REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

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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.

ADVERTISEMENT.

It will be perceived, that in relation to the title and number of the volume, there has been a departure from the course heretofore adopted. If apology be necessary, it may be found in a resolve of the legislature, approved March 31, 1836, providing, "That each volume of the Reports of the decisions of the Supreme Judicial Court of this State, subsequent to the third volume of FAIRFIELD'S REPORTS, *shall be entitled and lettered upon the back thereof*, MAINE REPORTS, and that the first volume, subsequent to the third volume of Fairfield's Reports, shall be numbered the *thirteenth* volume of MAINE REPORTS."

In preparing the statements of fact, the Reporter has attempted, and not without much labor, to condense them into the least possible compass, consistent with a clear understanding of the case. In some few instances, additional facts would have been inserted, if they had been found in the exceptions or report.

In framing the abstracts, he has, when practicable, given the principles decided, in preference to abridged statements of the facts followed by the conclusions drawn from them by the Court. In his statements of principles, he has intended to confine himself to such as are necessarily implied in the decision of the case. He has done this from the belief, that the whole Court are responsible for that alone, and that the reasonings and illustrations, as well as the whole language of the opinion, have but the authority of the Judge by whom such opinion may have been drawn up.

To avoid a delay until after the close of the law Circuit, the index has been prepared by the Reporter in less time, than he could have wished. He hopes, that some of its imperfections may be attributed to this cause, although he has devoted to it all the attention that circumstances would permit.

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK, APRIL TERM, 1836.

WILLIAM W. WISE *& al. vs.* ROBERT TRIPP.

A creditor, who has purchased at vendue the right of his debtor to have a conveyance of land pursuant to the provisions of the *stat.* of 1829, *ch.* 431, and who has subsequently taken a deed thereof from the obligor in the bond to himself, may avoid a prior fraudulent deed from such obligor.

The grantee of a fraudulent purchaser, who had been present in Court on the trial of an action in which his grantor was a party, and had heard evidence proving his grantor's title to be fraudulent, was held to have such notice of the fraud, that his deed might be avoided for that cause.

One who has given a deed of warranty to the demandant and also a deed of quitclaim to the tenant is a competent witness for the latter, on the question of title to the same land.

THIS was a writ of entry to recover a tract of land in *Sanford.* The tenant pleaded the general issue, and in his brief statement alleged, that he was not tenant of the freehold, but held only as tenant at will under *Timothy Shaw*, who was tenant of the freehold. The parties agreed on a statement of facts on which the action was submitted for the opinion of the Court. They agreed, that the facts reported in the case, *Timothy Shaw* v. *Michael Wise*, 1 *Fairf.* 113, are to be considered facts in this case, and to have the same effect, as if this action was against *Shaw*; that the deeds and papers referred to in that case are to be considered, as in this case; that *Benjamin Stanley*, on the 14th of *September*, 1832, made a quitclaim deed of the land to said *Shaw*,

of which he had given a bond to *Tripp*, and a warranty deed to *Michael Wise*; which deed to *Shaw* was recorded *October* 20, 1834; that on the 18th of *November*, 1833, said *Michael Wise* gave a deed thereof to the demandants; that one of the demandants is a son of said *Michael Wise*, was a witness on the trial of said action, *Shaw* v. *Wise*, and heard all the evidence, and the verdict of the jury; and that before the commencement of this suit, said *Tripp* had agreed to become the tenant of *Shaw*. The parties and said *Shaw* agreed in writing, that the decision of the Court, if made upon the merits of the title, should be conclusive upon said *Shaw*, as well as upon the parties.

Holmes, for the plaintiffs, made the following points.

1. *Shaw*, the actual defendant in this case, having taken a deed from *Stanley*, and holding title only under him by a conveyance subsequent to the deed to *Michael Wise*, is estopped and not at liberty to question the consideration of that deed. *Ricker* v. *Ham*, 14 *Mass. R.* 137.

2. The deed from *Stanley* to *Wise* was made on sufficient and good consideration. The full value of the land was paid to *Stanley* in money, and if any part of this money was furnished by *Tripp* in fraud of his creditors, they may call it out of the hands of *Wise*, but they cannot come in and avoid the deed.

3. *Shaw's* deed from *Stanley* was without consideration. It is not pretended, that *Shaw* paid any thing to *Stanley*, and if his debt against *Tripp* can be considered as paid to *Stanley*, still it was but one sixth part of the value of the land. If, therefore, *Wise's* deed was fraudulent, as to *Tripp's* creditors, *Shaw's* is equally so, and he cannot avoid the first deed.

4. The only evidence to prove fraud comes from *Stanley*, who is an incompetent witness. His competency was objected to in the first trial, and is not waived in this. He has given two deeds of the same land, and if he can come in and prove the first deed void, he may give as many as he chooses, taking the consideration each time, and avoiding them in succession.

5. When *Stanley* made his deed to *Shaw*, *Tripp* was not his tenant; and being a mere deed of release nothing passed by it.

6. The case does not show, that the demandants had any knowledge, that the conveyance to their grantor was fraudulent.

One of them heard the first trial, but heard also on the trial, that the only witness pretending fraud was objected to; and after hearing that the decision of the court was in favor of his father, he might well believe, that the court did not consider the deed fraudulent.

D. Goodenow, for the defendant.

The case in *Fairfield* shews that *Tripp* had paid for this land, and was entitled to a deed of it by virtue of his bond from *Stanley;* that the bond was given up and a deed given to *Wise* for the express purpose of defrauding the creditors of *Tripp*, of whom *Shaw* was one; that *Shaw* had become the purchaser of *Tripp's* interest in the bond, and had entitled himself to a deed from *Stanley* by the terms of the statute; and that *Stanley* could be compelled by bill in equity to deed the land to *Shaw*. The deed from *Stanley* to *Shaw* was equally valid, whether made voluntarily, or by compulsory process of law. As a creditor of *Tripp*, *Shaw* had obtained the legal title to this land, and was enabled to contest and avoid the fraudulent deed to *Michael Wise*. The only reason why *Shaw* did not succeed in the former action, was, because he had not then received his deed from *Stanley*.

The demandants are in no better situation, than *Michael Wise*, because they had sufficient notice, that the title of their grantor was fraudulent and void, as to creditors. One of them heard the testimony on oath, asserting the fraud, and the verdict of the jury establishing it. The law requires only sufficient notice to put a reasonable man on his guard; but it amounted to certainty in this case.

The arguments reported and the authorities cited in behalf of *Shaw*, in the case in *Fairfield*, were referred to as a sufficient answer to all the other objections. *Cadogan* v. *Kennett*, 2 *Cowper*, 434, and *Co. Lit.* 290, were cited in addition.

The action was continued *nisi*, and the opinion of the Court afterwards drawn up by

Weston C. J. — *Tripp*, not being tenant of the freehold, but the tenant at will of *Timothy Shaw*, at first relied upon this fact by way of defence; but it having been agreed by the immediate parties, and by the counsel for *Shaw*, that the title should be set-

tled upon its merits, as if the action were brought against *Shaw*, that ground of defence is waived.

The question then is, whether upon the facts, the demandants are entitled to prevail against *Shaw*. The parties have agreed, that the facts reported by the Judge, in the case of *Shaw* v. *Michael Wise*, 1 *Fairf.* 113, "are to be considered as facts, and to make a part of this case." We do not understand, that the competency of the testimony, by which those facts were ascertained, is now open to inquiry. But if it were, we perceive no sufficient objection to the competency of *Stanley*. The rule that a witness shall not defeat by his testimony an instrument, to which he is a party, is confined to such as are negotiable. *Worcester* v. *Eaton*, 11 *Mass.* 368. The interest of *Stanley* was rather to sustain the deed, he gave with general warranty to *Wise*; and if he gave a warranty to *Shaw*, his interest would be balanced.

In *March*, 1829, *Tripp* possessed a valuable interest in the contract he had made with *Stanley* for the purchase of the land in controversy, upon which he had paid nearly two thirds of the purchase money. The legislature had previously made that interest liable to attachment. *Stat.* of 1829, *ch.* 431. It was an extension of the remedial process of the law to existing interests of a debtor, which may have been purchased with the funds of the creditor. It did not impair the obligation of a contract, but made it available for the fulfilment of contracts between debtor and creditor.

On the eleventh of the same month of *March*, *Tripp*, the debtor, avowedly for the purpose of defeating his creditors, made over his interest in the land to *Michael Wise*. And in furtherance of this object, the bond he held from *Stanley* was given up and cancelled, and *Stanley*, fully apprized of what was intended, by the procurement of *Tripp*, conveyed to *Wise*, who paid nothing from his own funds, either before or after the conveyance. Whether the attachable interest of *Tripp*, thus attempted to be put out of the reach of his creditors, vested in the personal contract of *Stanley*, or is to be regarded as real estate, the course pursued was equally fraudulent, and liable to be avoided in favor of a creditor. The law has been long settled, that every gift,

grant or sale, thus fraudulently made, either of lands, or of goods and chattels, is void as to creditors.

On the twenty-first of *March*, 1829, *Shaw*, a previous creditor, attached the interest of his debtor, *Tripp*, arising from his contract with *Stanley*. We are of opinion, that he had a right to do so; and thus to avoid and vacate the proceedings of *Tripp* and *Wise* to defraud him. Judgment being rendered in his favor, within thirty days thereafter, he caused the interest he had attached to be sold, in the manner required by law, of which he was the purchaser. He thus became by law entitled to a conveyance ftom *Stanley*, according to the original condition of his bond. As a remedy to enforce this right, he might have prosecuted a bill in equity. But this coercive process is not necessary, if the contracting party will voluntarily make the conveyance without it. In *September*, 1832, *Stanley* did convey to him, by which his right was consummated. The previous title of *Michael Wise*, founded as it was in fraud, has no claim to be preferred to that of *Shaw*.

Have the demandants, to whom *Michael* conveyed, any better title to hold the land, purged of the fraud, to which their grantor was a party? We think not. One of them was conusant of the fraud, by which the creditors of *Tripp* were attempted to be defeated.

Having been present at the former trial, he knew that his grantor had no beneficial interest in the land; — that it had been purchased with *Tripp's* money, and put into the hands of *Michael Wise* for fraudulent purposes. Notice to one of the demandants is equivalent to notice to both. They cannot then be regarded as *bona fide* purchasers. Upon the facts agreed, we are all of opinion, that the tenant is entitled to judgment.

JACOB EMERY *vs.* JEREMIAH GOODWIN.

An action was brought by one, who had been under guardianship, as a spendthrift, against his former guardian in the name of the Judge of Probate upon the guardianship bond, in which action it was alleged, that the guardian had conducted unfaithfully and fraudulently in the sale of the real estate of the ward, sold at public auction for the payment of his debts; that the guardian had become the purchaser of the estate, and had sold it again at an advance; and that this advance should have been for the benefit of the ward, and should have been credited in the guardian's account. This action was tried upon the merits, a verdict was found for the defendant, and judgment was rendered thereon. Afterwards, the spendthrift brought a bill in equity against the guardian, charging the same facts without imputing fraud, and claming the difference between the purchase and sale, as a trust; to which the guardian pleaded the former judgment in bar. On demurrer, this was held a good plea.

THIS was a bill in equity, in which the plaintiff alleged, that in *September*, 1829, the defendant and one *William Trafton* were appointed by the Judge of Probate guardians of the plaintiff, as a spendthrift, "and gave bonds, as the law directs;" that they afterwards duly obtained license to sell so much of the plaintiff's real estate for the payment of his debts, as would produce the sum of $7,123,00; that the guardians duly advertised and sold the real estate of the plaintiff, at public auction, to a large amount; that the defendant became the purchaser of four several tracts of the land for the aggregate sum of $3,947,07; that the lands thus purchased were of much greater value, than the sum paid by the defendant therefor; that on the settlement of his guardianship account in the Probate office, the defendant credited the said sum of $3,947,07, and no more; that the defendant had no authority in law to become the purchaser, except to hold in trust for the plaintiff; that in *November*, 1830, the defendant sold the same real estate for a large amount above the price given by him therefor; and that the plaintiff had demanded of the defendant the excess of the sale above the amount paid for the same, and had requested him to render an account of his sales. The bill also prayed, that the defendant should be holden to make a discovery of the persons to whom the said real estate had been sold by him, and of the amount received for the same.

The defendant pleaded in bar to all these allegations a former verdict and judgment in his favour, after a full trial, at the Su-

preme Judicial Court for the county of *York*, *September* Term, 1831, in an action of debt, brought by the said *Jacob Emery* and for his benefit, in the name of the Judge of Probate for said county, against the said *Jeremiah Goodwin* and *William Trafton* and their sureties, on their said bond, given to the Judge of Probate, as guardians of the said *Jacob Emery*, the plaintiff in this action, dated the 7th of *September*, 1829. And the defendant in his plea averred in substance; that the defendants in that suit pleaded the general issue, and for brief statement, under the statute, said, that the covenants, in the condition of said writing obligatory mentioned to be kept and performed on their part, they had in all respects fully kept and performed; that the said *Jacob Emery* replied by brief statement, that the said *Goodwin* and *Trafton*, as guardians of the said *Emery*, did negligently, and fraudulently manage the property of their ward in these particulars. 1. The estate was not sold at a proper time and in a proper manner. 2. That a saw-mill, grist-mill, potash, store, and pasture were sold in one parcel, when it would have been more to the advantage of the estate to have sold them separately, and that cash was demanded unnecessarily. 3. "*One of the guardians was a purchaser of a large amount of timber land; and while guardian, sold it again for a number of thousands of dollars more than he gave, which speculation should be for the benefit of the ward, and the amount should have been credited in the guardian's account;*" that the jury found, "that the instrument declared on was the deed of the defendants, and that the condition of said bond had never been violated by them, as the plaintiff has alleged;" that judgment was rendered on that verdict: that the causes of action, set forth and tried in that suit, are identically the same, as the causes of action and complaint in this bill; that the court rendering the former judgment had jurisdiction of the subject matter thereof, and of the parties; that the former judgment remained in full force, and that there was no error in it; that the trial was upon the merits; that it was not obtained by fraud; that there is nothing now existing to impeach it; that no new evidence has been discovered to enable the plaintiff to go behind it; and that nothing existed in the defendant's own knowledge contrary to the finding of the jury. The truth of this plea was

supported by the answer of the defendant. To this plea the plaintiff demurred.

The bill contained another charge, independent of this, to which the defendant put in an answer, which was admitted by the plaintiff to be a perfect defence to that portion of the bill.

The case was argued by *Mellen* and *D. Goodenow* for the plaintiff; and by *E. Shepley*, in writing, and *J. Shepley*, orally, for the defendant.

For the plaintiff, it was contended, that the plea in bar was insufficient, and that the defendant should be held to answer to the merits.

1. Because in the first suit the defendant was charged with fraud, and the jury could not find a verdict for the plaintiff, unless they were satisfied, that the defendant had been guilty of fraud in the course pursued by him. But in this bill, no such charge is made. The charge is merely, that the guardian purchased the property of the ward, and sold it again at a profit. This he might fairly and honestly do for the ward's benefit, but not for his own. 1 *Story on Eq.* 304, *scc.* 308, 309. The guardian is holden to be a trustee, for the ward on motives of public policy, *ibid. sec.* 314, 317. Fraud and trust are distinct subjects, though sometimes there may be some ingredients of fraud in a trust, and a recovery in one is no bar to a recovery in the other. *Dunlap* v. *Stetson*, 4 *Mason*, 349; *Saunders* v. *Marshall*, 4 *Hen. & Mum.* 458. Judgment for the defendant in *assumpsit* in an action on a domestic judgment, is no bar to an action of debt on the same judgment. *M'Kim* v. *Odom*, argued in this county, in 1835. 3 *Fairfield*, 94. Unless the merits are tried, a former judgment is no bar. *Hopkins* v. *Lee*, 6 *Wheaton*, 114. As this mere question of trust could not be, and was not tried in the former action, the judgment pleaded is no bar to this.

2. The judgment recited in the plea, is no bar to this bill, because the bond on which the suit was brought was not authorized by law. There was no statute then in existence requiring a guardian of a spendthrift to give bond. The bond being invalid, no judgment founded upon it can prevent the party from pursuing his proper remedy.

The *stat. ch.* 51, *sec.* 53, provides, that guardians of spendthrifts shall give the same bond, as guardians of idiots, &c. On looking back to *sec.* 51, it will be found, that no provision is inserted, that the guardian of an idiot shall give bond. It was probably omitted by mistake. The *stat.* of 1830, *ch.* 470, *sec.* 11, provides for giving bond in such cases, thereby shewing, that the legislature considered, that no provision existed for it previously.

3. But if the bond had been legal, no action could have been maintained upon it until after a citation to account. The suit might properly have been determined against the plaintiff on that ground. *Nelson J.* v. *Jaques*, 1 *Greenl.* 147; *Potter* v. *Titcomb*, 7 *Greenl.* 302.

4. The plaintiff had a right to a discovery of the facts in relation to the purchase and sale. Until this is done, the court cannot say, whether the plea discloses a sufficient bar or not. 2 *Mad. Ch.* 337, and notes.

5. The bill discloses a clear case for relief. The law is well settled, that if a guardian purchases property of his ward, and sells it at a profit, he must account for the difference, as a trustee of the ward. 1 *Story on Eq. sec.* 321, 322. *Jennison* v. *Hapgood*, 10 *Pick.* 77; *Harrington* v. *Brown*, 5 *Pick.* 519; *Fay J.* v. *Hunt*, 5 *Pick.* 404; 2 *Kent's Com.* 229; 1 *Mad. Ch.* 110; *Ball* v. *Carew*, 13 *Pick.* 29.

6. This Court, by the express provisions of the *stat.* 1830, *ch.* 462, has jurisdiction in cases of trust. It is the duty of courts of equity to enforce trusts. 1 *Story on Eq. sec.* 532, 535.

7. The averments in the plea of identity of the causes of action in that suit and in the present bill, and that the action was tried on the merits, are mere questions of law, and not of fact; and are to be decided by the court upon the papers before them. Fraud and trust are not the same, and so the court must say. The jury have only found, that the defendant was not guilty of fraud. It is the province of the court to adjudge him to be trustee. The defendant therefore should be holden to answer to the merits.

For the defendant, it was argued, that if the cause be heard on bill and answer, the answer shall be admitted true in all points.

Com. Digest, Chancery M; Chapin v. *Coleman*, 11 *Pick.* 336. In *Chapin* v. *Coleman*, the court say, that in such case, the defendant is not bound to answer the original claim, or cause of action. A former judgment is a bar in equity, equally as in law. 3 *Atkins*, 626; *Homer* v. *Fish*, 1 *Pick.* 435. When there is a plea of former judgment, and it is intended to deny, that the causes of action were the same, or that the trial was on the merits, the course is to take issue on those averments in the plea. *New England Bank* v. *Lewis*, 8 *Pick.* 118; *Hughes* v. *Blake*, 6 *Wheaton*, 472. All the averments contained in our plea in bar are to be taken as true in this case, the same as in case of a demurrer to a plea in bar in a court of law.

Two of these averments are, that the former suit was tried on the merits, and that the causes of action in that suit and in the present bill are the same. In the case of *M'Kim* v. *Odom*, cited for the plaintiff, the decision was, that an action of *assumpsit* could not be maintained on a judgment of another of the *United States*. If the objection to the form of action had been waived, and a judgment had been rendered for the plaintiff, it is believed, it would have been a bar to an action of debt for the same cause.

The former judgment is a bar to this process. The rule is, that a judgment in a competent court is a bar to a suit for the same cause of action *in any other court*. In *Bateman* v. *Willoe*, 1 *Sch. & Lef. Repts. Lord Redesdale* thus states the rule. "If a matter has already been investigated in a court of justice according to the common and ordinary rules of investigation, a court of equity cannot take upon itself to enter into it again." In *Homer* v. *Fish*, 1 *Pick.* 435, the court cite and affirm the language of the *Lord Chancellor* in the case of *Bateman* v. *Willoe*. The principle is thus stated, by *Chancellor Kent*, in *Simpson* v. *Hart*, 1 *Johns. Ch. R.* 91. "The general principle is, that the decision of a court of competent authority, or a *res judicata*, is binding and conclusive on all other courts of concurrent power. It is a principle, which pervades not only our own, but all other systems of jurisprudence, and has become a rule of universal law, and is founded on the soundest policy." This case was overruled in the court of errors on other points, but the *Chancellor* says, in

Holmes v. *Remsen*, 7 *Johns. Ch. R.* 286, that the principles of the case were affirmed by the majority of the court, differing with him in their application, as well as by the minority, agreeing with him. The principle is affirmed in *Smith* v. *McIver*, 9 *Wheaton*, 532; *Hawley* v. *Mancius*, 7 *Johns. Ch. R.* 174. It has been said, that there is a discovery prayed for in this bill, and therefore, that an answer to the merits should have been made. The reply is, that a judgment sufficient to bar relief is sufficient to bar discovery. It would be idle to go into the enquiry, if the whole question has been already settled conclusively between the parties. *Sutton* v. *Earl of Scarborough*, 9 *Ves.* 71.

