that he shall not be admitted as a witness. The exception in regard to defendants in tort, against whom no testimony has been adduced, is a matter not of right, but depends on the Judge at *nisi prius,* who will or not at his discretion, direct the trial and acquittal of such defendant first. *Sawyer* v. *Morrill,* 10 *Pick.* 16; *Davis* v. *Living et al.* 1 *Holt,* 275.

In *New York,* where a co-defendant in a criminal prosecution was tried separately, another defendant was holden an incompetent witness, on the ground of his being a party to the record. The *People* v. *Bill,* 10 *Johns.* 95.

In *Fox et al.* v. *Whitney,* 16 *Mass.* 118, *Parker C. J.* in delivering the opinion of the court, recognizes the general rule, that no party to a cause can testify in it. And admitting that the party there might not be eventually interested, he adds, that, "it has heretofore been thought sufficient to exclude such testimony, that the witness is a party on record, and we see no reason for relaxing the rule."

We are all of opinion that the deposition offered could not legally be admitted.

Judgment for plaintiff.

AGRY *vs.* BETTS *& al.*

The adjudication of two Justices of the Peace and of the *quorum*, under *stat.* of 1822, *ch.* 209, upon the sufficiency of the officer's return of his having notified a creditor of the intention of an execution debtor to take the poor debtor's oath, is conclusive upon the parties. If the return be false, the creditor's remedy is by action against the officer.

DEBT upon a jail bond. The defence was, that the principal obligor had taken the poor debtor's oath before two Justices of the Peace and of the quorum, and had been discharged; and the proper record was introduced to show this fact. The record also recited, that upon examination by the Justices, of the return of the officer upon the notification previously issued to the creditor, it appeared to have been duly served.

To avoid the effect of this, the plaintiff proposed to show that, at the time of the alleged service of notice upon him, which was by leaving a copy at his last and usual place of abode in *Hallowell*, he was not an inhabitant of the State, having removed therefrom twelve or eighteen months previous. This evidence was objected to, and *Perham J.*, in the Court below, sustained the objection. A verdict was thereupon returned for the defendants, and exceptions were taken by plaintiff's counsel to the ruling of the Judge.

Rogers, for the plaintiff, endeavored to show that there had been in the proceedings before the magistrates, no compliance with several important requisitions of the statute, but in particular that requiring notice to the creditor. This notice is indispensable. The Justices had no power to administer the oath without it. *Little* v. *Hasty*, 12 *Mass.* 319; *Haskell* v. *Haven & al.* 3 *Pick.* 404.

Where a creditor lives out of the State, the service should be by copy upon his agent or attorney, if he have one, and if not, then with the Justice by whom the execution was issued. The service in this case, therefore, was clearly not what the statute required. As a general principle, no man's rights are to be affected without notice. *Putnam & al.* v. *Longley*, 11 *Pick.* 487; *Parker* v. *Danforth & Tr.* 16 *Mass.* 302; *Smith* v. *Rice*, 11

Mass. 507; *Chase* v. *Hathaway*, 14 *Mass.* 222; 3 *Black. Com.* 423.

The decision of the magistrates upon this question is not conclusive. The statute did not intend to confer any judicial power upon them. Their duty "to examine the notice," has relation principally to themselves, to their own justification, and is also for the benefit of the creditor. The adjudication without notice, therefore, was void, the Justices having no jurisdiction. 19 *Johns.* 39; 7 *Cowen*, 269; *Haskell* v. *Haven & al.* 3 *Pick.* 404; *Hall & al.* v. *Williams*, 6 *Pick.* 232.

This record exhibits a defect, inasmuch as it comes up made by *two magistrates*, while the statute says *one* of them should make it.

Kent, for the defendants, cited *Haskell* v. *Haven*, 3 *Pick.* 404; *Kendrick* v. *Gregory*, 9 *Geenl.* 22.

WESTON C. J. — The question submitted to our determination is, whether there has, or has not been a breach of the condition of the bond, declared on. The defendant relies upon the proceedings had before two Justices of the Peace, each of the quorum, for the county of *Somerset*, under the act for the relief of poor debtors, statute of 1822, *ch.* 209, which are certified to us by the same Justices, as a true copy of the record, remaining with them. By the fifteenth section of that act it is provided, "that one of said Justices shall always make proper entries and records of their proceedings, and enter judgment in due form, as in other cases." If the record when made, contained a certificate that it was done by one of the Justices, a copy authenticated by him alone, might be regarded as sufficient evidence. But it is in truth a record of the proceedings of the court holden by both Justices, and a copy may be verified by both, to which full credence is due, as a true copy of their record. The proceedings thus certified, are regular in all their parts, and are evidence, if not controverted, of such a discharge of the defendant, as saved the condition of his bond.

But it is insisted, that the requirements of the statute were not so far complied with, as to give jurisdiction to the Justices. It appears, and is not denied, that the defendant stood committed by

force of an execution, that he made complaint to a Justice of the Peace, under the twelfth section of the act, that the Justice issued his notification to the creditor, in the form therein prescribed, and that the same was returned, with an entry of service made thereon. This presents the very state of facts, under which the two Justices of the quorum were to be called to exercise their powers. By the thirteenth section, they are authorized and empowered to examine the return of the notification, and in their discretion to proceed further, if it appear to them to have been duly made. It is specially made a part of their jurisdiction, to examine and pass upon the sufficiency of the return. It is an act of judicial discretion, entrusted to them by law for their definitive determination. It is urged by the counsel for the plaintiff, that their decision ought not to be binding, because they had no means of knowing whether the officer's return was true or false. But the officer is, upon his responsibility, entrusted with the performance of this duty. The returns of officers upon process, returnable to other courts, are received as true, and not suffered to be controverted, leaving the parties injured to their remedy against them, if false. We see no reason why the same principle should not be applied to the return of notifications, authorized by the statute under consideration.

Authorities have been cited to show, that it is a violation of first principles to affect the rights of a party by judicial proceedings, who has never been notified, or had an opportunity to be heard. The doctrine is sound, and is respected, wherever there exists an enlightened administration of justice; but the question under discussion is, what shall be regarded as evidence of notice to the party. It has been wisely determined by the law, that of this the certificate of a class of officers, to whom this duty is confided, shall be conclusive. But so strict and rigid is the responsibility to which they are subjected, that if false, adequate redress is afforded by action to the party injured.

What has been once determined by a court of competent jurisdiction, is no longer an open question; except upon appeal, where it exists, or in some of the modes of revision, provided by law. And we are satisfied, that the court of the two Justices of

the quorum were in the exercise of their proper jurisdiction, when they passed upon the sufficiency of the return in question.

In *Little* v. *Hasey*, 12 *Mass.* 319, the Justices acted, not under the law then in force, but under one which had been repealed; and this appeared upon the face of their proceedings. In *Putnam et al.* v. *Longley*, 11 *Pick.* 487, there being three creditors, service of the notification was made only on one, instead of being made on each, as the law required; and it was holden that the objection was fatal. There was no question raised, as to the sufficiency of the testimony, by which this was made to appear. The fact was probably certified by the Justices. For had they found that service was made on all, their certificate would doubtless have been holden conclusive upon this point. And such was the opinion of the court in *Haskell* v. *Haven*, 3 *Pick.* 404, where *Parker C. J.* says, that if the two Justices have examined the return of the notification, made by the officer who served it, and find it duly made, their certificate must be conclusive evidence of this fact; "for it is made by the statute the special duty of the magistrates to examine the return." Upon this point, the statute of *Massachusetts* is similar to our own.

Exceptions overruled.

Gilmore *vs.* Bussey.

A negotiable promissory note given for a subsisting debt, will not be regarded as *payment* of the debt, when it is otherwise understood or agreed by the parties, at the time.

Therefore, where a general agent gave his negotiable note for labor performed for his principal, the understanding of the parties being, that it was merely to settle the amount and enable the payee to obtain payment of the principal; and on the principal refusing to take up the note, payment was enforced against the agent, it was *held* that the statute of limitations, as it regarded the principal, would commence running from the time of such payment, and not from the time of giving the note.

This was an action of *assumpsit*, in which the plaintiff sought to recover a sum of money, alleged to have been paid by him for the defendant, under the direction of one acting as his general agent.

The defendant pleaded the general issue, and under a brief statement relied upon the statute of limitations.

The plaintiff read a letter from the defendant to him, dated *October* 15, 1818, in regard to the occupation and improvement by the plaintiff, of certain lots of land belonging to the defendant. He then called *Thomas Morrill* as a witness, who testified that he worked for the plaintiff in the summer of 1821, on the lands of the defendant, at the request of the plaintiff, and received his promissory negotiable note therefor; *Morrill* stating that he contemplated purchasing some land of the defendant, and that he would turn out said note towards the purchase money.

It was also proved that *Samuel Lowder, Jr.* who was the general agent of the defendant at the time, told the plaintiff that he might hire *Morrill* to assist him in getting hay.

Morrill further testified, that he did purchase land of the defendant, through his agent, *Lowder*, and frequently requested the latter to receive said note in part payment, and expected that it would be so received, until the year 1827, when on *Lowder's* refusing to allow it, he, the witness, commenced a suit upon the note against the present plaintiff. That, after this, *Gilmore* and *Lowder* both came to him, and that the latter promised him that he would stop the suit and pay the debt; and that he, the witness, thereupon wrote to his attorney to stay further proceedings, which was accordingly done. Notwithstanding this, *Lowder* still declining to pay or allow the note, *Morrill* commenced another suit upon it against the present plaintiff, and after obtaining judgment against him, the debt was satisfied by a sale of *Gilmore's* property on execution, *December*, 1827.

The defendant read in evidence, a power of attorney from him to *Samuel Lowder* and *Samuel Lowder, Jr.*, given in 1823.

On this evidence, *Ruggles J.*, in the Court of Common Pleas, instructed the jury, that if the note to *Morrill* was given by the plaintiff on account of the defendant and for his benefit, by virtue of the limited agency, created by the agreement between the plaintiff and defendant, he, the defendant, became liable to the plaintiff therefor; and if it had been in no wise accounted for, it was still a subsisting claim against the defendant; — that the law raised a presumption of payment after the lapse of six years from

the time of giving said note to *Morrill*, which would be rebutted by a subsequent promise to pay the debt, or an unqualified admission of its being still due: and that the promise by the defendant's general agent, if made for the defendant, to stop the action and pay the note, as testified to by *Morrill*, if they believed the testimony, revived the liability of the defendant; and that they might consider the defendant as thereby assuming the debt due to *Morrill* — and the payment of it afterwards by the plaintiff, was paying money to the use of the defendant; and that the statute of limitations would commence running from the time the money was so paid and the execution discharged.

He also instructed the jury, that the new power of attorney from the defendant to *Lowder* and *Lowder, Jr.*, was not a revocation of the authority under which the latter acted in directing the employment of *Morrill*.

A verdict being returned for the plaintiff, the defendant's counsel took exceptions to the foregoing ruling of the Judge, and thereupon brought the cause into this Court.

Rogers, for the defendant, contended that the plaintiff had no authority to hire *Morrill* on the defendant's account; but if he had, that then the negotiable note of the plaintiff to *Morrill* was a payment, and consequently that the statute of limitations would commence running from that time.

He also objected to the instructions of the Judge, as to the revival of the debt by the promise of *Lowder, Jr.*, insisting that he had no authority to bind the defendant for that purpose; and at most, that it was a promise to *Morrill* and not to the plaintiff.

Brown, for the plaintiff, submitted the case without argument.

Weston C. J. — The jury have found that the plaintiff has paid money to the use of the defendant. It must have been upon the ground that the labor of *Morrill*, was performed in the defendant's service, and on his account. There is evidence to sustain this finding; although it is not to be found in the defendant's letter, addressed to the plaintiff. *Lowder, Jr.* the general agent of the defendant at the time, authorized the plaintiff to hire *Morrill*; and unless it was to be on the defendant's account, there was no necessity for such authority. If the plaintiff was author-

ized to hire, he had by implication authority to pay for the services rendered. When did he pay? A negotiable note will discharge a prior debt on simple contract, unless it is otherwise agreed. But it is very evident that neither *Gilmore* nor *Morrill* considered *Bussey* discharged; for it was taken with a view that it should be allowed and paid by the latter. It was intended to be made use of as evidence to show the value of the services performed by *Morrill*. *Lowder* had notice that the note was given for this purpose, and was frequently requested to turn it on account of what was due from *Morrill* to *Bussey* for land. *Morrill* testified that he did not ascertain that *Lowder* would not allow the offset, as he expected, until 1827. Up to that period he had regarded it as evidence of his claim against *Bussey*. He then turned upon his immediate employer, the plaintiff, the statute of limitations not having at that time attached, and ultimately enforced payment. Upon these facts, the mere giving of the note by the plaintiff was not such a payment as would have discharged the defendant from the claims of *Morrill*. It was not so received or intended. If the plaintiff had not paid or had been unable to pay, *Morrill*, notwithstanding the note, could have recovered for his labor of *Bussey*, proving that it was performed on his account, and that the note was originally received, not as payment, but as a voucher against him.

It was not then until the plaintiff had actually paid the money, which he was justified in doing by his authority to hire, that any right of action accrued to him against the defendant. Within six years from that time, this action was brought. The case does not therefore require a new promise, which there has been an attempt to prove, the sufficiency of which it is unnecessary to determine, or the authority of the agent, by whom it is alleged to have been made.

Exceptions overruled.

BEAN *vs.* GREEN *& al.*

Where one established a line of stages, and posted notices "that he would not be accountable for any baggage, unless the fare was paid and the same was entered on the way bill." *Held*, nevertheless, that he was liable for the loss of a trunk through negligence, though the fare was not paid; a knowledge of the notice not having been brought home to the owner of the trunk, or his servant who carried it to the stage office.

Held, further, that a knowledge of said notice by the post master, to whom the trunk was delivered by the plaintiff's servant, to be delivered to the stage driver, would not affect the owner of the trunk; that knowledge not having been communicated to him by the post master, or to his servant.

THIS was an action on the case brought against the defendants, as common carriers, for the loss of a trunk and its contents, through the alleged negligence of the defendants.

It appeared in evidence, that the defendants were jointly concerned in running a stage between *Bangor* and *Milburn*, by which the mail was carried. The plaintiff, who resided at *Corn-ville*, having proceeded himself to *Bangor*, left his trunk to be forwarded with its contents by the defendants' stage. The trunk was taken, by a member of the plaintiff's family, to the post office, delivered to the post master with a request that he would deliver it to the stage driver, directing him to leave it at the post office in *Bangor*, which the post master did; but the trunk was lost and not delivered at *Bangor*.

The defendants shew, that when they established their line of stages they posted notices in divers places, and among them at the post office aforesaid, "that they would not be accountable for any baggage, unless the fare was paid and the same entered on the way bill." And it was admitted in this case that the fare had not been paid. The post master had knowledge of the defendants' advertisements, but he did not communicate it to the plaintiff or to the person who brought the trunk to his office.

On this evidence the defendants' counsel contended, that *Smith*, the post master, having knowledge of said condition at the time the trunk was left at his office, the carrying of the trunk was subject to the condition, and requested the Court so to instruct the jury. But *Ruggles J.*, before whom the cause was tried in the Court of Common Pleas, instructed the jury that the

knowledge of the post master of the said advertised condition not being communicated to the plaintiff, or to the person leaving it at his office, did not subject the carrying of said trunk to the condition; and left it for the jury to decide, whether the plaintiff had knowledge of the published condition before the trunk was taken by the defendants' servant to be carried as aforesaid. The verdict being for the plaintiff, the defendants' counsel took exceptions to the ruling of the Judge and brought the cause into this Court.

Rogers, for the defendants, contended that the post master was to be regarded as the agent of the plaintiff, and that notice to him was equivalent to notice to the principal. 7 *Johns.* 44; 1 *Term R.* 205; 4 *Term R.* 66; 16 *Johns.* 86; 2 *Stark. Ev.* 54; 1 *Term R.* 16; 5 *East*, 498; *Com. Dig. Title Factor*; 2 *Stark.* 60; 4 *Taunt.* 565; 13 *Ves.* 120.

Moody, for the plaintiff, cited the following authorities: 5 *Peters. Abr.* 95; 5 *East*, 428; 5 *East*, 507; 2 *Stark.* 279, 337; *Story on Bailments*, 338; 2 *Stark.* 234; 1 *Pick.* 50; 2 *Camp.* 414; 4 *Maryland Rep.* 817.

WESTON C. J. — The attempt on the part of common carriers, to limit and qualify the liability imposed upon them by the common law, although to be sustained when notice of it is clearly carried home to the knowledge of the party to be affected, is not to be favored or extended; and courts have not unfrequently expressed their regret that it had ever been permitted. The cases cited by the counsel for the defendants, establish the doctrine, that notice to the porter, messenger, or agent, by whom the parcel or package is sent by the owner, is notice to him. But we cannot regard the post master as being the agent of the owner, within the meaning of this rule. He might, with at least equal propriety, be deemed the agent of the defendants. The Judge below was right, therefore, in declining to instruct the jury, that the knowledge of the post master was constructive notice to the plaintiff. The exceptions are accordingly overruled.

Judgment on the verdict.

HAMMATT *vs.* SAWYER.

A mortgagee is not *tenant in common* with his mortgagor within the meaning of *stat.* of 1821, *ch.* 35, which subjects such tenant to the payment of treble damages, for cutting wood, timber, &c. on the common land without giving forty days previous notice to his co-tenant.

And where one is mortgagee of the share of one who was tenant in common with others, not being in possession, and having made no entry to foreclose the mortgage, he is not a *tenant in common*, within the meaning of said statute, and entitled to his action for treble damages against the other owners, for cutting without giving him the statute notice.

THIS was an action of trespass, commenced by the plaintiff, as well for himself as for the other co-tenants under the provisions of the Act of 1821, *ch.* 35, entitled "an Act to prevent tenants in common, joint tenants, and copartners from committing waste, and for other purposes." The case was submitted for the opinion of the Court, upon the following agreed statement of facts.

Previous to *January* 17, 1833, *Hammatt*, the plaintiff, was the owner of *Mollinocket* township, upon which the trespass was alleged to have been committed. On that day he conveyed one half of said township in common and undivided, to *Waldo Pierce* and *Robert Treat*, who on the same day mortgaged the same to *Hammatt*, to secure the payment of the purchase money. This mortgage was paid and discharged *May* 1, 1833. On the same 17th day of *January*, *Hammatt* conveyed one fourth of said township to *Hazen Mitchell*, and one fourth to *Elihu Baxter*, in common and undivided, taking from each of them a mortgage of his fourth to secure the payment of the purchase money. The mortgage given by *Mitchell*, was discharged on the 29th of *April*, 1833 — and on the *Baxter* mortgage all that was due had been paid, leaving about $4000 unpaid. *Pierce*, *Treat*, *Mitchell* and *Baxter*, previous to the commencement of this suit, and previous to the time of the alleged trespass, had conveyed all their interest in said township to the defendant and *Josiah S. Little*, by deeds of warranty, the defendant receiving title to seven eighths and *Little* to one eighth. After which, and before the time of the alleged trespass, the defendant had conveyed one eighth to *Daniel Chamberlain*, and one eighth to *Eleazer Crabtree*, in common and undivided, who still owned.

The timber, it was agreed, was all cut under the direction of the defendant, by the consent and for the benefit of all the persons interested in the township except *Hammatt*, and without the statute notice to him. Said township, it was agreed, was in a wild uncultivated state, no persons residing upon it.

If, upon these facts, the Court should be of opinion that the action could be maintained, judgment was to be rendered for the plaintiff, for such damages as should be found upon evidence, otherwise judgment was to be rendered for the defendant for his costs.

Rogers, argued for the plaintiff, insisting that these parties were tenants in common, within the meaning of the *stat.* of 1821, *ch.* 36, and consequently that the action was well maintained. He also cited the following authorities; *Blaney* v. *Bearce*, 2 *Greenl.* 132; *Smith* v. *Goodwin*, 2 *Greenl.* 173; *Stowell* v. *Pike*, 2 *Greenl.* 387.

F. Allen and W. P. Fessenden, for the defendant, cited the following authorities: *Willington* v. *Gale*, 7 *Mass.* 138; *Cro. Chas.* 806; 1 *Rolle*, 859; 2 *Rolle*, 242; 2 *Cruise's Dig.* 106, 107; 8 *Mass.* 566, *(supplement;)* *Stearns on Real Actions*, 256; 2 *Cruise's Dig.* 549; *Rising* v. *Stannard*, 17 *Mass.* 282; *Goodwin* v. *Richardson*, 11 *Mass.* 469; *Potter* v. *Wheeler*, 13 *Mass.* 504; *Keay* v. *Goodwin*, 16 *Mass.* 1; *Stowell* v. *Pike*, 2 *Greenl.* 387;

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

This is an action of trespass, commenced by the plaintiff, claiming to be a tenant in common with the defendant and others in a township of wild and uncultivated land, to recover a penalty claimed under the provisions of statute of 1821, *chap.* 35, to prevent tenants in common, joint-tenants and coparceners from committing waste. The ground of defence is, that at the time of the cutting the trees mentioned in the plaintiff's writ, he was not a tenant in common with the defendant, and, therefore, not entitled to the notice required by the second section of the statute, nor to

maintain this action for the penalty. *Hammatt* had no other interest in the township but as mortgagee of one undivided fourth part, the same having been mortgaged to him by *Baxter*. He had not taken actual possession under his mortgage, and there had been no breach of the condition.

Sawyer and others, having purchased *Baxter's* interest in the township, stood in the situation of mortgagors of the quarter to *Hammatt*. Between mortgagor and mortgagee there are no relations of a tenancy in common. It is not even contended in support of the action, that *Sawyer*, as mortgagor, would be liable to the statute penalty for cutting timber on the mortgaged premises. The mortgagee has another remedy in such case. As between them, the mortgagee is considered as seised of the legal estate, even while the mortgaged premises remain in the possession of the mortgagor; and this court has decided, that for cutting and carrying away timber from the mortgaged premises by the mortgagor, the mortgagee has a remedy by action of trespass *quare clausum*. *Stowell* v. *Pike*, 2 *Greenl*, 387. If there be a tenancy in common between the plaintiff and defendant, it must grow out of some interest in the latter other than as assignee of *Baxter*.

But *Sawyer* and others, not parties to the suit, were owners of the other undivided three fourths of the township, in fee, and consequently were tenants in common with the owner of the other undivided fourth, mortgaged to *Hammatt*. Was *Hammatt*, as mortgagee tenant in common with them?

In examining this question, we are to consider *Sawyer* in his character as owner of the three fourths, without being at all affected by his interest in the other fourth, — and that *Hammatt* cannot bring to his aid, in support of his claim to be tenant in common with *Sawyer*, as owner of the three fourths, any principles of law applicable to him as the assignee of *Baxter*, or as mortgagor of the one fourth. So far as it regards *Sawyer*, they are entirely distinct concerns, and *Hammatt* holds no other relations to him as owner of the three fourths than he would have held if *Sawyer* had never purchased of *Baxter*. The charge is

not against *Sawyer*, as mortgagor or claiming under the mortgage, or as a stranger, but as tenant in common. As mortgagor, he is not such. As owner in fee of the three fourths, he is, but not with *Hammatt*, unless *he* became such as mortgagee.

It is a settled principle of law, that as between the mortgagor and mortgagee, the fee of the estate passes to the mortgagee, at the execution of the deed; but as between the mortgagor and other persons he is considered as still having the legal estate in himself. A mortgagee has but a chattel interest, the freehold remains in the mortgagor. *Lane* v. *Shears*, 1 *Wend.* 437.

The mortgagor, notwithstanding the mortgage, is deemed seised. The mortgage is a mere incident to the bond, and a discharge of the bond will relieve the property from the incumbrance. *Wilson* v. *Troup*. 2 *Cowen*, 230; *Hatch* v. *White*, 2 *Gallison*, 155; *Vose* v. *Handy*, 2 *Greenl.* 322. *Chancellor Kent* says, the conclusion to be drawn from a view of the English and American authorities, is that the mortgagee before entry, notwithstanding the form of the conveyance has only a chattel interest, and his mortgage is a mere security for a debt, while the interest of the mortgagor is descendible by inheritance, devisable by will, and alienable by deed. 4 *Kent's Comm.* 153. In *Goodwin* v. *Richardson*, 11 *Mass.* 469, *Jackson J.* says, "the mortgagee can never become the owner of the land unless he elects to be so, and makes a formal entry for the condition broken. It is true that the mortgage deed purports to convey to the mortgagee a present estate in fee simple, defeasible on the performance of a certain condition by the mortgagor. But according to the construction of the instrument, which has been long settled in our courts, and which is warranted by the statutes relating to the subject, the mortgagee, instead of having an estate in the land, defeasible on performance of a condition subsequent, has the right of acquiring an estate on a certain contingency, and on the performance of a condition precedent on his part. But he has only a lien on the land, and not any estate in it, strictly speaking, until he actually takes the land in legal form, towards the discharge of his debt.

The mortgagor is a freeholder, so long as he remains in possession, and if an entry should be made on him or he be disseised by a stranger, he may maintain trespass or a writ of entry. *Groton* v. *Boxborough*, 6 *Mass.* 53. But it may be questionable, whether the mortgagee, not having been in actual possession, nor elected whether to hold the land, or rely on his personal security, can maintain trespass against a stranger. This principle seems to be recognised in *Hatch* v. *Dwight*, 17 *Mass.* 299, which was an action of trespass on the case for a nuisance in destroying the plaintiff's mill and site by flowing.

The plaintiff sustained her action. Among other points in the case, it became a question when her right of action commenced, she holding the premises injured as mortgagee. Upon this question the court say, "as to damages, we think it was right to limit the plaintiff to the period of her actual possession. Before that it was uncertain whether she would claim to hold the land, or rely upon her personal security for the debt. Although a mortgagee may enter at any time, yet until he enters, the land must be considered as belonging to the mortgagor, who can maintain trespass for any injury done to the freehold against any but the mortgagee."

In the case at bar, the premises being uncultivated, the possession was vacant, but still as it respects all persons, except the mortgagee, the mortgagor was seized and the constructive possession follows the seizin. There had been no breach of the condition in the mortgage, there had been no entry or taking of actual possession by the mortgagee; no intimation whether he should claim the land or rely upon his personal security. It seems to result from the principles established in the cases above referred to that, as it respects the owners of the three fourths, *Hammatt* could not, as mortgagee, be considered the owner of the remaining fourth, at least, until he had taken possession, or in some manner indicated his intention to hold it, and that, until then, the mortgagor is to be considered as the owner, and to be treated as such by the other co-tenants. See also *Ely* v. *McQuire*, 2 *Hammond*, 234; *Gibson* v. *Seymour*, 3 *Vermont Rep.* 565. Viewing *Sawyer*, then, as mortgagor of the one fourth, and he is

not tenant in common with *Hammatt* of that fourth, because none of the relations of a tenancy in common exist between mortgagor and mortgagee.

Viewing him as owner of the three fourths and he is not tenant in common with *Hammatt*, of the whole tract, because, as it regards strangers to the mortgage, and as such *Sawyer* is to be viewed when impleaded as he now is, *Hammatt* has not become the owner of the mortgaged premises.

The case, from its intricacy and involved nature, is not free from difficulty, but as said by *Story J.* when commenting on this statute in *Prescott* v. *Nevers*, 4 *Mason*, 326, the statute is highly penal, and ought not to embrace cases which are not fairly within its terms.

We cannot say that the case presented for our decision, clearly falls within either the letter or spirit of the statute.

HAWES *& al. vs.* SMITH.

In the construction of contracts, the plain, ordinary and popular sense or meaning of the terms used, should prevail.

Where one was arrested at the suit of his creditor, and A. agreed in writing, in consideration that the creditor would discharge his debtor from the arrest, to pay him within 60 days, "all such sums of money as *may now be due and owing* to him" from said debtor, "whether on note or account;" the agreement was construed to embrace those debts only which were then actually *payable*.

THIS action, which was *assumpsit* upon the special contract of the defendant, hereafter stated, was submitted for the opinion of the Court upon the following agreed statement of facts.

On the 3d day of *October*, 1833, one *Greenlief C. Neally*, a debtor of the plaintiffs, being under arrest at their suit in *Bangor*, was discharged therefrom on his procuring the defendant to execute the following agreement in writing with the plaintiffs, *viz:*

"*Bangor, Oct.* 3d, 1833.

"Whereas *Greenlief C. Neally* has been arrested in this "place, at the suit of *Hawes & Lyon* of *Boston*, and is now un- "der arrest in the same suit, I hereby agree and promise the said "*Hawes & Lyon*, that if the said *Greenlief C. Neally*, is dis-

" charged from the same arrest and suffered to go at large, I will " pay to said *Hawes & Lyon*, or to *William P. Fessenden* their " attorney, in sixty days, all such sums of money as may now be " due and owing to the said *Hawes & Lyon* from the said *Neally*, " whether on note or account, and also the costs of said suit, in " sixty days from the date hereof. *Samuel Smith.*"

At the time of the execution of this contract, the plaintiffs held three notes against *Neally* which had become *payable*, and an account for goods sold, and four other notes which did not become payable until after that time. The deposition of one *Ranney* in relation to the account, and the length of credit given, was made a part of the case.

The plaintiffs claimed to recover the amount of all that *Neally* owed them on the day the contract was made, whether it had become *payable* or not, which the defendant resisted.

Upon these facts, the Court were to render such judgment, as in their opinion should be conformable to the law of the case.

W. P. Fessenden, argued for the plaintiffs, citing the following authorities: *McCarty* v. *Barrow*, 7 *East*, 436; 4 *Peters*, 436; *Wentworth* v. *Whittemore*, 1 *Mass.* 473; *Frothingham* v. *Haley*, 3 *Mass.* 70; *Davis* v. *Ham*, 3 *Mass.* 33; *Willard* v. *Sheafe & Tr.* 4 *Mass.* 236; *Wood* v. *Patridge*, 11 *Mass.* 493; *Sayward v. Drew*, 6 *Greenl.* 263; *Grenough* v. *Walker*, 5 *Mass.* 217.

Rogers, for the defendant.

Parris J. — In giving a construction to this contract it is proper to take into consideration the situation of all the parties at the time it was entered into. The promise was made for the benefit of *Neally* and to procure his release from arrest.

The introduction to the contract shows that this was the consideration of the promise; and this mode was adopted to effect the object rather than the usual course of taking bail for appearance. By procuring bail *Neally* would have been entitled to liberation, and the responsibility of the bail would be satisfied by producing the debtor to the officer holding the execution.

The suit was commenced on such notes and demands only as were then payable, and judgment could be recovered for nothing

more, so that the creditor could, by law, hold *Neally* no longer than he procured bail for his appearance, and after waiting until court for judgment, could recover nothing more than was payable when his suit was commenced; — and on producing the debtor in the lifetime of the execution, which would extend to ninety days, or on payment of the amount of the execution, the bail would be wholly discharged. This was the extent of the creditor's power on the one hand, and the debtor's rights on the other.

Instead of becoming bail for *Neally's* appearance, the defendant assumed the payment of the debt in sixty days, which was sooner than it could have been recovered of the debtor if the action had been prosecuted.

It is contended, that the defendant not only assumed the debt on which the suit was commenced, but that he undertook to pay, in sixty days, all the other debts which *Neally* owed the plaintiff, although not payable when the action was commenced, and some of them not even payable at the expiration of the sixty days; that is, that, in consideration that the plaintiff would release *Neally* from arrest on notes that were then payable, and which he could not avoid doing on the furnishing of bail, *Smith* undertook to pay, not only the debt sued for, but other debts, even before they became payable.

If such was the understanding of the parties, if they made such a contract, they are to be held to it. It is our business to enforce, not to make, contracts for parties. But it is not for us to enforce as an agreement what the parties never assented to.

It is admitted that the language of the promise, according to its strict legal import, might embrace all that is contended for by the plaintiff. But cases often arise where the meaning of language is to be accommodated to the situation and circumstances of the parties using it. As said by the court, in *Sumner* v. *Williams*, 8 *Mass.* 214, nothing can be more equitable than that the situation of the parties, the subject matter of their transactions and the whole language of their instruments should have operation in settling the legal effect of their contract;— and it would be a disgrace to any system of jurisprudence to permit one party

to catch another, contrary to the spirit of their contract, by a form of words, which perhaps neither party understood.

The maxims for the exposition of contracts are simple and consistent, and well calculated to effect their sole object; namely, to do justice between the parties by enforcing a performance of their agreement, according to the sense in which they mutually understood it at the time it was made; — and all latitude of construction must submit to this restriction, that the words and language of the instrument bear the sense intended to be put upon them. *Chitty on Con.* 19.

The plain, ordinary and popular sense or meaning of the terms adopted by the parties, shall prevail. *Ibid,* 20. It was said by the court, in *McWilliams* v. *Martin,* 12 *Serg. & Rawle,* 269, that it never was a rule of construction, that the words in a contract were to be taken in their technical sense, but according to their proper and most known signification, that which is most in use. The necessary use of particular technical expression is chiefly regarded in the sense of law terms. *Lord Mansfield* said, in *Goodtitle* v. *Bailey, Cowp.* 600, the rules laid down in respect to the construction of contracts are founded in law, reason and common sense; that they shall operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they shall operate in that which by law will effectuate the intention.

In the construction of agreements the intention of the parties is principally to be attended to. *Buller J.* in *Browning* v. *Wright,* 2 *Bos. & Pull.* 26.

We can have no doubt from the situation, circumstances and objects of the parties, as they are developed in their written agreement, that the phraseology, " all such sums of money as may now be due and owing, whether on note or account," was supposed and intended to mean and include only such as were then payable, and for the recovery of which *Neally* had been arrested, and this, no doubt, would be considered the popular meaning of such language, although we admit that the strict technical or legal signification of the terms may be different. The Counsel for the plaintiff admits that due is synonymous with pay-

able in a popular but not in a legal sense, and he is supported by the authorities which he has cited, especially *Greenough* v. *Walker*, 5 *Mass.* 214, where the court say, a note may be due and not payable. Numerous instances might, however, be referred to where courts, even, have used the term due as synonymous with payable. In *Kingman* v. *Pierce*, 17 *Mass.* 247, where the principle was settled that the promissor had no legal right to discharge his note by payment until it became payable, the court say, " according to the evidence reported, the note was not *due* when it was paid to the plaintiff's son. The defendant came unlawfully to the possession of it, for he had no right to it until it became *due*." In *Saunders* v. *Frost*, 5 *Pick.* 267, the court say, " the principal question is as to the effect of the tender. The tender can be considered valid only in relation to the interest and the amount of the note which was *due*, for the mortgagee could not be compelled to receive payment until it became *due*. A great number of similar instances might be mentioned, where courts of the highest respectability have used the word *due* in the same sense as *payable*.

Is it matter of surprise then that others should so use it, especially those not familiar with the legal distinction, and who, probably, never heard or suspected that a note was considered due until it became payable.

When the popular meaning of a term becomes so general as to cause its introduction into the opinions and judgments of respectable judicial tribunals, it would have the semblance of severity not to permit it to be used in a similar manner in contracts, which those tribunals may be called upon to expound. We think that we are adhering to general established rules, which are among the maxims of the law, in deciding that the defendant is answerable only for such sums as were actually payable by *Neally* to the plaintiff on the third of *October*, 1833. — *Verba intentioni et non a contra debent inservire* has become a maxim, which *Coke* says, " is to be of all men confessed and granted, without proof, argument or discourse."

The delivery of the articles charged in the account, is proved by *Ranney*, and he testifies that when credit was given the sales

were usually settled by notes. There is no proof that any credit was in fact given on the goods, but the contrary is to be inferred from *Ranney's* testimony, which is the only evidence in the case, except what is derived from witnesses residing at a distance, who testify as to the usual credit for similar purchases. The positive, uncontradicted testimony of *Ranney* must be decisive of the question; — and, as no credit is proved to have been given, the account was payable on the 3d of *October*, 1833, and is to be included in the judgment.

HASTY *& al. vs.* WHEELER.

A. gave B. a lease of a "store and cellar" for five years, if not sooner determined by the lessor. The lessee covenanted not to commit strip or waste — but was to have the right "to repair, alter and improve the premises in such "manner as should be for his interest and benefit"— and "all fixtures which should be added to the premises, should remain and become the property of the lessor." If the lessee should hold, for the whole term, the improvements were to be at his expense, but if the lease should be sooner determined, the lessor was to pay "for all betterments" made by the lessee. The latter entered, raised the store from one to two feet, and finished off a victualing cellar, it never having been used for that purpose before, and made other alterations. *Held*, that this did not constitute *waste*, but that, the lessee being obliged to quit before the expiration of his term, was entitled to recover of the lessor the *value of the improvements* made to the estate.

THIS was an action of covenant broken, founded on an indenture or lease executed between the parties in this suit on the 2d day of *May*, 1831. The general issue was pleaded, and a brief statement filed, alleging general performance.

The lease was from the defendant to the plaintiffs, of a "store and cellar" in *Bangor*, to hold for the term of one or five years from the 1st day of *November*, 1830. The plaintiffs covenanted to pay an annual rent of one hundred dollars, and *not to commit strip or waste.*

It was therein further stipulated as follows, *viz:* "That the "said *Hasty & Huntress* may at their own expense repair, alter "and improve said premises in such manner as shall be for their "interest and benefit; but that all fixtures which they may make "to the premises during said term shall remain and become the

" property of the said *Wheeler*, at the end of said term, without " any charge for the same — that if the said *Wheeler* do not hold " the premises for the whole time, this lease shall expire after " two years from this date; but in such case said *Wheeler* shall " pay the said *Hasty & Huntress* for all betterments which they " shall make in the premises."

It was proved that the plaintiffs, after entering into possession of the premises under their lease, raised the store from one to two feet, and built such walls, and erected such other fixtures as rendered the cellar convenient for occupancy as a victualing cellar. In doing which they expended about $400. The cellar had never been used as a victualing cellar, nor was it in a situation so to be used when the lease was executed.

It was further proved, that this expenditure increased the value of the property to an amount greater than the sum expended, provided the building had remained, and had continued to be occupied for the ordinary and proper purposes of such a building: but if the building was to be removed and the site improved by the erection of large brick tenements, as was the fact, the value of the property had not been increased by the expenditures of the plaintiffs.

The plaintiffs were obliged to quit the premises before the expiration of the five years mentioned in the lease, by reason of *Wheeler's* not holding the same: — and they claimed to be remunerated for the expenditures by them made.

Parris J. who tried the cause, intending to reserve the question, whether the alterations actually made, were such as were provided for in the indenture, directed the jury to ascertain the value of these alterations to the owner of the estate, provided the building had remained and had been occupied for lawful purposes. If, in the opinion of the Court, the plaintiffs were not entitled to any thing for the alterations and expenditures by them made, then the verdict, which was for the plaintiffs, was to be set aside, and they were to become nonsuit, otherwise judgment was to be rendered thereon.

The case was argued in writing, by *Rogers*, for the plaintiff, and *T. P. Chandler*, for the defendant.

For the defendant, it was contended that the acts of the plaintiffs in raising the building and making the alterations named in the case, were in violation of their own covenant against strip and waste. 3 *Dane's Abr.* 214, to 216; 218, 219, 221, 232, 241; 3 *Saund. Rep.* 259, note.

The alterations were not such as were provided for in the indenture. The defendant never intended to give the entire control of the premises to the plaintiffs, permitting them to change its character, and render it a new species of property.

Parris J. — It is contended by the defendant, that the acts of the plaintiffs in making the alterations named in the case, were in violation of their own covenants against strip and waste.

Such alterations as were made in the store and cellar would probably fall within the ancient legal definition of voluntary waste, although we do not think it is strictly a change of the nature and character of the premises demised. It is yet a store and cellar, and so it is called in the indenture. The evidence of the estate is therefore not changed, as in the cases put of a grist mill changed into a saw mill or fulling mill; or a hall into a stable. But still the alterations were such as constitute waste as it is defined in some of the books.

If, therefore, the covenant against waste is to be construed according to what the defendant contends is its strict legal definition, and is not modified by other parts of the indenture, it follows, that the plaintiffs made the alterations in their own wrong and are not entitled to remuneration for the expense thereby incurred.

But we are to look through the whole instrument to learn the intention of the parties, and when that is ascertained it is the duty of the court to carry it into effect, the first general principle in the construction of covenants being, that they shall be so expounded as to carry into effect the intention of the parties.

Plowden says, the scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied then is the matter itself, and the intent thereof also accomplished. 1 *Plowd. Com.* 18.

The rule of the civil law is, if the words of a covenant appear to be contrary to the intention of the covenantors, which is other-

wise evident, such intention must be followed rather than the words. 1 *Domat.* 22. However general the words of a covenant may be if standing alone, yet if from the covenants in the same deed it is plainly and irresistibly to be inferred, that the party could not have intended to use the words in the general sense which they import, their operation is to be limited. If such an inference does arise from concomitant covenants they will control.

We find in the indenture a covenant on the part of the defendant, that the plaintiffs may alter and improve the premises in such manner as shall be for their interest and benefit. By *improve*, we understand is meant to make better, so that the tenants might alter and make the premises better at their own expense. It is difficult to reconcile this covenant with that of the tenants' restraining them from waste, if that term is to have such a strict legal signification as contended for by the defendant. But if we apply to it the common ordinary meaning, the two covenants may stand together and there will be no inconsistency.

The construction then would be, that the tenants might alter the premises at their own expense, in such manner as shall be for their interest and benefit, but not so as to injure the premises or render them less valuable.

They might *improve* them, that is, make them better, but should not commit strip or waste, that is, make them worse. Indeed, in some authorities, this is considered the criterion or test of waste, where the nature of the thing demised is not changed, *Mr. Dane* says, it is not waste if the tenant better the thing of the same kind ; and generally nothing can be considered as waste which does not *injure* the inheritance, either by lessening its value or by weakening its title. 3 *Dane's Abr.* 222. *Bac. Abr. Waste C.*

Unless the construction obovementioned be put upon the former covenant, its legal operation would be to defeat the latter, for according to some of the authorities referred to by the defendant's counsel it would be waste to remove a door or a window, or any thing once fixed to the freehold.

The strictness of the law in relation to waste, has in some of the older cases been carried to an unwarrantable extent, and as *Lord Tenterden* said in *Young* v. *Spencer*, 10 *Barnew. & Cresw.*

145, they are not reconcilable with each other. That was an action on the case in the nature of waste, brought by a landlord against his tenant for opening an additional door in the house demised. The jury found that by this act of the tenant no injury whatever was done to the house, but, under the judge's direction, gave a verdict for the plaintiff with nominal damages. On a motion for a new trial before the *King's Bench*, a new trial was granted, and the court held it not to be waste unless it detracted from the lessor's evidence of title. So in an action of waste for ploughing up three closes of meadow land and converting the same into garden ground and building thereon, the jury found a verdict for the *plaintiff* with three farthings damages, being one farthing for each close, whereupon the court entered up judgment for the *defendant*. 2 *Bos. & Pull.* 86.

If a tenant for life or years commit waste, he forfeits the place wasted and treble damages; and yet, if by the terms of his lease it appears that additions and improvements were to be made by the lessee, no action of waste could be sustained, although he make such alterations as, at common law, would have been waste.

In *Doe* v. *Jones*, 4 *Barnew. & Adolp.* 126, the premises demised were a dwellinghouse, garden, &c. The lessee covenanted to repair and keep repaired the messuage, &c., by the indenture demised, *together with such buildings, improvements and additions as should be made by him.* The lessee took down part of the house front, next to the street, and converted the lower portion of the premises, on that side, into a shop. The old windows, which were of the form usual in private houses of that description, and about four feet six inches wide, and five feet high, were taken away, and shop windows put in, measuring about eight feet in width by six in height. On the inside, a partition on the ground floor was broken through, a new door made in it and an old one stopped up. During all these proceedings notice in writing was given to the lessee not to alter the premises. In giving an opinion, *Taunton J.* says, " This case is the same as if there had been an express contract for the liberty to make improvements which, at common law, would have been waste. Here the contract is implied." That is, the covenant on the part of the

lessee to keep repaired such improvements as he should make, created an implied contract on the part of the lessor that such improvements might be made, although they would be waste at common law. In that case, there was no express covenant against waste, as there is in this. But that fact does not affect the principle, for in the absence of all express covenants the lessee is liable to an action of waste, in which the forfeiture is the estate wasted and treble damages, or to an action on the case, in the nature of waste, in which the plaintiff recovers the actual damages which the premises have sustained.

The alteration of the premises, in *Doe* v. *Jones*, was a conversion of a private dwellinghouse, or a part thereof, into a shop, and was quite as important, and as clearly within the common law definition of waste, as were the alterations made by the plaintiffs in the case at bar.

From this examination of principle and authority we think the plaintiffs were not so restrained by their covenants, as to be inhibited from making such alterations in the demised premises as might be for their interest and benefit, although they might come within the strict legal definition of waste.

We have already said that the alterations did not change the character of the property so as to affect the evidence of the lessor's estate. From the phraseology of the indenture it is to be inferred that the store and cellar were considered different tenements as they are each particularly described.

If they had been considered as constituting but one tenement, a demise of the cellar separately would have been unnecessary, as the lease of the store would have included the cellar. It is also apparent that the parties contemplated alterations of a permanent nature, as there is a provision in the indenture that *all fixtures which the lessees may make to the premises during the term, shall remain and become the property of the lessor without any charge therefor.*

Under this, and the other parts of the lease already commented upon, the lessor would be amply secure. In the first place, under the covenant against strip and waste, he would be secure against *injury* to the premises by alterations. On the other

hand, he would be abundantly safe under the agreement that all the alterations, however expensive or beneficial, would become his own, free of expense, at the expiration of the lease. Thus favorably situated it is no matter of surprise that the lessor should yield to the lessee the right of *improving* the estate by alterations. There is nothing in the arrangement inconsistent with reason and good sense on the part of a cautious lessor. Nor do we perceive that the force of the argument is diminished by the fact that the improvements were to be paid for by the lessor, if the lease was terminated by him within the five years, as it would depend entirely on himself whether to become chargeable for the alterations or not. If it was for his interest to terminate the lease earlier, he might do so by paying for the improvements; but if he chose to acquire them free of charge, he could do so merely by waiting until the expiration of the contemplated term. The lessees were completely in the power of the lessor, and they were admonished, at every step, not to expend a single dollar improvidently, as they could not recover it, even if the lessor terminated the lease the next day, unless the estate was thereby made better; nor could they recover it at all, however greatly the value of the estate might be enhanced, if they continued to occupy throughout the contemplated term.

The jury have found, that the expenditure increased the value of the property, as it then stood, to an amount greater than the sum expended, thereby establishing the fact that nothing was done injurious to the lessor, even if his liability to pay for the improvements had been absolute. We admit the correctness of the concluding paragraph in the defendant's written argument, that law and equity usually draw after them the judgment of the court, but, in this case, we cannot perceive that either is on the side of the defendant.

Low *plff. in equity, vs.* Treadwell.

Courts of equity will decree specific performance of a contract for the conveyance of land, though the party seeking it may not in every respect have strictly performed his part of the agreement, if no *laches* are imputable to him.

Though the Court will not lend its aid to enforce a hard, unreasonable and unequal contract, yet the enhancement or depreciation of the value of property by events subsequent to the making of a contract for the conveyance of land, will not be regarded by the Court, if such contract be fairly entered into at the time.

The maker of a note may prove by *parol*, that the payee, subsequent to the making of the note, agreed that payment might be made to a third person.