It is also contended, that the probate bond was not authorised by law, and that therefore the judgment pleaded is no bar to this bill. But the bond certainly was not against law. The statute cited for the plaintiff clearly indicates, that some bond should be given; and it is not pretended, but that this was a proper one for the purpose.

The plaintiff by his former suit upon it considered the bond as valid, and cannot now object. If the verdict had been in favor of the plaintiff, instead of against him, the defendant could not have avoided payment of the amount of the judgment. If it would have bound the defendant, it must also be binding on the plaintiff. But were the judgment subject to be reversed, the plaintiff must go to this Court, as a court of law, for his remedy. A court of equity will not interfere in such cases. *Baker* v. *Morgan*, 2 *Dow's R.* 526; *Le Guen* v. *Governeur*, 1 *Johns. Cases in error*, 492; *Shottenkirk* v. *Wheeler*, 3 *Johns. Ch. R.* 275; *De Reimer* v. *De Cantillon*, 4 *Johns. Ch. R.* 85; *Hawley* v. *Mancius*, before cited.

It is also said, that the action on the bond might have been defeated, because the defendant was not cited to account. The answer is, 1. That if the objection could be taken after plea of performance, it was mere matter of evidence, and would not appear on the record. 2. That this supposition is negatived by the averment in the plea, that the trial was on the merits. 3. That such supposition was inconsistent with the finding of the jury.

It is urged, that the plaintiff might have failed, because the jury were not satisfied, that the defendant was guilty of fraud, and

therefore the judgment is no bar. But the plea avers, that the merits, that is, the whole merits, were tried; and this is admitted by the demurrer. The principle is, that a judgment is not only final as to the matter actually determined, but as to every other matter which the parties might have litigated in the cause, and which they might have had decided. *Le Guen* v. *Governeur*, and the other cases before cited. There are frequently cases, where the party has several remedies, and a decision on the merits, on the trial of either, is a bar to any other suit for the same cause. In this case, if there had been any real cause of action, the plaintiff might have sought his remedy by a suit on the bond, the one first adopted; by a bill in equity, now attempted; or by a citation to account in the probate office. Unless the first is a bar to this; if the court should hold the defendant to answer, and decide in his favor on the merits; such judgment could be no bar to another attempt by citing the defendant to account in the probate court. In one of the cases cited for the plaintiff, *Jennison* v. *Hapgood*, the latter course was adopted. The plaintiff may elect his remedy, but if he does not happen to make the best choice, he is not at liberty to try his case over again in a better shape.

We are not disposed to contest the general principle, that where one acts for another, and is both seller and purchaser, that he must account for all profits he may make to the proprietor of the property sold. But whether that principle applies to a sale by an administrator or guardian, at public auction, pursuant to the provisions of law, we believe has not been decided in this State. In one state it has been held, that it does not. It is sufficient to say, that the only question now before the court is, whether the former judgment is a bar to this bill.

Weston C. J. — The plaintiff has filed a demurrer to the defendant's plea; and the question is, as to the sufficiency of the plea, in relation to that part of the bill, to which it was intended to apply. A plea may be interposed to part of the bill; and it will be sustained, so far as it may be a good bar to any of its material allegations.

It is insisted, that the trust charged in the bill, arising from the sale, purchase, and resale of certain estates belonging to the plaintiff, by the defendant, his guardian, has been once before a court of competent jurisdiction, that it has passed in *rem judicatam*, and ought not to be again opened. The former suit was brought in this court, for the benefit of the plaintiff, in the name of the Judge of Probate, for this county, on a bond given to the Judge by the defendant, with sureties, *September* 7th, 1829, conditioned for the faithful performance of his duties, as guardian to the plaintiff. As the law then stood, the defendant was to give the same bond, for the faithful discharge of his trust, as guardians appointed for lunatics, idiots, and persons *non compos*. In the revision of the laws, a requirement to this effect of such guardians had been omitted; and it was not imposed by statute, until after the date of the bond under consideration.

But although the reference in the statute then afforded no light, in relation to the bond to be given by guardians to spendthrifts, it was manifestly the will of the legislature, that such a bond, should be taken from every such guardian; and it was to be for the faithful performance of the trust confided to him. If the Judge of Probate, in the exercise of his jurisdiction, has no right to require, or to receive a bond, except where it is prescribed by statute, about which we give no opinion, it may be strongly urged, that the bond in question was thus prescribed. But for the purposes of this investigation, it is sufficient to say, that the bond was given, that the plaintiff sought his remedy under it, that no objection was taken to its validity; and that a suit upon it was sustained in the Supreme Judicial Court. We are not called upon, sitting as a court of equity, to examine into the regularity of these proceedings. The cases of *Baker* v. *Morgan*, 2 *Dow*. 526, and of *Shottenkirk* v. *Wheeler*, 3 *Johns. Ch.* 275, very strongly point out the impropriety of such an interference.

If the court had jurisdiction of the bond, which they sustained, and which cannot be questioned collaterally under this bill, did it involve the trust, upon which the defendant is now sought to be charged? We are of opinion, that it did expressly and directly. The trust charged is an official trust, the faithful fulfilment, of which constituted the principal condition of the bond. The brief

statement of the plaintiff in that suit, which by our law is a substitute for special pleading, charges the defendant generally, with unfaithfulness in the discharge of his trust, as guardian, and with negligent, and fraudulent management of the property of his ward. He then proceeds to point out certain specifications. Of what? Unfaithfulness in the trust, is as much involved in them, as negligent, and fraudulent management. If either was made out, the condition was broken. Among the specifications, is the very ground upon which a trust in favor of the plaintiff is based in the bill.

It is contended, that the failure of the plaintiff to recover in the former suit may have been, because the defendant might not have been cited to account in the probate office. An administrator is required by law to give bond, conditioned to return an inventory of the estate within three months, and to render an account of his administration within one year. It has been held, that before he can be charged upon the bond, for a failure of these duties, he must be first cited to return an inventory, or to account in the probate office. *Nelson* v. *Jaques*, 1 *Greenl.* 138; *Potter* v. *Titcomb*, 7 *Greenl.* 302.

These are positive requirements, in regard to which the place where, and the tribunal before which the business is to be transacted, is the court of probate. The guardian has duties to perform, in the comfortable maintenance of the ward, and his family; in the collection, and payment of his debts, and in the management, and preservation of his property. And although he acts under the supervision of the court, by which he is appointed, and may doubtless be cited to give an account of his trust; yet this is not a duty directly and affirmatively prescribed by statute, as it is in the case of administrators. The duty of a guardian, imposed by statute, and secured by bond, does not depend upon the injunction of the probate court. He could not be cited to appear there, and fulfil his trust. That with the exception of the return of an inventory, is to be performed elsewhere. And if not performed, the condition of his bond is broken.

We are not satisfied, that before an action can be maintained upon a guardian's bond, he must be first called upon to appear in the probate court, and show how he has fulfilled his duties. And

if it were necessary, no such point was raised between the parties. No averment to this effect was necessary in the declaration, which was debt on bond, The defendant and his sureties did not place their defence upon this ground, in their brief statement; but relied upon a general performance of the condition of their bond. The plaintiff in his counter statement pointed out certain breaches, upon which the parties were at issue. The jury found for the defendant. If they had found for the plaintiff; and the defendant had thereupon insisted, that he was not charged by the verdict, because there was no proof, that he had been cited before the probate court, it might well have been replied, that he put no such point in issue. That he must be regarded, as having waived the objection. That he could not be permitted to take the chance of a verdict in his favor, and then interpose a ground of defence, which if earlier made might have been removed by competent proof. But as has been before intimated, whether that suit was regularly conducted, or not, it is not our present business to determine. It sufficiently appears, that the jury have found, that there was no breach of the condition of the bond.

But assuming, that the jury responded only to the ground of fraud, made by the plaintiff in his brief statement, as his counsel insist, and negatived the breaches assigned, because not satisfied that fraud existed; it appears to us, that the plaintiff might, and should at the time, have protested against so limited a finding. Or if that was right under his brief statement, it was his own fault thus to have narrowed his ground of action. The bond was to secure the performance of the defendant's trust. The plaintiff elected to resort to that remedy. The trust was directly open to inquiry; but fraud only, as it was evidence of a breach of trust. Nor can we entertain a doubt that the whole subject matter, the bond with its condition, was within the jurisdiction of the court in that suit. To enforce the faithful performance of the trust, was the very object of the bond. A suit rightfully brought upon that bond, carried with it necessarily a right to inquire as to the trust. The one was inseparable from the other.

It is an elementary principle, of high importance in the administration of justice, that the judgment or decree of a court of competent jurisdiction is final, as to the subject matter determin-

ed, and that it cannot be opened, before any court of concurrent jurisdiction. The authorities go further; and maintain the position, that the parties are concluded, as to whatever might have been litigated or decided in a former suit. *Marriot* v. *Hampton*, 7 *T. R.* 269. *LeGuen* v. *Governeur et al.*, 1 *Johns. Cases*, 436. *Kent J.* in the last case says, he knows but two exceptions to this rule; the case of mutual dealings, where the defendant, who omits to set off his counter demand, may bring a cross action; and the case of ejectment, according to the English and New York practice, where the defendant, neglecting to bring forward his title, is not precluded by a recovery against him from availing himself of it in a new suit.

The principle is, that every man is bound to take care of his rights, and to enforce them, when opportunity is afforded him. In *Bateman* v. *Willoe*, 1 *Schoales & Lefroy*, 201, Lord Chancellor *Redesdale* says, "the inattention of parties in a court of law, can scarcely be made a subject for the interference of a court of equity; there may be cases cognizable at law, and also in equity, and of which cognizance cannot be effectually taken at law, and therefore equity does sometimes interfere; as in cases of complicated accounts, where the party has not made defence, because it was impossible for him to do it effectually at law; so where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but without circumstances of that kind, I do not know that equity ever does interfere to grant a trial of a matter, which has already been discussed in a court of law, a matter capable of being discussed there, and over which the court of law had full jurisdiction. "In *Simpson* v. *Hart*, 1 *Johns. Ch.* 91, *Chancellor Kent* says, he knows of no modern case, where a bill has been sustained upon a point, which had been before a court of law of competent authority, except "upon some new matter of equity, not arising in the former case, or for some relief, to which the powers of the court of law were not fully and effectually adequate." The foregoing are the principal cases, cited for the defendant upon

this point. Others to the same effect have been also cited; and they might be further extended.

In the opinion of this Court, they apply with great force to the case before us. First, because the trust, sought to be enforced in the bill, appears to us to be involved in the former issue. Secondly, if it was not, it was directly within the condition of the bond, and might, and should have been distinctly presented. Thirdly, it was a trust, necessarily within the jurisdiction of the court, entertaining that suit. And lastly, the facts, from which it arises, were then known and set forth, in the plaintintiff's brief statement. The demurrer, to the defendant's plea in bar, is accordingly overruled.

Aaron Porter *vs.* William P. Hooper *& al.*

One tenant in common of a saw-mill cannot maintain an action of trespass *quare clausum* against a co-tenant for his entry into the entire common property, and exclusive occupation thereof.

Trespass for mesne profits cannot be maintained by one tenant in common against another without an actual ouster.

This was an action of trespass *quare clausum*, and came up on exceptions from the Court of Common Pleas. The plaintiff in his declaration alleged, that he owned one sixth part in common of the saw-mill, called the Gooch mill, in Biddeford; and that the defendants, on the first day of *February*, 1830, entered into said mill, deforced the plaintiff, and kept him out of the use and occupation of his one sixth thereof from that time until the thirty-first day of *October*, 1831.

At the trial before *Whitman, C. J.* the plaintiff offered to prove the allegations made in his declaration; that he had sustained injury thereby; and that the defendants surrendered up to the plaintiff the occupation of his one sixth part of the mill, on said 31st of *October*, 1831. The plaintiff admitted, that the defendants, before and during the time aforesaid, were owners in common with the plaintiff and others in the same mill; and "that they held the same mill and privilege before said deforcement, as

such property is usually held." The Judge ruled, that on this evidence and admission, the action could not be maintained, and directed a nonsuit, to which the plaintiff excepted.

Mellen and *D. Goodenow*, for the plaintiff, contended, that this action of trespass *quare clausum*, would lie, if the plaintiff on these facts could maintain an action of tort in any form. The *stat.* of 1835, *ch.* 700, *sec.* 1, is broad enough to include all actions of tort, and the form has now become wholly immaterial. The legislature have abolished all distinctions between actions of trespass *quare clausum*, trespass, and trespass on the case.

The case shews, that the plaintiff has been forcibly kept out of the possession and enjoyment of his property a long time by the defendants, and is entitled to a remedy in some mode. This is the proper one. A writ of entry, or ejectment, will lie, where one tenant in common deforces another, *Higbee* v. *Rice*, 5 *Mass. R.* 344; 1 *Chitty on Pl.* 145, 192; *Goodtitle* v. *Tombs*, 3 *Wilson*, 118; *Barnitz* v. *Casey*, 7 *Cranch*, 456. Where a writ of entry, or ejectment, can be supported, trespass *quare clausum* will lie.

As the defendants kept the plaintiff out of possession for a long time and then permitted him to enter; this may be rightly considered, as an action of trespass for the mesne profits. These actions are but legal fictions to try the merits of the case. *Cummings* v. *Noyes*, 10 *Mass. R.* 433. And it lies as well between tenants in common, as between strangers. 1 *Chitty on Pl.* 53, 67. The restoration of the possession to the plaintiff may be considered equivalent to a judgment in his favor; and trespass for mesne profits will lie after judgment without an entry. *Winkley* v. *Hill*, 6 *N. H. Rep.* 391. If the right is settled without a judgment, that ought not to deprive the party of his remedy for mesne profits.

The case also shews, that this mill was owned by several, and was occupied, as such mills usually are. This occupation is well understood to be by specified days or turns allotted to each; and this allotment may be proved by parol. *Porter* v. *Perkins*, 5 *Mass. R.* 233. The action may therefore be maintained for this keeping of the plaintiff out of the enjoyment of his allotted days.

The plaintiff is entitled to some remedy, and this is the only one pertinent. Assumpsit will not lie. *Porter* v. *Hooper & al.* 2 *Fairf.* 170; *Wiggin* v. *Wiggin*, 6 *N. H. Rep.* 298; 3 *Starkie on Ev.* 1513; *Wyman* v. *Hook*, 2 *Greenl.* 336; *Allen* v. *Thayer*, 17 *Mass. R.* 299; *Hawkes* v. *Young*, 6 *N. H. Rep.* 300.

J. Shepley, for the defendants. When this case is divested of what is mere matter of form, nothing remains, saving that the defendants did not choose to give up the possession, which they then had, to the plaintiff, and suffer him to enter into the exclusive occupancy in their stead. From the very nature of the property both parties could not occupy it at the same time. This is a mere question, whether one tenant in common of a saw-mill can maintain an action of trespass *quare clausum* against his co-tenant for an entire occupation of the common property. That he cannot is settled in very many cases. Among them are *Blanchard* v. *Baker*, 8 *Greenl.* 270; *Cutting* v. *Rockwood*, 2 *Pick.* 444; *Rising* v. *Stannard*, 17 *Mass. R.* 282; *Keay* v. *Goodwin*, 16 *Mass. R.* 4.

Nor has the statute cited, either in letter or in spirit, any reference to the action of trespass *quare clausum* That statute merely says, "That in all actions of *trespass and of trespass on the case*, the declaration shall be deemed equally good and valid to all intents and purposes, whether the same shall be, in form, an action of trespass or trespass on the case." It was only intended to do away the nice distinctions in the books between trespass and trespass on the case turning on the question, whether the injury was direct or consequential.

It has been argued, that this may be considered an action for mesne profits. It might be sufficient to say, that this is not an action of that character. But if it had been, the action could not have been maintained until after a judgment of court determining the rights of the parties. No such judgment is pretended to be in existence.

It is also said, that trespass *quare clausum* will lie, where a writ of entry, or ejectment, can be maintained. This is denied. There are many cases where one tenant in common may elect to consider himself disseised by another in order to try his right,

when no action of trespass *quare clausum* can be maintained. It has been held, that a writ of entry will lie, where one denies the title of his co-tenant, and yet no one would pretend, that on such evidence an action of trespass could be maintained. But if the proposition were made out, the cases cited do not shew, that a writ of entry could be maintained on the facts appearing in this case.

The action was continued nisi, and the opinion of the Court afterwards drawn up by

WESTON C. J. — If one tenant in common ousts his companion, the party injured may vindicate his right in a real action. And it was decided in the case of *Goodtitle* v. *Tombs*, 3 *Wilson*, 118, that after having obtained judgment in ejectment, he might maintain an action of trespass for mesne profits; but the opinion of the court was founded upon the judgment, as evidence of an actual ouster, from the time of the demise until it was rendered.

In *Fairclaim* v. *Shackleton*, 5 *Burrow*, 2604, it was held that the receipt of the whole profits of an estate by one tenant in common, for a period of twenty-six years, without accounting to his companion, did not amount to an actual ouster, which is in other words a disseisin. That decision had the effect to protect the other co-tenant from being barred by the statute of limitations. But it is an authority to show that an actual ouster is an adverse holding, accompanied with acts or declarations, indicating a denial of the title of the other co-tenant. If, however, the facts in that case, had not been qualified by the circumstances adverted to in the opinion of the court, they might have been left to the jury, as evidence of an actual ouster. In *McClung* v. *Ross*, 5 *Wheaton*, 116, the court held, that although one tenant in common may oust his co-tenant and hold in severalty, yet that a silent possession, accompanied with no act, which can amount to an ouster, or give notice to his co-tenant that his holding is adverse, ought not to be construed into an adverse possession.

In *Doe* v. *Prosser*, *Cowper*, 217, a sole and uninterrupted possession by one tenant in common for thirty-six years, without any account to, or demand made, or claim set up by his compan-

ion was regarded as sufficient evidence for a jury to presume an actual ouster of the co-tenant. And *Lord Mansfield* held, that if one tenant in common in possession denies the title of his companion, his possession becomes adverse, and amounts to an ouster. And undoubtedly an ouster may be proved by any competent evidence, of a character to satisfy a jury that the tenant in possession claims to exclude his companion altogether. Nothing short of this can constitute an actual ouster or disseisin. Whether if such ouster or disseisin is purged by entry, the party injured may thereupon maintain trespass for the mesne profits, as he might after he had obtained judgment at law for possession, it is not necessary to decide in this action. Nor is it necessary to determine whether the deforcement, of which the plaintiff complains, while it existed, might not have been treated by him, as an ouster or disseisin at his election, for the sake of the remedy by a writ of entry, it being the opinion of the Court, that trespass for the mesne profits cannot be maintained without an actual ouster, if it can without previously obtaining judgment at law for possession.

The declaration does not charge the defendants with having ousted or expelled the plaintiff from his freehold, but with having held him out of the use and occupation of his proportion of the mill and privilege, from the first of *February*, 1830, for the period of one year and nine months. And the plaintiff offered to prove at the trial, that the defendants so held him out, until they surrendered his proportion to him in *October*, 1831. There is nothing either alleged, or proposed to be proved, like an actual ouster or denial of the plaintiff's title. The injury then consists in the defendants' entry and exclusive occupancy for the period charged. And this is not a trespass. The defendants, if they had not been the major owners, had an equal right to the possession with the plaintiff. In *Rising et al.* v. *Stannard*, 17 *Mass.* 282, the court say, that before partition, each "tenant in common has a right to occupy any part of the common property, and may assign such possessory right to a stranger. He may even occupy the whole, without being a trespasser." His co-tenant may be prejudiced by his exclusive occupancy, but he cannot charge him as a wrongdoer.

The plaintiff's remedy consisted in his right to take possession of the whole himself, if he could do it peaceably. Or he might maintain an action of account, or even of assumpsit against the defendants, if they had received more than their proportion of the profits. In the former action between these parties, 2 *Fairf.* 170, the court do not deny, that if the defendants had received more profits than they had a right to retain, it might have been recovered under the count for money had and received.

If the defendants had removed any of the plaintiff's timber or boards from the mill, or its appurtenances, where he had an equal right to place them, or had taken any of the common property from him, while in his use, or had actually expelled him from the premises, they would have been trespassers; but no averments are made, or proof offered to this effect.

If it had appeared, that there had been an allotment to the plaintiff for a certain period of part of the mill, if it could have been practically and beneficially done, and the defendants had entered upon his part, within the period limited, we doubt not the plaintiff could have maintained trespass *quare clausum* against them. *Welden* v. *Bridgewater*, *Cro. Eliz.* 421. And we perceive no reason why he might not have done so, if there had been legally assigned to him the whole mill, for any certain and definite time, and they had entered, while he was entitled to the several and exclusive occupancy. But this does not appear; nor can we regard it as deducible from the fact, admitted by the plaintiff, that the parties were tenants in common of the premises in controversy, and that they held it, as such property is usually held. We are not aware of any settled usage, in regard to the occupancy of mills owned in common, of which we can take judicial notice. If the plaintiff would charge the defendants with any trespass, upon his right to occupy in severalty, he should have proved, or have offered to prove it affirmatively.