This was a *bill in equity* in which the plaintiff sought the specific performance of a contract for the conveyance of land. The facts, and points made by counsel, are sufficiently stated in the opinion of the Court, which was delivered by

Parris J. — The complainant sets forth in his bill, that on the 27th of *March*, 1832, he entered into a contract in writing under seal, with the respondent, whereby the respondent covenanted and agreed, that upon the payment to him, by the said *Low*, of forty-three thousand of good bricks, in said *Low's* yard in *Bangor*, twenty thousand of which to be delivered by the first day of *August* then next, and twenty-three thousand on the sixth of *October*, 1833, he, the said *Treadwell*, would, by a good and sufficient deed of bargain and sale and of warranty, convey to the complainant a piece of land in *Bangor*, being the north part of lot numbered 221, as delineated on *Treat's* plan, particularly describing a tract 247 feet long and 157 feet wide, and also an easement for a passage way from the south end of said tract over the east side of said *Treadwell's* land to Garland street, which contract, under the hands and seals of the parties, as particularly set forth at large in the complainant's bill. It is further alleged in the bill, that the complainant on the same twenty-seventh of *March*, when the said agreement was completed, made and delivered to the respondent two notes of hand, promising to pay him the two quantities of bricks mentioned in said written agreement, at the time, place and manner therein mentioned, and that,

at the time of signing said notes the said *Treadwell* represented that he owed *Joshua W. Carr*, of *Bangor*, twenty thousand of bricks that would be due and payable on the same first day of *August*, when the complainant's note for the same quantity of bricks would become due and payable to said *Treadwell*, and that the bricks to be delivered by the complainant to *Treadwell*, were intended for *Carr* in fulfillment of *Treadwell's* obligation to him. — It is further alleged, that *after* making the note and before the same became payable, *Treadwell* informed the complainant that if he would, in any way, satisfy *Carr* for the twenty thousand of bricks payable to him as aforesaid, so that said *Carr* would not call upon *Treadwell* for payment, it should be considered and accepted as payment to him ; — and that, thereupon, in pursuance of *Treadwell's* representation and engagement, the complainant on the 28th of *July*, 1832, made an arrangement with *Carr* to postpone the payment of the twenty thousand of bricks for a few days, stipulating to make *Carr* a suitable compensation for the delay and injury he might sustain thereby ; — and that on the sixteenth of the same *August*, the complainant paid and delivered to said *Carr*, and he accepted and received said twenty thousand of bricks, in full payment and satisfaction of his claim against *Treadwell* for the like quantity ; — and that said *Carr* also accepted and received from the complainant an additional quantity of five hundred bricks for the delay of payment as above stated.

In this manner, *Low* claims to have satisfied and discharged his contract with *Treadwell*, so far as regards the twenty thousand of bricks, by the original agreement to be paid by the first of *August*. The complainant further states in his bill, that on the fifth day of *October*, 1833, he was ready with said twenty-three thousand of good bricks in his yard in *Bangor*, and then and there counted out and tendered the same bricks to said *Treadwell*, and gave notice to him in writing, early in the morning of said fifth of *October*, the sixth being the sabbath, that said bricks were ready to be delivered to him in payment of said note and in full satisfaction of the quantity mentioned in the written agreement. The bill alleges that *Treadwell* refuses to execute the

contract on his part, and prays for a conveyance and general relief.

The respondent, in his answer, admits the written agreement or contract as set forth in the bill, saving an error in the width of the lot, which he alleges should be one hundred and fifty-*three* feet, and so appears by the plan, and not one hundred and fifty-*seven* feet; and that the error was made by the complainant by whom the agreement was written.

He admits that he was to pay *Carr* twenty thousand of bricks on the first of *August*, 1832, alleges that he demanded the twenty thousand of bricks of the complainant on the first of *August*, who did not deliver them, and denies that he ever consented to have *Low* pay *Carr* twenty thousand of bricks for him, or had any notice, until between the middle and end of *August*, that *Low* thought to pay *Carr*, or he to receive of *Low*, any bricks on account of *Low's* note to the respondent. He does not deny a tender of the twenty-three thousand of bricks on the fifth of *October*, but denies notice of it, and admits a demand on him by the complainant for a deed, and his refusal.

The answer contains much other matter not called for by the bill, and consequently irrelevant. The general replication having been filed, our attention has been called to the proof in the case. There is no other controversy between the parties concerning the written agreement of the 27th of *March*, than the alleged error in the description of the length of the end lines of the piece of land, which constituted the subject of the contract. The agreement itself refers to *Treat's* plan of the 30th of *September*, 1830, and the respondent asserts, in his answer, that, by this plan, the northwardly and southwardly end lines of the lot are only one hundred and fifty-*three* feet in length. If it so appeared on the plan we should certainly consider the error as proved, and cause it to be corrected. But *Davis*, the Register of Deeds, testifies that the plan is recorded in his office, and that the lot about which these parties are contending is represented thereon as one hundred and fifty-*seven* feet by four hundred and twenty-five feet. In addition to this, we have before us the original plan itself, which coincides with *Davis's* testimony. We must, therefore, on this point, consider the answer as overcome by other proof, and

that there is no mistake in the description of the premises calling for our correction.

It is admitted in the bill that the twenty thousand of bricks were not actually delivered on the first of *August*, but the complainant sets forth, what he contends is a sufficient excuse for not doing it. He avers that he was authorized by *Treadwell*, to make payment to *Carr*, and that he was assured by *Treadwell* that if he, *Low*, would, in any way, satisfy *Carr*, so that he would not call on *Treadwell* for payment, it should be considered as payment of the note from *Low* to *Treadwell*, and that, in pursuance of this understanding he did pay *Carr* to his entire satisfaction. This arrangement *Treadwell* denies in his answer. It is contended in defence, that the assent of *Treadwell* to the payment to *Carr* cannot be proved by parol, as it would be varying a written contract. Every contract, when reduced to writing, must be proved by the written instrument. It is presumed that the parties incorporate and embody therein all the terms and conditions of their agreement, and with few exceptions, such as fraud and the like, the contract will not be affected by parol proof. But the parties may vary a written contract by a *subsequent* parol agreement. The contracting parties may enlarge the time of payment, or change the mode of payment, or put an end to the contract, and this may be proved by parol. *Keating* v. *Price*, 1 *Johns. Cas.* 22; *Ratcliff* v. *Pemberton*, 1 *Esp. Rep.* 35; *Thresh* v. *Rake*, *ibid*, 53; *Edwin* v. *Saunders*, 1 *Cowen*, 250. In *Fleming* v. *Gilbert*, 3 *Johns.* 528, it was held, that the time of the performance of the condition of a bond may be enlarged by a parol agreement of the parties. *Chitty* says, a subsequent parol agreement not contradicting the terms of the original contract, but merely in continuance thereof, and in dispensation of the performance of its terms, as in prolongation of the time of execution, is good, even in the case of a contract reduced into writing under the statute of frauds. *Chitty on Cont.* 27. A. holds a note against B. who may authorise payment to be made to C., and such payment will be as valid as if made to the promisee himself. The authority to make the payment may be proved by parol as well as the payment itself, and it is not varying or altering the written contract. It is discharg-

ing the contract by payment, and no one will doubt that payment may be proved by parol. We do not say that parol proof of any thing that took place at the time the written contract was entered into, is admissible to vary either the time or mode of payment. If the writing is explicit upon that, it is probably to be considered as the only evidence, but we do hold that the parties may *subsequently* modify the written contract upon those points, and that such modification may be proved by parol. Much reliance is placed by the defendant, on the case of *Brooks* v. *Wheelock*, 11 *Pick.* 439. To us, the point decided in that case appears to be altogether different from the one under consideration. *Wheelock* entered into a contract in writing, to execute and deliver a deed of land upon payment of certain notes given for the purchase money, and made a subsequent *verbal* promise to deliver the deed upon the payment of the notes before they should fall due. Payment of the notes was tendered before they became payable, but the tender was refused, and the notes were not actually paid. The court held the tender of no effect, as the defendant was not bound by his *written* contract to receive payment before the notes fell due. If the payment had been received, the specific performance would, no doubt, have been decreed. The plaintiff *there* was seeking for the performance of a *verbal* agreement. The plaintiff here is seeking for the performance of a *written* agreement, and he proves that he has so performed the condition precedent on his part, as to be entitled to relief; and that whether time be the essence of his contract or not, it has been waived. The contract, which he calls upon the defendant to perform is wholly in writing.

We are referred to *Lord Hardwicke's* observations in *Buckhouse* v. *Crosby*, *Eq. Cas. Abr.* 32, that an agreement to waive a contract for the purchase of land is as much an agreement concerning lands as the original contract is, and therefore, must, as it seems, be in writing. Without expressing any opinion upon that point, it is a sufficient answer that the waiver here, if any there was, did not relate to the purchase of lands, but to the time of delivery of a quantity of bricks. Those bricks, indeed, formed the consideration of the purchase, but the payment of the consideration may be proved by parol.

The written agreement of the 27th of *March* is explicit and certain, and the inquiry is, has *Low* so performed his part thereof as to entitle him, *in equity*, to demand performance by *Treadwell*. It has been held, that where there is an enlargement of a condition precedent, the plaintiff loses his remedy *at law* upon the covenant itself. Hence the necessity of resorting to equity for relief.

As already stated, *Low* alleges in his bill, that he made payment of the first note to *Carr* by the consent and under an agreement with *Treadwell*. This is denied in the answer, which, being under oath, is to be taken as true, unless overcome by the testimony of two witnesses, or of one witness and circumstances corroborating.

The circumstances bearing upon this point in the case are these; *Treadwell*, having on the first of *March* purchased the whole lot of *Carr*, for which he was to pay him $300, gave him his note for that amount payable $210 in joiner work, which he was to perform himself, and twenty thousand of good bricks of a quality suitable for the walls of a house, said walls to be eight inches thick, to be delivered at a kiln near *Treadwell's* house, on or before the first of *August*, 1832. On the twenty-seventh of the same *March*, he contracted to sell a part of the lot to *Low* for forty-three thousand of bricks, taking two notes, one for twenty thousand of bricks suitable to build a wall in a house called eight inch wall, to be delivered in *Low's* yard in *Bangor*, which is near *Treadwell's* house, by the first day of *August*, 1832, corresponding precisely with *Treadwell's* note to *Carr*. These are, however, mere circumstances, not amounting to proof of any understanding between *Low* and *Treadwell* that the former should deliver the bricks to *Carr* on account of the latter; — but they do show that *Treadwell* was under an engagement to deliver to *Carr* the same quantity and description of bricks which he was to have of *Low*, and at the same time. But, upon this point, the case is not destitute of proof. *Carr* says, previous to the time when *Treadwell's* note became due, said *Treadwell* informed him that he was to have the bricks of *Low*, to be delivered at *Low's* brick yard, to pay his note; that *Low* wished to make an arrangement with him, *Treadwell*, to

wait until the bricks were burned. *Treadwell* informed *Carr* that he had stated to *Low* that if he would make an arrangement with *Carr* to extend the time, it would be satisfactory to him. *Carr* says, he had several conversations with *Treadwell*, who uniformly stated that if *Low* paid the bricks to the satisfaction of *Carr*, he, *Treadwell*, would be satisfied in regard to the bricks due from *Low* to him; and that during the time *Low* was delivering the bricks, *Carr* mentioned to *Treadwell* that some of them were not of good quality, who replied, "you must settle that with *Low*, as you have undertaken to receive the bricks from him." *Jason Comings* heard *Treadwell* tell *Low*, the day after the note became payable, that if he would take him off or pay the bricks to *Carr*, he would be satisfied, whereupon *Low* told *Treadwell* that *Carr* had agreed to take the bricks of him, and that he should have got *Treadwell's* note of *Carr* if it had not been given for joiner work also. *Percival* says, that *Treadwell* told him that it was understood by *Low*, *Carr* and himself, that the bricks due to him from *Low* should go to *Carr*. *Hancock*, who hauled the bricks, says, that previous to the hauling, *Treadwell* informed him that *Carr* had a claim upon him for twenty thousand of bricks, and he had a claim for a similar quantity against *Low*, and that *Carr* was to have the bricks of *Low*. In addition to this, in a cross bill filed by *Treadwell*, he calls upon *Low* to state distinctly, whether he ever received any order, verbal or written, to pay, for him, any bricks to *Carr*; to which *Low* replies, that *Treadwell* requested him to pay the bricks to *Carr*, and that all he, *Treadwell*, wanted, was, that *Low* should satisfy *Carr*.

With this mass of proof before us we are bound to say, that so much of the respondent's answer as denies that he ever requested or consented to have the bricks delivered to *Carr*, and that avers that he never had any notice until between the middle and end of *August*, from any person or any quarter, that *Low* had thought to pay the bricks to *Carr*, or he to receive them, is completely overcome.

It is proved by *Carr*, that he consented to defer the delivery of the bricks for a short time; — that he did receive twenty thousand of bricks of *Low* on account of the same quantity due

from *Treadwell*, and that *Treadwell* did not pay that part of his note to *Carr* in any other way but by the bricks from *Low*.

The fact is established by abundant proof, that the prolongation of time was by the mutual consent of all the parties, and *Treadwell* never, until after the actual delivery of the bricks, made any objections or claimed to rescind the contract. On the contrary he demanded the bricks on the first of *August*, thereby claiming under the contract, and he told *Percival*, on the same day, that his object in making the demand of the bricks of *Low* was to hold him to pay the money, if *Carr* should call on him for cash, and he stated to *Low* at the time of making the demand that all he wanted was that *Low* should satisfy *Carr*, and he was then informed, that *Carr* had stated that he had agreed with *Treadwell* to receive the bricks of *Low*, and that *Carr* had agreed with *Low* to postpone the day of payment, to all which *Treadwell* made no objection.

We consider the allegation in the bill, so far as it relates to the payment of the first note to *Carr* by the assent of the respondent, and the prolongation of the time of payment by his assent, also as fully proved.

The second note was to be paid on the sixth of *October*, 1833. It is admitted that *that* day was the sabbath.

It is proved by *Gowen*, that a quantity of bricks, sufficient to pay this note, and of such a quality as is therein described, was on the third and fourth days of *October*, 1833, counted out and placed by themselves in *Low's* brick yard for *Treadwell*, and that the witness was present from sunrise of the fifth of *October* until after sunset of the same day, ready to deliver said bricks for *Low* to *Treadwell*, if he had called for them. The bricks were packed in tiers, and still remain in *Low's* yard in the place where they were piled on the fifth of *October*. It is, moreover, proved by *Percival* and *Gowen* that, early on the morning of the fifth of *October*, they left a written notice from *Low*, at the house of *Treadwell*, which is within thirty rods of *Low's* brick yard, informing *Treadwell* that the bricks were then ready, at said yard, to be delivered to him; and there is proof from *Morse* and *Hardy*, that *Treadwell* was at home on that day. Every thing, which the law requires, was thus done by *Low*, with the

most scrupulous exactness, to discharge his liability on the second note, and, in our opinion, he entirely accomplished it. He now calls for our interposition to afford him relief. He claims a performance of the contract by *Treadwell*, and invokes the aid of the chancery powers of this Court to enforce the performance.

By statute, *chap.* 50, this Court is clothed with power and authority to hear and determine, in equity, all cases of contract in writing, where the party claims the specific performance of the same, and in which there may not be a plain, adequate and complete remedy at law. Under a similar statute provision, in *Massachusetts*, the Supreme Court of that State, say, "we are satisfied that no subject is more proper for the power of a court of chancery, in decreeing specific execution, than a contract for the sale of real estate, and such contracts are clearly within the chancery powers granted by the legislature to this court. *Ensign* v. *Kellogg*, 4 *Pick.* 5. That court has also determined, that as to those subjects of which it has chancery jurisdiction, their powers will be exercised, according to the same principles of equity, and they will proceed in the same manner as do the courts of a similar jurisdiction in *England*. *Dwight* v. *Pomeroy*, 17 *Mass.* 303. *Pomeroy* v. *Winship*, 12 *Mass.* 514. In matters of real property, or property which partakes of the realty, equity exercises its authority to put the purchaser in the actual possession of the subject of his purchase, upon the principle that he has a moral right to the observance of the contract, and in equity, that which is agreed to be done, is considered as actually performed.

In cases where the terms of the contract have not been strictly performed on the part of the person seeking specific performance, and consequently an action at law could not be maintained, as performance according to the terms of the contract could not be averred, courts of equity have carried the agreement into execution, where there had been no *laches* imputable to the party seeking the specific performance. But where the party who applies for a specific performance has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay; — when there is nothing in the acts or conduct of the other party

that amounts to an acquiescence in that delay, the court will not compel a specific performance. It will not permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and according to the event, either abandon it, or, considering the lapse of time as nothing, claim a specific performance. If, on the other hand, the circumstances of the case and the conduct of the opposite party will afford ground for a just inference, that he has acquiesced in the delay and waived the default, the non-performance at the stipulated time will be overlooked, and will be deemed to have been waived by the other party.

The evidence in this case of a waiver on the part of *Treadwell*, of a strict performance, as to time, in the payment of the first note, and an acquiescence in the delay, is abundant; and as to the other note, the evidence is equally conclusive that *Low* shew himself ready, desirous, prompt and eager to perform, and has thus placed himself in a favorable position to call for a performance from the other party.

We are urged to consider the great disparity between the consideration paid, and the value of the land claimed, and not to lend our aid to the perfecting of so unequal an arrangement. It is readily admitted that a bill for a specific performance is an application to the sound judicial discretion of the court, which is not to be exercised where the plaintiff has so conducted himself as to destroy all claim to its interposition; neither is it to be exercised to carry into effect a hard, unreasonable and unequal contract.

It is proved in this case, that the land claimed is now, in *June*, 1835, of the value of *three thousand five hundred* dollars. The sum paid by *Low* was forty-three thousand of bricks, worth four dollars and fifty cents per thousand, equal to one hundred and ninety-three dollars and fifty cents. This shows a most surprising inequality, and which, if it had existed at the time of the contract, would, unexplained, present a stubborn obstacle to any relief from this Court.

But it is the value of the property at the time of entering into the agreement which stamps the character of fairness or unfairness upon the transaction. While it shall not be permitted to the one party to lie by and not perform until he ascertains that the

contract is one of profit and then call for a conveyance, not having seasonably fulfilled on his part, so neither will it be permitted to the other unwarrantably to delay the conveyance, and urge the rise in the value of the property in the mean time, as a valid reason why he should be absolved from his contract. The parties, on entering into the agreement, assume the risk of the fluctuations in the market; and whether the value of the property, which is the subject of the agreement, be increased or diminished by such fluctuations, the validity of their contract is not thereby to be affected.

Where the equitable title is complete, a legal conveyance will be decreed, though the property may have been much enhanced or depreciated in value. Subsequent events will not, in equity, vary a contract fairly entered into. *Keene* v. *Stukely*, *Gilb. Eq. Rep.* 155; *Revell* v. *Hussey*, 2 *Ball & Beatty*, 287.

By looking at the facts developed, as they existed when the written agreement was entered into, we shall readily ascertain whether there is disclosed, on either side, any thing of hardship or inequality.

The whole of lot numbered two hundred and twenty-one was purchased of *Carr* by *Treadwell*, in *March*, 1832, for three hundred dollars, two hundred and ten dollars of which was to be paid in joiner work, and ninety dollars in bricks. The whole lot was four hundred and twenty-five feet in length, and one hundred and fifty-seven feet in width. In the course of the same month, *Treadwell* sold what was asserted in the argument and not denied to be the *rear*, or back part of the lot to *Low*, for forty-three thousand of bricks, equal in value to one hundred and ninety-three dollars and fifty cents. So that *Treadwell* retained the front, measuring one hundred and fifty-seven by one hundred and seventy-eight feet, at the cost of only one hundred and six dollars and fifty cents. This shows most conclusively how the property was valued at that time, and that *Low* gave *Treadwell* a higher rate for the tract he purchased under the agreement of the twenty-seventh of *March*, than *Treadwell* gave *Carr*, in the same month, for the whole lot. Since that day there has been a most unexampled rise in the value of real estate in *Bangor*. But who is entitled to the benefit of that increase in value of

the tract demanded subsequent to the agreement? Equity considers the estate as belonging to the purchaser from the time he enters into the contract to purchase, and will not equity secure to the owner the rise in the value of his own estate? What if the property had become of less value by reason of the depreciation of real estate; on whom would have been the loss? Would that depreciation have constituted any sufficient defence for *Low* against the payment of his notes? Clearly not.

We have no hesitation in saying, that we see nothing in this contract that has the semblance of hardship, unreasonableness or inequality, having reference to the value of the property on the twenty-seventh of *March*, 1832.

A state of things has arisen since, wholly unexpected, no doubt, by either party, but which can have no retrospective operation upon the validity of existing contracts untinctured with fraud.

We are, therefore, of opinion that the complainant is entitled to have a specific performance by the respondent, of his contract of the twenty-seventh of *March*, 1832, as set out in the bill.

The complainant, having discovered that *Treadwell*, the respondent, had executed a conveyance by deed, of a portion of the premises demanded, to his son *Benjamin Treadwell*, has, in the proper mode, caused the said *Benjamin* to be made a party to this suit, as a confederate with the principal respondent. *Benjamin* admits, in his answer, that he knew of the bargain between his father and *Low*; — that he knew that *Low* commenced building a fence on the land in the spring of 1833, claiming the land and averring that he had paid for it; — that he had heard his father tender the notes to *Low* and demand the bond or agreement of the twenty-seventh of *March*, set out in the bill, and that his father put the notes into his hands to keep until *Low* would give up the contract. In addition to these admissions of *Benjamin* in his answer, it is proved by *Percy*, that in *January*, 1834, he was present when *Low*, *Joseph* and *Benjamin Treadwell* met on the lot of land in dispute. *Low* was having wood hauled on the lot for the purpose of burning bricks the ensuing summer. *Joseph Treadwell* forbid him. *Low* said he had bought the land and paid for it. *Benjamin* said to his father, that he had better let

the wood be carried on, and have the dispute decided by court. Whereupon *Joseph* desisted and *Low* continued to occupy.

Here is abundant evidence that *Benjamin*, at the time he took a deed from his father, in *April*, 1834, had knowledge of *Low's* claim and possession, and consequently his deed cannot be permitted to affect or overreach that claim. If A. purchase, with notice of the claim of B., although B. has not a conveyance, and A. actually procure the estate to be conveyed to him, yet he will be bound in equity by the notice; for it is a general rule in equity, that a purchaser with notice, is bound to the same extent, and in the same manner as the person was of whom he purchased.

We feel no difficulty in the case arising from the conveyance to *Benjamin*. At the time he took that conveyance, his conscience was affected by a knowledge of *Low's* claim, and he is, therefore, to be considered as a purchaser, subject to *Low's* equity.

We shall, therefore, decree that he release and convey to the plaintiff, in fee, all the right and title derived to him under his deed from *Joseph Treadwell*, of the 7th of *April*, 1834, to that portion of lot numbered two hundred and twenty-one, as delineated on *Treat's* plan, which is described in the contract set forth in the plaintiff's bill, as purchased of *Joseph Treadwell*, on the 27th of *March*, one thousand eight hundred and thirty-two.

Preble, for the plaintiff.

Mellen, for the defendant.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF WASHINGTON, JUNE TERM, 1835.

GALVIN *plff. in equity vs.* SHAW *& al.*

Where a preliminary hearing was had before one Judge in vacation, on an application for an injunction, and objection was taken to the jurisdiction of the Court, which was overruled; it was held that the defendant was not thereby precluded from taking the same objection when called before the whole Court by bill.

Where one erected dams on certain lakes and streams, thereby diverting or keeping back the waters to which the plaintiff in equity claimed to have a legal right for his mills below such erections, it was held not to be a case of "fraud" within the meaning of the *stat.* of 1830, *ch.* 462, extending the equity powers of this Court.