Upon the whole, as the case is presented, the opinion of the Court is, that the nonsuit was properly ordered.

Exceptions overruled.

IVORY HOVEY *vs.* JOHN G. DEANE.

Where a township of land was conveyed by the State to an individual, with a reservation therein, that each person who had settled thereon before a certain day should receive a deed of a hundred acre lot, including his improvement, from the grantee of the State, on payment of a certain sum before a fixed day; it was *held*, that the fee of the whole township passed by the deed; and that a settler must pay the stipulated sum by the time fixed to entitle himself to a deed.

When the copy of a will and of the probate of it in another State, is duly filed in the proper probate office in this State, it has relation back to the time of the decease of the testator.

Where a written power of attorney is offered in evidence, on a trial, to prove the authority of one acting as agent, and rejected from want of proper proof of its execution; parol evidence is inadmissible to prove the agency.

THIS was an action of trespass for taking and carrying away a quantity of timber and bark, alleged to be the plaintiff's property. The defendant pleaded the general issue, and filed a brief statement, setting forth that the timber and bark were not the property of the plaintiff, but of the heirs of *William Bingham* and others, owners of township No 14, in the County of *Hancock*; and that the defendant, acting by direction of their agent and attorney, took the timber and bark, because it had been illegally cut on said township.

The defendant proved a conveyance of said township from the Commonwealth of *Massachusetts* to *William Bingham*, by deed, dated *Jan.* 28, 1793. The deed contained the following words—"reserving to each of the settlers, who settled on the premises before the 1st day of *July*, 1791, his heirs and assigns forever, one hundred acres of land, to be laid out in one lot so as to include such improvements of the said settlers, as were made previous to *July* 1, 1791, and to be least injurious to the adjoining lands; and each of said settlers, who settled before *Jan.* 1, 1784, upon paying to said *Bingham*, his heirs and assigns, five Spanish milled dollars, and every other of said settlers, upon paying to said *Bingham*, his heirs or assigns, twenty Spanish milled dollars, shall receive from the said *Bingham*, his heirs or assigns, a deed of one hundred acres of said land, laid out as aforesaid, to hold the same in fee; the said deeds to be given in two years from the

date hereof, provided the settlers make payment as aforesaid, within that period."

The plaintiff shew, that the timber and bark were cut on a lot in said township, which was actually occupied as a settler's lot before *July* 1, 1791, by one *Flood*, under whom he claimed. There was no evidence, that any sum of money had been paid or offered to *Bingham*, or his heirs, for this lot in pursuance of said reservation, or that any deed of the said lot had been given to *Flood*, or those claiming under him, by *Bingham*, or his heirs; but there was evidence tending to shew, that the possession of the lot was abandoned by the settler, as early, as 1792, prior to the deed from the Commonwealth, and that no person had subsequently resided thereon.

The plaintiff's counsel contended, that the title to this lot never passed to *Bingham* by the deed; but *Parris J.*, who tried the cause, ruled that it did.

Thomas M. Willing became the owner of one half the township, No 14, by conveyance from *Bingham*, and by his will, approved *Oct.* 28, 1822, authorized his executors to make conveyances to pass the real estate, whereof he died seized; and in pursuance of this authority, *R. Willing*, as surviving executor of *T. M. Willing*, on the 6th of *Sept.* 1827, conveyed this lot, in trust, to *J. Richards* and *J. R. Ingersol.* A copy of the will of *T. M. Willing* was filed in the proper probate office in this State, subsequently to the giving of said deed by *R. Willing.* The counsel of the plaintiff objected, that as no copy of the will had been filed within this State at the time of the making of this deed, that it was inoperative and that nothing passed by it; but the Judge overruled the objection.

The defendant proved, that in taking possession of the timber and bark, he acted under *John Black*, who professed to be agent and attorney of the owners of township No. 14. To prove the agency of *Black*, the defendant offered a power of attorney from the heirs of *Bingham*, and from *Richards* and *Ingersoll*, to said *Black*, but failed to prove its due execution. He then offered *Black's* deposition to prove his agency, to the admission of which the plaintiff objected. That the trial might proceed, the Judge permitted the deposition to be read. The jury returned a

verdict for the defendant, which was to be set aside, if the ruling of the Judge was incorrect.

J. Holmes, for the plaintiff, contended:

1. That the reservation in the deed, from the Commonwealth to *Bingham*, operated as a covenant to the use of the settlers. No title to the settler's lots passed to *Bingham* in the first instance, nor could it, until he had located the lots, and offered deeds on payment of the sums stipulated in the reservation. The payment by the settler was not a condition precedent, but he was entitled to retain his possession until the location was made of his lot, and would forfeit his right only by refusing to pay on tender of the deed. It could never have been contemplated, when the deed was made, that the settlers were to go to *Philadelphia* to pay their five dollars each to obtain their deeds. But if the reservation did not convey the lots to the settlers, still the title in them did not pass to *Bingham*, and the tenant cannot shew title in a third person, unless he can derive title to himself by legal conveyance. *Shapleigh* v. *Pillsbury*, 1 *Greenl.* 271.

2. The will of *Bingham* could have no legal effect to convey lands in this State before the copy was filed according to the provisions of our statute.

3. The written power of attorney produced, but not proved, shew, that *Black's* power, if any, was not by parol, but in writing. Parol evidence to prove its contents is inadmissible. *Black* was interested, and for that cause his deposition was inadmissible. He was liable to *Dean* for all damages sustained in consequence of his assuming to be the agent of the *Bingham* heirs when he was not.

D. Goodenow, for the defendant.

1. As *Bingham* was to convey the fee to the settlers, on their complying with the conditions prescribed in the reservation in the deed, the fee must pass to him, or he could not pass it to others. And as there was but one deed made, or contemplated to be made, from the Commonwealth to *Bingham*, the fee must necessarily pass when the deed was delivered. This question is settled in principle, in *Dunlap* v. *Stetson*, 4 *Mason*, 349. But in this case no such question can fairly arise, because the report shews, that the original settler had abandoned the lot before the deed to

Bingham. The reservation applied only to settlers then upon the land.

2. Our statute is silent as to the time when the copy of the will and of the probate of it is to be filed. When once filed, the will is to be considered as valid as if it had been proved here at the time it was proved in the place of the testator's domicil. The filing of the will operates retrospectively and gives effect to it from the time of its being originally proved.

3. It is not necessary that a power to act in a case like this should be in writing. If this be true, then it is not necessary to produce a written power, if one exists; but it is sufficient to prove in any mode, the authority to act for the principals. This may well be done by parol. The defendant is not the person holding the written power, and ought not to be prejudiced, if it is withheld. He having acted under the direction of *Black*, ought to be allowed to shew that *Black* was the agent of the owners, by any means within his power. The deposition of *Black* is proper evidence for that purpose. He is a competent witness to prove his own agency; *Paley on Agency*, 235. It has been held, that a magistrate, having a written commission, may testify on a trial, that he is a magistrate. *State* v. *Hascall*, 6 *N. H. Rep.* 352. Where the acts of the agent are beneficial to the principal, as in this case, the agency may be presumed. *Hatch* v. *Smith*, 5 *Mass. R.* 42.

The action was continued for advisement, and the opinion of the Court afterwards drawn up by

Weston C. J.— From the terms of the conveyance, from the Commonwealth of *Massachusetts* to *William Bingham*, in 1793, of township number fourteen, taken together, it is manifest, that it was intended the fee of the whole should pass to him. The settlers, for whose accommodation certain conditions were imposed, were to receive conveyances in fee from *Bingham*, his heirs or assigns, which plainly implies, that the legal title, by that conveyance, vested in *Bingham*. And there it was to remain, unless the settlers paid the sums, required to be paid by them respectively.

When a copy of the will of *Thomas M. Willing*, deceased, with a copy of the probate thereof, under the seal of the court where the same will had been proved and allowed, was filed and recorded in the proper probate office in this State, it had relation back to the decease of the testator, as this Court has decided, in *Spring* v. *Parkman*, 3 *Fairf.* 127.

The authority of *Black*, under whom the defendant acted, depending on a power of attorney, produced at the trial, could not be proved by parol. The power should have been established by competent proof. This not having been done, and the agency of *Black*, having been proved only by his own testimony, the verdict is for that cause set aside, and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1836.

BARRETT POTTER, *Judge*, *vs.* JOSEPH TITCOMB.*

Under the statute of 1831, *c.* 514, entitled "An act to abolish special pleading," the defendant has not the right to put in any special plea to the merits.

In an action brought on a probate bond in the name of the Judge of Probate, before the stat. of 1831, *c.* 514, judgment had been rendered in favor of the plaintiff, and execution had issued for the use of those at whose instance the suit had been brought. Afterwards, and after the passing of the Act, a writ of *scire facias* in the name of the Judge of Probate, was sued out to have execution issue on the same judgment, for a further sum for the benefit of another person, and by reason of a distinct claim. *Held*, that this was a new suit, so that the defendant was not entitled to plead specially.

THIS was a *scire facias* in the name of the Judge of Probate, commenced by *Moses Titcomb*, administrator on the estate of *Elizabeth Titcomb*. The original action on which judgment was rendered in the suit on the bond, was commenced prior to the enactment of the statute abolishing special pleading. The defendant offered several pleas in bar of said *scire facias*, but the counsel of the plaintiff declined to receive them, insisting that the defendant was bound to plead the general issue, and was not entitled to any other plea. The question was submitted to *Parris J.*, then holding the Court, to decide whether by law the defendant had not a right to plead specially and double, if he or his counsel chose to adopt that mode. The Judge decided, that the defendant was by the terms of the statute bound to plead the

* EMERY, Judge, having been counsel in the original action, did not sit in this case.

general issue, and was not by law entitled to plead any other plea. To this ruling the defendant excepted.

Mellen and *Daveies*, for the defendant, after an eloquent and forcible eulogium on the benefits of special pleading, contended:

1. That by the common law, every defendant had the right to plead specially and double, and that this right remained, unless it was taken away by statute; that although the statute of 1831, *c.* 514, requires the defendant to plead the general issue, still it gives him the right to file a brief statement of the special matter of his defence, or to plead it specially at his election; and that filing the statement is a mere privilege given to the defendant, which he may waive, if he pleases, and plead specially. Although in Congress the title is a part of the act, it is not so in this State. Here the title precedes the words, "be it enacted," &c., and is but a mere name given to the act by the draftsman. Independent of the title, there is not a word in the act indicating an intention to abolish special pleading. The words are merely "may give," &c. but neither require the filing of the brief statement, nor deny the right to plead specially. The statute has never been construed to destroy pleas in abatement and demurrers, and yet such would be the consequence, if the literal words of the title are to govern.

2. If the statute has a general application it does not apply here, because this is but a mere continuation of the original suit, which was commenced before the act was passed. This is not a trial to determine, whether the bond is or is not forfeited, but a mere enquiry, whether the plaintiff in his official capacity shall have execution for a further sum. A *scire facias* is not an original suit, but the old one revived or continued. 1 *Sellon's Pr.* 187; 6 *Dane's Abr.* 463; 2 *Saund.* 71 *a*, *note* 4; *Clark* v. *Paine*, 11 *Pick.* 66; *Dearborn* v. *Dearborn*, 15 *Mass. R.* 316.

Mitchell, for the plaintiff.

1. The object of the statute was to simplify the law, and to make it intelligible to the people generally. The title is a part of the act, and is always read with the bill, and with it there cannot rest a doubt as to the meaning of the statute. The plain and obvious intention is, that the general issue shall be pleaded in all cases, and when the defendant wishes to avail himself of

any matter of defence which he cannot give in evidence under the general issue, that he should file a brief statement of the substance of it. The manifest intention was to abolish special pleading.

2. Although the present, as well as the original suit, is in the name of the Judge of Probate, yet the real plaintiff, recognized by our own statutes, in the two cases are wholly different. This is in all respects a new suit, and in case of failure, the costs are to be paid by a different person. This *scire facias* is as much a new suit, as any suit on a judgment can be, and indeed more so, as in that case the parties must be the same. There is no limitation as to the number of persons, entitled to bring *scire facias* to have satisfaction of their debts on a probate bond, or as to the time, when such suits may be brought. If all these are but one suit, then no one can tell how long the suit will last, or when it is ended.

The action was continued for advisement, and the opinion of the Court afterwards drawn up by

WESTON C. J. — The will of the legislature, within the range of its constitutional powers, when expressed so as to be understood, is to be respected and obeyed. By the act to abolish special pleading, *statute* of 1831, *c.* 514, it is provided that in all civil actions, the general issue shall be pleaded by the defendant, and joined by the plaintiff. This has been enforced in all cases where an action is to be tried upon its merits; but has not been extended to pleas in abatement, which are preliminary in their character, or to demurrers to declarations, which controvert no facts legally set forth; but submit to the court whether any cause of action has been exhibited by the plaintiff.

The science of special pleading was intended to present, with clearness and precision, the point really at issue between the parties. Its rules, in their original design, are admirably adapted to effect this object. But they had been so often perverted to the purposes of chicane and delay, that *Sir William Blackstone* remarked, near a century ago, that the courts had in many instances, and the legislature in more, allowed special matter to be given in evidence, under the general issue. And he adds, that

although it was apprehended, that confusion and uncertainty would follow such an innovation, it had proved otherwise in practice. 3 *Bl. Com.* 306. The forms and technicalities of the law have been much relaxed in this country from its earliest settlement. And it must be conceded, that the reform has generally proved salutary. It cannot but be perceived, in the act under consideration, that the legislature intended that, in trials upon the merits in all civil actions, every special matter should be given in evidence under the general issue. Special pleading is not expressly interdicted, in the body of the act; but its manifest scope, object and design is, to substitute therefor a brief statement of any special matter. It has been urged, that it was intended for the relief of defendants, and not for the benefit of plaintiffs. But this is, in our judgment, giving the law too narrow a construction. The embarrassment and abuses, intended to be remedied, operated upon both parties. Both were equally within the mischief. Why then should the defendant be permitted at his election, to subject the plaintiff to the inconveniences, which were supposed to attend the former system? Unless he is precluded from this course, the benefit of the act cannot be made mutual. And we are of opinion, that upon a just construction of the statute, without reference to its title, having regard to the manifest intention of the legislature, the defendant is not entitled, nor can he be permitted, to plead to the merits any other plea, than the general issue.

Without determining upon the propriety of refering to the title of the act, in aid of its construction, it may not be improper to remark, that as the title is read or stated, in its passage through the legislature, in all its stages, it would be extraordinary indeed, if it should entirely misstate the object of a law, not exceeding ten lines in length.

It is further insisted, that the act does not apply to this case, which it is said is not a new action, but the continuance of a former one, instituted before the enactment of the law. *Dane* holds *scire facias* on a judgment to be a mere continuance of the former action. 6 *Dane*, 463. In *Underhill* v. *Devereux*, 2 *Saund.* 71, *note* 4, *Serjeant Williams* states, that a *scire facias* upon a judgment, is to some purposes, only a continuance of the former suit; and he cites *Wright* v. *Nutt*, 1 *T. R.* 38, which was *scire*

facias, brought merely to revive a judgment against executors. But the present process, although brought upon the former judgment, which stands as security for other liabilities, is virtually for a new plaintiff, and for a distinct and independent claim. In *Dearborn* v. *Dearborn*, 15 *Mass.* 316, the court held, that *scire facias* against bail was not to be considered a new suit; but the court were there considering the duty of an attorney, who had undertaken the collection of a debt. In *Atwood* v. *Burr*, 2 *Salk.* 603, *scire facias* against bail was declared to be a new and distinct suit, and so it is regarded in 6 *Dane*, 463. In *Clark* v. *Paine*, 11 *Pick.* 66, the court cite *Dearborn* v. *Dearborn*, but say that there is some force in the argument, that a *scire facias* is an original writ, when a new party is brought into court. In *Gonnigal* v. *Smith*, 6 *Johns. R.* 106, which was *scire facias* to revive a judgment, it was held to be a new action.

In *Coke Littleton*, 290, *b*, *Littleton*, § 505, commenting upon a *scire facias* to revive a judgment, after a year and a day, says that it may well be called an action, inasmuch as the defendant may plead thereto divers matters, after the original judgment.

And *Coke* adds, that every writ, whereunto the defendant may plead, be it original or judicial, is in law an action. Hence *Littleton* says, § 506, that a release of all actions is a good plea in bar to a *scire facias*. And in *Pulteney* v. *Townson*, 2 *W. Black.* 1227, the court held that a *scire facias* was, upon principle, a personal action; and this upon the authority of *Littleton*, *Coke* and *Holt*, who had given therefor an unanswerable reason, that the defendant may plead to it. The same doctrine was recognized in *Gray* v. *Jones*, 2 *Wils.* 251, and in *Fenno* v. *Evans*, 1 *T. R.* 267. And *Serjeant Williams*, in the note before cited, says, that as the defendant may plead to a *scire facias*, it is considered in law as an action, and in the nature of a new original.

We are bound then upon authority to hold, that the process before us is itself an action; and being instituted, since the passage of the act to abolish special pleading is, in our opinion, subject to its provisions. And although based upon the former judgment; yet being brought for the benefit of a new party, and for a distinct claim, it is to be regarded rather in the nature of a new suit, than as the continuation of a former one. The exceptions

are accordingly overruled. And we come to this result with the more satisfaction, as either party may, under a brief statement, have every benefit which could be fairly and properly derived from special pleading.

Benjamin M. Tyler *vs.* White Dyer.

A bond conditioned to perform an award of referees was signed by both parties to it and left in the hands of a third person, with directions not to give it up without the consent of both. The action was maintained on the bond without such assent to its delivery.

Where a complaint and warrant, issued by one justice and returned to another, were proved to have been lost, parol evidence of their contents was admitted.

Where referees awarded, that one party should pay to the other the costs of a criminal prosecution, instituted on the complaint of him in whose favor the award was made; it was held, that so much of the award was void.

In an action on a bond to perform an award, evidence offered to shew that the line in dispute, established by the referees, was not the true line, was held to be inadmissible.

A submission in the form prescribed in the *stat. ch.* 78, with the omission of the words requiring the award to be made to the Court of Common Pleas, is a submission at common law.

This was an action of debt on a bond, executed by both plaintiff and defendant, in the penal sum of five hundred dollars. The condition of the bond recited, "that whereas we have agreed to submit the settlement of the line betwixt the lots No. 16 and 17 in the 4th range East, in *Baldwin*, to the determination" of certain referees, "and have entered into a rule, that their decision shall be final, as to the line and all costs, that have arisen betwixt us about the premises" and provided that the obligation should be void, "if the said *Tyler* and *Dyer* shall abide the decision of said referees in settling said line and all costs, and do and perform each to the other every obligation ordered by said referees promptly and without delay, by quitclaim deed and payment of costs." The rule referred to in the bond was under the hands and seals of the parties, and acknowledged before a justice of the peace, and followed the form prescribed in the *stat. ch.* 78, ex-

cepting that it contained no provision for its return to and acceptance by the Court of Common Pleas. In this rule the subject matter of the reference is thus stated. To submit the settlement *of the line betwixt us, and all costs, which has been long disputed by us,* to the determination" of the referees.

The award of the referees was made upon the back of the rule of submission, and after establishing the line between the parties, concluded thus. "The cost of court before *G. C. Esq.* in an action of trespass on the 30th day of *May*, 1831, to be paid by said *Tyler* — the costs of court on said 30th day of *May*, before *W. T. Esq.* to be paid by said *Dyer;* and also the referee's fees and expenses of former survey, amounting to fifteen dollars, to be paid by said *Dyer.*"

It appeared on the trial, that the bond had been left by the parties with *W. Thompson, Esq.* for safe keeping until they should take it out of his hands by mutual agreement. The bond remained in his possession, except when loaned for a few days, until it was produced on the trial, each party having previously had a copy. The defendant objected to the reading of the bond until it had been proved, that the defendant had assented that the bond should be delivered up. *Emery J.* before whom the trial was had, overruled the objection.

The plaintiff proved the payment by him of fifteen dollars to the referees for their services, and the expense of a former survey, and that he paid to the defendant the costs awarded to be paid by him. It appeared on the trial, that the costs of court before *W. T., Esq.* awarded to be paid by the defendant to the plaintiff, amounting to the sum of $18,08, were the costs made on a complaint in behalf of the State, by *Tyler* against *Dyer*, for a wilful trespass on the land in dispute. The complaint and warrant were made before one justice, and returned before another, but no proceedings were had upon them, although preparation had been made for the trial. The trial was stopped in consequence of the parties entering into the agreement to refer. The justice to whom the complaint and warrant had been returned testified, that no record had been made of them, and that they could not be found at the time of the trial; and was proceeding to state their contents, when the defendant objected, because the originals were

not produced. The objection was overruled. It was also objected, that the referees had exceeded their authority in awarding the payment of that bill of costs; but this objection was overruled.

The defendant proposed to introduce evidence to show, that the line was established by the referees in the wrong place; but this evidence was also rejected by the Judge.

The defendant insisted, that the submission in this case, was under the *stat.* of 1821, *ch.* 78, and objected that the award was void, because referees appointed under that statute have no jurisdiction of questions concerning the title to real estate; and because no demand subscribed by the party making it, was annexed to the submission; and because the report of the referees had not been made to the Court of Common Pleas held next after it had been agreed upon. The Judge overruled all these objections. It was proved, that the referees read their award to the respective parties at the time it was made.

The defendant consented to be defaulted, subject to the opinion of the court, on the ruling and decisions of the Judge.

Codman, for the defendant.

1. The parol testimony in regard to the complaint and warrant should not have been admitted. The best evidence should be produced. 1 *Stark. on Ev.* 102. In this case the best evidence was the original papers. If they could not be found by the justice to whom they had been returned, then the record of the justice issuing them should have been produced, before evidence of their contents was admissible. *Stockbridge* v. *West Stockbridge*, 12 *Mass. R.* 400; *Thayer* v. *Stearns*, 1 *Pick.* 109.

2. The referees exceeded the authority given them in awarding to the plaintiff, the costs in the case, *State* v. *Dyer*. The referees have no power to award costs, unless it is expressly given them in the submission. *Gordon* v. *Tucker*, 6 *Greenl.* 247. Their whole authority is derived from the written submission signed by the parties, and that gives power only over the costs of the reference. *Bean* v. *Farnham*, 6 *Pick.* 269; *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21. But no submission of the question, whether the defendant should pay to the plaintiff the costs

of a process in behalf of the State, can be binding on them. The *stat. ch.* 235, forbids the payment of costs to the complainant before a Justice of the Peace.

3. The defendant should have been permitted te shew, that the referees erred in establishing the line in the place they did. The case of *Bean* v. *Farnham*, before cited, goes to that extent.

4. The submission is acknowledged before a Justice of the Peace, and is in the form prescribed in the statute, with the omission of a few words, and was manifestly intended by the parties to be a statute submission. The award is therefore void. It is void, because referees have no jurisdiction of questions concerning the title to real estate. *Fowle* v. *Bigelow*, 8 *Mass. R.* 1; *Fryeburg Canal* v. *Frye*, 5 *Greenl.* 38. Void, because no demand signed by the party making it was annexed to the submission. *Ballard* v. *Coolidge*, 3 *Mass. R.* 324; *Mansfield* v. *Doughty*, 3 *Mass. R.* 398; *Woodsum* v. *Sawyer*, 9 *Greenl. R.* 15. And void because the report of the referees was not made to the Court of Common Pleas, held next after it had been agreed on. 5 *Mass. R.* 489; *ibid*, 524; 10 *Mass. R.* 141; 1 *Mass. R.* 411; 5 *Mass. R.* 139; 14 *Mass. R.* 48.

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

1. The parol evidence in relation to the costs of the process in behalf of the State, was properly admitted. The evidence was offered only to shew the amount of the costs of that process, and there is no necessity, that any record should be produced for that purpose. As the Justice to whom the complaint and warrant were returned never acted under them, the costs were never made up by him in his official character, and therefore the record, if made out, would not shew the amount. The Justice had nothing to record, as he never acted, and had nothing before him, on which he could found a record. But were it otherwise, the Justice testified to his having had the papers in his possession and to their loss; and the custodier is the proper person to testify to the custody and the loss. *Jones* v. *Fales*, 5 *Mass. R.* 101. This was the best evidence to be found to establish the fact, and the best evidence is always admissible. Parol evidence is admissible to prove the contents of a written instrument, which has been

lost. *Taunton, &c. Turn. Corp.* v. *Whiting*, 10 *Mass. R.* 332; *Cady* v. *Eggleston*, 11 *Mass. R.* 282; *Welsh* v. *Barrett*, 15 *Mass. R.* 380; *Bassett* v. *Marshall*, 9 *Mass. R.* 312.

2. Although the process was in behalf of the State, still it could be supported only by establishing the title of the plaintiff to the land in controversy. The process was not pursued to a final conclusion in consequence of entering into this submission, and the complainant was compelled to pay them, because the law forbids them to be taxed and paid by the State. The costs were incurred by the plaintiff in asserting his title, and were agreed by the parties to abide the result of the decision of the referees in regard to the line, as were also costs of another process where the defendant was complainant. The defendant has received the costs awarded to him, and ought in equity to pay this sum. This is a sufficient consideration for an express agreement to refer.

The counsel for the defendant were proceeding to their reply to the other points made in defence, but were stopped by the Court. They however cited on the 4th point, *Small* v. *Conner*, 8 *Greenl.* 165.

The action was continued *nisi* for advisement, and the opinion of the Court afterwards delivered by

Emery J. — This is an action of debt on an arbitration bond, conditioned to abide the decision of three gentlemen, named in the submission, as to the settlement of the line betwixt the lots No. 16 and 17 in the fourth range East, in *Baldwin*, and all costs that had arisen betwixt the parties about the premises.

In the progress of the trial, as opened to the jury, various objections were interposed by the counsel for the defendant and overruled. He objected to the reading of the submission till proof of consent that the bond should be delivered up. The execution of the bond was proved by the testimony of *William Thompson*. And it being written so that each severally bound himself to the other in the penal sum of 500 dollars, to abide the award; the bond was left with *Thompson* for safe keeping, till the parties called for it, and until they took it out of the witnesse's hands by mutual agreement. Each had a copy. The witness did not know, whether he gave the bond to *Mr. Swasey*,

but thinks he did. *Dyer* said he did not care what became of the bond, and the witness did not recollect any consent of *Dyer* to deliver up the bond to *Swasey*. The witness was summoned and required to bring the bond into Court, and he did. We cannot think that the plaintiff's remedy upon this bond depends upon the withholding of *Dyer's* consent to the delivery up of the paper to *Tyler*. — The paper was executed and delivered as the deed of each, to be an available security to which ever of them should have occasion to try its legal efficacy. And the witness, with whom it was left for safe keeping, could not withhold it from the summons of the Court, where the rights of the parties were to be tried. The parol proof by *Thompson*, as to the loss of the warrant, was also a subject of objection. The witness stated, that he made diligent search for the warrant, but could not find it. It was laid on the witnesse's table, and the parties agreed to refer their subjects of dispute.

Here the proof of the loss was full enough to let in the parol proof of the contents of the complaint and warrant. In an action for a malicious arrest, where parol evidence was given of the loss of the information and warrant upon which the plaintiff was arrested, the plaintiff was at liberty to go into secondary evidence of their contents. *Freeman* v. *Arkell*, 3 *D. & R.* 669.

The plaintiff and defendant being neighbours, whose lands joined, had long been in dispute about their boundary, as is stated in the submission. They had been in litigation, and had respectively incurred costs, but in a state of momentary good feeling, or possibly for the time, tired of their unprofitable prosecutions, concluded to refer those subjects, the line and costs, to three gentlemen of respectability mutually chosen. After the matter had been decided by them, and the result was announced, and after *Dyer* had promised to pay the cost, he said he had part of it at home and the rest he would make out immediately. Yet when the suit is brought, he still resists. And notwithstanding the small value of the land, the subject matter in controversy, as one of the witnesses says, not five dollars, yet we must decide it according to the principles of law, applicable to subjects of this description.

It is a submission at common law, and not under the statute. The return therefore to any Court was unnecessary. The nature of the subject referred is disclosed in the submission. No other annexation of a demand was required.

The proposition to shew that the line was established in the wrong place, was, on the argument, fully considered by the defendant as a hopeless matter to be attempted. It was precisely the subject which had been decided against his client by judges of his own choosing.

We see no proof of partiality or misconduct on the part of the referees. If any thing of the kind existed, it comes from the frank disclosure of that gentleman, who said his prejudgment was in favor of the defendant, but he was irresistably driven from that ground by the evidence before the referees.

No imputation of unfairness rests upon him. *Graves* v. *Fisher & al.* 5 *Greenl.* 69.

The general principle recognized by this Court, in *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21, is that an awrd of arbitrators, at common law, is not examinable except on the ground of corruption, gross partiality, or evident excess of power. And this last ground of complaint is pressed upon our consideration in the objection that the referees exceeded their authority in awarding the bill of costs against *Dyer*, of $18, 08, in a suit in behalf of the State, on complaint of *Tyler* v. *Dyer*, on the statute. This is the most serious matter of objection.

In *Maine Laws*, 3*d vol. ch.* 235, *pp.* 64–5, it is enacted, "that no costs are to be taxed or allowed, by a Justice of the Peace on complaint alleging any offence against law to have been committed, for the benefit or use of the complainant as a witness, aid or constable, or in any other capacity whatsoever, nor greater fees than what are expressly established and allowed in criminal cases, by the act establishing and regulating fees of officers and other persons therein mentioned."

In the same Act it is provided by the 3d section, that "where upon any examination had before any Justice of the Peace, upon complaint made, the party accused shall be ordered by such Justice to recognize to answer before any Court having jurisdiction of the offence charged, and the Grand Jury of such Court, upon

investigation shall not find a bill of indictment against such accused party, the Justice so ordering him to recognize shall not be entitled to receive any fees for any services rendered in said case, from the State or County," leaving the implication, as is contended, that he is rightfully entitled to demand and receive compensation from the complainant, and hence inferring, that if paid by the complainant, it lays the foundation for reclaiming the amount from the person accused.

There are English and American authorities, which go toward countenancing the allowance, in an award, of great latitude.

The Court will not entertain an application for setting aside an award founded upon an indictment at the Assizes for not repairing a road, though the question in dispute be of a civil nature. *Rex* v. *Cotesbatch*, 2 *D. & R.* 265.

And though an arbitrator on a question of mixed law and fact has allowed transactions apparently illegal, as premiums of insurance on a voyage to a hostile port, the court will not set aside the award. *Wohlenberg* v. *Lageman*, 6 *Taunt.* 254. And an award of costs is good, though the principal sum if found by a jury would not carry costs. *McLaughlin* v. *Scott*, 1 *Bin.* 61. It has also been said, that having submitted to a judge chosen by themselves, the parties give to his acts an authority which the courts would not allow to their own. *Wood* v. *Griffith*, 1 *Swan.* 56.

And arbitrators, unless terms of the submission expressly provide otherwise, are judges of both law and fact. *Klein* v. *Catara*, 2 *Gal. R.* 61. The plaintiff expended this bill of cost in a criminal prosecution against the defendant on the complaint of the plaintiff.

But it is manifest that this bill of cost and officer's fees ought not to have been included. It would be dangerous to give encouragement to such allowances on references, of costs incurred in prosecutions in the name of the State to aid a civil injury. It was not costs between the parties in legal acceptation. Yet as this is plainly to be separated by the award, from the rest which is not objectionable, it does not go to destroy the whole. *Gordon* v. *Tucker et al.*, 6 *Greenl.* 247. The line is happily settled, and the residue of costs is fairly chargeable. It comes then

merely, on a hearing in chancery, to what amount execution shall issue on the judgment for the penalty. We think our distinction will not conflict with *Smith* v. *Thorndike*, 8 *Greenl.* 119, or *Walker* v. *Sanborn*, 8 *Greenl.* 288.

It is a settled rule of law, that in the construction of awards no intendment shall be indulged to overturn an award, but every reasonable intendment shall be allowed to uphold it. 1 *Peters*, 222, *Karthaus* v. *Ferrer & al.* We think favorably of the mode of terminating controversies between neighbors, such as was adopted in this case, and feel bound to give a fair and liberal construction to support awards, as far as we can, where there is no fraud, partiality or corruption on the part of the arbitrators. The default must stand and judgment be rendered in favor of the plaintiff for the penalty.

MAINE BANK *vs.* JOHN B. OSBORN.

Suits are brought by the holder of a note against the maker and the indorser; and at the first term the action against the maker is defaulted, and that against the indorser continued, at his instance, until the next term, and then defaulted. Before the second term, the maker pays the full amount of the judgment against him. Neither party is entitled to costs.

THIS is an action against the defendant, as indorser of a promissory note, in which *C. C. Mitchell* and *T. B. Little* were promissors. Suits were commenced against the promissors and indorser, at the *April* term of the S. J. Court, 1835. The action against the promissers was defaulted at the same term, and that against *Osborn* continued, the plaintiffs moving for judgment, and the defendant alleging a defence. The plaintiffs took out their execution against the promissors, and it was wholly paid before the sitting of the court, at the *November* term. At the *November* term, *Osborn* was defaulted, his counsel being uninformed that the judgment had been paid. At that term, the plaintiffs moved for costs against *Osborn*, which motion was reserved for the consideration of the whole Court.

At the *April* term, 1836, *Daveis* for the plaintiffs, again moved for costs, and said, that as the plaintiffs were delayed of the judgment to which they were justly entitled, as the default at the next term proved, by the interference of the defendant, the plaintiffs were equitably entitled to their costs. In this State the Court are at liberty to decide the question on principle, and to allow costs in a case where during the pendency of the suit another party to the note has paid the debt. It is for the advantage of the defendant in such cases, as he is exonerated from the payment of the debt, instead of having a judgment against him for both debt and costs. The only case against us, that of *Gilmore* v. *Carr*, 2 *Mass. R.* 171, is not now law even in *Massachusetts*, for it is overruled in *Porter* v. *Ingraham*, 10 *Mass. R.* 88. If the last case does not overrule the first, it at least balances it and leaves this an open question. The propriety of the decision in *Gilmore* v. *Carr*, has been much questioned. 1 *Dane*, 415, § 3. The defendant is not the prevailing party in this case, but the plaintiff is. This is shewn by the default. The practice in *New York* is in our favor. *Austin* v. *Bemis*, 8 *Johns. R.* 356, and *Mr. Johnson's* note, commenting on *Gilmore* v. *Carr*. But there is a distinction between this case and *Gilmore* v. *Carr*. Here, there was a default, so that it was too late to say that nothing was due.

S. Longfellow, Jr. for the defendant, cited and relied upon the case of *Gilmore* v. *Carr*, commented upon by the plaintiff. Here our statutes regulate costs, and the decisions of the courts of States, other than *Massachusetts*, cannot be applicable.

But if there could be any doubt under the general statute regulating costs, it is entirely removed by a reference to the statute of 1829, *c.* 444, § 3. This action was commenced while that statute was in force, and under it the plaintiff, in an action of assumpsit brought originally to this Court, can recover no costs, unless he recovers over one hundred dollars debt. Here he can recover no debt.

The opinion of the Court, *Emery J.* not sitting on account of interest, was afterwards delivered by

Weston C. J. — This case is not distinguishable from *Gilmore* v. *Carr*, 2 *Mass. R.* 171. That case is not overruled by

Porter v. *Ingraham*, 10 *Mass. R.* 88. Indeed the Court in the latter decision, state very expressly, that there are essential grounds of difference between them; and that they do not overrule the former case. Costs depend here upon our own statutes; and cannot be affected by the law or practice of other States. The plaintiff's motion for costs is overruled; but as the defendant has no merits, we do not take off the default, for the purpose of awarding costs in his favor.

IRA STANLEY *vs. Proprietors of* BRUNSWICK TONTINE HOTEL CORPORATION.

An authorized committee of a corporation by memorandum in writing, agreed that S. should occupy their hotel for one year at a stipulated rent to be paid quarterly in advance; and that he should have the refusal of it for two succeeding years, provided he kept a house satisfactory to the committee. No time was mentioned in the agreement when the occupancy was to commence, but it was fixed on the trial by the proof of both parties. *Held*, that this was a valid contract for a lease, and that the corporation were liable to pay the amount of the loss sustained by their refusal to comply with its terms.

Parol evidence, that the agreement was reduced to writing by the committee and delivered to S. in consequence of his statement to them, that he wished to have it in writing to show to a third person for a particular purpose, but to whom it was not shewn, was held not to destroy the right of action on the agreement.

THIS was an action of *assumpsit*, commenced on the 14th of *June*, 1834, on the following written instrument.

"*Mem.* The subscribers, a Committee of the Brunswick Tontine Hotel Corporation, agree that *Mr. Ira Stanley* shall occupy their hotel for one year, he paying therefor four hundred dollars per year in quarterly payments in advance, and paying the insurance and all the taxes that may be assessed on the same. And that he shall have the refusal of the house for the two succeeding years, the rent not to exceed five hundred dollars per year, and

the insurance and taxes, provided he keeps a house satisfactory to the Committee.

John F. Titcomb,
Isaac Lincoln, } *Com.*
Jno. Dunning."

"*Brunswick, Jan.* 15, 1834.

It was admitted, that the instrument was signed by the persons whose names appear thereon, and that they were a majority of the committee duly authorized to act in the premises, and it was thereupon read in evidence. At the time the writing was made the hotel was under lease to one *Pike*, which lease expired on the first of *June*, 1834. The plaintiff proved, that before the first of *June*, he tendered to the committee one hundred dollars for the first quarter's rent, and demanded a lease; and that the committee replied, that they had sold the house to *Col. Pike*, but did not require any sureties from *Stanley*, or give any other reason for refusing the lease. He also proved, that before the first of *June*, 1834, the proprietors had leased the house to another person. The defendants then proved by members of the committee, who had sold out their shares in the corporation, and who were permitted to testify, although objected to by the plaintiff, both on the ground of interest, and on the ground, that the testimony would vary the terms of a written contract, that there was much conversation about *Stanley's* having the house before the paper was signed — that the lease was to commence on the first of *June* following the date of the paper, and that *Stanley* was to have the house after *Pike's* lease expired on the first of *June*, 1834, if he succeeded in finding some one who would sell him the furniture necessary for keeping the house — that after the terms were agreed on and they were about retiring, *Stanley* requested some little writing to carry to the persons of whom he expected to have the furniture, that they might be satisfied; and that the committee requested a person sitting by to write a paper, and that he wrote the paper declared on, which was signed by the committee and handed to *Stanley*, who was to shew it to *Jewett & Mudge*, of whom he expected to have the furniture. The same witnesses stated, that the terms mentioned in the paper were correct and according to the agreement, but said that the paper did not express the whole agreement, for that *Stanley* was to get some one who would agree to furnish the house.

They also testified, that the plaintiff agreed to give them notice within a week, whether he would take the house.

There was much testimony on each side to satisfy the jury, that the plaintiff could or could not have procured furniture, and that he did or did not give the committee notice of his intention to take the house within the week, or within an extended time alleged by the plaintiff to have been given by the committee. There was no evidence, that the plaintiff shew the paper to the person of whom he expected to obtain the furniture.

On the trial, before *Emery J.* the defendants contended, that no contract had been made by them with the plaintiff, and that the paper, though signed by the committee, was never placed in the hands of the plaintiff, as a completed contract, but merely as evidence of what they were willing to do on certain conditions, which were never complied with by the plaintiff. And they requested the Judge to give four separate instructions to the jury, which are recited in the opinion of the Court. The Judge declined giving these instructions, and gave the following.

That it was incumbent on the plaintiff to satisfy them, that the contract was truly and absolutely made with the proprietors, through their committee, for the occupancy of the house as the plaintiff had declared, and that the plaintiff had performed all that he was by this agreement bound to do.

That of the sufficiency of the evidence they were the exclusive judges.

That they would consider whether or not the time was extended, so as to give the plaintiff an opportunity to procure furniture; and whether from the testimony of *Mr. Mudge*, to whom application was made, the plaintiff could rely with propriety upon his aid to an extent answering the expectations of the parties, and whether it would be reasonable to suppose, that the parties expected the furnishing of this establishment was to be completed at once.

That if they believed the witness, it was proper for them to consider, that when the tender was made of the first quarter's rent in advance, no objection was then made, that notice had not been given, or claim made for suretyship, or reason assigned, excepting that they had disposed of it to another person. And

also, if they believed the witnesses, they might take into consideration, that the house was leased to another before the time when the plaintiff was to commence his occupation of it, if the agreement had been carried into effect, and the committee thus disabled from carrying their agreement with the plaintiff into effect. And the jury were instructed, that from these considerations, if proved to their satisfaction, they must draw such inferences, as they should judge were right.

The jury found a verdict for the plaintiff, which was to be set aside and a new trial granted, if the instructions given were erroneous, or if those requested by the counsel for the defendants ought to have been given.

Mellen, for the defendants.

It appears from the report, that our defence was, that the writing declared on was never completed, or delivered as a contract into the hands of *Stanley*, but for another purpose, and merely as evidence of what the corporation would do, if the plaintiff performed certain conditions stipulated, and which conditions he failed to comply with. Therefore the instructions, we requested, were on no *abstract question of law*, but upon a point of vital importance; upon a question decisive of the cause.

The defendants complain, that the requested instructions were not given, as a legal guide, as to what constitutes a contract. *Smith* v. *Carrington*, 4 *Cranch*, 71.

The paper was a mere offer to make a contract on certain terms, and though delivered to the plaintiff, still not as a perfected or accepted contract. The plaintiff had no right to use the writing and attempt to avail himself of it, as a completed contract, when at his special request, it was drawn up and handed to him merely to show to the persons, of whom he expected to obtain his furniture by way of argument to induce them to befriend him, and when, if he could obtain assistance, he was to return and have a lease to commence long afterwards. This was not a contract so perfected, that an action can be maintained upon it. *Bailey on Bills*, 338, *note* 4; *Delauny* v. *Mitchell*, 1 *Starkie's R.* 439; *Barker* v. *Prentiss*, 6 *Mass. R.* 430; *Boutelle* v. *Wheaton*, 13 *Pick.* 499; *Skildry* v. *Warren*, 15 *Johns. R.* 270.