THIS was a bill in equity, in which the plaintiff set forth that he was the owner of a township of timber land situated in this County, and known by the name of the Tallmadge township, on which he also had certain mills; and that he was entitled to the free course and use of a certain stream running through said township and by said mills, known by the name of the Eastern Branch of the Musquash Stream, for the purpose of propelling his mills and for the floating of logs to them. The same allegations were also made as to certain other streams which were tributary to the Eastern Branch. But the defendants, it was alleged, well knowing the premises, but maliciously and fraudulently contriving to injure the plaintiff, and to lessen the value of his said land and mills and to deprive him of the beneficial and profitable use of them, and to prevent him from floating and driving his logs down

to his mills, went above said mills at the outlet of a certain lake which emptied its waters into the Eastern Branch Stream, and there erected certain dams whereby the passage of the waters to said stream were wholly obstructed, and by said defendants were unreasonably, maliciously, and fraudulently detained in the said lake; whereby the plaintiff was greatly injured, the injuries being specially set forth and described. The bill closed with a prayer that the defendants might be enjoined from keeping the gates in their said dams closed and thus detaining the waters of the lake.—That the Court would decree that the said dams be abated and removed, and for such further relief in the premises as to equity and justice might appertain.

The defendants demurred specially to the plaintiffs' bill, assigning for cause a want of jurisdiction in the Court.

It seemed that a preliminary hearing had been had before one Judge in vacation, on an application for an injunction, at which objection was taken to the jurisdiction of the Court, which was overruled.

Chase, for the defendant, argued in support of positions which were sustained by the decision of the Court, citing the following authorities; *Maine Stat. ch.* 462, § 2; *Dwight* v. *Pomeroy*, 17 *Mass.* 303; *Terrill* v. *Merrill*, 17 *Mass.* 117; *Frost* v. *Butler*, 7 *Greenl.* 231; *Given* v. *Simpson*, 5 *Greenl.* 303; *French* v. *Sturdivant*, 8 *Greenl.* 246; *Pratt* v. *Bacon*, 10 *Pick.* 126.

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

The demurrer comes too late. There was a demurrer *ore tenus* before one Judge in vacation, which was overruled, and the defendant proceeded to answer. He is therefore precluded from putting in a demurrer here.

This Court has jurisdiction in the case. Where terms of legal import are used in a statute they are to be construed according to their legal interpretation or definition. Nuisances are classed under the head of *fraud*. The allegation in the bill is fraud, and that is admitted by the demurrer.

The 2d. section of the statute does not confine the power of granting injunctions to cases arising under the 1st. section. But that under the second section, is a newly created, superadded

power, in no way dependent upon the 1st. section. This bill would also lie under the term *waste*. The term in this statute being used in its technical sense. *Angell on Water Courses*, 176, 178, (last ed.) 2 *Mad.* 284.

WESTON C. J. — The defendants have demurred specially to the plaintiff's bill, assigning for cause, a want of jurisdiction in the court. It is urged, that this point is not open to the defendants, as the same objection was, it is said, made and overruled, at a hearing before one of the Judges of this Court in the vacation. That was a preliminary inquiry on an application for an injunction; and does not preclude the defendants from taking any ground in defence, which might be otherwise proper, when called upon in court.

Chancery powers have not been much favored or extended in the State of *Massachusetts*, of which, until recently, we formed a part. They were limited originally to cases of mortgage, and to bonds with condition. It was then extended by statute to cases of trust, arising under deeds, wills, or in the settlements of estates, and to cases, where a party claims the specific performance of a contract in writing. Thus it stood at the period of our separation. In *Dwight* v. *Pomeroy et als.* 17 *Mass.* 303, the opinion of the court was, that the authority given was intended to be limited to the subjects, expressly mentioned in the statute. Since that period the Supreme Judicial Court in *Massachusetts* have been clothed with chancery powers, in disputes between partners, joint tenants and tenants in common, and also in cases of nuisance. In *Pratt* v. *Bacon et al.* 10 *Pick.* 122, the court say, "it has often been decided, that the court does not take equity jurisdiction, except where it is given by statute, either in express terms or by necessary implication; and that it will not be assumed by analogy, or equity of construction." This court has used language to the same effect, in *Given et ux.* v. *Simpson et al.* 5 *Greenl.* 303.

By the statute of 1830, *ch.* 462, the equity powers of this court were much enlarged, so as to embrace cases of fraud, trust, accident or mistake. These terms, it is insisted, cover the whole field of equity jurisdiction, without any limitation whatever.

These are undoubtedly the principal sources of chancery powers; mistake, however, being usually understood to belong to the more general head of accident. *Baron Comyns*, treating of the equity powers of the court of chancery, states that it has jurisdiction properly in three cases, fraud, accident and trust. 2 *Com. Dig. Chan. ch.* 2. And he further states, that these are the cases principally, in which equity will give relief. *Ibid, Chancery*, 3 *F.* 1. *Maddock*, in his treatise, says the generality of the older writers describe the equity jurisdiction of the Chancellor under three heads, fraud, trust, and accident. To this classification, he adds three other heads, account, infants, and the specific performance of agreements, stating, however, that even under all these heads, it may not be very obvious, how the great multiplicity of doctrines, arising out of the equity jurisdiction, can be included. 1 *Mad.* 21.

Notwithstanding the classification, which may have been adopted, in discussing chancery powers, and however arbitrarily general terms may have been extended, by equity jurists in the English practice, considering the reluctance with which these powers have been granted by the legislative department, and the policy of the courts, not to enlarge them by analogy or construction, we are of opinion that the terms, used in the statute of 1830, before cited, cannot be extended beyond the fair and just meaning of these expressions in our language and practice. Since the passage of the statute, in *Frost* v. *Butler*, 7 *Greenl.* 225, and in *French* v. *Sturdivant*, 8 *Greenl.* 246, the chancery powers thereby conferred, are not considered as general, but limited and specific.

The acts, complained of in the bill, are the erection of two dams, to the annoyance of the plaintiff's mills. The court of Chancery in *England*, exercise jurisdiction in cases of nuisance. And it is there arranged under the general head of fraud. 1 *Maddock*, 128. It might as well have embraced trespass or trover, or any other tortious act, by which another is injured. Fraud consists in artifice, trick, cunning, deception, or any unfair dealing, by which another is cheated. We perceive nothing in the erection of these dams, which partakes of that character. They were openly erected. There could have been no concealment or

artifice in the case. The defendants are answerable at law to the plaintiffs, if they have acted without right. Giving these acts the appellation of fraudulent in the bill, or charging them as done with a fraudulent design, does not change their character. We are very clear that they cannot be regarded as acts of fraud, within the intent and meaning of the statute under consideration.

Injunctions may be granted, by the second section of the statute, to prevent injustice; but this must be exercised in furtherance of the jurisdiction conferred. It must be limited to cases in which it belongs to the Court, in the discharge of its equity powers, to determine the rights of suitors, and to repress the injustice which would violate them. In other cases, rights are to be vindicated and wrongs suppressed, by the remedies afforded in the ordinary administration of justice. Having determined that the gravamen set forth in the bill, is not of equity jurisdiction, according to our laws, we leave the whole subject to the common law courts, which are clothed with ample power to do justice between the parties. The opinion of the court is, that the bill does not set forth a case within the jurisdiction of the Court; and it is accordingly dismissed.

Byrnes *vs.* Hoyt.

Where a judgment rendered in favor of the plaintiff was reversed on a writ of error brought by the defendant, the latter was held to be entitled, in *scire facias*, to have execution for the amount he had paid, viz., the debt or damages and costs of suit, with the costs of the *scire facias; but not his own costs taxable against the plaintiff in the original suit had he prevailed.*

This was a writ of *scire facias* in which the plaintiff sought his remedy against the defendant under the decision of this Court, upon writ of error, reversing a judgment recovered by the present defendant against the plaintiff. [*See* 2 *Fairf.* 475.] And the only question in the case was, whether the plaintiff should have execution for his costs taxed against the present defendant in the original suit.

J. Granger, for the plaintiff, contended that he was entitled to recover the costs in defence of the original action, and cited,

2 *Tidd's Pr.* 1136; *Cummings* v. *Noyes*, 10 *Mass.* 433; *White* v. *Palmer*, 4 *Mass.* 147.

Chase, for the defendant, cited, *Nelson* v. *Andrews*, 2 *Mass.* 164; *Brown* v. *Chase*, 4 *Mass.* 436; *Howe* v. *Gregory*, 1 *Mass.* 81; *Smith* v. *Franklin*, 1 *Mass.* 480; *Parker* v. *Harris*, 1 *Salk.* 262; *Clements* v. *Walker*, 4 *Burr.* 2156; *Cummings* v. *Sibley*, 4 *Burr.* 2490; *Bell* v. *Potts*, 5 *East*, 49; *Wheeler* v. *Roberts*, 7 *Cowen*, 536.

WESTON C. J. — The rule laid down in *Parker* v. *Harris*, 1 *Salk.* 262, that where judgment is given for the plaintiff, and the defendant brings error, there shall only be judgment to reverse the former judgment, for it is to be eased and discharged of that only that the suit is brought, was cited as a subsisting one in *Clements* v. *Waller*, 4 *Burrow*, 2154, and was expressly recognised by *Lord Mansfield*, in *Cummings* v. *Sibley*, 4 *Burrow*, 2489. *Dane* also states this as a general rule, in his abridgment. 5 *Dane*, *ch.* 137, *art.* 13, § 23. And this we understand, upon inquiry, to have been our practice, which we are not at liberty to change, whatever it may have been elsewhere.

The plaintiff in error, then, by the reversal, is entitled to be restored to what he lost directly by the judgment, which he succeeded in reversing; and not to his costs in the original suit, to which he would have been entitled, if judgment had been rendered in his favor. This is the measure of relief, which our law allows to a defendant, aggrieved by an erroneous judgment. It restores to him what he has paid, but does not give him the costs, which if the right judgment had been originally rendered, he would have been entitled to have received.

As the amount paid by the plaintiff in scire facias, who was also plaintiff in error, appears of record, by the return of the original execution against him, he is to have judgment for that sum, with the costs of the present suit.

SIBLEY *vs.* SPRING.

Where one covenanted to "sell and convey" a lot of land for an agreed price, to be paid at a time subsequent to the giving of the deed, it was held that a tender of a deed of warranty while the land was under the incumbrance of a mortgage, was not a fulfilment of the covenant.

And such covenantee in an action on the covenant was permitted to recover the value of certain work he had done for the covenanter in part payment for the land.

THIS was an action of *covenant broken*, founded upon a contract under seal, between the parties, by which the defendant covenanted to sell and convey to the plaintiff a certain house lot in *Calais;* the deed to be given on a day fixed. For which, the plaintiff was to do certain mason work, and within one year after the delivery of the deed, pay the sum of $200: The plaintiff did the work as agreed, and demanded a fulfilment of the covenant on the part of the defendant, or payment for his labor. The defendant then made and tendered to the plaintiff, a warranty deed of the lot, but the plaintiff refused to receive it, on the ground that the land was incumbered by a mortgage given by the defendant to his grantor for the original consideration; and the question was, whether this tender of the defendant, under these circumstances was a fulfilment of his covenant. And it was agreed by the parties, that the Court should render such judgment upon these facts, as in their opinion would be conformable to the law of the case.

Chase, for the plaintiff.

The defendant's covenant was broken by the existence of the mortgage. *Porter* v. *Noyes*, 2 *Greenl.* 22; *Greenby* v. *Cheevers*, 9 *Johns.* 126; *Van Eps* v. *Schenectady*, 12 *Johns.* 436.

A good title as well as a good deed was intended. *Wilde* v. *Frost*, 4 *Taunt.* 334; 6 *Cowen*, 445; *Judson* v. *Wass*, 11 *Johns.* 525.

Whether the plaintiff knew of the mortgage at the time of the contract cannot affect the case. 5 *Taunt.* 334.

He cited further, *Brown* v. *Bellows*, 4 *Pick.* 179; 2 *Caines' R.* 195; *Sug. Vend.* 246; *Parker* v. *Palmer*, 20 *Johns.* 130;

Bean v. *Mayo*, 5 *Greenl.* 94; *Allen* v. *Sayward*, 5 *Greenl.* 227; *Jackson* v. *Peck*, 4 *Wend.* 300.

That parol evidence was inadmissible in the case, 5 *Cowen.* 507.

Mellen & Vance, for the defendant, insisted that the words, "sell and convey" did not imply a covenant to convey a good and valid title. *Spring* was mortgagor in possession, and as to all the world except *Deming* was the owner. *The land* therefore, passed by the deed. The conveyance in fact, was more full than the contract required, containing as it did all the usual covenants. There is a difference between a covenant to convey a lot of land, and to convey an indefeasible title. The covenant in this case was not of the latter description.

WESTON C. J. — The case finds that the plaintiff, having kept the covenants on his part to be performed, did, before the commencement of this action, demand performance of the defendant; or payment of the value of his labor. And the question submitted to us is, whether performance had been duly tendered, on the part of the defendant. This depends upon the true construction of his covenant. He was to sell and convey a house lot particularly described, to the plaintiff, of which he was to have a deed at a stipulated period. Does this covenant require, that the defendant should give a good title to the plaintiff of the lot described, free of all incumbrances? We are of opinion that it does. The plaintiff was to give what was understood to be the full value of the land. Paying a full equivalent, he had a right to expect the entire enjoyment of the property, free from all lawful claims or demands. This is fairly to be understood, by the sale of the one, and the purchase of the other.

It is urged in argument, that the case before us differs from the *New York* cases, cited for the plaintiff; as he had notice of the incumbrance, on account of which he objects to the conveyance, tendered by the defendant. But in *Greenby plff. in error* v. *Cheevers*, 9 *Johns.* 126, *Greenby* had agreed to sell and convey, by a good and sufficient deed, to *Cheevers*, a certain piece of land, at a certain price, to be paid by instalments. *Cheevers* had paid a portion of the purchase money, but had not paid enough

to entitle him to a deed, and finding that the land, with other lands, was under mortgage, and claiming a right upon that ground to disaffirm the contract, brought assumpsit to recover back what he had paid. It appeared that at the time of the agreement, the mortgage was on record, and open to the knowledge of *Cheevers*. The mortgage was payable before *Cheevers* would have been entitled to his deed, and the court, presuming that *Greenby* intended by that time to pay it, and put himself in a capacity to convey a good title, held that *Cheevers*, the plaintiff below, had no cause of action, and reversed the judgment, rendered in his favor. But they say, if *Cheevers* had waited, until half his purchase money was due, upon payment of which he was to have his deed, "and had then offered to pay on receiving his deed, and *Greenby* had then been incapacitated to convey, by the outstanding mortgage, which he had omitted to redeem, there might have been ground to consider the contract at an end and rescinded." The court thus intimate an opinion, that such an incumbrance justifies a refusal of the deed; and this, although the party refusing knew of its existence, at the time of the contract.

Aiken v. *Sanford*, 5 *Mass.* 494, cited for the defendant, was debt on bond, and the decision turned upon the terms of the condition set forth on oyer, which were that the defendant should sell and convey to the plaintiff a tract of land, by good and sufficient deed of warranty. The court held that the import of these words was confined to the form of the deed, and its execution, and not to the title. There the consideration was first to be paid, after which the party was to receive his deed; and the court said that if the title failed, he might as well sue on the covenants in his deed, as on his bond. But they observed, that if the money was to be paid on receiving the deed, another construction might be reasonable; otherwise the purchaser might part with his money for a lawsuit. There is the same objection to the obligation of receiving such a deed where, as here, the whole or the greater part of the consideration is at all events to be paid afterwards. The party is compellable to pay, if he cannot refuse the deed, even although attended with the probability

if not the certainty, of a lawsuit. If the justice of the case, upon the hypothesis assumed, would have required that a good and sufficient title should be conveyed, where the party had stipulated to be secured by a covenant of general warranty, as in the case cited, there is a greater necessity for the same requirement in regard to the contract in question, which contained no such stipulation.

It is insisted that the remaining land, with the house upon it, was ample security for the incumbrancer; but he might have taken, whenever he pleased, the lot the plaintiff had agreed to purchase, and thus have deprived him of the enjoyment of it, or subjected him to the loss of it altogether, upon foreclosure, unless he advanced money for its redemption. It would be unreasonable and unjust to subject the plaintiff to these hazards and contingencies.

In our opinion the tender of the deed, made by the defendant, the land being incumbered, was not a fulfilment, or an offer to fulfil, the covenant on his part, for the breach of which this action is brought. Judgment is to be rendered for the plaintiff, for the agreed value of the labor performed by him, with interest from the time of the demand, made by him upon the defendant.

BUCKNAM *vs.* BUCKNAM *& als.*

In a warrant issuing from the Court of Probate to Commissioners, they were directed to appraise *all the estate* of the deceased, and after assigning to the widow her dower, they were to distribute *the remainder* to and among his children. In their return which was duly accepted, they stated that, in pursuance of the authority conferred they had appraised all the estate of the deceased, and had divided it as directed, each parcel of which they particularly described. The lands contiguous to the County road, were represented as bounded upon it. *Held,* that the fee of the road, subject to the public easement, was thereby divided, those owning the lots contiguous to it and on opposite sides going to the centre of the road.

THIS was a petition for partition of certain lands belonging to the estate of *John Bucknam.* The facts in the case are suffi-

ciently stated in the opinion of the Court; the principal question being, whether, under the circumstances of this case, the fee of the County road running through the lands of said *John Bucknam*, passed, in a division of the estate, to those who had lots assigned them contiguous to it, and bounded upon it.

And to this point, *Chase* for the respondents, cited the following authorities: *Witham* v. *Cutts*, 4 *Greenl.* 31; *Lunt* v. *Holland*, 14 *Mass.* 149; *Hatch* v. *Dwight*, 17 *Mass.* 289.

Hamlin, for the petitioner, insisted that the road was excluded in the division, and cited *Fairfield* v. *Williams & al.* 4 *Mass.* 427; *Tippets* v. *Walker & al.* 4 *Mass.* 595; *Perley* v. *Chandler*, 6 *Mass.* 454; *Perkins & al.* v. *Pitts*, 11 *Mass.* 127; *McNaughton* v. *Loomis*, 18 *Johns.* 18; *Sibley* v. *Holden*, 14 *Pick.* 249; *Gates* v. *Hathaway*, 15 *Johns.* 447; *Dunlap* v. *Stetson*, 4 *Mason*, 349.

Weston C. J. — The claim of the petitioner is founded upon the assumption, that the fee of the county road, subject to the easement, has not been divided among the heirs, and he entitles himself to four shares or seventh parts, one in his own right, and three by purchase from the other heirs. If the land described in the petition, has not been divided, the petitioner is entitled to the portion he claims.

And it is contended that this land, which in the division of the estate is called the county road, remains undivided, because the heirs, to whom the contiguous lands were assigned, were bounded by and on the road, and a tract set off and assigned to *William Backnam*, was bounded on the south side of the road. Authorities have been cited to show, that where land is bounded on a stream, it extends by construction of law to the middle or thread of the stream. And this doctrine is attempted to be applied by analogy, to land bounded on a road, which it is said should be extended to the centre of the road. But this principle has not been adopted in Massachusetts, as appears from cases cited for the petitioner.

The heirs hold respectively, in virtue of a division made under the authority of the Judge of Probate. The return made by the commissioners and accepted by the court, should be liberally and

favorably construed, to give effect to the intention fairly deducible from it. In their warrant, they were directed to appraise all the real estate of the deceased, and after assigning to the widow her dower, they were to distribute the remainder to and among his children. In their return, they set forth, that in pursuance of their authority, they have appraised under oath all the real estate, of which he died seised, each parcel of which they particularly describe. And the lands contiguous to the county road are in the appraisement represented as bounded upon it, as they are in the division, which follows, among the heirs. The aggregate of the lands appraised, which they say embraced the whole estate, they proceeded to apportion to the widow and children. It is manifest then that they did not intend to leave any part of the estate undivided. They returned affirmatively that they had appraised the whole; and what they appraised they divided. The road itself is no where made the subject of a distinct estimate, nor is it in terms assigned to any of the heirs. The return is accepted and allowed by the judge; being, as he states, presented to him as a division of the real estate of the deceased.

In *Sibley* v. *Holden*, 10 *Pick.* 249, two tenants in common of land, through which a road passed, made partition by deeds of release. To the one was assigned the land on one side of the road, and to the other the land upon the opposite side, and each was bounded by the road. The opinion of the court was, that the parties did not intend to divide the road. But had it appeared that they intended to make partition of their entire interest, they acknowledge that it would have afforded a very strong argument against any construction, which would treat the road as excluded from the partition.

In all instruments, the lawful intentions of the parties expressed, or fairly implied, are to be carried into effect. From, is generally a term of exclusion, yet it may include the time or place, to which it refers, where the context and subject matter require that construction. *Pugh et ux. v. the Duke of Leeds*, *Cowper*, 714; *Brunswick v. McKean*, 4 *Greenl.* 508. It does not appear to us that by or to, or on one side, north or south, are stronger terms of exclusion than from, or that they are not equally suscep-

tible of receiving a construction, which shall include the *terminus*, to which they refer. If then the whole estate was appraised and divided, and intended so to be, as is expressly stated by the commissioners, to whom does the fee of the county road belong? We think to the owners of the contiguous land, each going to the centre; for the land of each is on opposite sides, and each has an equal right to the road.

This is not a stronger case of construction, than obtained in *Witham* v. *Cutts*, 4 *Greenl.* 31, which depended upon a division of land made by commissioners, appointed by the Judge of Probate. It is there intimated, that if a deed had been given, by the owners of the land of each parcel, by the description used by the commissioners, the whole of the land might not have been embraced; but the whole was holden to have been divided; such being evidently the intention of the commissioners.

It results that the petitioner, having failed to make out the title, upon which he relies, can take nothing by his petition.

CUNNINGHAM *vs.* WARDWELL.

A bill of exchange, drawn by one upon *himself*, is to be regarded as an *accepted bill.*

Parol evidence, that a bill of exchange, absolute in its terms, was to be payable on a contingency, is inadmissible, in an action on such bill.

As where A. sold a cargo of lumber to B. taking his bill for the amount, payable unconditionally at the port of discharge. In an action on the bill, evidence offered by B. that about ten days before the drawing of the bill, A. agreed to sell him a cargo of lumber for shipment, and *to take the sea risk upon himself*, was held to be inadmissible.

Assumpsit, upon the following bill of exchange, *viz:*

"*Calais, July* 31, 1830. At sight, this my first bill of exchange, the second of the same tenor and date unpaid, pay to the order of *John Cunningham*, $649,95, being for and on account of the cargo of lumber furnished the schooner *Sophronia*, on joint account of myself and owners of the said schooner.

"*Eliakim Wardwell.*"

"To *Capt. Eliakim Wardwell*, master of the schooner *Sophronia*, at the port he may discharge his cargo."

The plaintiff proved that the cargo of the *Sophronia* was discharged at *Philadelphia*, except what had been thrown overboard in a gale of wind on the passage out; that the bill declared on was there presented to the defendant by the plaintiff's agent who was a passenger in the vessel, and that the defendant paid a part of it, leaving unpaid, as appeared in the course of the trial, a sum about equal to the price of the lumber thrown overboard.

The defendant offered two depositions which went to prove, that about ten days prior to the date of the bill, the plaintiff sold to the defendant the said cargo of lumber at *Calais*, and agreed to run the sea risk himself; and that a part was lost at sea as aforesaid.

The defendant contended, that the bill was merely an order for payment for the lumber according to what he contended was the original and then subsisting contract of sale; and also, that by the bill, he was liable to pay only for what lumber arrived at the port of discharge. He also moved the Court to instruct the jury, that if they found that at the time of the sailing of said vessel from *Calais*, it was the understanding of the parties, that the price of any part of the cargo which should be lost at sea should go so far towards said bill, they should so deduct it.