Whether upon the evidence in the case, this was a completed contract, was a mere question of law, and on that precise question, it is insisted, that we had a legal right to a distinct instruction, one way or the other; but it was declined, and nothing equivalent to it was given. The instruction was only, "that it was incumbent on the plaintiff to satisfy them, that the contract was truly and absolutely made with the proprietors through their committee for the occupancy of the house, as the plaintiff had declared, and that the plaintiff had performed all that he was by this agreement bound to do." Now this is nothing more, than to say, that they would find for the plaintiff, if he had made out his case. The instruction given *does not touch the point or principle* on which it was requested; it does not give any light or guide as to the elements which compose a contract, but all was referred to the jury for their determination. We say we were by law entitled to the requested instructions. *Johnson* v. *Baker*, 4 *B. & Ald.* 439; *Ashberry* v. *Colloway*, 1 *Wash.* 73; 2 *Stark. Ev.* 474, *note; Fairbanks* v. *Metcalf*, 8 *Mass. R.* 230; 1 *Stark. Ev.* 333; *Murray* v. *Earl of Stair*, 2 *Barn. & Creswell*, 82; *Storer* v. *Logan*, 9 *Mass. R.* 55; *Barker* v. *Prentiss*, *before cited; Goddard* v. *Cutts*, 2 *Fairf.* 440; *Jeffries* v. *Austin*, 1 *Strange*, 647; *Bailey on Bills*, 340.

Deblois, for the plaintiff.

The first enquiry is, whether there is a contract found in the terms of the written instrument. It expresses very clearly what the parties were to do — that the corporation should give *Stanley* a lease of their hotel for the term of time mentioned; that he should make certain payments quarterly and in advance; and should pay the taxes and insurance. The contract for a lease is fully set forth and without ambiguity. The next enquiry is, was the paper delivered, as a completed contract? It was in the plaintiff's possession, produced by him on the trial, and read to the jury without objection. The law presumes, that the party thus producing a paper has a lawful right to it; and the party questioning it must show, that it was wrongfully obtained. *Lonsdale* v. *Brown*, 3 *Wash. C. C. Repts.* 404; *Ward* v. *Lewis*, 4 *Pick.* 518; *Powers* v. *Russell*, 13 *Pick.* 69. All the evidence in the case shews, that the instrument was delivered to the plaintiff by

the committee voluntarily and understandingly, and the only attempt to escape from it is by introducing parol proof to shew, that on a certain contingency this actual delivery was to become no delivery. Such evidence is not admissible. The case of *Ward* v. *Lewis*, before cited, is directly in point.

The report shews, that the plaintiff's counsel seasonably objected to the introduction of parol evidence on the part of the defendants, to prove any conversation before or at the time of the making of the written contract. Such testimony is inadmissible. When the contract is put on paper, that is the only evidence of it. *Tayloe* v. *Riggs*, 1 *Peters*, 591; *Hale* v. *Jewell*, 7 *Greenl.* 435; *Boody* v. *York*, 8 *Greenl.* 272; *Kimball* v. *Morrill*, 4 *Greenl.* 368. The testimony, if it had any bearing, went to destroy the contract, and therefore was not admissible. *Hunt* v. *Adams*, 7 *Mass. R.* 518. In the case now in hearing, all the parol testimony introduced was of conversations before the instrument was written. If the objection we made was good, and the conversations ought to have been excluded, all the objections made in defence fall to the ground. They are wholly founded on this illegal testimony.

But if the evidence is properly in the case, we are to enquire, whether the instructions requested were properly withheld, and whether those given were erroneous.

It is not pretended, that there was any fault on the part of the plaintiff, in relation to obtaining the paper, other than his saying he wished to have his contract in writing to shew to *Mudge* and *Jewett*, and when obtained, that he did not shew it to them. The plaintiff had a right to ask to have the contract he had made, put in writing, that he might have the evidence of it; and if he had given ever so many reasons resting only in his imagination to induce the defendants to do their duty, it would not vitiate the contract. That was fairly made and drawn up under the direction of the defendants. This is a sufficient reason why the instructions requested ought not to have been given.

But in any view of the case, upon what facts were the court to charge? 1. Was this an absolute or a conditional contract. 2. If a conditional one, were the conditions complied with. On these subjects the Judge did charge, and no complaint has been

made, that the charge is erroneous. The charge was correct in itself and sufficiently full, embracing the whole case. If the instructions requested required more, or were different, they ought not to have been given. If they were in substance the same then the defendants have no cause of complaint.

S. Fessenden, on the same side, replied to the arguments of the plaintiff's counsel, and cited *Hathorn* v. *Stinson*, 1 *Fairf.* 224.

The action was continued for advisement, and the opinion of the Court was afterwards drawn up by

EMERY J. — The first enquiry is, whether the witnesses *Cushing* and *Lincoln* ought to have been admitted. They both had divested themselves of the interest which they once had in the property before *June*, 1834, and declared they had no interest in the event of the suit. No solid objection remains to their admissibility.

Ought the instructions requested to have been given, and were the instructions which were given to the jury correct. The jury having found that the contract was truly and absolutely made with the proprietors through their committee for the occupancy of the house, as the plaintiff had declared, and that the plaintiff had performed all that he was by their agreement bound to do. And it being proved that before the occupancy was to commence, the property had been so transferred, that *Col. Pike* had obtained a commanding part in it, and the committee were then disabled to give a lease, and the jury have assessed the damages for the breach of the contract in not permitting the plaintiff to occupy the property, it becomes important to consider whether the Judge erred in refusing the first requested instruction.

Much discussion has arisen in the English Courts, as to what is a lease and what is only an agreement for a lease, because if it be a lease *there* a stamp of a higher denomination is required. And in *Poole* v. *Bently*, 12 *East*, 167, *Lord Ellenborough* says, that the rule to be collected from all the cases is, that the intention of the parties, *as declared by the words of the instrument, must govern the construction.* In *Woodfall's Landlord & Tenant, page*, 4, 5, it is said, it may be laid down as a rule, that whatever words

are sufficient to explain the intent of the parties that the one shall divest himself of the possession and the other come in to it for such a determinate term, 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. A license to inhabit a house amounts to a lease.

If one license another to enjoy such a house or land for such a time, it is a lease. It is a certain present interest and ought to be pleaded as a lease. It may be pleaded as a license. If pleaded as a lease for years and traversed, the lessee may give the license in evidence to prove it. These words in an instrument, "be it remembered that A. B. hath let and by these presents doth demise," &c. were held to operate as a present demise, although the instrument contained a further covenant for a future lease.

The first instruction requested, was, that if on the evidence, the jury should be of opinion that the alleged contract declared on was placed in the hands of *Stanley*, for the purpose of shewing the same to *Mudge & Jewett*, as evidence that he should have a lease of the house, if he would furnish it, as he expected he should be able to do, but not as a completed contract, then they ought to return a verdict for the defendant. It would have been incorrect to give such an instruction, because it was proved, that the contract was made as stated. And the taking of it in writing was for the plaintiff's security. He might shew it, or might not, without affecting the validity of the contract, which was to be construed by its own terms.

It was requested secondly, that instruction should be given, that if they should be of opinion, that said alleged contract was placed in *Stanley's* hand as an unfinished contract for the purposes abovenamed, and not to be a complete contract, unless he should give notice to the Directors or Committee, that he would furnish the house, then they ought to find for the defendant.

It was thirdly requested, that instruction should be given, that if they should be of opinion that when said alleged contract was placed in said *Stanley's* hands, if it was not a completed contract, but was agreed not to be such unless notice should be given to

the committee in the time and manner above stated, then they ought to find for the defendants.

Substantially, the instructions requested in the second and third place, were given, in requiring the jury to be satisfied that the contract was truly and absolutely made, as the plaintiff had declared, and that the plaintiff had performed all that he was by their agreement bound to do, and directing their enquiry especially to the fact whether or not the time was extended, &c.

The fourth requested instruction was, that it was the duty of *Stanley*, to present the signed paper to *Mudge & Jewett*, for the purpose stated by him to the committee, and according to the condition on which he received it, and then give notice to the defendants within the time agreed on. It could not be material for the court to give a direction, as thus requested, because if *Mudge & Jewett*, or either of them, or any other person, according to the evidence had confidence in the plaintiff to aid him without seeing the paper, it was totally indifferent to the defendants. The plaintiff could do nothing without advancing the quarter's rent, which he tendered, and he was at the mercy of the defendants' judgment, whether he kept a house satisfactory to the committee.

The Court, in cases of this description, will examine the whole evidence with care and adopt the inferences which a jury might properly draw from it; and if upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. 1 *Peters*, 170, 182, *M'Lanahan & al.* v. *Universal Insurance Company*.

Upon the evidence, we apprehend substantial justice has been done. And judgment is to be rendered on the verdict.

JOHN LINDSEY *vs.* THOMAS GORDON *& al.*

L. agrees by bond to convey to G. a vessel on payment of three notes given for her, the first to be paid in one year; and at the same time G. receives possession of the vessel and gives to L. a writing, promising to deliver to him a "load of hard wood within thirty days towards the payment of the first note," and to redeliver the vessel to L. on failure to deliver the wood or pay the notes as they fall due; and on failing to deliver the wood or pay the notes, as agreed, to furnish security to the value of the wood, or to the amount of the notes, "at the option of L." The wood was not delivered, and in forty days a small payment was made on the first note; and after that time and before one year the vessel was accidentally lost in the possession of the defendants.

Held, that the payment was to be considered as made on account of the wood; that the acceptance of this payment after the thirty days was an assent that G. might still retain the possession of the vessel; and, as the loss happened without any fault of G. that the redelivery was excused; and that the action could be maintained only for the difference between the payment and the value of the wood.

THIS was an action on the case, and came before the Court on an agreed statement of facts.

On the 25th of *Nov.* 1834, the defendants made and executed the following agreement. "Whereas we have this day received of *John Lindsey* of *Portland*, for the conveyance to us of the *Schooner Spartan* with her appurtenances, on the payment by us of the sum of 550 dollars, for which we have given our notes, and have agreed to deliver to him a load of hard wood at the market price in *Portland*, within thirty days from this day to be indorsed on the first note. And whereas we have this day received possession of said vessel to hold until failure of the payments of any one of the notes aforesaid, or to deliver the wood as aforesaid. Now we do hereby agree to keep said vessel in good order and to deliver her up to said *Lindsey* or his order on the failure by us to pay the notes aforesaid, or any one of them; and to forfeit whatever sum we may have paid thereon; and we further agree to deliver within thirty days a load of good wood to said *Lindsey*, at the market price in *Portland*, toward the payment of said first note, and to pay all of said notes, as they fall due; or to forfeit all right to said vessel. In case we should be prevented from accident or unavoidable circumstances from deliv-

ering the wood aforesaid or any lumber at our option, we agree to furnish other security to the value of a load of wood or lumber or of the whole amount of the said sum of 550 dollars at the option of said *Lindsey*."

The notes referred to were three in number, and were dated on said 25th of *Nov.* and made payable in one, two, and three years. On that first payable there was an indorsement of $37,76, dated *Jan.* 6, 1834. Neither of the notes had become payable when this action was commenced. After said 6th day of *Jan.* the said *Schooner* was lost at sea in the possession of the defendants. They had not and never have performed or offerred to perform any of the agreements set forth in said instrument, if any such agreements there be, according to the terms thereof, further than it may appear by the papers referred to. If in the legal construction of said instrument taken as a whole, and in connexion with the facts herein set forth, the Court should be of opinion, that the plaintiff can support an action thereon against the defendants, then judgment is to be rendered for the plaintiff for such sum, as the Court shall adjudge due. If he cannot support such action, then judgment is to be rendered for the defendants. Costs to be awarded according to law.

W. P. Fessenden, for the plaintiff, said, that where there is an agreed statement of facts nothing is before the court, but what appears on the statement or on the papers referred to and making a part of it. This is a mere question of the true construction of the paper, to be ascertained from examining the whole of it, and finding the meaning of the parties to it. The plaintiff had agreed to sell his *Schooner* to the defendants, and had given them a bond, that he would convey it on payment of the consideration money; and had delivered the vessel into their possession. As the notes were all given on time, the parties stipulated, that the plaintiff should have some portion of the consideration paid, and some security beyond merely retaining the ownership in his hands. For this purpose the writing was given; and it provides.

1. That they will deliver to the plaintiff in *Portland*, within thirty days a load of hard wood at the market price. This must mean such load of wood, as this vessel would carry. The case finds, that this was not delivered, and the action is maintained to

the extent of the value of this load of wood for that neglect, unless in case of failure to do it within the thirty days, the defendants were immediately bound to deliver up the vessel, or give security for its value. Even in that case, they were bound to pay the value of the wood for the use of the vessel.

2. But in case of neglect to deliver the wood within thirty days, the defendants stipulated that they would immediately deliver up the vessel to the plaintiff. The vessel was then in their hands, and they ought to have delivered her up according to their express contract. As they failed to do so, they should be holden in this action to pay the value of the vessel.

3. The contract between these parties further provided, that in case the defendants should be prevented from accident or unavoidable circumstances from delivering the wood within the time fixed by them, that they would furnish other security not only to the value of the wood, but to the value of the vessel, if the plaintiff desired it. The case finds, that they have done nothing, and the action is supported on this ground also.

As to the indorsement on the note, it is to be considered only as a payment of so much towards it. If it was accepted by the plaintiff, as so much towards the wood, that should have appeared by the indorsement, or have been shewn in evidence.

Daveis, for the defendants, contended, that from the plaintiff's keeping the property of the *Schooner* in himself, and giving merely a bond for the conveyance of it, and taking the notes of the defendants for the amount of the purchase money, he relied for his security mainly on the vessel herself. He suffered her to go into the possession of the defendants, as a mere bailment to be redelivered on failure to pay the first note at the end of the year. Before the time elasped, the vessel was lost without any fault of defendants.

It has been contended, that the defendants are bound to pay the value of the vessel, or give good security to the amount, which is in substance the same thing. But this is not correct. The general rule is, that when a loss happens, the risk is with him in whom the title is, and in this case, that was in *Lindsey*. 2 *Kent's Com.* 498. Where there is one of several things to be done in the alternative, the obligor or contractor has the choice.

1 *Pothier, Evan's Ed.* 136, 137. And the discharge of one, discharges the whole. 2 *Evan's Pothier*, 52. And the loss of the vessel by the act of God, preventing the defendants from returning the vessel, excuses them from giving security. 5 *Viner's ab.* 210.

But on any construction of the contract, the defendants were not obligated to furnish the security, unless at the option of the plaintiff. It is necessary before an action can be maintained, that this option should be notified to the defendants, which has never been done.

As it respects the load of wood, the expression is too loose and uncertain to be the foundation of an action. How can it be ascertained, what the value of a "load of hard wood" is? But the indorsement on the note on the sixth of *Jan.* following, long before it was payable, was for the wood, and fixes the price put on it by the parties. The action was continued for advisement, and the opinion of the Court afterwards delivered by

WESTON C. J. — There was a promise absolutely to deliver a load of wood, in thirty days. If the defendants failed to do so, they were to redeliver the vessel. They did neither at the end of that time; although the vessel was then in existence, and in their power. They are therefore liable to pay the wood; and have no excuse for their failure to do so. By accepting a partial payment after the thirty days, we consider the plaintiff to have waived his right to the immediate return of the vessel, and to have assented to the continuance of the contract and that the vessel should still continue in the possession of the defendants. It remained then at the plaintiff's risk; and being lost without the fault of the defendants, redelivery by them is excused, and no action lies against them therefor.

Neither of the notes was due at the commencement of this action; and if the defendants still remain liable upon them, they cannot be recovered in this suit. The wood was to be paid in thirty days, and indorsed on the first note. The partial payment made and indorsed, more than ten months before that note fell due, must be understood to have been paid and received on account of the wood. The value of the load of wood, to be paid by the

defendants, is to be ascertained. From that sum the amount indorsed on the first note is to be deducted, and the plaintiff is to have judgment for the difference, with interest from the time the wood should have been delivered.

JAMES C. CHURCHILL *& al. v.* ASA BAILEY.

A partner who sells personal property of the partnership in his own name, on receiving a release from the purchaser to himself, is a competent witness for such purchaser on a trial where title to the property is in question.

Parol evidence is admissible to shew, that such release was actually made and delivered on a day subsequent to its date.

Also, to shew that the date of a receipted bill of sale was erroneous, and to shew the time when it was made and delivered.

G. delivered his horse to P. with permission to exchange it for another, provided G. should approve the bargain. P. made an exchange, paying difference money himself, and taking the second horse into his possession, when it was attached by B. a deputy sheriff, who left it in the possession of P. taking a receipter for it procured by P. The horse was afterwards delivered by P. to G. who was then ignorant of the attachment, and who approved the exchange and received the second horse as his own. *Held*, that the officer making the attachment could not hold the horse against G.

THIS was an action of replevin for a horse, alleged to be the property of the plaintiff. The general issue was pleaded with a brief statement, that the horse was the property of one *Parker*, and that the defendant, as a deputy sheriff, attached it as *Parker's* property. On the trial before *Emery J.* the case was:

That on the 4th of *June*, 1833, *Gould & Stanley*, partners in business, were the owners of a horse, and on that day *Gould*, having authority from *Stanley* to dispose of the partnership effects, made a contract with one *Parker*, of which the following is a copy:

"Whereas *William Parker* has this day received of me one light red or sorrel horse, for which he has given me his receipt, which horse he is to return to me on demand, — and whereas I have agreed to sell him said horse on the following terms, viz:— That the said *William Parker* shall within thirty days from the date hereof pay to me thirty-five dollars, and fifty dollars within three months from this date. Now, if the said *Parker* shall

well, truly, and promptly pay the said sums of thirty-five and fifty dollars at the times aforesaid, I promise to execute and deliver to him a bill of sale of said horse, but it is expressly understood that said horse is to be and shall remain my property until the said payment shall be fully made. *Jesse Gould.*

"*Portland, June* 4th, 1833. Attest: *R. A. L. Codman.*"

At the same time the horse was delivered to *Parker*, who gave his written promise to return it on demand. On *July* 12, *Parker* paid *Gould* $35,00; and afterwards, at *Parker's* solicitation, *Gould* gave him permission to exchange this horse for some other, provided that the horse to be received in exchange should be brought to him, and he should approve the bargain. On the first of *September*, *Parker* made an exchange of this horse for another with one *Merrill*, giving his note for $10,00, as difference money, but giving no information, that the horse was not his own. On the tenth of *September*, the defendant, as a deputy sheriff, attached this last horse, as the property of *Parker*, who procured one *Grant* to give a receipt to the officer therefor, and the horse was left in *Parker's* possession. On the 23d of *September*, *Parker* took the last horse to *Gould*, who after examination and trial, assented to the exchange, and delivered the horse back to *Parker* to keep on the same terms, as the first, dating the written promise to return the horse on the 24th of *August*, the time on which they supposed the leave to exchange had been given. On the fourth of *November*, *Parker* took the horse to *Gould*, and delivered it back to him, saying that he wished to give it up, as he could not pay the balance due. On the same day *Gould* sold the horse to the plaintiffs, had the value indorsed on a note they held against *Gould & Stanley*, and put it in the plaintiffs' stable. At this time *Gould* was ignorant that the horse had been attached. On the day following *Grant*, the receipter, found the horse in the stable of the plaintiffs, took it out without their knowledge, and delivered it to the defendant, and thereupon, on his refusal to give it up, the plaintiffs brought this action.

On the trial, *Gould* was called as a witness by the plaintiffs. He was objected to by the defendant, and produced a release from the plaintiffs to him discharging and releasing all claim and

demand against him, growing out of or arising from the sale of this horse. The release was dated one year prior to the time when it was produced in the Court of Common Pleas, being before the exchange of horses took place. The objection was still insisted on, because it did not release the claim which *Stanley*, his partner, had, and because parol evidence was inadmissible to shew any mistake in the date. The Judge overruled the objection.

To shew the sale from *Gould* to the plaintiffs, they produced a paper, of which a copy follows.

" *Churchill & Carter* bought of *Jesse Gould*, 1833, *Oct.* 4, one sorrel horse, 7 years old, $80,00

" Received payment by indorsed on my note. *Jesse Gould.*"

Parol evidence was offered to prove that the sale was actually made on the 4th of *Nov.*; that the paper was written on that day, and that the month of *October* was inserted by mistake. This was objected to on the part of the defendants, and the objection overruled by the Judge. The subject of variance in dates, and the considerations indicating fraud or fairness in the whole transaction, were commented upon by the counsel on each side; and the counsel of the defendant requested the Judge to instruct the jury, " that if they were satisfied, that *Gould* intended to give up his claim upon the first horse after he had received the thirty-five dollars and given his consent to the exchange and afterwards took the receipt of *August* 24, to hold the horse as his own without agreeing to pay *Parker* anything or giving up the notes for the first horse, the transaction would be void, as to *bona fide* creditors by the statute of frauds."