But *Parris J.* who tried the cause, instructed the jury, that the bill of exchange was to be considered as evidence of the contract between the parties, of sale and payment for the lumber; and inasmuch as it was in writing, it could not be varied or explained by parol evidence relating to conversation between the parties prior to its execution and delivery; but that the parties might subsequently modify it, and proof of such modification might be made by parol — That, if they were satisfied that it was modified after its execution, by the plaintiff's agreeing to take the sea risk, as the defendant contended; or if at the time the vessel sailed from *Calais*, it was the understanding of the parties, that the price of any part of the cargo lost at sea, should go so far towards said bill, their verdict should be for the defendant; otherwise, as the parties had reduced their contract to writing, their verdict should be for the plaintiff.

The verdict was for the plaintiff. If, in the opinion of the whole Court, he was not entitled to retain it, it was to be set aside and a new trial granted, otherwise judgment was to be rendered thereon.

Porter, for the defendant, argued, that from the peculiar phraseology of the bill, the risk of transportation was to be borne by the plaintiff.

The drawing of the bill of exchange was not an abandonment of the original bargain, but should be taken in connection with it. Of itself it is not a contract of sale, because it does not show what lumber was furnished as to kind or quantity. *Descadillas* v. *Harris*, 8 *Greenl.* 298.

But if it was the evidence of sale, it may be explained by parol, because the whole contract was not reduced to writing. *Barker* v. *Prentiss*, 6 *Mass.* 430; *Springfield Bank* v. *Merrick*, 14 *Mass.* 322; *Jones* v. *Fales*, 4 *Mass.* 245; *Sargent* v. *Southgate*, 6 *Pick.* 312; *Bowers* v. *Hurd*, 10 *Mass.* 430.

The action is against the defendant as acceptor, and acceptance may be modified by parol. *Chitty on Bills*, 199, 209.

If it be said that part payment is evidence of acceptance, the reply is that this also is open to explanation. *Davenport* v. *Mason*, 15 *Mass.* 90; *Storer* v. *Logan*, 9 *Mass.* 55; *Stackpole* v. *Arnold*, 11 *Mass.* 27; *Farley* v. *Thompson*, 15 *Mass.* 18.

The evidence offered was proper to show a failure of consideration. *Sawyer* v. *Cleaveland*, 10 *Mass.* 415; *Williamson* v. *Scott*, 17 *Mass.* 249; *Russel* v. *Degrand*, 15 *Mass.* 35; *Cowdin* v. *Boutelle*, 9 *Mass.* 254; 2 *Wendall*, 431.

Bridges, for the plaintiff, cited the following authorities: *Caine* v. *Olds*, 2 *B. & Cres.* 626; *Hunt* v. *Adams*, 6 *Mass.* 519; *Chadwick* v. *Perkins*, 3 *Greenl.* 399; *Small* v. *Quincy*, 4 *Greenl.* 497; *Pickering* v. *Dowson*, 4 *Taunt.* 779; 2 *Stark.* 281; *Stevens* v. *Wilkinson*, 22; *Com. L. Rep.* 88; 1 *Camp.* 40; 3 *Camp.* 38; 2 *Camp.* 246; 7 *East*, 483; *Bailey on Bills*, 346; 2 *Stark. Rep.* 175.

WESTON C. J. — It is urged by the counsel for the defendant, that this is a bill by him drawn upon himself, but not accepted. No question is raised as to the form of the action, nor does it appear from the case, whether the defendant is charged as drawer or acceptor. The drawer undertakes that the bill shall be accepted. As it was here drawn upon himself, he sustained also the relation of drawee. And if in both capacities, which he assumed upon signing the bill, he undertook that the bill should be accepted and paid, of which the bill itself is evidence, it is accepted. A promise to accept an existing bill, if made upon an executed consideration, or if it influence any person to take or retain the bill, it is as to the person to whom the promise is made in the one case, and as to him whom it influenced in the other, a complete acceptance. *Bayley on Bills*, 103.

The bill sets forth the consideration, upon which it was drawn, namely, for a cargo of lumber furnished for the schooner, *Sophronia*, and it is drawn payable at sight, at her port of discharge. It is drawn to be paid absolutely, upon her arrival at her discharging port, without any other condition or qualification. She did arrive, and was discharged at *Philadelphia;* and there the bill was presented to the defendant and payment demanded. It was then due by the terms of the bill.

But it is contended, that by a previous parol agreement between the parties, the plaintiff assumed the sea risk of the cargo, and that if any portion of it was lost, by reason of that risk, the amount was to be rateably reduced. If evidence to this effect is admissible by way of defence, the verdict rendered for the plaintiff is to be set aside. It introduces a condition, which changes the liability of the defendant upon the bill. The consideration appears on its face. It was for the cargo furnished; and it is not pretended but that the cargo, for which the bill was drawn was delivered. There was no failure then in the consideration. The only question is, what did the defendant promise? The written evidence is, that he promised to pay a fixed sum, upon the arrival of the vessel at her port of discharge. The parol evidence modifies and qualifies it, and renders it contingent, whether that sum was to be paid or not.

In *Barker* v. *Prentiss*, 6 *Mass.* 430, *Parsons C. J.* states the law to be that between the original parties, parol evidence may be received to contradict a written simple contract; and to show that there existed limitations and conditions, not reduced to writing. And in *Hunt* v. *Adams*, in the same volume, 519, the same doctrine is intimated; but with some hesitation. In the same case, 7 *Mass.* 518, *Sewall J.* in delivering the opinion of the court, returns to a sounder and better view of the law of evidence, and recognizes the rule, that parol testimony is not admissible to vary or contradict that which is written, which in its nature is better and more certain. The same principle is confirmed in the leading case of *Stackpole* v. *Arnold*, 11 *Mass.* 27, which has steadily maintained its authority in our practice. It was enforced in the case of *Small et al.* v. *Quincy et al.*, 4 *Greenl.* 497. It would be easy to multiply cases to the same effect, and to repeat the reasons upon which this rule is founded; but we deem it unnecessary. We are of opinion that the bill, upon which this action is brought, cannot be legally varied in its terms by the parol testimony adduced; and that there is no competent evidence of the condition, upon which the defendant relies.

But even if admissible, it was within the power of the parties to substitute one contract for another. Suppose it was agreed by parol, at the time of the sale of the lumber, that the plaintiff would take the sea risk to the port of discharge, they might make a mere contract, or the defendant might waive that condition. The bill itself is evidence of what was last agreed. As it has no such condition, although it might have been expressed in a single line, its omission is evidence, that it was no longer insisted upon.

Judgment on the verdict.

COFFIN *vs.* BUCKNAM.

In an action by an administrator on a promissory note, commenced more than six years after the date of the note, an indorsement in the handwriting of the intestate, of a payment purporting to be made more than two years before the statute of limitations would attach, and six months prior to his death, it was held, the jury might regard as evidence of a new promise, though there was no proof other than as above, of the time when said indorsement was actually made.

ASSUMPSIT, upon two promissory notes, one of which was dated *April* 6, 1825, given by the defendant to *Joseph Wilson*, and by him indorsed to the plaintiff's intestate. The writ was dated *August* 8, 1833. The defendant pleaded the general issue and the statute of limitations.

To avoid this defence, the plaintiff relied upon an indorsement of four dollars upon the note, purporting to have been made *December* 16, 1828, and in the handwriting of the intestate, who died in *June*, 1829, as evidence of a new promise. There was no evidence other than as above, of the time when said indorsement was actually made.

The defendant contended, that this was not sufficient to take the case out of the statute of limitations. But *Whitman C. J.* in the C. C. Pleas, instructed the jury, that the indorsement having been made long before the lapse of six years, and before the intestate could have any inducement to make it, other than the fact that the payment had been made as the indorsement purported, might be evidence of a new promise, made at the time, to pay the balance of the note, and might be by them considered sufficient evidence of it, if unexplained by any other evidence tending to show that it had been improperly made. Whereupon the jury returned a verdict for the plaintiff for the amount due upon the note. To the foregoing instructions the defendant's counsel took exceptions and brought the case up to this Court.

Chase, for the defendant, contended that the indorsement was not competent evidence. It is the mere declaration of the party. If he charged himself, so also did he benefit himself. The small amount of the indorsement, compared with the amount of the note, renders the transaction suspicious.

There is no case, that he was aware of, where an admission of a party against himself at the time it was made, was afterward permitted to be used by him for his own benefit. *Whitney* v. *Bigelow*, 4 *Pick.* 110.

Hamlin, for the plaintiff, cited *Roseboom* v. *Billington*, 17 *Johns.* 182; *Phill. Ev.* 114; *Searle* v. *Barrington*, 2 *Strange*, 826.

WESTON C. J. — The modern doctrine, as to what is necessary to take a case out of the statute of limitations, will be found laid down in *Perley* v. *Little*, 3 *Greenl.* 97; *Porter* v. *Hill*, 4 *Greenl.* 41, and in *Bangs* v. *Hall*, 2 *Pick.* 374. We refer to these cases as presenting a very satisfactory elucidation of the statute, and the effect to be given to it. In *Whitney* v. *Bigelow*, 4 *Pick.* 110, the court in *Massachusetts* express their determination to adhere to the principles decided in *Bangs* v. *Hall*, which are in accordance with the law as settled here. But they further proceed to state, that no set form of words is necessary to prove the acknowledgment of a debt, or a promise to pay it; and that it may be inferred from facts without words, as by payment of part of a contract, within the six years. Payment by the maker of a note of a part of it, and causing it to be indorsed thereon, is an act equivalent to an acknowledgment in words, that the note is a subsisting debt, and is evidence of a promise to pay it. And this deduction, about which there could have been no question, according to the older cases, is in *Whitney* v. *Bigelow*, holden to be consistent with the later and more approved decisions, under the statute. But it is there stated, and very properly, that the operation of the statute will not be avoided by a mere indorsement by the plaintiff himself, without the knowledge of the defendant, or proof of the payment of the sum indorsed.

The indorsement on the note in question, was made by the plaintiff's testator. Is there competent proof that it was upon a payment by the defendant? We are of opinion that there is. The indorsement must have been made before the six years had expired; for the note was given in 1825, and the testator died in

1829. At the time of the indorsement, he was under no temptation to make it, for the sake of evidence; as the statute would not have attached for more than two years. The indorsement was then clearly against his interest, furnishing proof that he had received part of the contents of the note. This never could have been done, if the sum indorsed had not been paid. And it could have been paid only by the defendant, or by some one authorized by him. These are inferences justified by common experience; and they are of a character to satisfy the mind. Proof of this description is a kind of moral evidence, in regard to which no reasonable doubt can be entertained. It has accordingly been holden, that entries, made by persons deceased, against their interest, are admissible in evidence. *Warren* v. *Greenville*, 2 *Strange*, 1129. *Higham* v. *Ridgewey*, 10 *East*, 109. *Doe, upon the dem.* of *Ruce* v. *Robson*, 15 *East*, 32. In the last case, *Lord Ellenborough* says, "the ground upon which this evidence has been received is, that there is a total absence of interest in the persons making the entries to pervert the fact, and at the same time a competency in them to know it."

The opinion of the Court is, that the instructions to the jury of the presiding Judge, in the court below, were in conformity with the law of the case.

Exceptions overruled.

BUCKNAM *vs.* NASH *& al.*

The clause in the statute of frauds relating to contracts for the sale of goods of the price of $30 or more, has reference to executory contracts, and not to contracts executed.

Therefore where the terms of sale were settled, and the vendor accepted the promise of the vendee to pay the stipulated price to another, not making the actual payment a condition of sale, the property was held to have passed and vested in the vendee as soon as he had obtained actual possession of it, by the consent of the vendor, either express or implied, that being equivalent to a formal delivery.

In an action of trespass against one for taking a quantity of logs belonging to the plaintiff, the latter was permitted to recover under the general averment of damages, the profit he would have made by sawing the timber, and by its appreciation in price.

Trespass, for taking 500 spruce logs. The plaintiff in his writ claimed to recover the value of the logs, and also special damages for the loss of the profit of sawing said logs at his mill.

The plaintiff, in support of the action, called a witness who testified, that, he was present when the plaintiff came to purchase the logs of *William White, Jr.* in *April*, 1833. That they called the number 500. *White* asked fifty cents apiece for the logs, but *Bucknam* gave $240 for the lot, and agreed to go and see *Oliver* and *Atkins Nash*, of whom *White* purchased the land from which the timber was cut, and have the $240 indorsed on the notes given for the land. He further testified, that the plaintiff and *White* were both upon the logs, examining them, but he saw nothing of any formal delivery; nor was there any evidence that the $240, or any part of it, had been paid to *O. & A. Nash.*

By another witness the plaintiff proved, that he and the witness, a few days after the transaction above referred to, went on to the logs and began rafting them, *White* being present and making no objection; and while thus engaged, *Holmes Nash*, the defendant, came and took the logs from their possession. There was much other evidence in the case, which the finding of the jury has rendered it unnecessary to report.

The defendants' counsel requested the Judge to instruct the jury, that there being no writing and no money paid, and the

property being of greater value than $30, no title passed to the plaintiff, there having been *no delivery*. But *Parris J.* instructed the jury, that if they found that the sale was absolute and unconditional, and the parties were on the logs at the time of making the sale, both minds assenting to the transfer of the property, and that the logs were in the river where the plaintiff had a right to go to take possession of them, and did subsequently take possession of them as testified to by *William Bucknam*, the property in the logs passed, notwithstanding there was no formal delivery at the time of the sale.

The defendants' counsel further requested the Judge to instruct the jury, that if they found that *White* sold the timber to the plaintiff, in consequence of a misrepresentation made to him by the plaintiff, of what *Holmes Nash* had said to the plaintiff about giving up the timber, it would make the sale to the plaintiff void. The Judge instructed the jury, that if the sale was conditional, as testified to by *White*, either as to the payment to *Oliver* and *Aikins Nash*, or as to the giving up of the logs by *Holmes Nash*, then, unless they found that the condition was complied with, by payment to *O. & A. Nash*, and that *Holmes Nash* had given up the logs or assented to the sale, their verdict should be for the defendants.

The jury were further instructed, that if they found a verdict for the plaintiff, they might in assessing damages, take into consideration the value of the logs, the loss of the profit that the plaintiff would have received from sawing said logs, and also the loss of his profit in the rise of the price of lumber.

The jury returned a verdict for the plaintiff, which was to be subject to the opinion of the whole Court upon the evidence and instructions reported.

Hamlin, for the plaintiff.

F. Allen, and *Porter*, for the defendants.

Weston C. J. — The last request, made by the counsel for the defendants, that the Judge would instruct the jury, that the sale to the plaintiff was void, if he falsely represented that *Holmes Nash* had given up the timber, was substantially complied with. The jury were instructed, that if it was a condition

of the sale, as stated by *White, Junior*, that *Holmes Nash* had given up the timber, and such was not the fact, the plaintiff could not claim under the sale. If then the jury believed *White*, they must have found that *Nash* gave up the timber, and if he did so, there was no misrepresentation upon this point.

With regard to the sale, if the terms were settled, and the vendor accepted the promise of the plaintiff to pay the stipulated price, either to himself, or to others appointed by him to receive it, and actual payment was not made a condition of the sale, the property passed and vested in the plaintiff, at least as soon as he took actual possession. That possession, by the consent of the vendor expressed or implied, there being a sufficient consideration for the sale, was equivalent to a formal delivery. The logs thereby became subject to the plaintiff's control, and the vendor parted with his interest in them, for the promise of the plaintiff to pay the price agreed, which might be enforced at law. The clause in the statute of frauds, upon which the counsel for the defendants rely, has reference to an executory contract. This was a contract of sale executed, as the jury have found, under the instructions of the Judge.

The cases, cited for the defendants, show that where a sale is made, depending upon a condition first to be performed, or at the time of receiving the chattels agreed to be sold, the sale does not become effectual, but upon proof of the performance of the condition. But no objection can be sustained upon this ground; as the jury have negatived every condition insisted upon, or have found it fulfilled by the plaintiff.

The defendants' counsel insist, that the jury were erroneously instructed, as to the true measure of damages. Had this been an action by the vendee against the vendor for not fulfilling the contract of sale, the cases referred to upon this point would have been applicable; and it would have deserved very serious consideration, whether the rule prescribed could have been sustained. But this is an action of trespass, in which the plaintiff has made out his title to the property, upon a sale consummated, which was taken from his possession by the defendants without right, and where they must be regarded as wrongdoers in the same manner, as if neither of them had ever had any pretence of title

thereto. What, in such cases, is the measure of damages? The injured party is entitled by law to a full indemnity. That may not be in all cases the exchangeable value at the time, of that which is the subject matter of the trespass. A party has upon his grounds a quantity of standing timber, which he chooses to preserve, in the expectation that it may appreciate in value. It would hardly accord with the claims of justice, to oblige him to accept from a trespasser, in an action brought to vindicate his rights, the price of the timber, at such time, as he might please to take it from the true owner, although the latter might be able to prove at the trial, that its value had greatly increased. The owner of timber, prepared to be manufactured, or of any other kind of lumber or merchandise, has an undoubted right to exercise his own judgment, as to the most suitable time of sale, and if tortiously taken from him, unless he is permitted to recover, whatever he can prove it would have been worth to him, if retained, he is not indemnified, and the trespasser may be a gainer at his expense. In the case before us, the jury were instructed, that they might allow the plaintiff the profit, he would have made by sawing the timber, and by its appreciation in price. He was certainly best entitled to this profit; and it would be altogether inequitable to leave it in the hands of trespassers. They are bound, upon the principles of common justice, to put him in as good a situation, as if they had not interfered.

In our opinion, the latitude given to the jury, on the subject of damages, in the instructions of the Judge, did not go beyond what the law of the case required. A general averment of damage in the plaintiff's declaration, was sufficient for his purpose, under which it was competent for him to prove the loss he had sustained, by the trespass alleged, not exceeding the amount set forth and claimed.

MOSHIER *vs.* REDING *& al.*

A. lessee is estopped to deny the title of his lessor in an action between them. He must first restore the possession which he obtained from his landlord, before he can avail himself of a title acquired subsequent to his entry.

No particular form of words is necessary to constitute the relation of landlord and tenant; it is sufficient if it appear to have been the intention of one to dispossess himself of the premises, and the other to enter under him for a determinate period pursuant to an agreement.

At the expiration of a lease for years, no notice to quit is necessary to dissolve the relation of landlord and tenant. But if the tenant holds over after the termination of his lease, and the lessor assents to it, (which may be inferred from his silence,) the lessee will become tenant from year to year, and cannot be dispossessed without regular notice.

A. having bargained for the purchase of a lot of land and entered thereon, though without deed, bargained for the sale of the same land to B. covenanting to convey to the latter on payment of $800 in equal annual payments, and stipulating that B. and his assigns should enter and take the profits to their own use. B. entered and afterward sold his possession and all his rights to C. The latter entered and occupied for years, neither he nor B. paying any of the installments due to A. and the latter not objecting to their holding over after such non-payment. *Held*, that these facts created the relation of landlord and tenant between A. and B. and his assigns. That A's assent to the holding over of B. and his assigns after the termination of the first year, constituted a tenancy from year to year, and that B. and his assigns could not be dispossessed without regular notice to quit.

A. for entering and cutting the grass, without the consent of C. was held to be a *trespasser*: and that this liability to C. was not affected by his procuring a deed from the one of whom he purchased, subsequent to the act complained of.

THIS was trespass, *quare clausum fregit*, and was tried upon the general issue, before *Parris J.* at the *June term* in this county, 1834.

The facts, substantially, as stated in the bill of exceptions, were thus: *John Black*, as agent of the *Bingham heirs*, in the year 1824, gave the defendant, *Reding*, a bond, conditioned for the conveyance of the *locus in quo*, on payment of two certain notes of hand given for the purchase money. *Reding* entered into possession, though, as *Black* testified, he gave him no permission so to do, but it was with his knowledge.

In 1825, *Reding* gave one *Charles McLean* a bond, conditioned for the conveyance of the same land to him *or his assigns*,

on payment, according to their tenor, of eight notes of hand, payable in equal annual payments from the day of the purchase — the bond also providing, that *McLean*, his heirs and assigns, might enter into the possession of the land and take the rents and profits to his and their use. *McLean* lived upon the land until 1827, when he assigned *Reding's* bond to the plaintiff, and sold him all his "claims and possession," of the lot in question. The plaintiff entered the same year, erected a house upon the land, moved his family thereon, and continued to occupy it till the time of the alleged trespass in *August*, 1832. At that time, *Reding* had not paid his notes to *Black*, and had received no deed from him; nor had he a legal claim for one. Nor had *McLean* paid his notes to *Reding* according to their tenor, or the plaintiff his to *McLean*.

In the summer of 1832, *Reding* put the other defendant, *Crosby*, into a part of the house, while *Moshier* himself was absent at *Mirimachi*, his family still continuing to occupy the other part of the house. *Crosby*, under the direction of *Reding*, cut the grass, and this was the act complained of in this action.

After the commencement of the action, which was *August 29th*, 1832, *Reding* paid his notes to *Black* and received a deed from him of the *locus in quo*, dated *March 7th*, 1833.

The presiding Judge instructed the jury, that if they should find that the defendants entered and took possession by the consent of *Moshier*, or his wife, then their verdict should be for the defendants. But if no such consent was given, and the entry and acts done, were forcible and against the will of *Moshier*, or his wife, their verdict should be for the plaintiff.

The jury returned a verdict for the plaintiff, and the defendant's counsel thereupon filed his exceptions to the foregoing instructions, agreeable to the statute.

Chase, for the defendant, argued in support of the following positions: 1. A lessee can never dispute the lessor's title until he deliver possession; or, unless there has been fraud in the lessor; or the lessor's title had expired.

2. There is no difference in the operation of the law of estop-

pel whether the tenant enters under a lease or an agreement to purchase.

3. Where the lessee or tenant is estopped to controvert the landlord's title, all claiming under him are equally estopped.

4. Notice to quit is unnecessary where the entry is under an agreement to purchase.

Jackson v. *Dyer*, 14 *Johns.* 224; *Jackson* v. *Croy*, 12 *Johns.* 427; *Jackson* v. *McLeod*, 12 *Johns.* 182; *Jackson* v. *Creal*, 13 *Johns.* 116; *Jackson* v. *Hardner*, 4 *Johns.* 203; *Jackson* v. *Stuart*, 6 *Johns.* 34; *Smith* v. *Stewart*, 6 *Johns.* 46; *Jackson* v. *Vosburg*, 7 *Johns.* 187; *Jackson* v. *De Watz*, 7 *Johns.* 157; *Jackson* v. *Jones*, 9 *Cowen*, 182; *Brant* v. *Livermore*, 10 *Johns.* 358; *Jackson* v. *Whitford*, 2 *Caines' Rep.* 215; *Barwick* v. *Thompson*, 7 *T. R.* 488; *Fletcher* v. *McFarland*, 12 *Mass.* 43; *Jackson* v. *Wilson*, 9 *Johns.* 92; *Jackson* v. *Dobbin*, 3 *Johns.* 223; *Jackson* v. *Davis*, 5 *Cowen*, 123: *Schauber* v. *Jackson*, 2 *Wend.* 62; *Beaver* v. *Delahon*, 1 *H. Black.* 8; *Watertown* v. *White*, 13 *Mass.* 481; 2 *Stark. Ev.* 533, *(note h. & k.)* *Miller* v. *McBryall*, 14 *Serg. & Rawle*, 382; *Bowker* v. *Walker*, 1 *Vermont Rep.* 18; *Tuttle* v. *Reynolds*, 1 *Vermont Rep.* 80; *Rowan* v. *Little*, 11 *Wend.* 616; *Whitside* v. *Jackson*, 1 *Wend.* 418; *Jackson* v. *Miller*, 7 *Cowen*, 747; *Jackson* v. *Rowland*, 6 *Wend*, 666; *Jackson* v. *Miller*, 6 *Wend.* 228; *Jackson* v. *Smith*, 7 *Cowen*, 717; *Tillinghast's Adams on Ejectmen*, 247; *Binney* v. *Chapman*, 5 *Pick.* 124.