The report shews, that the Judge instructed the jury as follows:

" That if they were upon the evidence satisfied, that the original arrangement of the 4th of *June*, 1833, between *Gould* and *Parker*, was a fair and honest one, *Gould* was competent to sell any of the property of the firm of *Gould & Stanley* on such terms and conditions, as to him might seem proper; that from the precautions taken and from the evidence as to *Parker's* situation, they would judge whether at the time *Parker* made the contract about the horse, and *Mr. Codman* wrote the papers, there was perfect confidence in *Parker's* ability to pay, and

whether or not it was intended, that the horse should remain *Gould's* property till the whole sum was paid; that if it was so intended, that *Parker* had no interest in the horse, but upon those terms; that if they believed *Gould*, the firm of *Gould & Stanley*, were then in good credit, and did not fail until about a month afterwards; that if they believed that *Parker* first applied to *Gould* for liberty to exchange that horse, and it was granted only on condition of *Gould's* approval after seeing and trying him, and that to be on the same terms and conditions, and restrictions, as in regard to the first horse, *Parker* would gain no property in the horse obtained on the exchange by paying or giving a note for ten dollars, only having paid thirty-five dollars toward the price of the horse; that if rights such as *Gould* had by the original contract could be defeated by such means, an agent to exchange a piece of personal property, by paying a small sum of his own money to boot, would become tenant in common with the original owner without his knowledge or consent; that if the jury were satisfied, that the original intent of *Gould* and *Parker* was not fraudulent, then *Gould* owned equally well the horse given in exchange for the first, and no new delivery was necessary from *Parker* to *Gould*, for by the course pursued *Parker* became *Gould's* agent to effect the exchange for *Gould's* benefit; that if they were satisfied, that *Gould* did take the horse in question and put him into the plaintiffs' stable, and they were informed of it, and the plaintiffs fairly and honestly purchased the horse of *Gould* and paid for it by endorsing the price on the note, about which the jury must judge, the delivery by leaving the horse in the stable was sufficient; and that if an officer on a writ against one individual attach the property of another, and the possession of that property is afterwards peaceably regained by the owner, the officer has no such special property, as will justify him in taking it from the possession of the true owner on the execution issued on the judgment on the writ by virtue of which the attachment was made."

The Judge declined giving the instrucion requested by the counsel of the defendant, and did instruct them, that if on the evidence, they believed that the original contract of *June* 4th, 1833, was fraudulently made, with the design that *Parker* should

by the mode adopted, be entitled to cheat or defraud creditors, then the plaintiffs must fail in their suit; but if the original contract of the 4th of *June* was honest and fair, the statute of frauds had nothing to do with the case.

If these rulings, decisions and instructions were erroneous, the verdict, which was for the plaintiffs, was to be set aside and a new trial granted, otherwise the verdict was to stand.

R. A. L. Codman and *R. Belcher*, for the defendant, contended:

1. *Gould* was improperly admitted as a witness. The seller is liable to the purchaser on an implied warranty of title, and is therefore inadmissible as a witness for him. *Hale* v. *Smith*, 6 *Greenl.* 416. Nor is this interest divested by reason of the paper produced as a release, because it is dated before the acts occasioning the interest had taken place, and its character could not be altered by parol evidence. *Stackpole* v. *Arnold*, 11 *Mass. R.* 27. And also because it being partnership property and a partnership transaction, a release to one could not divest the interest of both, and take away *Stanley's* claim on *Gould*.

2. The parol evidence in relation to the bill of sale from *Gould* to the plaintiffs ought not to have been admitted. *Stackpole* v. *Arnold*, before cited.

3. At the time of the attachment of the second horse by the defendant, *that horse* was not the property of *Gould*, but of *Parker* or *Merrill*. If it belonged to either, this action must fail. A delivery of it to *Gould* was necessary before the horse could vest in him, and none was made until after the rights of others had intervened by the attachment. *Phillips* v. *Hunnewell*, 4 *Greenl.* 376; *Quincy* v. *Tilton*, 5 *Greenl.* 277; *Lanfear* v. *Sumner*, 17 *Mass. R.* 110; *Woodbury* v. *Long*, 8 *Pick.* 543; *Shumway* v. *Rutter*, 7 *Pick.* 56. *Gould* could not own both horses at the same time, and as *Parker* had no permission to make any exchange until after *Gould* had seen the other horse, and approved the trade, the first horse remained his until after the attachment of the other. Until after this time, *Gould* could have taken the first horse from *Merrill*, as his own, and consequently could have acquired no title to the second. *Parsons* v. *Webb*, 8 *Greenl.* 38; *Smith* v. *Dennie*, 6 *Pick.* 262. Nor could any

subsequent ratification by *Gould*, of the acts of Parker in making the exchange, destroy the lien on the horse acquired by the attachment. *Fettyplace* v. *Dutch*, 13 *Pick.* 388; *Woodman* v. *Trafton*, 7 *Greenl.* 178.

4. *Parker*, having paid thirty-five dollars on the note and ten dollars on the exchange towards the second horse, was at least a joint owner with *Gould* to that amount in the second horse, and one tenant in common cannot maintain replevin. *Hart* v. *Fitzgerald*, 2 *Mass. R.* 509.

5. The instruction requested ought to have been given. *Hathorn* v. *Stinson*, 1 *Fairf.* 224; *Howe* v. *Ward*, 4 *Greenl.* 195; *Dearborn* v. *Parks*, 5 *Greenl.* 81.

Fessenden & Deblois, for the plaintiffs.

Gould was rightly admitted to testify. The only interest he could have in favor of the plaintiffs arose from his liability to make good to them the damages they might sustain from failure of their title to this horse. As he sold the horse to them in his own name, the release was as extensive as the obligation, and discharged him from all interest. The mistake in the date is of no importance, as the release on its face shews distinctly, that the sale of this horse was the subject matter of it. It took effect from its delivery and not from its date. The parol evidence in relation to the paper taken by *Gould* of the plaintiffs was properly admitted on the same principles. Besides, this was a mere receipted bill of parcels, always open to explanation by parol evidence.

The instructions of the Judge were correct. The verdict of the jury has determined that there was no fraud, or unfairness in the transactions; but it is contended, that by the positive rules of law we are to be deprived of the fruits of our verdict. By the terms of the agreement the horse was to remain *Gould's* until the notes were fully paid, and it was only delivered into *Parker's* possession for use, on his written promise to return it on demand. This is a much stronger case in our favor, than if the horse had been *Parker's*, and he had mortgaged it to secure the payment of those notes; and yet that would have been sufficient to give title to *Gould*. *Ayer* v. *Bartlett*, 6 *Pick.* 71; *Holbrook* v. *Baker*, 5 *Greenl.* 309; *Rounds* v. *Baxter*, 4 *Greenl.* 454; *Ap-*

pleton v. *Crowninshield*, 3 *Mass. R.* 443; *Holly* v. *Huggeford*, 8 *Pick.* 73; *Wheeler* v. *Train*, 3 *Pick.* 255; *Lunt* v. *Whitaker*, 1 *Fairf.* 310. The exchange of *Gould's* horse with his assent by *Parker*, vested the second horse in *Gould*. The delivery of this horse to *Parker*, the agent and bailee of *Gould*, was equivalent to a delivery to *Gould* personally. *Macomber* v. *Parker*, 13 *Pick.* 175; *Kittredge* v. *Sumner*, 11 *Pick.* 50. The horse thus became the property of *Gould*, and could not be held on attachment for *Parker's* debts. *Griffin* v. *Derby*, 5 *Greenl.* 476. *Parker's* giving his note for the difference money gave him no interest in the horse, and therefore he could not be a tenant in common with the plaintiffs. *Emerson* v. *Fiske*, 6 *Greenl.* 200. But in this case the horse was afterwards actually delivered to *Gould*, who accepted it for the first, and returned it to *Parker* to keep on the same conditions. This was a ratification of the acts of *Parker* in making the exchange and had relation back to the time it took place. But in this case *Parker* procured a receipter for the horse and retained it in his own possession. This was never any thing more than a mere nominal attachment, and the conduct of the defendant was an abandonment of it, so far as it respected third persons, ignorant of it, as *Gould* was. *Carrington* v. *Smith*, 8 *Pick.* 419.

What the statute of frauds has to do with this case is not readily perceived. The case of *Griffin* v. *Derby*, before cited, is a sufficient answer to all objections from that source.

The action was continued for advisement, and the opinion of the Court afterwards delivered by

Weston C. J. — After *Gould*, the witness, was released by the plaintiffs, he had no remaining interest in their favor. If a release to *Gould* would not directly discharge *Stanley*, no claim could be made against the latter, which would subject *Gould* to contribution; for he was released "from all and every claim and demand growing out of, or arising from the sale." There is evidently a mistake in the date of the release, but the subject matter is very clearly described, and the suit to which it refers, and would be sufficient for the protection of the witness. It was competent for the witness to testify, as to the true time when the

sale was made to the plaintiffs, notwithstanding the bill has a different date. Instruments take effect from the time of their delivery, whatever date they may bear. No declarations of *Parker* were received in evidence, but what were part of the *res gesta*.

The jury have negatived all fraud in the transaction under consideration, on the part of *Gould* or of the plaintiffs. It was competent for *Gould* to prescribe his own terms, if done in good faith, which the jury have found, in his bargain with *Parker* in relation to the first horse. That never having been paid for, remained *Gould's* property, until he consented to exchange him for another. This he might do through the agency of *Parker*. And when he approved of the exchange made by his agent, it had relation back to the time when it was made. No creditor of *Parker* was thereby injured. He had at no time, as the law then stood, an attachable interest in either horse. If *Parker*, in the discharge of his agency, agreed to give boot, he would thereby have a claim upon *Gould*, his principal, for indemnity; but this would draw after it no lien or interest in the horse, received in exchange. With regard to the sum of thirty dollars paid by him to *Gould*, with a view to the purchase of the horse, it was not agreed that he should thereby obtain an interest in common in the horse, in proportion to what he had paid, but it was expressly stipulated, that it should remain the property of *Gould*, until all the payments were fully made.

The attachment of the second horse by the defendant, as the property of *Parker*, at the suit of *Turner*, had no effect upon the rights of *Gould* or of the plaintiffs. *Gould* might lawfully employ *Parker* as his agent, without subjecting the property to be effected by a creditor of the agent. As to him, the interference of such creditor would be a mere nullity. *Gould* got possession of his own property peaceably, and had a perfect right to sell it to the plaintiffs. He was the active partner, in the firm of *Gould & Stanley*; and had ample authority to dispose of the property. The plaintiffs paid a full and valuable consideration for the horse; and when it was put into their stable, it became their property, and was in their actual possession.

We perceive no error in the proceedings of the Judge in receiving testimony, or in withholding or giving instructions to the jury. *Judgment on the verdict.*

CHARLES COFFIN *vs.* BENJAMIN T. CHASE.*

The seventh section of the *statute* of 1829, *ch.* 445, respecting Sheriffs, was prospective in its operation; and did not apply to deputies then in office.

THIS was an action of trespass on the case brought against the defendant for acting as a deputy sheriff, when he was not such in fact, in the extent of an execution upon land of the plaintiff in June, 1829. The facts in the case were ageed by the parties, from which it appeared, that on the 20th of *July*, 1826, the defendant was duly appointed, commissioned and qualified to act as a deputy sheriff within and for the County of *York*, in which County, the land levied on was situated; that the sheriff by whom he was appointed remained in office until after the levy, and that the appointment of the defendant had never been revoked or annulled by the sheriff; but that the commission of the defendant, as a deputy, had not been recorded in the clerk's office under the provisions of the *statute* of *March* 5, 1829, *ch.* 445, § 7.

If, in the opinion of the Court, the defendant had ceased to be a deputy sheriff when the levy was made, because his commission had not been recorded; and if the plaintiff was entitled to maintain the action; then damages were to be assessed, otherwise the plaintiff was to become nonsuit.

Daveis, for the plaintiff, argued that the statute referred to was peremptory in requiring the commissions of all deputy sheriffs to be recorded, and that in its letter and spirit it applied to those then in office, as well as to those who might be afterwards appointed. The statute is for the public benefit, and should be construed liberally. The people surely ought to have the means of knowing who the persons are exercising so much power over their property, and even liberty. The terms of the statute are so comprehensive, as necessarily to embrace this case. All statutes are to be obeyed from the time they become law. *Brig Ann*, 1 *Gall.* 62; 1 *Kent's Com.* 454.

The plaintiff asks only for a sound exposition, of the statute, without a resort to the exceedingly unsafe rule of construction,

* EMERY Judge, was engaged in criminal trials, and did not sit at the hearing of this and the following case.

that the legislature could not have intended the statute to operate according to the natural import of its language, merely because the law might not be generally known. They once passed a statute of limitation barring all actions on gaol bonds after five days from its passage, and before it was known to be a law by any, save the Governour.

The defendant being an officer *de facto*, the levy is good; and the plaintiff therefore is compelled to resort to this action to obtain redress for the injury he has sustained.

D. Goodenow, for the defendant.

The action cannot be maintained, because the defendant was an officer *de jure*, as well as *de facto*. The language of that section of the statute relates only to appointments to be made, and discharges to be given, and not to then existing deputies or gaolers. But if the language of the first part of the section did apply to all cases, it must be considered as directory only, as to those then in office; for the provision, that the appointments shall not be valid until the commission is recorded, necessarily excludes all such as are already acting under valid commissions. The legislature never could have intended, that every deputy and gaoler should be turned out of office without their having the means of knowing or suspecting it, and be subjected to severe penalties without any ground of suspicion, that they were acting illegally.

But the plaintiff has not been injured, and therefore cannot maintain this action. If the levy be void, the land remains *Coffin's*, and he has suffered nothing. If it be good, then it has gone to pay his debt, of which an honest man should not complain.

The action was continued *nisi*, and the opinion of the Court afterwards drawn up by

Weston C. J. — We are of opinion, that the seventh section of the additional act respecting sheriffs, *statute* of 1829, *ch.* 445, was prospective in its operation. If held to be retrospective, the effect of it would be to revive the authority of deputies, who had been previously discharged, but whose discharge had not been recorded, and to put the whole existing deputation out of office,

until their appointments were recorded; and thus to leave them without protection for official acts done, before they could be apprized of the existence of the law. This we think the legislature could not have intended. We are accordingly of opinion, that the defendant had the authority, the exercise of which is complained of in this action. He has therefore no occasion to press his motion to dismiss the action, for the want of a new indorser.

Plaintiff nonsuit.

BENJAMIN BAKER *vs. The Inhabitants of* WINDHAM.

Where a town voted to indemnify an inhabitant for his costs, in a certain suit, "which had arisen or might arise in the same on account of *Gray* line," and an action had been brought against the town to recover the costs of that suit; parol evidence was *held* admissible to shew, that the suit was brought at the request of the Selectmen and Town Agent for the purpose of settling a disputed line between that and an adjoining town, with the express agreement, that the town should pay all costs incurred either in settling the line or in proving the title; and to shew, that these facts had been communicated to the town before the vote was passed.

Also, to shew, that the suit was conducted to its termination with the advice and direction of the Selectmen and Town Agent.

It was *held*, that the action could be maintained, although it appeared from the verdict of the jury, that the line claimed by the town was the true line, and that the suit failed from defect of proof of title to the land.

Parol evidence, admitted to prove that the plaintiff had a good title to the land, was held to be immaterial.

THIS was an action of *assumpsit* brought to recover the costs and expenses of a suit, in which the plaintiff was demandant and one *Atkins Small* was defendant, and was tried on the general issue before *Emery J.* The plaintiff read a vote of the town of *Windham*, on the 14th of *September*, 1829, in these words, "Voted to indemnify *Benjamin Baker* in his costs in the action against *Atkins Small*, which have or may arise in the same, on account of *Gray line*." He also proved by parol testimony, all of which was objected to by the defendant but admitted by the

Judge, that before the passing of that vote, the plaintiff had been solicited by the town agent and selectmen of *Windham* for permission to bring an action in his name against *Small* for the purpose of settling the disputed line between the towns of *Windham* and *Gray*, and that the plaintiff informed them, that he would run no risk of costs, and would not suffer the action to proceed in his name, unless he could be fully indemnified against all costs, and said, that a vote like one passed in reference to a proposed suit in favour of one *Varney* would not be satisfactory ; that after these statements and after a consultation between the town agent and selectmen, the writ was made by the town agent and given to one of the selectmen to procure service thereof; that these facts were stated in town meeting before the vote of *September* 14 was passed ; that after the vote the action proceeded to trial ; that the suit was conducted under the advice and direction of the selectmen and town agent ; that on the trial the defendant prevailed in the action ; and that the plaintiff was compelled to pay the amount claimed by him in this suit. And it was agreed, that the plaintiff made all the advances and managed the cause in conjunction with his counsel, one of whom was said town agent. The plaintiff also offered to read in evidence a vote of the town, passed *April* 6, 1829, which was objected to by the defendants, but admitted by the Judge, and of which the following is a copy. " Voted, that the town indemnify *David Varney* for costs in an action against any individual in *Gray* for a trespass, which has been, or may be committed on his land between the two disputed lines between *Windham* and *Gray*, provided he shall fail in his action on account of the northeasterly line not being the true line bebetween said towns."

The defendant then read in evidence the verdict of the jury in the plaintiff's action against *Small*, as returned in by them in these words, " The jury find that *E. Putnam*, the grantor to *Baker*, was not lawfully seized of lot No. 138, in the town of *Windham*, the jury also find, that the eastern line of the town of *Windham*, as exhibited on *Noyes'* plan, is the true line of the town of *Gray*." The eastern line is the one claimed to be the true one by the defendants. He also read in evidence the same verdict, as put into form by the Court, as follows. " The jury find, that the defend-

ant did not disseise the demandant in manner and form, as is alleged in the declaration." The plaintiff then offered evidence to shew, that notwithstanding the verdict of the jury, he had a good title to the land, and that his grantor, *Putnam*, was seized thereof, which was objected to by the defendant, and admitted by the Judge.

The Judge instructed the jury as follows.

That as this was a suit brought by the plaintiff for an indemnity, the situation of the parties, as developed in the evidence, would necessarily be taken into consideration. That corporations speak by their votes, but they are supposed to have a recollection of their own doings. If the jury believed the evidence, of which they were the judges, it had become desirable in the town of *Windham*, that the divisional line between itself and *Gray* should be settled by bringing an action in the name of some person owning land on the line; that the jury would judge from the evidence, whether *Baker*, the plaintiff, would have continued to prosecute the suit against *Atkins Small*, without the indemnity promised by the town; that it was competent for the town to ratify the suit commenced by direction of the Selectmen; that to ascertain the meaning of the vote declared on, as to the extent of the security to the plaintiff, it was proper to find out the object of the parties; that the engagement should be construed according to the plain and natural import of the terms used to carry into effect the intention of the parties; that in order to come at the truth in relation to a contract, in the exposition of it, words may be transposed; that this contract was capable of being read in the following manner, *viz.* "In action on account of *Gray* line voted to indemnify *Benjamin Baker*, in his costs which have or may arise in the same against *Atkins Small*."

That the terms "on account of *Gray* line" were to characterise and describe the action, rather than to become a limitation of the portion of the expenses for which the plaintiff was to be indemnified; that they would consider, whether it was probable the town would consent to proceed in the suit in the name of the plaintiff, unless satisfied that he had something like a title, and judge also from the evidence whether or not the plaintiff was disposed or anxious to engage in a lawsuit as to his title without

indemnity; and whether it was or was not probable it was expected, that the expenses must arise in the prosecution as well as to the title of the plaintiff, as to the mere location of the line; that if it was the intention of the parties to make this prosecution of *Small* the suit of the town, the contract of the defendants to indemnify the plaintiff as to his costs in the action, would not be performed by holding him to lose part of them, without the defendants refunding all the lawful costs to which the plaintiff was subjected.

If the foregoing rulings, decisions and instructions, or either of them, were erroneous, the verdict, which was for the plaintiff, was to be set aside, otherwise to stand.

This question, was the suit in its commencement and progress the suit of the town of *Windham*, in the name of *Baker?* was put to the jury, and by them answed, "yea."

The case was argued by *Deblois*, for the plaintiff, and by *Mellen*, for the defendants.

Mellen. The action was founded on a contract in writing, the vote of the town, and by which alone the town were bound, if bound they were. The construction of such a contract is *a question of law;* and of course to be decided by the court, subject to revision by the whole Court. This was not done, but left to the jury.