McLean, was in under *Reding*, and was therefore estopped to deny his title. *Moshier* claiming under *McLean*, and well knowing of *Reding's* title, is equally estopped. The possession of *Reding*, if not by deed, was by the tacit consent at least of *Black*, and this equitable title is sufficient at least against *McLean & Moshier*. Besides, it is contended that the deed of *Black*, had relation back to the time of the agreement to purchase and entry under that agreement.

J. Granger, argued for the plaintiff, citing the following authorities: *Com. Dig. Trespass, B.* 1; *Hammond's N. P.* 153; 2 *Wheaton's Selwyn*, 1018; *Suffring* v. *Townsend*, 9 *Johns.* 35; *Proprietors, &c.* v. *McFarland*, 12 *Mass.* 324; *Shaw* v. *Wise*,

1 *Fairf.* 113; *Adams on Ejectment*, 247; *Morgan* v. *Paul*, 17 *Com. Law Rep.* 303; *Coffin* v. *Lunt*, 2 *Pick.* 70; 1 *Esp. Dig.* 268; 1 *Cruise*, 281; 1 *East*, 245; 1 *Taunt*, 322; 2 *Saund. on Pl.* 866; *Smith* v. *Stewart*, 6 *Johns.* 46; *Jackson* v. *Davis*, 5 *Cowen*, 123.

The opinion of the Court was delivered by

PARRIS J. — The plaintiff, having proved that he had occupied the farm where the trespass is alleged to have been committed, for a number of years, had erected a house thereon where he dwelt with his family, and that he had never abandoned the possession, was entitled to continue his occupation unmolested by the defendant, unless the latter could show some superior claim or title thereto. He did show that he was an earlier occupant, that he entered upon the premises in 1824, and continued to improve them until he contracted to sell to *McLean*, and then permitted him to enter and occupy. We do not deem it material to discuss the defendant's rights to possession, &c. under his contract with *Black*. If *Reding* had taken possession of the land without the assent or knowledge of the true owner, such possession could not lawfully be disturbed by a stranger, as he could not justify his interruption of *Reding's* possession by calling in aid *Black's* title.

Where a landlord shows no title, but asks to be restored to the possession with which he parted, good faith requires it should be delivered to him, it being no answer to say he is not the owner of the land. *Miller* v. *McBrier*, 14 *Serg. & Rawle*, 385.

A defendant is estopped from contesting the title under which he entered in any manner as against his landlord. He must first restore the possession which he obtained from his landlord, and then, as plaintiff, he may avail himself of any title which he has been or may be able to acquire. *Jackson* v. *Harper*, 5 *Wend.* 246.

Although the possession of the lessor be merely tortious, as if he be a disseisor, such possession will enable him to make a lease which will be good against every man except the disseisee. *Comyn's, Landlord & Tenant*, 17. *Reding* being in actual pos-

session on the 26th of *May*, 1825, contracted, by bond, to sell to *McLean*, and to give him a deed of the premises upon his paying eight hundred dollars in eight equal annual payments. *Reding*, also, by the bond, expressly contracted to permit *McLean*, his heirs and assigns, in the mean time, peaceably and quietly to hold, occupy and enjoy the premises, and to receive and take to their own use the rents and profits thereof.

The last of the notes described in the bond did not become payable until *May*, 1833.

Is *McLean* to be considered as lessee of the premises? It has been holden that express words of demise or reservation of rent are not essential, it being sufficient if it appear to have been the intention of the lessor to dispossess himself of the premises, and of the lessee to enter pursuant to the agreement. *Miller* v. *McBrier*, before cited. Whatever words, says *Ch. Baron Gilbert*, are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it for such a determinate time, whether they run in the form of a license, covenant or agreement, are of themselves sufficient, and will, in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose. *Bac. Abr. Leases, K.* To constitute a good lease it need only appear to be the intention of the lessor on the one hand to dispossess himself of the tenements in favor of the lessee by the very making of the lease; — and of the lessee on the other hand to enter and be possessed pursuant to the lessor's consent. *Comyn on Landlord and Tenant*, 59. There can be no doubt that the intention of the parties was for *McLean* to have the occupancy of the premises, at least, until the first note became payable and for such further time as he continued punctually to pay the notes as they severally arrived at maturity. — Suppose it to have been a lease for a year only, and that on the 26th of *May*, 1826, the lessee's term would have expired by effluxion of time. Notice to quit, at that time would not be necessary in order to dissolve the relation of landlord and tenant. *Cobb* v. *Stokes*, 8 *East*, 358. And the landlord might enter immediately after the expiration of the lease, and the plea of *liberum tenementum* would be a good justification to an action

of *quare clausum* by the tenant for such entry. *Sampson* v. *Henry*, 13 *Pick.* 36; *Taylor* v. *Cole*, 3 *T. R.* 294; 4 *Kent's Com.* 112.

But where the tenant holds over, after his term has expired, and the lessor assents to it (and even his silence may be construed into an acquiescence or assent) it will be considered as a tacit renewal of the lease, at least for the following year, and the lessee will become tenant from year to year, and cannot be dispossessed without regular notice. In this the civil and common law both concur. 4 *Kent's Com.* 110, 114. If the lessor receive rent, or the lessee be permitted to continue on the land for a twelve month, a tenancy from year to year will then be implied. *Doe* v. *Stennett*, 2 *Esp. N. P. Cas.* 716. If *Reding* had a right to enter immediately on the failure to pay the first note when it became payable, if the term under the bond then expired, his conduct in retaining the notes and acquiescing in the tenant's possession would amount to a renewal of the lease, and consequently *McLean* became tenant from year to year, commencing on the 26th of *May*, 1826, and the tenancy, or relation of landlord and tenant could not thereafter be regularly determined, but by notice to quit. If, on the other hand, the permission given by *Reding* to *McLean* in the bond, to occupy the premises, extended to the time when the last note became payable, then it follows that the term had not expired when the defendant committed the acts complained of as a trespass, and he had no right to enter either with or without notice. This is the view we take of the case if the permission to occupy, given in the bond, is to be construed as a lease.

The counsel for the defendant relies upon several cases in *New York*. The strongest case cited by him, is *Jackson* v. *Miller*.

There the agreement that the purchaser might take possession was by parol, and he was consequently a mere tenant at will, and *Chancellor Kent* says, a strict tenant at will, in the primary sense of that tenancy, is not entitled to notice to quit. 4 *Kent*, 112.

In *Jackson* v. *Miller*, *Ch. Just. Savage* reviews the cases bearing upon the question under consideration. Some of them

are questions between mortgagee and mortgagor where there is a broad distinction, the mortgagor being, at most, a *quasi* tenant at will, or rather tenant by sufferance. In others, the permission to occupy was by parol, and in some as in *Jackson* v. *Niven*, 10 *Johns.* 335, where the contract was under seal, notice was holden to be necessary.

The Chief Justice admits that there is some confusion in the books on this question; — that whether notice shall be given or not is mere matter of practice, and it seems reasonable that it should be given in all cases where the tenant occupies with the permission of the landlord for an indefinite period, and does no act hostile to the landlord, but he says the case of a contract to sell seems to have been uniformly considered an exception.

We admit that there may be cases where no notice would be necessary, as in this, if *Reding* had not, by his acquiescence, permitted *Moshier* to assume the character of tenant from year to year. But where there is an agreement by deed, that for a stipulated consideration the obligee may enter and quietly enjoy certain real estate, and receive and take to his own use the rents and profits thereof, the general rule laid down by *Chief Baron Gilbert*, will readily determine the character of the tenancy.

The counsel for the defendant necessarily treats it as a lease, contending that *Moshier*, as lessee, is estopped to deny his landlord's title. Unless *Reding* can thus shut out inquiry into his title he falls at once, as the case shows beyond controversy that at the time of the alleged trespass he had no title whatever derived from the owner of the fee. The case of *Right, on the demise of Lewis* v. *Beard*, 13 *East*, 210, is direct as to the necessity of notice. *Lewis* put the defendant into possession of a parcel of land under an agreement to purchase. On ejectment to recover possession, the defendant contended that he was the legal tenant, and that until demand and refusal of the possession, he was not a trespasser. On the other hand, it was said that the defendant had taken possession under a supposed title, and, therefore, not as tenant. *Lawrence J.* before whom the action was tried, held, that the defendant's possession being lawful, required to be determined by notice to deliver it up. The case went before the *King's Bench*, and *Lord Ellenborough*, in giving the opinion of

the court, said, that after *Lewis* had put the defendant into possession, he could not, without a demand of the possession again and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat him as a wrongdoer and a trespasser; — and on this authority the court in *New York* rely in a similar decision in *Jackson* v. *Niven*, 10 *Johns.* 335.

Comyn, in his treatise on *landlord* and *tenant*, before referred to, says, where a sale of lands is agreed upon and the owner of the lands puts the intended vendee into possession, he cannot oust him without a notice to quit, or at least, a demand of the possession. *Comyn*, 291. So where an agreement was made between A. and B. that A. should sell certain premises to B. if it turned out that A. had a title to them, and that B. should have the possession from the date of the agreement, it was held that A. could not eject B. without a demand of possession, and the court was of opinion that the service of a declaration in ejectment was not equivalent to a demand, because an ejectment treats the party in possession as a wrongdoer; and in this case the defendant had entered with the license of the plaintiff. *Comyn*, 291 ; *Doe* v. *Jackson*, 1 *Barnew & Cresw.* 448. In *Denn, on the demise of Mackey* v. *Mackey*, 1*st Pennington*, 420, the defendant entered land with the permission of the owner in his lifetime, made improvements and remained there a number of years without any reservation of rent. It was held that the heir of the owner must give the tenant notice to quit, before bringing ejectment. The same principle is recognised in *Jackson* v. *Bryan*, 3 *Johns.* 322, where no rent was reserved and *Spencer*, *J.* said *that* is not an indespensible criterion of a tenancy.

The entry by the defendant was in midsummer, while all the crops were on the ground, and when the tenant had reason to suppose that he should have been permitted to reap where he had been permitted to sow. There is nothing in the case that shows that *Reding* had objected to the tenant's continuing in possession or that he had called for payment of the notes, one of which had not become payable, or given any intimation that he should enter and take possession. The tenant having been permitted thus quietly to remain from year to year under the contract, we think there was an implied assent that he might continue through the

year which had partly expired; at least that he should not be entered upon and thrust out, or interrupted in his possession until after seasonable notice. As said by *Tilghman C. J.* in *Bedford* v. *McElherron*, 2 *Serg. & Rawle*, 49, it might fairly be presumed that the tenant retained that possession with the consent of *Reding*, and was consequently entitled to notice to quit.

By the terms of the deed, *McLean* was authorised to assign, and he did so assign to the defendant in *March*, 1829, for the consideration of two hundred dollars, whereupon *Moshier* entered, and if, as contended by the defendant, the relation of landlord and tenant existed between *Reding* and *McLean*, previous to the assignment, it attached to *Moshier*, immediately on his entry. He was in of the same estate as *McLean*, and *Reding* acquired the same rights against him as assignee, by reason of the privity of estate that he had against *McLean* upon his covenants in law previous to the assignment. If *McLean* would be entitled to notice so would *Moshier*, and whether they are to be considered as lessees or not, we think they were so in by the permission of *Reding*, that he had no right to enter upon them without notice, at the time and in the manner he did.

CASE

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF HANCOCK, JUNE TERM, 1835.

The Inhabitants of BUCKSPORT *vs.* SPOFFORD.

It was not necessary that the selectmens' warrant for calling a town meeting in 1803, should be *under seal.*

The original warrant might be used in evidence though it had never been recorded.

The constable's return on the warrant, was dated the day only before the meeting was holden, and did not set forth *the manner* in which he had notified the inhabitants. Held, that the validity of the meeting was not thereby affected.

Where a committee of gentlemen claiming to be authorised by the inhabitants of a town, invited a gentleman to become the minister of that town, which invitation he accepted, was settled according to ecclesiastical usage, and continued to officiate in that office for more than thirty years, the town all the time paying the stipulated salary, it was holden, that the town had waived its right, if any ever existed, to set up objections to the legality of the meeting, at which the invitation aforesaid was authorised.

The fee of lands in a town reserved for parsonage or ministerial lands, vests in the minister of the town when one is settled, and the tenure cannot be changed by a vote of the town, even though the minister assent thereto. And whatever rights the town may acquire in relation to the use or enjoyment of the profits, must be under him and in subordination to his legal title.

THIS was a writ of entry, in which the plaintiffs demanded certain parcels of land in *Bucksport*, being parts of the parsonage in said town, counting on their own seizin within twenty years, and a disseizin by the tenant.

The demandants proved the original designation of the lot by the proprietors, as the parsonage lot; and a formal entry upon the same, before bringing the action.

The defence set up was, that these lands had been sold to the tenant by a committee appointed for that purpose by the town, acting in its parochial capacity, with the assent of the *Rev. Mr. Blood.* It appeared that this gentleman was regularly settled as the first minister of *Bucksport*, in the year 1803, if the objections to the record evidence of his settlement, (which are sufficiently stated in the opinion of the Court,) were properly overruled, and that he had ever since continued in that office.

At a town meeting, held *Jan.* 31, 1803, it was voted; "that in "consequence of *Mr. Mighill Blood's* answer to the town com- "mittee, who were authorised in their name to give him a call "to settle with them as their minister, that he have in addition to "a salary of $300 per annum, the use and improvement of the "*one half part* of the three hundred acre lot, called the Parson- "age lot, in said town." *Mr. Blood* knew of the passage of this vote, and assented to it.

Upon the whole evidence, for the purpose of bringing all the questions of law raised in the case before the Court, the Chief Justice instructed the jury to find for the tenant, which they did; the parties agreeing, that if in the opinion of the Court the demandants were entitled by law to maintain this action, the verdict should be set aside and a new trial granted.

Rogers, for the demandants.

The statute of *Maine*, *ch.* 254, passed 1824, vested the fee and estate in lands reserved for the use of the ministry, or parsonage lands, *in the town*, where the fee had not *already* vested in some particular *parish* or *individual.* Had the fee become so vested prior to the passage of this act? It is contended that the fee in no case can become vested in a parish. If there be a minister, the fee simple is in him, and his successors; and if there be no minister the fee is in abeyance. *Weston* v. *Hunt*, 2 *Mass.* 500; *Brown* v. *Porter*, 10 *Mass.* 93. Nor had it become vested in any individual. None could take but a legally settled minister, and it is contended that there is no legally settled minister in the town of *Bucksport.*

1. There is no sufficient evidence of a warrant having issued for calling a meeting. This should be proved by the record.

Thayer v. *Stearns & als.* 1 *Pick.* 109; *Inhabitants of first Parish in Sutton* v. *Cole*, 3 *Pick.* 232.

2. The service of the warrant was not sufficient in regard to time — and in its not appearing in what manner he had served the notice. *Tuttle* v. *Cary*, 7 *Greenl.* 426.

But if *Mr. Blood* was legally settled, he is estopped by the terms of the settlement to claim more than one half of these lands. And the parish is estopped in like manner. *Brown* v. *Porter*, before cited.

Abbott and *Pond*, for the defendant, cited the following authorities: *Rice* v. *Osgood*, 9 *Mass.* 44; *Parsonsfield* v. *Dalton*, 5 *Greenl.* 221; *Town of Pawlet* v. *Clark*, 9 *Cranch*, 292; *Shapleigh* v. *Pilsbury*, 1 *Greenl.* 271; *Weston* v. *Hunt*, 2 *Mass.* 500; *Proprs. Ken. Pur.* v. *Laboree*, 2 *Greenl.* 275; *Lewis* v. *Webb*, 3 *Greenl.* 326; *Dartmouth College* v. *Woodward*, 4 *Wheaton*, 518; *Const. of Maine, art.* 1, *sec.* 21; *Richardson* v. *Brown*, 6 *Greenl.* 355; *Fletcher* v. *Peck*, 6 *Cranch*, 87; *Colman* v. *Anderson*, 10 *Mass.* 113; *Maine Stat. ch.* 114, *sec.* 1; *Thayer* v. *Stearns*, 1 *Pick.* 112; *Ford* v. *Clough*, 8 *Greenl.* 344; *Bangs* v. *Snow*, 1 *Mass.* 181; *Waldron* v. *Lee*, 5 *Pick.* 329.

Weston C. J. — The validity of the settlement of the *Rev. Mr. Blood*, as the minister of *Bucksport*, is controverted on several grounds. First, that the warrant calling the town meeting, at which it was voted to invite *Mr. Blood* to become their minister, was not under seal. But the statute, under which that meeting was called, did not require that the warrant should be under seal; and it was accordingly held not to be essential in *Colman* v. *Anderson*, 10 *Mass.* 105. Secondly, that the warrant does not appear to have been recorded, and that it can be proved only by the record. The fact to be made out is, that the meeting was holden, in pursuance of a regular and lawful warrant. The original in the custody of the town clerk, having all the legal requisites, is produced. It is in its nature the best evidence of the fact. Its validity is not made by law to depend on its being recorded. If such a duty had been prescribed, it would

have been of a directory character, and not a condition precedent to the exercise of the powers, given by the warrant. As that is a paper which may be lost or destroyed by time and accident, there is great convenience in having it recorded, and it may be among the implied duties of the town clerk. And the record when made, or a copy of it duly attested, is evidence of the existence and contents of the warrant; but certainly not of a higher character than the warrant itself, which is the original and primary evidence. It would be extraordinary if an objection of this kind on the part of the demandants could be sustained, founded on the assumed delinquency of their town clerk in not recording the warrant. In *Thayer* v. *Stearns et al.* 1 *Pick.* 109, cited in the argument, in which the defendants justified as assessors of the town of *Milford*, the question was, whether a defect in the return of the constable on the warrant for the meeting, at which they were chosen, supposed to be fatal, could be supplied by parol testimony. The court held the return as it stood sufficient for the purposes of the defence, but had it been otherwise, intimated an opinion that the defendants were bound to show themselves to have been duly chosen by the records, that is, as must, we think, be understood, without the aid of parol testimony, the legal admission of which was the point raised at the trial. That kind of proof was held inadmissible, and it was contrasted for illustration with record proof. It cannot fairly be deduced from it, that the original warrant itself was not evidence of its existence and contents. That the court could not have taken any distinction between the warrant and the record of it, holding the latter competent, and the former incompetent evidence, may be seen by adverting to the case of *Saxton* v. *Nimms et al.* 14 *Mass.* 315, upon which they based that part of their opinion. There the question was, whether the return on the warrant, that full seven days warning of a school district meeting had been given, might be contradicted by the testimony of some of the inhabitants, that they had less than seven days notice. The court held that such testimony could not legally be received.

The date of the constable's return was the day previous to the meeting. This constitutes no objection, as was decided in *Thay-*

er v. *Stearns,* before cited, and in *Ford* v. *Clough et al.* 8 *Greenl.* 334.

It is further insisted that the meeting was illegal, inasmuch as the constable has not returned in what manner he notified the inhabitants, and *Tuttle* v. *Cary,* 7 *Greenl.* 426, is much relied on as an authority in point. In that case the defendant, who had acted as moderator of a meeting, was called upon to answer in damages, for an alleged violation of official duty. It was a case calling for strict proof of all essential averments, on the part of the plaintiff. It was incumbent on him to show that his vote had been refused at a legal meeting. For the purpose of upholding proceedings, *ut res magis valeat, quam pereat,* many deficiencies, not inconsistent with what does appear, are supplied by presumption and intendment of law. A construction thus liberal and enlarged has been applied in aid of the proceedings of *quasi* corporations, created for public purposes, and of ancient proprieties. In the former, persons little skilled in business are, from the necessity of the case, frequently called upon to act officially. Under such circumstances, their acts and doings are to be viewed with an indulgent eye, and such has been the uniform practice of the courts. The case of *Tuttle* v. *Cary* is of another character, not within the reason, upon which this practice is founded. It has more analogy to a suit for a penalty or forfeiture. This court there decided that the legality of the meeting did not appear by competent proof. And whatever may have been the general reasoning of the learned Judge, who pronounced the opinion of the court, the decision has reference to the case then under consideration. But admitting the points there decided to be of general application, it is distinguishable from the case before us. There, the manner of warning was prescribed by the Parish act. Here, it is not prescribed, but depends upon the vote or agreement of the town. The town proceeded to act under the warrant in question, as returned. They were satisfied with it, and it may well be presumed to have been served in the manner agreed upon. The case of *Ford* v. *Clough et al.* before referred to, recognises and sustains these distinctions.

A committee of gentlemen, claiming to be authorized by the inhabitants of the town of *Bucksport,* invite the *Rev. Mr. Blood*

to become their minister. He accepts their invitation, is settled according to ecclesiastical usage, and enters upon the duties of his office. He continues to serve them for thirty years, the prime of his days. They acquiesce during all that period, enjoy the benefit of his labors, and pay the stipulated salary. If there was any irregularity in warning the first meeting, it is not imputable to him, nor does he appear to have been apprized of it. If it had been competent for them, at an earlier period, to have set up these objections, which is not admitted, it is not too much to hold that they have by their long acquiescence, waived them, and ratified and confirmed the acts of their officers and agents.

If then, *Mr. Blood* became in 1803, and has since continued, the settled minister of the town of *Bucksport*, have the demandants proved their seizin in the land in controversy, as alleged? The leading cases of *Weston* v. *Hunt*, and of *Brown* v. *Porter*, cited in the argument, establish the doctrine, that if there be a minister, the fee of parsonage or ministerial lands is in him, and that during a vacancy, it is in abeyance. This was the general law; the tenure by which these lands were holden. That tenure may be changed by alienation, which may be made effectual by the minister, with the assent of his town or parish. If the condition prescribed by the town at the adjourned meeting, in regard to the ministerial lot, to which *Mr. Blood* is found to have assented, was binding and operative, it did not vest the fee of any part of it in the town. There was no alienation of the land, by any of the forms authorized by law. The whole must therefore have vested in *Mr. Blood*, in right of his town or parish, or a part remained in abeyance. That is a state of things, which all the ancient jurists agree, the law abhors. This arose partly from feudal reasons, which have ceased to exist, but principally because it is unpropitious to proper care and vigilance in the preservation of property of this description, and to productive labor and improvement. It would be to lock up the land from its destination and appropriate use.

Whether after the acceptance of their invitation by *Mr. Blood*, without conditions, it was competent for the town to impose them; or whether if so, it must not have been in pursuance of an article in the warrant calling the meeting, are questions, which

the case does not require us to decide. *Mr. Blood*, doubtless, considered their understanding binding upon him in a moral, if not in a legal point of view; and the case finds that he has accordingly assented to the disposition of this part of the lot on the part of the town. But whatever may have been the legal character of that agreement or understanding, we are of opinion that by law, the fee of the whole lot, did, and must vest in *Mr. Blood*, as the settled minister of that town. It did not remain in abeyance. It vested in him, as much as the inheritance does in the heir, upon the death of the ancestor. This course of things, depending on the general law, could not be changed by a vote of the town. He might, in pursuance of the agreement, hold a portion of it in trust for the town, under an obligation to permit them to enjoy the profits, or to convey to their appointee, but the legal title would remain in him, in right of the town. Whatever rights the town had under their vote with his assent, would be under him, and in subordination to his legal title. This view of the case is sustained by the opinion of the court in *Brown* v. *Porter*.

If the land vested in *Mr. Blood*, and we are of opinion that it did, although it may have been subject to trusts, prior to the act of 1824, *c.* 254, that statute did not operate upon the land in controversy, and the demandants have failed to prove their seizin, as alleged.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF WALDO, JULY TERM, 1835.

JACKSON *vs. The Inhabitants of* BELMONT.