The counsel for the defendants objected to the admission of *parol evidence of any kind*, to aid in ascertaining the legal meaning and true construction of the vote, and yet a series of facts was displayed before the jury. And for what purpose? Was it not expressly to influence them in forming their opinion, as to the meaning and effect of the vote? The Judge was requested to give a construction to the vote of the town, and yet gave no direct and explicit instruction, except in connexion with the facts improperly let into the case; if it can be said that any instructions were given, they were those relating to the transposition of the words, and which are too plainly wrong to require argument to shew it. The verdict in the former case proved that the plaintiff lost the cause for want of proof, that he had any title, and no parol evidence was admissible to control or falsify it; and yet the judge permitted that question to be tried over on improper evi-

dence introduced by one side only, as the other could not come prepared *in that case*. The verdict also proves, that the line contended for by *Windham*, was the true line, and therefore the plaintiff could have lost no costs, "on account of *Gray* line," and was entitled to no indemnity by that vote. The loss of costs was because the plaintiff failed of shewing his title and seisin of the land. There is no ambiguity in the vote; but if the plaintiff is mistaken in this respect, and there is a latent ambiguity, it relates only to the words "on account of *Gray* line," and parol evidence would then be proper only to show what the dispute was, but would by no means justify the admission of such proof to shew, that the action was in fact the suit of the town, and thus to alter the meaning of the vote. The plaintiff and the town had a mutual interest in the suit to settle the title to the land and the town line; the town agreed to pay all costs incurred in settling the line, and no further, leaving him to pay the expenses in relation to the title. With a knowledge of this the plaintiff proceeded with his action, and has no claim against the town. The instructions and decisions of the Judge were clearly wrong, and the verdict should be set aside.

Deblois, in his argument for the plaintiff, said — that no parol proof was admitted to shew the meaning of the vote. The plaintiff placed his right of action on the ground that the original suit, for the costs of which this action is brought, was in its commencement and progress, and to its termination, the suit of the town in the name of the plaintiff; and to prove this the parol proof objected to was introduced, and the vote was read in proof of the ratification by the town of the doings of the agent and selectmen. The ratification of their acts is equivalent to a prior authority. *Kupfer* v. *Inhab. of Augusta*, 12 *Mass. R.* 185; *Abbot* v. *Hermon*, 7 *Greenl.* 118. As between individuals subsequent ratification is good. *Milliken* v. *Coombs*, 1 *Greenl.* 343; *Herring* v. *Polley*, 8 *Mass.* 113. Again, the admissibility of this testimony is justifiable on another ground. A promise may be implied on the part of a corporation from the acts of its agent, whose powers are, as in this case, of a general character. *Abbott* v. *Hermon*, 7 *Greenl.* 118. And *assumpsit* will lie for labor and expense. *Damon* v. *Granby*, 2 *Pick.* 345; *Taft* v. *Montague*,

14 *Mass. R.* 282. Inferences may be drawn from corporate acts, tending to prove a contract or promise, as well as from the acts of an individual. *Canal Bridge* v. *Gordon*, 1 *Pick.* 297; *Abbott* v. *Hermon*, 7 *Greenl.* 118; *Hayden* v. *Madison*, 7 *Greenl.* 76. Corporations may be bound by an implied promise. *Smith* v. *Cong. Meeting-house in Lowell*, 8 *Pick.* 178; *Davenport* v. *Hallowell*, 1 *Fairf.* 317. Corporations may speak by their acts as well as votes, and for this purpose, the situation of the parties, the subject matter of their transactions, and the whole language of their instruments, are to be taken into consideration in determining the meaning of any particular sentence or provision. *Sumner* v. *Williams*, 8 *Mass R.* 214; *Fowle* v. *Bigelow*, 10 *Mass. R.* 379; *Davenport* v. *Hallowell*, 1 *Fairf.* 317; *Hopkins* v. *Young*, 11 *Mass. R.* 302; *Brewer* v. *Knapp*, 1 *Pick.* 332. If the suit was commenced for the benefit of the town, they must take the risk, that the plaintiff had title. *Walker* v. *Webber*, 3 *Fairf.* 60.

In order to get at the true construction of a contract, words may be transposed. *Hobart* v. *Dodge*, 1 *Fairf.* 156; *Jones* v. *Fales*, 4 *Mass. R.* 245.

It does not appear from the report, that any evidence was actually admitted to shew, that the plaintiff had title to the land in the former trial, and a new trial is only granted from what appears on the report. *Brunswick* v. *McKean*, 4 *Greenl.* 508; *Bond* v. *Cutler*, 7 *Mass.* 205. But if it did appear by the report, it was proper to shew the inducement that the town had to commence the suit in the name of the plaintiff, and why they contracted to pay the costs; and this contravenes no rule of evidence, that a verdict is binding. If there may be an implied promise to pay, as the authorities shew, then the possession of the plaintiff is a necessary part of the proof, and might well be considered, though contradicted by the evidence of the verdict.

But suppose the charge to be considered not strictly and sufficiently explicit, still substantial justice has been done by the verdict. The jury have found, that it was the suit of the defendants in its commencement and progress; and the Court should not grant a new trial. 2 *T. R.* 4; 1 *Mass. R.* 237; 7 *Greenl.* 442; *ibid.* 141.

The action was continued for advisement, and the opinion of the Court was afterwards drawn up by

WESTON C. J. — The vote of the town, upon which one of the counts in the plaintiff's declaration is based, would not, and could not, upon its mere production, maintain the action. It would be still necessary for the plaintiff to show that a suit had been instituted, and costs had been incurred, on account of *Gray* line. If he is not to be permitted to do this, the vote is merely illusory and inoperative. The parol testimony was not adduced to explain or extend the vote, but to apply it to its proper subject matter. It is of the same nature, with that which is received to show the location of monuments, referred to in a deed, or the identity of a party. It was not enough for the plaintiff to show, that he had a suit with *Atkins Small.* It was necessary for him to prove, that it was on account of *Gray* line. The writ would not show that fact. Or if on inspection, *Gray* line might be set forth as one of the bounds of the land described in the declaration, it would not thence appear, that the location of that line was in controversy, or that the action was brought to settle it. It appears to us, that the best evidence, the nature of the case admitted, was resorted to for this purpose; and that no legal objection to its competency can be sustained.

The vote assumes, that there was a dispute about *Gray* line. The plaintiff proved, that the proper town authorities of *Windham,* their selectmen and town agent, were desirous of having that line established. Aware that the plaintiff claimed a part of the disputed land, they solicited the privilege of bringing an action in his name against *Small,* an opposing claimant, avowedly for the purpose of determining the controverted line. The plaintiff was unwilling to be put forward in the controversy, unless he could be indemnified in relation to the expense, notifying them that he would run no risk, which might expose him to costs. Thus put upon their guard by the plaintiff, and apprized of the condition upon which alone he would consent to have his name used, the town outhorities caused the action to be prosecuted, the writ having been made by the town agent, upon consultation with the selectmen. These facts were communicated to the

town, when the subject was brought before them in town meeting; and they are perfectly consistent with their vote, and render it intelligible. When once the fact is established, as it certainly is from the evidence, as well as from the express finding of the jury, that the suit was brought on account of *Gray* line, it results that all the costs arising in the same, were on the same account; and it was against these costs, that the vote undertook to indemnify the plaintiff. The vote in favor of *Varney* was admissible, not to explain or qualify the vote in favor of the plaintiff, but to show in connection with the parol testimony, that the plaintiff was not satisfied with such a vote, as passed to indemnify *Varney*. The plaintiff's case did not require this testimony. It merely went to corroborate, what was sufficiently proved before, that he was unwilling to incur the hazard of costs.

There can be no doubt that the plaintiff had interests involved in the suit, other than the costs, and this was well known to the town, when they passed their vote. It was for them to consider whether they would assume the whole expense of the prosecution, or require contribution from him. And being advised, that he would consent to the use of his name upon no other terms, they assumed the whole. And it was equally his right to consider and determine, whether he would bring an action on his own account, or whether he would not rather endeavor to compromise with the opposing interest, or forego his claim altogether. The result was, that he would not bring the suit on his own account, of which he apprized the agents of the town. But he said to them, and through them to the town, you may bring the suit in my name; but it must be upon the express condition, that I am not to run the hazard of any part of the expense; and thereupon followed the vote of indemnity.

If the town authorities acted advisedly, and one of them was by profession a lawyer, they must have contemplated that a lawsuit is liable to many contingencies. A defect of title on either side may develope itself, which had been overlooked. There may be an apparent defect, arising from a want of testimony to meet an objection unexpectedly made. It should have been foreseen, that the plaintiff might fail in his action from other

causes, than an adverse determination of the *Gray* line. And if upon such a result, they would have thrown the expense upon him, the selectmen and town agent, in their negotiations with him, and the town in their vote, should have provided accordingly. No condition to this effect is to be implied from the terms of the plaintiff, or the vote of the town. It was expressly negatived by the one, and not insisted upon by the other. Hence the evidence of title given by the plaintiff, on the trial of this cause, may be regarded as immaterial. It was not necessary to support the present action; and it could not prejudice the defendants. The plaintiff did not volunteer his name for their use. They sought it; and if they were disappointed in the result, the fault cannot be imputed to him, nor does it impair his claim to indemnity.

Aside from the parol testimony, which we are of opinion was properly received, the correctness of the transposition in the terms of the vote, to which the Judge resorted by way of illustration, might perhaps be questionable; but with that testimony, it does appear that the action was brought on account of *Gray* line; and hence the vote of indemnity extends to all the costs in that action, as the jury were instructed.

Upon the whole, we are of opinion, that the objections taken by the defendants have not been legally sustained.

Judgment on the verdict.

William McLellan *vs.* William Richardson.*

Where improper testimony has been admitted, with the assent of counsel, for further examination during the trial; and the jury have been instructed in the charge, that such evidence ought not to have been received, and that it should not be considered by them as evidence in the case, a new trial will not be granted.

The County Attorney cannot be admitted, as a witness, to disclose the proceedings before the grand jury.

This was an action of *trespass*, for injuries done to the plaintiff's store, and was tried before *Parris J.* There were two

* Emery Judge, was detained on the trial of indictments, and did not hear the arguments.

counts in the declaration for different trespasses with the space of a year between them. To maintain his action, it became important to the plaintiff to shew, that the defendant was near the store at the time the acts complained of were committed, and for this purpose he called a witness who testified, that he was one of the grand jury at a term of the Court of Common Pleas, when the defendant was called before them, as a witness on the complaint of the plaintiff, for committing the violence charged in one count of the declaration, and that the defendant there testified, that he saw a part of the injury complained of done and gave the name of the person by whom it was done, and related some conversation at the same time and place. The witness also stated, that no bill was found against any one on account of the transaction concerning which the enquiry had been made. After the witness had testified, that he was a grand juror and to a portion of the other facts stated, the defendant's counsel enquired, if it was proper to receive testimony from a grand juror of what had taken place before them in the course of their official examination. Some observations were made by the counsel on each side, the plaintiff's contending for its admissibility, and the defendant's doubting it, and wishing to make it a question.

In this stage of the proceedings, it was suggested by the Judge, that inasmuch, as the witness had testified thus far without objection, and as it might be a question of some doubt, it might be well that the witness should proceed and finish his testimony, and before the cause was committed to the jury the question could be further examined and the jury be charged thereon ; to which suggestion the defendant's counsel bowed, as was understood by the court, in token of assent. No objection to the course suggested was made or intimated in any manner. The court charged the jury, that whatever transpired before the grand jury ought not to be given in evidence, and that the testimony of the witness therefore should not be considered by them, as evidence in the case.

On the whole evidence in the case the jury returned a verdict for the plaintiff on one count, but found him not guilty on the count setting forth the acts in relation to which the enquiry was made before the grand jury. The verdict was taken subject to

the opinion of the whole Court on these facts reported by the Judge.

The defendant also filed a motion for a new trial, because the verdict was against law and evidence. He also filed a motion for a new trial, because since the trial he had discovered, that one of the jurors who returned the verdict had been one of the grand jurors before whom the complaint before mentioned was examined.

On the hearing of the case before the whole Court, the defendant's counsel offered the juror to prove, that he acted on both juries. He also offered the then County Attorney to prove, that the subject matter of the present action had been investigated by that grand jury.

On the case presented by the report,

Mellen and Daveis, for the defendant, contended that the testimony of the juror giving the statement of the defendant, when before the grand jury, was calculated to excite a prejudice against him, and to operate to his injury. This improper testimony came into the case without the fault of the court or the counsel, but being there the Judge's telling the jury in his charge to disregard it, could not place the defendant as well before them, as if the testimony had not been given in. The impression created by it might have been the very thing which turned the verdict against us.

Fessenden & Deblois, for the plaintiff, were informed by the Court, that argument on their part was unnecessary at present.

On the motion for a new trial, because the juror had been on the grand jury,

Mellen & Daveis contended, that it was competent to prove by the juror and by the County Attorney, in the mode proposed, that the juror was on the grand jury when the subject matter of the present suit had been investigated before them; and that these facts, when established by proof, furnished sufficient cause for a new trial. There are cases where the facts transpiring in the grand jury room may be shown even by the jurors themselves. *Low's case*, 4 *Greenl.* 446; *State* v. *Smith*, *ibid*, 450. And they argued, that these cases prove, that inquiries beyond those proposed to be put in this case may properly be put in to the ju-

ror, and answered by him. It was said, that the County Attorney was under no oath, but the general oath of office to discharge his duty faithfully, and was not bound by it to secrecy, or prohibited by it from testifying. It is only proposed to prove by him what the subject of the inquiry before the grand jury was; but not what were their counsels or proceedings.

To shew that a new trial ought to be granted, if the statement in the motion can be proved in the proposed mode, they cited *Commonwealth* v. *Hussey*, 13 *Mass. R.* 221.

Fessenden & Deblois, for the plaintiff, argued, that the objection to a grand juror's being a witness, arises not only from their oath, but from motives of public policy; from the necessity that the proceedings in the jury room should be kept secret, that the accused should not escape from justice; nor the truth be suppressed by witnesses from fear of a powerful, or a bad man. And they urged, that the reasons were stronger against admitting such proceedings to be disclosed by the County Attorney, than by the jurors.

The objection comes too late. A new trial will not be granted, even where good cause of challenge to a juror existed, if the party neglected to avail himself of it on the trial. *Jeffries* v. *Randall*, 14 *Mass. R.* 205; *Haskell* v. *Beckett*, 3 *Greenl.* 92. Jurors cannot be permitted by their testimony to impeach a verdict. *Taylor* v. *Greely*, 3 *Greenl.* 204; *Purinton* v. *Humphreys*, 6 *Greenl.* 379; *Vaize* v. *Delaval*, 1 *T. R.* 11; *Jackson* v. *Williamson*, 2 *T. R.* 281; *Dorr* v. *Fenno*, 12 *Pick.* 521; *Cluggage* v. *Swan*, 4 *Binney*, 150.

But they may be called to sustain it. *Little* v. *Larrabee*, 2 *Greenl.* 37; *Haskell* v. *Beckett*, 3 *Greenl.* 92; *Dana* v. *Tucker*, 4 *Johns. R.* 487; *Parrott* v. *Thatcher*, 9 *Mass. R.* 426.

If the testimony be admissible, it furnishes no ground for a new trial. No bill was found, and the bias, if any there was, must have been in favor of the defendant, not against him.

The opinion of the Court, after time taken for advisement, was drawn up by

Weston C. J. — With regard to the course pursued in the examination of the grand jurors, it must be understood to have been

assented to by the counsel for the defendant, and therefore furnishes no ground of exception on his part. Besides, the jury were instructed to disregard that testimony; and they acquitted the defendant of that part of the charge, to which they testified.

For the purpose of establishing the objection taken to the verdict, that *Robert Dunning*, one of the traverse jury, had before been a grand juror in the Common Pleas, before whom and his fellows, it is averred that an investigation was had, as to the guilt of the defendant, his counsel move the court, that the County Attorney may be examined on oath, in regard to what took place before them. This motion is resisted; and upon consideration we are of opinion, that it ought to be overruled. It is the policy of the law, that the preliminary inquiry, as to the guilt or innocence of a party, against whom a complaint has been preferred, should be secretly conducted. In furtherance of the same object, every grand juror is sworn to secrecy. One reason may have been, to prevent the escape of the party charged, to which he might be tempted, if apprized of the proceedings in train against him. Another may have been, to promote freedom of deliberation and opinion among the grand jury, which might be impaired, if it were known that the part taken by each, might be disclosed to the accused or his friends. A timid juror might in that case be overawed by the power and connections of an individual charged. If this motion were sustained, every thing done in the grand jury room might be unveiled, whenever the same subject matter was on trial before the traverse jury. It would be to open a door, which the law intended should be closed.

Whatever examination was gone into before the grand jury, no bill was preferred against the defendant. It is not then to be presumed, that any one of them was satisfied of his guilt. It is further stated and not denied, that the jurors generally, before the trial commenced, were inquired of, whether they had formed any opinion, or were sensible of any bias upon their minds, in relation to the case. Upon such an inquiry, every juror, conscious that he did not stand indifferent, should, and it may be presumed would, disclose the fact.

Upon the whole, we perceive no reason to doubt, that the defendant had a fair trial. *Judgment on the verdict.*

ICHABOD BARTLETT *vs.* ISAIAH PERKINS.

An action of trespass *quare clausum*, for cutting grass, can be maintained only by the tenant in possession.

In an action of trespass *quare clausum*, for taking away the annual profits of the land, an amendment of the declaration by adding a count for an usurpation of the fee will not be permitted.

Where an execution creditor levies upon land, of which the debtor is in possession, he thereby acquires a seizin, although defeasible, if the land belong to another.

THIS was an action of *trespass quare clausum*, for cutting and carrying away the plaintiff's grass during the months of *July* and *August*, 1835. The general issue was pleaded and joined, and a brief statement filed of soil and freehold in the defendant, and that the plaintiff was not in possession; and a replication was made, that the soil and freehold were in the plaintiff. The trial was had before *Emery J.* The plaintiff's counsel read in evidence a deed from one *E. G. Woodman* to him, dated *May* 2d, 1829, and proved, that the defendant admitted, that he cut about three tons of hay on the premises at the time mentioned in the declaration. But the plaintiff's witness also proved, that *E. G. Woodman* had always lived there, and stated, that he never knew any act of ownership by the plaintiff. The plaintiff's counsel then read in evidence an execution and levy upon the premises in favor of the defendant against said *E. G. Woodman*, dated *October* 20, 1834, and contended that the said *Woodman* thereby became only tenant at sufferance.

The defendant's counsel moved for a nonsuit, but the Judge declined to order it.

The counsel for the defendant then insisted on his levy read by the plaintiff, and proved, that said *Woodman* had always lived on the premises and had taken the rents and profits, as before his deed to the plaintiff; and that the plaintiff lived at a distance and paid no attention to the property. The defendant offered evidence tending to show the plaintiff's deed to be fraudulent as to creditors; and the plaintiff also introduced opposing testimony.

The Judge instructed the jury, that this action could not be maintained; but directed them to answer several interrogatories,

some of them relating to the question, whether the deed was or was not fraudulent, and others relating to the possession of *Woodman.* The answers with regard to the title showed, that in their opinion *Woodman's* conveyance to the plaintiff was not fraudulent. With respect to the possession, the questions and answers were as follows. "Was the said *Woodman* tenant at will of the said *Bartlett* of the premises described in the plaintiff's declaration, or only tenant from year to year, at the time of the alleged trespass?" Answer. Tenant at will.

"Has the said *Woodman* continued in the actual possession of the described premises ever since the giving of the deed, *May* 2d, 1829, up to the present time, or for what length of time had he such possession? Answer. He was in actual possession up to the time of the levy of the execution. Was the said *Woodman* in possession of the property at the time of the alleged trespass. Answer. No."

If the action could be maintained, on the case reported by the Judge, the verdict, which was for the defendant, was to be set aside; otherwise judgment to be rendered thereon.

The counsel for the plaintiff submitted the case on their briefs; and the counsel for the defendant submitted without argument.

J. C. Woodman, for the plaintiff, cited *Starr* v. *Jackson,* 11 *Mass. R.* 519; *Little* v. *Palister,* 3 *Greenl.* 6; *Campbell* v. *Procter,* 6 *Greenl.* 12; *Cruise's Dig. Title Estates at will, Vol.* 1, 282; *Ellis* v. *Paige,* 2 *Pick.* 71, *in the note; Same case,* 1 *Pick.* 47; *Bartlet* v. *Harlow,* 12 *Pick.* 348; *Varnum* v. *Abbott, ibid.* 474; *Baldwin* v. *Whiting,* 3 *Mass. R.* 61; *Emerson* v. *Thompson,* 2 *Pick.* 473.

Deblois, on the same side, cited in addition, *Prop. Ken. Purchase* v. *Call,* 1 *Mass. R.* 483; *Same* v. *Springer,* 4 *do.,* 416; *Bott* v. *Burnell,* 9 *do.,* 96; *Same* v. *Same,* 11 *do.,* 163; *Gore* v. *Brazer,* 3 *do.,* 539.

Dunn, for the defendant.

The action was continued, *nisi,* and the opinion of the Court prepared by

WESTON C. J.—From the evidence reported, and the finding of the jury, there can be no doubt the land in controversy, is the

property of the plaintiff; and if he had brought a writ of entry to recover possession, he would have been entitled to a verdict and judgment in his favor. From the nature of the remedy, he has thought proper to pursue, for an injury like that alleged in the declaration, it can be maintained only by the tenant in possession. It is urged that the plaintiff, as the lessor, might sustain an action against the defendant for his levy, as an usurpation of the fee; but that is not charged in the declaration; and it cannot be inserted by way of amendment, being for a a new cause of action. This suit is for cutting the grass upon the land, the year following the levy. In *Campbell* v. *Procter*, 6 *Greenl.* 12, the late Chief Justice permitted a count to be added to the plaintiff's declaration, charging an usurpation of the fee. The amendment was objected to, as a new cause of action. As however the case went off upon another point, no decision was had upon the correctness of the amendment. That action was for a trespass, *quare clausum*, in entering to make the levy, and the same act was charged in the amended count, as an usurpation of the fee. This is for an alleged trespass upon the land several months after the levy.