In an action by one against a town, to recover for labor expended in repairing the highway, it was held, that the following vote, viz: "to raise $3000 — and that the Proprietors' proportion of said tax *be laid out under the inspection and direction of the Selectmen,*" did not authorise the selectmen to contract for the working out of said tax on the liability and at the charge of the town.

Held further, that the following certificate given by two of the Selectmen, in connexion with the vote aforesaid, did not constitute a contract binding the town, even if they had been fully authorised for that purpose, *viz.*" This may certify that S. J. worked $41,56 of B. J's highway tax in 1828, in the district in which he lives, it being the district's proportion of the tax for that year."

THIS was an action of *assumpsit.* The writ contained two counts — the first on an account annexed, in which the defendants were charged for "labor on the highway in 1828, on account of non-resident propietors' tax, $41,56, and interest on the same, 5 years and 11 months, $13,76.

The second count set forth a special agreement, the terms of which were, that on the 1st day of *August,* 1828, the defendants by their agents, authorised for that purpose, in consideration that the plaintiff would work out so much of the highway tax of that year, set against the name of *Benjamin Joy,* a non-resident proprietor, as fell within the district where the plaintiff lived, that the defendants undertook to pay him therefor the sum of forty-one dollars and fifty-six cents.

The plaintiff, to maintain the action, introduced *Samuel Jackson, Jr.*, a witness, who testified that in *July*, 1828, *William White Esq.*, one of the Selectmen of *Belmont*, called on the plaintiff, his father, and asked him "if he could work the Proprietors' tax for that district" — and that the plaintiff replied that he could and would — and that he accordingly did, in that and the following month, work upon the highway on account of said taxes.

He then produced the records of the town of *Belmont*, by which it appeared that the warrant for calling the annual meeting in *March*, 1828, contained the following article, *viz*: "To see "how much money the town will raise for the repairs of the high- "way." And in the proceedings of the town under it — "Voted, "to raise three thousand dollars — and that the Proprietors' pro- "portion of said tax be laid out under the inspection and direction "of the Selectmen."

He also offered the following certificate, *viz*: "*Belmont, Aug.* "1, 1828. This may certify that *Mr. Samuel Jackson*, worked "forty-one dollars and fifty-six cents of *Benjamin Joy's* highway "tax in 1828, in the district in which he lives, it being that dis- "trict's proportion of the tax for that year.

"*Wm. White,*
"*Melzar Thomas.* } *Agents.*"

It was admitted that *White* and *Thomas*, were two of the board of Selectmen, for the year 1828, — that there was no article in the warrant calling the town meeting, having any relation to the subject matter of the vote, except the article 23d aforesaid, and that the certificate aforesaid was not given by *White* and *Thomas*, until after the expiration of their term of office.

To maintain the issue on their part, the defendants called *William White*, who testified, that in *July*, 1828, he asked the plaintiff, "if he wished to work out the tax aforesaid, or that part of "it which belonged to the district in which he lived, — that he, "said *White*, had had a conversation with *Mr. Joy's* agent, and "that he said, he did not wish any one to work the tax, except "some one who owed for land, or who wished to purchase land, "and that the plaintiff replied, either that he *was* owing for land,

" or that he had a piece of land in view which he wished to pur-
" chase, and that he should like to work the tax out." He stated further, that the plaintiff never called for " the certificate until " after a year, and that he then stated he wanted to settle with " the proprietors."

Thereupon the defendants' counsel requested *Perham J.* before whom the cause was tried in the C. C. Pleas, to instruct the jury :

1. That there should have been an article in the warrant calling the town meeting, for the specific subject upon which the town voted, in order to render the vote legal and binding.

2. That the vote of the town, did not authorize the Selectmen to *contract* with any individual to work out the Proprietors' tax on the credit of the defendants.

3. That if the vote of the town did authorize the Selectmen so to contract, yet that the agreement proved, being with one only of the Selectmen, was not binding on the defendants.

As to the first, the Court instructed the jury, that it was competent for the town, while acting under article 23d in the warrant to vote how the money should be expended, as well as how much should be raised.

As to the second request, the Court instructed the jury, that, the vote of the town was in evidence before them, and that they were to weigh it with other evidence, and the provisions of the statute which had been read to them, and decide whether it did or did not authorize the Selectmen to contract with individuals for the performance of the labor on the highways aforesaid.

As to the third, the Court instructed the jury, that, it was true that the minority of the board of Selectmen could not bind the majority and of consequence the defendants ; but that the act of the minority might afterwards be ratified by the majority, and thus be rendered obligatory upon the defendants, — and that the jury might consider the certificate signed by *White* and *Thomas*, as evidence of a ratifying by the majority of the act of the minority.

Under these instructions, the jury returned a verdict for the plaintiff, — and the case was brought up to this Court on exceptions to the ruling of the Judge.

W. G. Crosby, argued in support of the exceptions, and cited, *Maine stat. ch.* 114, *sec.* 5; *Kupfer & al.* v. *South Parish in Augusta*, 12 *Mass.* 189; *Towne* v. *Jaquith*, 6 *Mass.* 46; *Damon* v. *Granby*, 2 *Pick.* 345; *Jones* v. *Andover*, 9 *Pick.* 146.

J. Williamson, for the plaintiff, contended, 1. that the town was fully authorised to direct the appropriation of the money — and to empower the Selectmen to make contracts in regard to the repair of the highways. *Davenport* v. *Hallowell*, 1 *Fairf.* 317; *Maine Laws, ch.* 118, *sec.* 16.

2. He argued that the only reasonable construction which could be put upon the vote of the town was, that it authorised the Selectmen to contract. How could the tax be worked out under their "inspection and direction" unless they had, by contract with those who should do the labor, a power to direct and control their operations?

3. It is admitted that a minority of the Selectmen could not bind the town. But in this case, the majority act by ratifying the contract made by *White*. The town have had the benefit of the plaintiff's labor — have accepted it, and are therefore liable in this action. *Hayden* v. *Madison*, 7 *Greenl.* 76; *Abbott* v. *Hermon*, 7 *Greenl.* 118; *Smith* v. *The Proprs. of Meeting-house in Lowell*, 8 *Pick.* 178; *Nelson* v. *Milford*, 7 *Pick.* 18; *Davenport* v. *Hallowell*, 1 *Fairf.* 317.

Parris J. — The statute of this State, *chap.* 118, making provision for the repair and amendment of highways, provides that all highways, town ways, bridges, &c. lying within the bounds of any town, shall be kept in repair and amended at the proper charge and expense of such town; and each town is required to raise such sum of money to be expended in labor and materials on the highways as they shall determine necessary for the purpose.

This sum is to be assessed on the polls and rateable estate, personal and real, of the inhabitants, residents and non-residents of the town, as other town charges are assessed. From the exceptions, it is to be inferred that *Benjamin Joy* was taxed, as a non-resident, for the support and repair of highways in the town

of *Belmont*, in the year 1828, and that the plaintiff paid forty-one dollars and fifty-six cents of this tax by his labor on the highway. For this sum he now seeks to recover of the town.

We see no ground for the maintenance of the action. In the first place, the vote of the town did not authorise the Selectmen to hire the plaintiff, or any other person, to work upon the highways, on account of the proprietors' tax. By statute, the Selectmen are to assign to the several surveyors their divisions and limits, for making and repairing highways. The vote of the town, raising the money, and directing that the proprietors' proportion should be laid out under the inspection and direction of the Selectmen, was probably intended merely to authorise the Selectmen to assign the expenditure of the proprietors' tax on such of the roads and in such parts of the town as they should deem most necessary. Whether that was or was not the object of the vote, we are clearly of opinion that it was never intended to clothe the Selectmen with power to hire labor upon the credit of the non-resident proprietors' tax, and make the town answerable for such labor; and that the vote gives no such authority.

This construction is in perfect accordance with the acts of the Selectmen, as well as the plaintiff himself; for, in the second place, no contract was made by *White* with the plaintiff. The certificate signed by *White* and *Thomas*, merely shews that *Jackson* had paid a certain amount of *Joy's* highway tax; not a word is added about the accountability of the town, or any promise that the money shall be allowed or paid by the town. Can it be pretended that this is evidence of a contract to bind the town to pay back the money? Suppose that *Jackson* had paid *Joy's* State and county tax, and taken such a certificate as he now produces, could he thereby reclaim of the town the money he had thus voluntarily paid? Clearly not.

The testimony of *White*, places the matter beyond doubt, even if without it any doubt could remain. *Jackson* performed the labor on *Joy's* account, and took the certificate as evidence of the fact against *Joy*, intending, as he held out to *White*, to turn it towards the payment for land, which he either had purchased or was about to purchase of *Joy*.

We are decidedly of opinion, that the town never authorized the Selectmen to make such a contract as *Jackson* now attempts to set up, and that the Selectmen never made or undertook to make any such contract, and we think the jury ought to have been so instructed.

The construction of the vote of the town, under which the plaintiff claims for the Selectmen authority to make the contract, was purely a question of law, and ought to have been decided by the Court.

The verdict must, therefore, be set aside, and if the plaintiff is desirous of having a new trial, it must be at the bar of this Court.

CURTIS *vs.* DEERING.

A grantee may be *evicted* though he has never been in the actual occupation of the land.

If one enter upon land, having a lawful title, and hold adversely to another grantee of the same land, it is equivalent to an *eviction*, so that the latter may maintain an action against his grantor upon the covenant of warranty.

Where two claim title under the same grantor, the one whose deed was *first recorded*, though executed subsequently to the deed of the other, is to be regarded as having the *elder* as well as better title.

A. conveyed to B. in fee and in mortgage with covenants of warranty, and afterward conveyed the same land to C. without excepting the mortgage. The latter, procuring his deed to be first recorded, held the land. *Held*, that A. was liable to B. on the covenant of warranty, and that the measure of damages was the amount due on the mortgage.

THIS was an action of covenant broken, and was submitted for the decision of the Court upon the following statement of facts, which was agreed by the parties.

On the 8th of *March*, 1830, the defendant being seised in his own demesne as of fee, of a certain lot of land, conveyed the the same by deed of that date to the plaintiff, in fee and in mortgage, to secure the payment of certain notes of hand, the deed containing the usual covenants of seisin and warranty. The plaintiff did not enter under his mortgage, nor did he put his deed upon record until *October* 23, 1833.

On the 26*th* of *September*, 1832, the defendant, by his deed of that date, conveyed the premises to one *Isaac Deering, Jr.* who entered into the possession thereof and caused his deed to be duly recorded, *March* 28, 1833; and on the 16th of *October*, 1833, he conveyed one half to *John Hall*, and the other half to *Samuel Young*, who entered under their deeds and have ever since occupied the premises, claiming adversely to the plaintiff and every body else. And it was agreed that said *Hall and Young* had no knowledge of the prior conveyance to the plaintiff when they received their deeds from *Deering, Jr.*

The action was upon the covenant of warranty in the defendant's deed of the 8th of *March*, 1830; and if the Court should be of opinion that it was maintainable, it was agreed, that judgment should be rendered for such sum as in the opinion of the Court the plaintiff was legally entitled to recover. Otherwise, judgment was to be rendered for the defendant for his costs.

Johnson, for the plaintiff, cited 4 *Dane's Abr.* 362; *Sprague* v. *Baker*, 17 *Mass.* 586; *Hamilton* v. *Cutts & als.* 4 *Mass.* 349; *Higby* v. *Rice*, 5 *Mass.* 352; *Jackson* v. *Howe*, 14 *Johns.* 406; 13 *East* 72; 3 *Saund. Rep.* 448; 4 *Dane's Abr.* 362; *Hurd* v. *Fletcher*, *Doug. Rep.* 43; 2 *Saund. Rep.* 181; 3 *Cruise on Real Estate*, 34.

W. G. Crosby, for the defendant. 1. No action lies until eviction by title paramount. *Prescott* v. *Trueman*, 4 *Mass.* 631.

2. The plaintiff never having entered under his deed, could not be evicted. *Chapel* v. *Bull*, 17 *Mass.* 220.

3. The covenant to warrant and defend extends only to *elder* and *better* titles — to those then existing and not to those subsequently acquired. *Marston* v. *Hobbs*, 2 *Mass.* 438; *Emerson* v. *Minot*, 1 *Mass.* 463; *Cro. Jas.* 315; 2 *Saund.* 177, *n.* 10;

4. At the time the defendant conveyed by his last deed, he had an interest which he could convey. There was therefore no fraud done or intended by him. If the plaintiff suffers loss in the case, it will be in consequence of his own negligence in not putting his deed upon record.

Weston C. J. — This is a case, in which the plaintiff declares upon a general covenant of warranty, made by the defend-

ant, which is alleged to have been broken by him; and whether this allegation is made out by the facts agreed, is the question submitted to our consideration.

It is contended that the plaintiff, having never entered into the land, could not be evicted, and cases are cited to show, that there must be an eviction by judgment of law or otherwise, or a voluntary surrender by the party, in whose favor the covenant was made, to a claim which could not be lawfully resisted, or a purchase and extinguishment of the paramount title. This doctrine is well sustained by the authorities relied upon; and we are not disposed to question it. It is, however, our opinion, that the facts agreed, amount to an eviction. When the defendant conveyed to the plaintiff in fee and in mortgage, the legal seizin passed to the latter, to whom the former, retaining the possession, was thereafterwards in the eye of the law, but a tenant at will. If a stranger had entered upon the land, and committed a disseizin, the plaintiff could have maintained a writ of entry against him, counting upon his own seizin. And the grantees of *Isaac Deering, jr.* having by lawful title entered upon the land, and occupied it, claiming to hold it adverse to the plaintiff, and he, being without legal remedy against them, is evicted.

Another objection made is, that the plaintiff has not been evicted by elder title. This is generally laid down by the authorities as necessary to be averred and proved. In *Kirby* v. *Hansaker*, *Croke James*, 315, the only reason assigned is, that if the plaintiff aver that he was evicted by a party having a good or a better title, if it is not also alleged that he had an elder title, it might be that he derived it from the plaintiff himself, after the deed. A general covenant of warranty against all claims, has been limited by construction of law to lawful claims, because the law is a sufficient protection against wrongdoers. But all lawful claims, except such as are derived from the plaintiff, are within the terms, and should be within the operation of the covenant. There is no propriety in applying the rule, that there should be proof of elder title, to evictions founded upon the subsequent acts of the covenantor, which cannot be resisted. But in truth the claim of those who hold adversely to the plaintiff is, by construction of law the elder title. It is upon that ground only,

that it can be regarded better. As between them the title dates from the time of the registry. The plaintiff's, being later, is postponed, and their's, being earlier, has precedence.

It is lastly insisted, that the defendant, being the owner of the equity of redemption, and therefore having title to the land, except against the mortgagee, had a right to convey, and in so doing, has not broken his covenant. It would have been saved, if his conveyance had been made, subject to the rights of the mortgagee. Against him a conveyance in fee, without any saving, being made by his tenant at will, was a disseizin, at his election. His conveyance against the mortgagee was an unlawful act; although it might have been lawful, if it had not affected his interests. This results from the relations, which are sustained at law between him and the mortgagor. The deed thus unlawfully made by him, having occasioned an eviction, which the plaintiff cannot rightfully resist, is a breach of the defendant's covenant of warranty, upon which the plaintiff has declared. The damage sustained is the amount remaining due on the mortgage, for which, judgment is to be rendered for the plaintiff.

HOLBROOK *vs.* WEATHERBEE *& al.*

Where a subsequent attaching creditor had been permitted to defend the suit of a prior attaching creditor, under the provisions of *stat.* of 1831, *ch.* 508, it was held, that he could not be precluded from pursuing the defence by the defendant bringing into court, and depositing with the Clerk for his acceptance, the amount of his, the said subsequent attaching creditor's, claim.

IN this action, which was *assumpsit*, for goods sold and delivered, the following facts were agreed by the parties, *viz:*

The writ was sued out by the present plaintiff, returnable at the *November* term of the C. C. Pleas, 1833, and the defendant's goods attached thereon. Certain other creditors of the defendants also commenced suits against them for the same term, and caused the same goods to be attached, subject to the attachment of *Holbrook*. At the first term, *Sylvester & Hoyt*, two of the subsequently attaching creditors, on their petition, and on giving bond, were admitted under the provisions of *stat.* of 1831,

ch. 508, to defend this action on the ground that the claim set up therein was fraudulent.

At the same term, *Sylvester & Hoyt* recovered judgment in their action against the defendant, for $184,36 debt, and $27,84 costs of suit, — whereupon, they, the defendants, brought into Court the amount of said judgment in full satisfaction thereof, and deposited the same with the Clerk, where it remained subject to the order and disposal of *Sylvester & Hoyt.*

From the judgment rendered in this action, an appeal was taken to this Court, — and at the first term, the plaintiffs submitted a motion in writing, that the defendants be called and defaulted, they not appearing by themselves or attorney, and said *Sylvester & Hoyt*, being no longer entitled to defend, their judgment having been satisfied, — and the question was upon the granting or denial of this motion.

Sprague and *Heath*, for the plaintiffs, the argument of the former being submitted in writing.

The right of these petitioners to defend, depends upon the *stat.* of 25th of *March*, 1831, *ch.* 508. By that statute, contrary to the general policy of the law, a third person is permitted to interpose between the parties on the record, and contest a demand and create litigation where the defendant himself does not controvert the justice of the plaintiff's claim. This great inroad upon the general policy of the law, which endeavors to repress litigation, is manifestly founded upon this single, clear and cogent reason, that the subsequent attaching creditor depends for his security upon the same property that is attached by the first, and that if he do not defeat the first attachment, he will be in danger at least, of losing his own debt. It is for these reasons that he is permitted to defend a suit to which he is not a party. As his right to defend, depends entirely upon his interest in the question, upon the danger of his otherwise losing his demand, when that danger is removed, and that interest ceases, the right itself is also at an end. "*Cessante ratione cessat ipso lex.*" It would not only be an anomaly, but an absurdity to permit a third person either to come in, or to continue to contest the plaintiff's demand when such person has no rights at stake, and no interest in the question. And such is the condition of *Sylvester & Hoyt.* They

cannot need the property attached or any portion of it for the payment of their debt. The amount due to them having been judicially ascertained, that amount has been brought into Court, and there deposited awaiting their acceptance of it. What interest have they, or can they have therefore, in contesting the demands of the present plaintiff. And what right can they have to harass or delay him by litigation? *Sylvester & Hoyt*, act only for themselves. They neither petitioned originally, nor do they now appear in behalf of any other person, and it would be doing a gratuitous injustice to him, contrary to the spirit and reason of the law, and without any benefit to *Sylvester & Hoyt*, to allow them further to contest his demand. The defence of this action cannot be farther carried on under pretence of benefitting other creditors, who are not before the Court, and who have never asked any such benefit. For ought that appears, they are entirely satisfied. They may have other security — and if they have not, the course is open for them to avail themselves of the statute provisions in their favor. But the Court has no power to grant the favor to them indirectly through one who has no interest in the question. If they would have the benefit of the statute they must become petitioners themselves, in their own names setting forth *under oath* their claims, and the facts which shall entitle them to litigate with the plaintiff. To allow them to come in, in any other manner, would be to repeal one of the essential provisions of the statute, and deprive the plaintiff of the right expressly secured to him, of putting upon oath the party who claims to contest his demand.

Allen and *Alden*, for the subsequent attaching creditors.

PARRIS J. — Prior to the statute of *March* 25, 1831, *Chap.* 508, cases had frequently occurred where a subsequent attaching creditor, of property previously attached, had been compelled to stand by and permit a judgment to be rendered against his debtor on a fictitious demand, whereby his subsequent attachment would be wholly defeated; and if, by any fortunate arrangement with the officer having the execution issued on such fraudulent judgment, or in any other manner, he might afterwards have opportunity to contest the validity of such judgment, he would find

the burden of proof of its fraudulent character thrown upon him, so that, instead of the fraudulent plaintiff being required to prove the *bona fide* character of his demand, a judgment would be procured, by collusion with the defendant, which would be conclusive upon all subsequent attaching creditors, unless they could shew that it was fraudulent.

By the wholesome provisions of the statute above mentioned, in all cases where the same estate has been attached on mesne process in two or more suits, the plaintiff in any suit after that in which the first attachment shall have been made, may petition the court whereunto the writ is returnable, at any time during the pendency of such suit, for leave to defend against such first suit in like manner as the party therein sued might have done, which petition may be granted, if the court shall deem it just and proper. If the court admit such petitioner to defend, he is to give bond to pay the plaintiff all such costs as the court shall adjudge and decree to have been occasioned to the plaintiff by such defence, and it is to be entered on the record that such petitioner is admitted to defend.

The motion now is that *Sylvester* and *Hoyt* should not be permitted to defend further. They have filed their petition, made oath to the facts therein stated, given the bond required, and been duly admitted on the record.

What would be the consequence of granting the present motion? Would it not be that *Sylvester* and *Hoyt* would be liable on their bond for all such costs as have been occasioned to *Holbrook* by their interference? Again, the statute provides that, if the petitioner prevails in defending against such previous action, the court shall render judgment thereon, and shall award execution to the petitioner for his reasonable costs. In what situation should we place *Sylvester* and *Hoyt* as to the costs which they have incurred, if we were now to refuse them permission to defend further? They have taken upon themselves the defence of the suit, have been in court for several terms, and incurred expense arising from such defence, and yet they are not the prevailing party, and consequently could not have a judgment for costs. It would be manifestly wrong that an honest creditor should be

thus harassed by the parties to a fraudulent sale, and after having incurred heavy costs in exposing the fraud, have the door at once closed upon him without the possibility of remuneration. And yet such would be the hazardous situation of creditors situated like *Sylvester* and *Hoyt*, if the motion of *Holbrook*, now before us, is to be granted as matter of right. They may have defended the original suit with complete success through all the intermediate stages up to the time for the final trial; they may have expended, in such defence, a sum much larger than the debt which they are endeavoring to secure, and when the fraud is about to be conclusively established and the party plaintiff, a participator in the fraud, has no other means of escaping the accumulated costs, shall it be that he can do so by still further colluding with the defendant?

Inasmuch as the petitioners, *Sylvester* and *Hoyt*, have been admitted to defend by the Court of Common Pleas, and have sustained the defence for several terms in that court, as well as in this, and are still desirous of defending, we think it would be unreasonable now to turn them out of court remediless as to costs, and, perhaps, even liable on their bond.

The motion of the plaintiff is, therefore, denied.

PATTERSON *vs.* CUNNINGHAM.

A conveyance of certain lands and personal property was made by a father to his two sons, they, *verbally* agreeing that after their father's death, they would convey the same property to a sister, or pay her $300 in money. *Held*, by the Court, that this promise could not be enforced at law, being within that provision of the Stat. of frauds, *ch.* 53, *sec.* 1, requiring contracts for the sale of lands, &c. or any interest in or concerning the same, to be in writing.

The promise being in the alternative, to pay money or convey land, does not exempt it from the operation of the statute.

Nor will a delivery of a portion of the personal property, in execution of the agreement, take the case out of the Statute, the doctrine of *part performance* being confined to courts of equity.

THIS was an action of *assumpsit*, brought to enforce an agreement made by the defendant and a deceased brother, jointly,

with the father of the plaintiff for her benefit. The facts in the case are fully stated in the opinion of the Court.

Allyn, for the defendant, contended, 1. That the defendant was excused from the performance of the agreement, it having become impossible by the act of God, in consequence of the death of the defendant's brother, who *jointly* promised with him.

2. The promise was not made to the plaintiff, but to *William Cunningham*, and he would be estopped by his deed to deny the payment of the consideration. *Steele* v. *Adams*, 1 *Greenl.* 1.

3. The promise is within the 1st section of the *Stat.* of frauds. *Pitts* v. *Waugh*, 4 *Mass.* 424; *Dillingham* v. *Runnels*, 4 *Mass.* 400; *Boyd* v. *Stone*, 11 *Mass.* 347; *Sherburne* v. *Fuller*, 5 *Mass.* 133; *Hunt* v. *Maynard*, 6 *Pick.* 489; 15 *Johns.* 503; *Bishop* v. *Little*, 5 *Greenl.* 362.

4. If it is void in part it is void in the whole. 8 *Johns.* 195; 5 *Cowen*, 162; *Sugden on Vendors*, 55.

5. The part performance of the contract does not affect the case. *Kidder* v. *Hunt*, 1 *Pick.* 328; *Freeport* v. *Bartol*, 3 *Greenl.* 340.

Johnson, for the plaintiff.

1. An action of *assumpsit* may be maintained by one for whose benefit the promise was made. *Arnold & als.* v. *Lyman*, 17 *Mass.* 400; *Hall* v. *Marston*, 4 *Mass.* 575.

2. The bringing of the action is a sufficient demand. See *Hall* v. *Marston.*

3. Though the consideration related to land, still *assumpsit* may be maintained. *Dearbon* v. *Parks*, 5 *Greenl.* 81.

4. It is of no consequence that this property was a gratuity on the part of the father. *Dutton* v. *Poole*, *Thomas Jones' Rep.* 102; *Brown* v. *Atwood*, 7 *Greenl.* 356.

5. The promise is not within the statute of frauds, being in the alternative, to pay money or convey land. *Van Auston* v. *Wimple*, 5 *Cowen*, 62. If it were otherwise, it is now relieved from the operation of the statute by *part performance. Maine v. Melbourne*, 4 *Ves. Jr.* 720; *Davenport* v. *Mason*, 15 *Mass.* 85; 1 *Com. on Con.* 81.

6. That the defendant is not relieved from his promise by the death of his brother, cite 4 *Dane's Abr. ch.* 122, *art.* 2, § 12.

EMERY J. — This action comes before us on exceptions from the Court of Common Pleas, where the Judge, by consent of parties, in order to bring the action before this Court, directed a nonsuit. From the report of the opening evidence on the part of the plaintiff at the trial, it is apparent that there was an attempt between the father, *William Cunningham,* and his two sons, *Ruggles* and *Thomas,* on the 23d *Sept.* 1830, to make an arrangement for securing to the plaintiff a portion of her father's estate. To effect this a deed was made by said *William,* of the real estate described in the plaintiff's writ to the defendant and said *Thomas* in fee, for the expressed consideration of $100, and a bill of sale of 2 chains and 3 cows. Nothing was in fact paid by the grantees, and the whole was to remain in the use and occupation of *William,* during his life, and did so remain. *Ruggles* and *Thomas* agreed, that after *William's* decease, they would at their election, give to the plaintiff, a deed of the real estate, and deliver her the articles of personal property, or pay her $300. This sum was to be received in the amount of any articles of household furniture of *William,* which after his decease, said *Ruggles* and *Thomas,* might pay to the plaintiff. It was intended as a provision by said *William,* by which the plaintiff should obtain a share of her father's estate after his decease, and which was less than her share of that estate. No writing was signed by said *Ruggles* and *Thomas,* or either of them, and the plaintiff was not present when the agreement was made. On the 6th of *July,* 1832, *William* died, and two days after, *Thomas* died also. In *September* following, the plaintiff demanded of the defendant, a conveyance of the real estate, and a delivery of the articles, or the payment of the $300. The conveyance has not been made. The defendant, however, saying he was willing to give a deed of his part of the real estate, but some of the heirs of *Thomas,* who were present, refused to convey the part of *Thomas,* because his estate was under administration; but *Ruggles* delivered the three cows, of the value of $30, and part of the furniture valued at $9,25, but refused to pay the balance. The chains had not come to the hands of the plaintiff or defend-

ant. After the commencement of this action, the defendant told the witness that he would settle with the plaintiff for the aforesaid claim.

If it be true that the defendant did make the engagement, we regret that he has not fulfilled it. How he can reconcile it to his conscience, to withhold from a sister, that which was transferred to him, by their mutual parent, to be conveyed to her, must necessarily be left to his consideration. If, however, he really meant to do what he is said to have engaged, but was prevented by the refusal of the plaintiff to take the half of the real estate, because the defendant could convey no more, nor pay the money, it goes somewhat to relieve him from censure, if we intended any, which is very far from being true. Yet we wonder that he did not make out and tender to the plaintiff, a deed of conveyance of his undivided interest in the land, with warranty against persons, claiming under him; and we hope that he will yet do so. Certainly the excuse that some of the heirs of *Thomas*, who were present, refused to convey the part of said *Thomas*, because his estate was under administration, was not likely to prove satisfactory in regard to what was within the defendant's power to convey. As the chains never came to his hands, we do not perceive any good ground to implicate him for them, even if there were no other objections to sustaining the suit. But the defendant objects to the incompleteness and insufficiency of the evidence coming from the witness, *Ebenezer Cunningham*, only, to support the action. This objection in point of law, is of a very grave character. To the decision of *Steele* v. *Adams*, he appeals for protection against the claim of the consideration money, which was in the deed acknowledged to have been paid by him and *Thomas* to *William*. The law in this State favors that appeal. The estoppel binds parties and privies.

He further invokes to his aid, the first section of our statute to prevent frauds and perjury, which provides that, "no action shall "hereafter be maintained upon any contract, for the sale of lands, "tenements or hereditaments, or any interest in or concerning the "same, unless the agreement upon which such action shall be "brought or some memorandum or note thereof, shall be in writ-"ing, and signed by the party to be charged therewith, or some

"other person thereunto by him lawfully authorised." *Maine Laws, ch.* 53.

It has been ingeniously argued by the counsel for the plaintiff, that the statute is not justly applicable to the present case, because the promise was in the alternative to convey the land, or pay the money, at the election of the defendant and *Thomas*. And even if it were applicable, that the act of the defendant, in delivering the three cows, was in *part performance* of the contract, and takes it out of the objection of the statute of frauds, and that the statement, since the suit, that he would settle with the plaintiff, for her claim, places his liability beyond dispute.

In a comparatively short period after the *statute* of frauds was passed, the case of the *Lord Lexington* v. *Clark and his wife*, was decided in the second year of *Wm. & Mary*. It is reported in the 2*d Ventris*, 223. The action was *assumpsit*, setting forth "that the plaintiff had demised to the former husband of the defendant's wife, lands at the rent of £320 per annum, to hold at will, and that there was due from the first husband £160 for half a years rent, and that he died possessed of the premises. And that the defendant's wife, while sole, and soon after the death of her late husband, in consideration that the plaintiff would permit her to hold and enjoy the premises till lady day next ensuing the decease of her said husband, and permit her to remove divers posts, rails and other things, fixed and placed upon the premises by her said husband, did promise to the plaintiff that she, as well the said £160, that then was in arrear as aforesaid in the life of her late husband, as also £260 more, would well and truly pay; and shews that she did enjoy the premises by the permission of the plaintiff till lady day aforesaid. And that he suffered her also to take away the things beforementioned, but neither while sole, did she, nor the defendant, or she since her marriage, pay, &c." On *non-assumpsit* pleaded, a special verdict was found that the wife made the promise, enjoyed the lands, took away the posts, &c. as set forth, and that since, she had paid the £160 to the plaintiff; but had not paid the £260, or any part thereof, and the jury found that said promise, nor any memorandum or note thereof, was not put into writing, or signed by the wife of the defendant, or any person authorised by her to do it; and they

found that she paid the £160 before the action brought; and they found the act of Parliament, in 29 *Car.* 2, against fraud and perjuries, whereby it is enacted, that no action should be brought to charge an Executor or Administrator upon any special promise to answer of his own estate, or upon any promise to answer for the debt, default or miscarriage of any other person, &c., unless the agreement, or some memorandum or note thereof were by the person, or some other empowered by him, put into writing, signed, &c.

It was argued for the plaintiff, that although as to the payment of the £160, which was the debt of her, the defendant's late husband, the promise might be void in regard it was not in writing, according to the statute; yet, as to the payment of the £260 the promise is not within the statute, for that is upon a good consideration, and her own proper debt and damages are only given for that, the £160 is found to have been paid. But by the opinion of all the court judgment was given for the defendant for the promise. As to one part being void, it cannot stand good for the other; for it is an entire agreement, and the action is brought for both the sums, and indeed could not be otherwise, without variance from the promise. A note is subjoined. It did not appear by the record that the wife was Executor or Administrator to her former husband.

In the year 1797, in the case *Chater* v. *Becket*, 7 *Term Rep.* 197, it was again decided, that a parol promise to pay the debt of another and also to do some other thing, is void by the Statute of Frauds, and that the plaintiff could not separate the two parts of such a contract. And *Lord Kenyon* remarked that, "if the agreement be void, there is an end of the case; for where there is an express promise, another promise cannot be implied. And he lamented extremely, that exceptions were ever introduced in construing the statute of frauds, and said, "it is a very beneficial statute; and if the courts had at first abided by the strict letter of the act, it would have prevented a multitude of suits that have since been brought." *Grose J.* observed, "that it was one indivisible contract and the plaintiff cannot recover on any part."

In *Crawford* v. *Morrel*, 8 *Johns. Rep.* 253, where the contract proved was, that the defendant was to pay the plaintiff not

only for land given for the highway but also for a distinct and separate piece of land, it was held, that the latter part of the contract being void by the statute of frauds, the whole, being an entire contract, was void.

This being a promise in the alternative does not relieve the case from the objection. The alternative was at the election of the defendant and *Thomas*, to convey the land and deliver the articles or pay the money. And where an election is to be made in general, it is the duty of the person with whom the election lies to make it in a reasonable time, and give seasonable notice of it. Here it was not to be made till after *William's* death ; and in two days after this event, *Thomas* himself died, and no demand had previously been made of either him or the defendant. This providential occurrence ought not to work injury to the defendant, the survivor. It would be wrong to cast the whole burden on him, when he has but half the land. The contract still concerned an interest in land. 5 *Co. Rep.* 21, *Laughter's Case, Com. Dig. Condition D.* 1. The fact that after the commencement of the suit, the defendant told the witness that he would settle with the plaintiff for her aforesaid claim, we consider furnishes no additional strength to that claim. *Bishop* v. *Little*, 5 *Greenl.* 362.

Nor can we think that the delivery of the three cows is such a part performance as to take the case out of the statute of frauds. The Court of Chancery in *England*, has admitted that it had gone too far in permitting part performance and other circumstances to take cases out of the statute of frauds, and then unavoidably perhaps, after establishing the agreement, to admit parol evidence of the contents of that agreement. 3 *Ves. Jun.* 696, 712; *Foster* v. *Hale*. And in *Freeport* v. *Bartol*, 3 *Greenl.* 340, when this position was attempted to be sustained, this court decided that, " the better opinion is that this principle of part performance is applicable to Courts of Equity only."

It is now the settled rule in equity, that although the defendant should answer and admit the agreement as stated in the bill, he may nevertheless protect himself against a performance by

pleading the statute. *Thompson* v. *Todd*, 1 *Peter's C. C. R.* 388; *Elder* v. *Elder*, 1 *Fairf.* 80.

We have not referred to us the declaration in this case upon which we are passing. But we consider the facts detailed in the exceptions, and suppose that the declaration may have been so framed as to be adapted to the facts disclosed. And then the defendant reposes on the formidable protection provided by the statute, because there is no competent evidence to charge him, as there was no note in writing. If the statute be of any value, the evidence on which the plaintiff rested her case is inadmissible. And, together with other cases cited, we apprehend that the case of *Griswold* v. *Messinger*, 6 *Pick.* 517, presents additional authority for our confirming the nonsuit.

WINSLOW *vs.* KELLEY.

In *assumpsit* to recover the price of goods sold, the plaintiff, to show the sale and delivery, called a witness, who testified that he received the goods of the plaintiff on the defendant's account and in pursuance of verbal directions from him; but the Court held the witness to be inadmissible, it appearing that the witness was not the *agent* of the defendant, and that the goods never came to the defendant's use or benefit.

Assumpsit on an account annexed to the writ. The only question in the case, arose from a charge of $1,50 for a quantity of yarn. To show the sale and delivery of this, the plaintiff, among other evidence, called one *Melvin* as a witness, who testified that he received the yarn of the plaintiff for his own use, on the defendant's account, in pursuance of verbal directions from him. The competency of this witness was denied by the defendant's counsel; but *Perham J.* before whom the cause was tried in the C. C. Pleas, admitted him, though it appeared further, that the witness did not in the transaction, act as the *agent* of the defendant, and that the yarn never came to the defendant's use or benefit.

A verdict being returned for the plaintiff, the defendant's counsel filed exceptions to the ruling of the Judge, pursuant to the statute, and by writ of error, (the cause having been commenced originally before a Justice of the Peace,) brought the case into this Court.

Allyn, for the defendant, cited 2 *Stark. Ev.* 747; *Emerton* v. *Andrews*, 4 *Mass.* 613; *Jones* v. *Brook*, 4 *Taunton*, 464; 1 *Camp.* 408; *Maxwell* v. *Pike*, 2 *Greenl.* 8; *Henderson* v. *Sevey*, 2 *Greenl.* 139; 1 *Johns.* 517.

F. Allen, for the plaintiff, insisted that the interest of the witness was balanced, and cited the following authorities: *Webb* v. *Margnard*, 16 *Johns.* 89; *Descadillas* v. *Harris*, 8 *Greenl.* 298; *Phillips* v. *Bridge*, 11 *Mass.* 242; *Thompson* v. *Snow*, 4 *Greenl.* 264.

PARRIS J. — It being expressly found, that in making the purchase, *Melvin* was not the agent of *Kelley*, and that the article purchased was for the use of *Melvin* and was never appropriated for *Kelley's* benefit, we think this case presents stronger objections in principle, against the admissibility of *Melvin's* testimony, than the case of *Hewett* v. *Lovering*, decided on the present circuit, *ante*, *p.* 201, or any of the cases there cited.

Upon the authority of that decision, as well as of *Emerton* v. *Andrews*, 4 *Mass.* 653, we sustain the exceptions. The judgment of the court below is, therefore, reversed.

HOWE *vs.* REED.

Where the residence of an execution debtor was described in the execution as being in a town out of the County, the officer in making a levy, was held to be justified in considering that town as the place of his residence *at the time of the levy.* And no proof being offered showing that he lived within the County, the officer was not required to notify him to choose an appraiser.

Where it was attempted to impeach a conveyance on the ground of fraud, evidence that the grantor made other conveyances, about the same time, which were fraudulent, was held to be admissible to prove *his* fraudulent design in the case on trial. But it could not affect the *grantee*, unless followed up by evidence of his participation in some way, in the fraud.

THIS was a *writ of entry*, brought to recover possession of an undivided moiety of a certain lot of land in this county. The general issue was pleaded and joined. The demandant relied upon a title acquired under the levy of an execution, on the 25th of *April*, 1829, against *Samuel D. Reed* and *John Drummond*, in favor of *Hall J. Howe*, the demandant, and *James Howe*, the latter of whom had deceased prior to the commencement of this suit.

The validity of this levy was objected to by the defendant's counsel, because it did not appear by the officer's return upon the execution, that *Samuel D. Reed*, one of the debtors, was notified, and had an opportunity to choose an appraiser, it not appearing further, that the judgment debtor was not living in the county at the time of the levy.

The counsel for the plaintiff thereupon moved for leave to have the return amended by the officer, so as that it should conform to the truth of the case, by adding, that said *Reed*, the judgment debtor, was duly notified by a written notice left at his last and usual place of abode, in *Lincolnville*. *Emery*, the presiding Judge, denied the motion, but overruled the objection of the tenant, and instructed the jury, that inasmuch as *Reed*, the judgment debtor, was named in the execution as of *Phipsburg*, in the county of *Lincoln*, the return was sufficient.

The tenant then read a deed of the premises from *Samuel D. Reed* to himself, dated *January* 25, 1828. This, the plaintiff contended was fraudulent and void, and introduced evidence tending to support that allegation. *Samuel D. Reed*, having been

released from his covenants and introduced by the defendant as a witness, the plaintiff proposed to inquire of him, to prove the deed from himself to the defendant, fraudulent as to creditors, as to certain transactions between himself and one *Drummond*, acting under the firm of *Reed & Drummond*, and *Albert Reed*, a clerk in their store, in relation to the sale of their whole stock in trade to him, with a vessel and certain real estate, about the middle of *January*, 1828. To this inquiry, the defendant's counsel objected, inasmuch as the defendant was not a party in the transactions alluded to, and the Judge sustained the objection. Afterward, however, on the defendant's counsel asking the witness whether the defendant had any knowledge of these transactions between *Reed & Drummond* and *Albert Reed*, or was in any manner a party thereto, to which the witness responded in the negative, the Judge permitted the history of the transactions alluded to, to be gone into, the defendant's counsel having thus, by his inquiries, opened the door for that purpose. The deposition of *George Drinkwater*, in relation to the same matter, which had before been offered by the plaintiff, and rejected by the Judge, was also admitted after the inquiry aforesaid proposed by the defendant's counsel. His testimony corresponded with that of *Reed*, and tended to show the conveyances from the former to *Albert Reed*, to be made with a fraudulent intent. It was also proved, that *Reed & Drummond* failed in *January*, 1828.

The jury returned a verdict for the demandant, which was to stand or be set aside and a new trial granted, according as the opinion of the whole Court should be upon the correctness of the foregoing ruling of the presiding Judge.

Preble, and *W. G. Crosby*, insisted that it should appear by *the return* of the officer, that the debtor was notified, or that he was not resident in the County. The residence, as stated in the execution, is no evidence of where it was at the time of the levy. The clerk makes out the execution from the writ, and he is not to change the place, though the party actually moves. He is a mere ministerial officer and judges nothing. It is otherwise with the sheriff—he must judge as to who is the owner of property, where parties reside, &c. *Means* v. *Osgood*, 7 *Greenl.* 146; *Howard & al.* v. *Turner*, 6 *Greenl.* 106.

They also contended, that the testimony of *Samuel D. Read* and *Drinkwater*, was inadmissible, no knowledge of the transactions alluded to, having been brought home to the knowledge of the defendant; and cited *Bridge* v. *Eggleston*, 14 *Mass.* 245.

Thayer, for the demandant, contended that no notice to the execution debtor, under the circumstances proved, was necessary.

To show that the testimony of *S. D. Reed* and *Drinkwater*, was rightly admitted, he cited 6 *Stark. Ev.* 34, 148.

PARRIS J. — Inasmuch as the execution describes the debtor as living in *Phipsburg*, in the county of *Lincoln*, we think the officer was fully justified in considering that town as his place of residence at the time of the levy; and as no proof was offered, showing that he lived within the county of *Waldo*, but the record showing that he did not, the officer was not required to notify him to choose an appraiser.

If the testimony of *Samuel D. Reed*, was originally inadmissible, we do not perceive how it became admissible by reason of the questions put to him by the defendant. Those questions did not relate to the subject matter concerning which he was called to testify. If they did, then, as said by the plaintiff's counsel, the door would have been opened by the defendant, and the plaintiff might take advantage of it, if he pleased. But the defendant contended, that whatever transactions might have taken place between *Samuel D. Reed*, and *Albert Reed*, or any other stranger, they should not be given in evidence to prejudice the defence in this action, unless a knowledge of them was brought home to the defendant. To show that he was not chargeable with notice, the defendant made the inquiry, and the answer was in his favor. Surely that, of itself, could not relieve the plaintiff from any restrictions as to the examination of the witness, which existed previous to making this inquiry by the defendant; much less could it have any influence upon the question of the admissibility of *Drinkwater's* deposition.

But we think the testimony of *Samuel D. Reed* and *Drinkwater*, admissible, notwithstanding the objections raised by the defendant's counsel. The conveyance from *Samuel D. Reed* to the defendant, which the plaintiff attempted to impeach, was on the 25th of *January*, 1828. It was proved that *Reed* and

Drummond failed as early as *January*, 1828. The testimony of *Drinkwater* related to a pretended sale of a large quantity of personal property, by *Samuel D. Reed* and *Drummond*, to *Albert Reed*, their clerk, about the middle of *January*, 1828, and the Judge, in his report of the case, says, that *Reed's* testimony was to the same points and facts as *Drinkwater's*.

To establish the fraudulent character of the conveyance of the real estate now in question, from *Samuel D. Reed* to the defendant, it was necessary for the plaintiff to prove, that the former conveyed for the purpose of defrauding his creditors, and that the latter received the conveyance with the knowledge of the grantor's fraudulent intent. Any evidence tending to show that the grantor made other fraudulent conveyances about the same time with the conveyance in question, would be admissible, as tending to shew his intention in making the latter conveyance. When that intention was proved to have been fraudulent, the plaintiff would have established one of the propositions necessary to make out his case. But he must go farther and show the grantee to have been a participator in the fraud; and this he may do by a course of proof entirely distinct from that by which he fixed fraud upon the grantor. If he fail in the latter proposition, the first, however conclusively established, will avail him nothing. This is the spirit of the decision in *Bridge* v. *Eggleston*, relied upon by the defendant's counsel, and it is precisely the case of *Foster* v. *Hall*, 12 *Pick.* 89. That was a question of fraudulent conveyance of real estate, impeached by the defendant, who, at the trial, proposed to prove that other fraudulent conveyances were made by the plaintiff's grantor, at or about the same time, with the conveyance in question. It was ruled, that unless some evidence was offered to show that the plaintiff knew of these particular conveyances, or of a general purpose of the grantor to convey away his property to the injury of his creditors, the evidence of other conveyances was not admissible.

But the whole Court held, that this ruling was incorrect; that the limitation under which the defendant was allowed to go into evidence of other fraudulent conveyances made at the same time, or previous to the conveyance to the plaintiff as evidence of the fraudulent intent, and design of the grantor, ought not to have

been imposed, but that the defendant ought to have been allowed to show, if he could, by the acts as well as the declarations of the grantor, prior to the conveyance in question, that he had a fraudulent design, without requiring proof of knowledge on the part of the plaintiff, of the particular acts of the grantor, from which such intent, on his part was to be inferred.

Considering that in the case at bar, the plaintiff had a right to avail himself directly of the testimony of *Samuel D. Reed* and *Drinkwater*, we perceive no reason for setting aside the verdict on account of any irregularity in the circuitous manner by which he came to the enjoyment of that right.

CUMBERLAND,

APRIL TERM, 1835.

STURDIVANT *vs.* SWEETSIR *& al.*

Where, in the levy of an execution, the appraisers were sworn to appraise real estate to satisfy "*the execution*," omitting, "*and all fees*," the levy was nevertheless held to be valid.

The officer's return stated, that the debtor *refusing* to choose an appraiser, two were appointed by the officer himself. *Held*, that this was equivalent to a statement that the debtor was *notified* to choose.

In levying an execution upon real estate, the appraisers may lawfully take into consideration, the contingent right of dower in the wife of the debtor.

THIS was an action of *trespass*, for breaking and entering the plaintiff's close in the town of *Cumberland*, and cutting and carrying away a quantity of hay. The general issue was pleaded and joined. Both parties claimed title under one *David Spear*, — the defendants by deed, and the plaintiff by the levy of an execution. To the validity of this levy, the defendant objected. 1. Because the appraisers were not sworn to satisfy the execution, "*and all fees.*" 2. Because two of the appraisers were chosen by the officer, and it did not appear that the defendant had been *notified* to choose an appraiser — though the return did state that the debtor *refused* to choose. 3. Because the appraisers appraised the estate, subject to the contingent right of dower in the wife of the debtor.

These objections were overruled by *Parris J.*, and a verdict was thereupon taken for the plaintiff, which was to stand, or be set aside, as the opinion of the whole Court should be upon the correctness of the foregoing ruling.

And now, after the cause had been briefly spoken to, by *Daveis* for the plaintiff, and *Longfellow* for the defendant, the Court sustained the ruling of the Judge at *nisi prius*, and ordered judgment on the verdict.

A TABLE

OF

THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

CONTRIBUTION.

CONVEYANCE.

CORPORATION.