The levy by the defendant was either a nullity, or it put him in the seizin, although not by right, of at least a freehold. If a nullity, because the judgment debtor had no estate, upon which a levy could be made, it left the lessor and the lessee as they were before. The case does not find that the lessee, *Woodman*, did any act inconsistent with his duty, when the levy was made, by which his tenancy at will would be determined. In *Campbell* v. *Procter*, the tenant, instead of notifying the execution creditor that he was but a tenant at will, pointed out the land he so held, to be levied on as his property, and was otherwise active in aiding the levy. This was very properly held such a desertion of duty, as determined his tenancy. An estate for years does not pass to the execution creditor by a levy, much less a tenancy at will. *Chapman* v. *Gray*, 15 *Mass. R.* 439.

The evidence is, that *Woodman*, the tenant, continued in possession of the land, receiving the profits to his own use as before, after the date of his deed to the plaintiff in 1829, and that the

plaintiff never was in the actual possession of any part of it. The jury have found that *Woodman* was tenant at will at the time of the trespass. And this of itself would defeat the plaintiff's action. *Little* v. *Palister*, 6 *Greenl.* 6. Another part of their finding, hardly consistent with this is, that he had actual possession up to the time of the levy, but not at the time of the tresspass. They probably intended to find, that his possession was divested by the levy.

But the better opinion seems to be, from the authorities, that where an execution creditor levies upon land, of which his debtor is in possession, he thereby acquires a seizin, although defeasable, if the land belongs to another. *Chapman* v. *Gray*, before cited. *Gookin* v. *Whittieer*, 4 *Greenl.* 16; *Allen* v. *Thayer*, 17 *Mass. R.* 299. Upon this view of the case, the plaintiff was disseised by the levy, and could not prosecute an action for any act of the disseisor subsequent to the levy, until he had entered, or recovered judgment for the land. And upon the whole case, the opinion of the court is, that the plaintiff had not such a possession, as would enable him to maintain this action.

Judgment on the verdict.

Timothy Downing *vs.* Abiezer S. Freeman.

A promise to pay a debt implied by law remains in force, although through the fraud and imposition of the promiser the credit was originally given to a third person.

Where one witness testifies affirmatively, that certain words were spoken in a conversation; and another testifies that they were not, and relates other words spoken at the same time inconsistent with those testified to by the first witness; and both witnesses are entitled to equal credit; the words stated by the first witness are not to be considered as proved.

This was an action of *assumpsit* brought to recover a bill for horse keeping, and was tried at the *March* term of the Court of Common Pleas, 1836, before *Whitman C. J.*; and came before this Court on exceptions to the ruling of the Judge. The plaintiff proved by one *Andrews*, that he was called on by the defendant to take a lame horse to the plaintiff's, which he did; that he

went in a disguise furnished by the defendant; that the horse was said to belong to a *Mr. White;* that he told the plaintiff, when he took the horse to him, that he, *Andrews*, owned it, and that his name was *Stearns;* that he wanted the horse taken care of, and he would pay for the keeping. *Andrews* further testified that the course of proceeding by him taken was with the knowledge and at the request of the defendant; that he, the witness, was a minor; and that the defendant said, that he and *White* would stand between him, *Andrews*, and all harm for his doings. After the plaintiff discovered these facts he returned the horse to *Freeman's* stable.

The defendant then called one *Gower*, as a witness, who testified, that in a certain conversation the plaintiff said, that when *Andrews* brought the horse he knew him.

The plaintiff then called another witness, one *Hodgkins*, who testified, that he heard the same conversation, which the last witness did; and that what the plaintiff said, was, that he saw *Andrews* after he had kept the horse, and then knew him to be the same who brought the horse; and that the conversation was not as the other witness had stated.

Upon this evidence, the Judge charged the jury, that if they were satisfied, that the plaintiff was imposed upon by *Andrews*, and that the defendant ordered the horse to be carried there for the purpose of imposing upon the plaintiff, or actively urged on the imposition, the plaintiff would be entitled to recover, unless they should be satisfied from the testimony of *Gower*, that no imposition was practised, by reason of the plaintiff's knowing *Andrews* at the time he brought the horse; and also, that where one of two witnesses, both equally credible, testify to a fact, and the other expressly contradicts the testimony of the other, the fact would be considered as not proved; and that as *Hodgkins* testified contrary to the testimony of *Gower*, they would consider whether the testimony of *Gower* was not controlled by the testimony of *Hodgkins*. Whereupon the jury returned a verdict for the plaintiff. To this instruction the defendant excepted.

Dunn, for the defendant, submitted the case without argument.

J. C. Woodman, for the plaintiff, submitted on his brief.

He argued, that *Freeman* sent the horse to be kept at *Downing's*, and was liable on an implied promise. He was the principal in the whole transaction, and if others were liable also, that could only be taken advantage of by plea in abatement. *Rusby* v. *Scarlett*, 5 *Esp. R.* 76; 1 *Com. on Con.* 238; and the defendant then being unknown to the plaintiff makes no difference. He for whose interest a parol promise is made may maintain an action. *Woodman* cited the following authorities: *Arnold* v. *Lyman*, 17 *Mass. R.* 405; *Kelly* v. *Munson*, 7 *Mass. R.* 319; *Greely* v. *Bartlett*, 1 *Greenl.* 172; *Felton* v. *Dickinson*, 10 *Mass. R.* 287; *Upton* v. *Gray*, 2 *Greenl.* 373; *Lamb* v. *Clark*, 5 *Pick.* 193; *Jones* v. *Hoar*, 5 *Pick.* 285.

After a continuance the opinion of the Court was drawn up by

WESTON C. J. — The defendant sent a horse in his possession, whether his property or not, to the plaintiff's stable to be kept. If by implication the plaintiff may have undertaken to keep the horse on the credit of *Andrews*, under the assumed name of *Stearns*, that undertaking having been obtained by fraud and imposition, brought about by the contrivance and procurement of the defendant, was not binding upon the plaintiff. The latter is then remitted to his right to maintain *assumpsit* against the defendant, upon his promise implied by law, for keeping the horse at his request, through the agency of *Andrews*. And if upon the facts, *Andrews* was also liable, or *White*, the owner of the horse real or pretended, the defendant should have pleaded in abatement.

The case was very fairly stated to the jury, by the presiding Judge. The conversation of the plaintiff, as testified to by *Grosvenor*, best accords with his acts. He would hardly have yielded to the imposition, if he had not been deceived. If *Grosvenor* was right, the other witness, *Gowen*, misunderstood a part of the conversation, and thus the discrepancy between them may be accounted for. But if the contradiction was not susceptible of explanation, and the witnesses were equally credible, and there were no other circumstances to incline the scale, the testimony of each would be neutralized, and the case left as it was before.

Exceptions overruled.

ALBERT NEWHALL *& al. Administrators of* SAMUEL WINTER'S *Estate vs.* JOSEPH VARGAS.

Where goods are sold on credit at a foreign port and shipped on board a vessel of the vendee, consigned to him, and to be delivered to him at his port of residence; and the consignee becomes insolvent before payment is made; the vendor has the right to stop the goods in their transit at any time before they shall come into the actual possession of the vendee.

The right to stop the goods *in transitu* is not divested by the purchase of the goods of others by the vendor on his own credit for the vendee.

Nor by the vendor's taking bills of exchange drawn in his favour by the master of the vessel on the vendee.

Nor by charging a commission for doing the business.

Nor does the reception by the vendee of part payment take away the right.

A claim made by the vendor on any person having charge of the goods, before the transit ends, is a sufficient exercise of the right of stoppage to revest the goods.

To prevent the enforcement of this right, it is not sufficient for the consignee to make his claim to the goods; he must obtain the actual possession.

To entitle himself to exercise his right of stoppage, the vendor is under no obligation to refund what he may have received in part payment; nor to pay the value of the freight.

THIS case came before the Court on a statement of facts, of which such are given, as are necessary for the proper understanding of the questions of law raised on the argument.

The action was replevin brought by the plaintiffs, as administrators of the estate of *Samuel Winter*, for a quantity of molasses, the cargo of the barque *William Smith*, imported into *Portland* from *Havana* in the island of *Cuba*, in *September*, 1835; of which barque *Levi Peterson* was master, and said *Samuel Winter* sole owner. Said barque arrived at *Matanzas* in said island in *August*, 1835, consigned to *N. Cross, Jr.* as the agent of *Winter*, who directed the master to proceed with the barque to *Havana* and consign her to *Joseph Vargas*, the defendant, a merchant at *Havana;* and the said *Vargas* on her arrival at that place received the consignment and sold the cargo, consisting of lumber, and received the net proceeds thereof, amounting to the sum of $3740,50, which were invested in the return cargo. In conformity to the directions of said master, the said *Vargas* purchased for and furnished him with a full return cargo of molasses, amounting in value to $13513,62. *Vargas* made sundry dis-

bursements for said barque amounting to $352,56, and paid the master $221,00 for other disbursements for the barque. For the balance of the account of the barque, the said master made, executed and delivered to the said *Vargas* five bills of exchange, drawn on said *Winter* by the master for value received, and made payable to said *Vargas* or his order at sixty days sight, amounting in all, to the sum of $10296,62; of which two were dated *September* 1, 1835; two others were dated *September* 3, 1835, and the other, *September* 4, 1835, all of which were made payable in the city of *New York*. *Peterson*, the master, sailed with his return cargo on the 6th of the same *September*, before which time said *Vargas* had negotiated said bills of exchange at *Havana*, charging *Winter* a commission of one and half per cent. therefor; and they were sent to the *United States* in the usual course of business. About one month after the sailing of said barque, news reached *Havana* of the death and insolvency of *Winter*; and thereupon the said *Joseph Vargas* sent his brother, *Nicholas Vargas*, to the *United States*, clothed with full power to act for him in relation to his claims arising out of his transactions with *Winter*, and arrived in the city of *New York* on the fourth of *November* following, and there found, that all of said bills of exchange had been protested for non acceptance; and immediately proceeded to *Boston* and from thence to *Portland*, where he arrived on the 15th of the same *November*; and soon after his arrival there and during his stay at *Portland*, said bills fell due and were protested for non payment; and the same were taken up and paid by *W. W. Russell* of *New York* for the honour and on the account of the said *Joseph Vargas*. Prior to the arrival of the said *Nicholas* in *Portland*, and in the month of *September*, *J. B. Thompson*, one of the partners of the mercantile house of *Fessenden*, *Thompson & Co.* of *Boston*, the general correspondents of the defendant in the latter city, and claiming to act as their agents, proceeded to *Portland* and employed one *Merrill* to act in his behalf, who received written instructions. In conformity to these instructions said *Merrill*, on the morning of the 28th of *September*, having been informed of the arrival of said barque in the lower harbour of *Portland*, proceeded on board, and there demanded of the mate then in charge of the barque,

the captain being on shore, the cargo of the same in the name and in behalf of the said *Joseph Vargas*, as his property, in consequence of the death and insolvency of said *Winter*, and forbid the delivery of said cargo to the representatives of said *Winter*, or to any others on his account. Said *Merrill* remained on board until the return of the master, and immediately on his coming on board demanded of the master the said cargo, and forbid him to deliver it to said *Winter's* representatives, or to any person in said *Winter's* behalf; and said master refused to deliver up the same, claiming to hold it for his own indemnity, or to do any act without the advice of counsel. During said *Merrill's* stay on board, an officer of the customs came and demanded said vessel's papers and left an inspector on board. Said *Merrill* then left the vessel, and on the day following demanded the cargo of the collector of *Portland*, and notified him of the previous demands on the master and mate. About four days after the arrival of the barque at *Portland* a keeper was put on board at the request of *Fessenden, Thompson & Co.* and in behalf of said *Joseph Vargas*, and of said *Peterson*, the master, who claimed an interest in the cargo, as an indemnity against said bills, and the keeper remained on board until the collector of *Portland* took the vessel into his possession. All of which proceedings of said *Fessenden, Thompson & Co.* and of those employed by them, were sanctioned and ratified by the said *Nicholas*, the attorney of said *Joseph Vargas*, on his arrival in *Portland*, and in behalf of said *Joseph*. This ratification took place several weeks before this suit was commenced. Before the commencement of the suit, said *Nicholas*, in behalf of the defendant, tendered the collector the amount of the duties due on the cargo and claimed the right of entering the same, as the property of said *Joseph Vargas*. At the time of the delivery of the cargo at *Havana*, an invoice thereof, and the amount of sales, purchases, disbursements and commissions were delivered to the master, and a letter was addressed to said *Winter* covering a bill of lading of the cargo, and forwarded, informing him, that said cargo had been furnished to the captain by said *Vargas*, and was consigned to said *Winter* to be delivered to him at *Portland*. Said *Peterson* was notified, as drawer of said bills of exchange in the ordinary course of business, and the defend-

ant holds him liable for said bills, in default of payment or discharge in some other mode. *Peterson*, the master, and the administrators of *Winter*, claimed the right to enter the cargo at the custom house; but the collector declined to decide on the conflicting claims, and after the expiration of fifteen days from the arrival of the barque, took the cargo out and stored the same in the government stores. Before the cargo was sold for the payment of duties, said *Nicholas Vargas*, as attorney of the defendant, paid the duties and was permitted to enter the cargo and take possession thereof. Afterwards, the administrators of *Winter* repaid to the agent of the defendant the duties on the cargo, under an agreement, that it should be without prejudice to the rights of either party. The orders from *Winter* to the master to obtain a full return cargo were verbal. On the passage home, from badness of weather, about one hundred hogsheads of the molasses were lost. The administrators of *Winter* on receiving the bills of lading and letter of advice, and sometime before the arrival of *Nicholas Vargas*, proceded immediately to call on the master for the papers for the purpose of entering said vessel and cargo, and they paid off and discharged the mate and crew.

Judgment was to be entered for the plaintiff or defendant according to law, with costs according to law.

The case was very strenuously and fully argued by

Preble and *Daveis*, for the plaintiffs, and by

Mellen and *Deblois*, for the defendant, at an adjournment of the regular term of the Court.

In the complete discharge of duty to clients, the counsel found it necessary to continue their arguments, though with much variation as to the time consumed by each, during two whole days; and the authorities cited are exceedingly numerous. To give even a sketch of the arguments would require more space than can be devoted to any one case; and therefore nothing more will be attempted, then to state some of the positions taken, and to give a list of authorities cited.

Daveis.

Vargas has no right to assume the character of vendor of the cargo, and in that capacity to set up the right to stop it *in tran-*

situ. By charging a commission on the negotiation of the bills, he may and should be considered as having sold them on *Winter's* account, and as having paid himself with the money. His after claim on the bills was obtained in the character of indorser, not as payee. Or the commission may be considered, as his compensation for a guaranty of the debt.

His character of vendor is discharged by taking the bills of exchange of *Peterson*, a third person, drawn on *Winter*, and holding *Peterson* accountable on them. This extinguishes all right of lien. In *Maine* and *Massachusetts* the transaction amounts to a payment. *Peterson's* being *Winter's* agent makes no difference.

But if *Vargas* can be considered as vendor, still the delivery of the cargo to *Peterson*, the agent of *Winter*, the vendee and consignee, on board *Winter's* vessel, was a delivery to *Winter* himself. This destroys all right of lien, and takes away all power to stop the goods *in transitu.*

With the exception of one case, *Stubbs* v. *Lund*, 7 *Mass. R.* 453, there is little conflict in the cases on this subject. That case was rightly decided on the facts. The majority of the court aided in deciding the case of *Illsley* v. *Stubbs*, 9 *Mass. R.* 65, and one of them delivered the opinion. The facts in the two cases are the same, and the true reasons are given in the latter case. If the Reporter's note is to be considered the true expression of the substance of the decision in *Stubbs* v. *Lund*, it is expressly overruled in *Pennsylvania*, and opposed to the main current of authorities bearing on the point.

The case shews, that a large portion of the cargo was purchased with *Winter's* own funds, the proceeds of the outward cargo; and that the property was brought home in *Winter's* vessel. If the right claimed had existed, it could not have been exercised until payment or tender of payment of these sums.

If *Vargas* had the right, it was not seasonably exercised in this case. This was no part of the duty of mere general correspondents. Before any ratification of their acts by *Vargas*, the administrators had asserted their rights.

Mr. Daveis cited the following authorities, and commented on many of them. Some of them were cited for the purpose of

pointing out the true principle of the decision; or of opposing others to them in which they were overruled; or of showing their want of pertinency to the present case.

Holt on Maritime Contracts, 499; *Lawes on Charter parties*, 415; *Sweet* v. *Pym*, 1 *East*, 4; *Feise* v. *Wray*, 3 *East*, 100; *Siffken* v. *Wray*, 6 *East*, 371; *Rowley* v. *Bigelow*, 12 *Pick.* 313; *Haille* v. *Smith*, 1 *Bos. & Pul.* 563; *Wiseman* v. *Vandeput*, 2 *Vernon*, 203; *Snee* v. *Prescott*, 1 *Atk.* 249; *Gilman* v. *Brown*, 1 *Mason*, 191; *Garson* v. *Green*, 1 *Johns. Ch. C.* 308; 4 *Kent*, 2*d Ed.* 151, 514; *Mackrath* v. *Symmons*, 15 *Ves.* 329; *The Constantia*, 6 *Rob. Adm. Rep.* 321; *Montagu on Lien*, 86 to 100; *Barrett* v. *Goddard*, 3 *Mason*, 107; *Abbott on Shipping*, 4*th Ed.* 365; *Lickbarrow* v. *Mason*, 2 *T. R.* 63; *Same case*, 1 *H. Bl.* 366; *Descadillas* v. *Harris*, 8 *Greenl.* 298; *Mayhew* v. *Prince*, 11 *Mass. R.* 54; *Grosvenor* v. *Stone*, 8 *Pick.* 79; *Scott* v. *McLellan*, 2 *Greenl.* 199; *Newsom* v. *Thornton*, 6 *East*, 16; *Illsley* v. *Stubbs*, 9 *Mass. R.* 65; *Atkin* v. *Barwick*, 1 *Strange*, 165; *Harman* v. *Fishar*, *Cowper*, 117; *Richardson* v. *Goss*, 3 *B. & P.* 124; *Scholfield* v. *Bell*, 14 *Mass. R.* 40; *Inglis* v. *Usherwood*, 1 *East*, 515; *Coates* v. *Railton*, 6 *B. & Cres.* 422; *Dixon* v. *Baldwin*, 5 *East*, 180; *Oppenheim* v. *Russell*, 3 *B. & P.* 42; *Bohtlingk* v. *Inglis*, 3 *East*, 381; *Stoveld* v. *Hughes*, 14 *East*, 312; *Scott* v. *Pettit*, 3 *B. & P.* 469; *Leeds* v. *Wright*, 3 *B. & P.* 320; *Rowe* v. *Pickford*, 8 *Taunt.* 83; *Harman* v. *Anderson*, 2 *Camp.* 243; *Noble* v. *Adams*, 7 *Taunt.* 25; 2 *Kent's Com.* 2*d Ed.* 347, 547, 422; *Mills* v. *Ball*, 2 *B. & P.* 457; *Foster* v. *Frampton*, 6 *B. & Cres.* 107; *Fowler* v. *McTaggart*, *cited in* 7 *T. R.* 442, *cited as Fowler* v. *Kymer*, 3 *East*, 396; *Salomans* v. *Nissen*, 2 *T. R.* 674; *Coxe* v. *Harden*, 4 *East*, 211; *The Spartan*, 3 *Amer. Jurist*, 32; *The Volunteer*, 1 *Sumner*, 551; *Bolin* v. *Huffnagle*, 1 *Rawle*, 1; *Fearon* v. *Bowers*, *cited in* 1 *H. Bl.* 364; *Cowing* v. *Snow*, 11 *Mass.* 415; *Pickman* v. *Woods*, 6 *Pick.* 252; *Portland Bank* v. *Stubbs*, 6 *Mass. R.* 422; *Caldwell* v. *Ball*, 1 *T. R.* 205; *Crashaw* v. *Edes*, 1 *B. & P.* 181; *Savignae* v. *Cuff*, *cited in* 2 *T. R.* 66; *Hodgson* v. *Loy*, 7 *T. R.* 436; *Kinlock* v. *Craig*, 3 *T. R.* 119; *Fenton* v. *Pearson*, 15 *East*, 419; *Ellis* v. *Hunt*, 7 *T. R.* 464; *Wright* v. *Lawes*,

4 *Esp. R.* 82; *Hammond* v. *Anderson*, 4 *B. & P. or* 1 *New Repts.* 69; *Fettyplace* v. *Dutch*, 13 *Pick.* 388; *Hurry* v. *Mangles*, 1 *Camp.* 452; *Holt* v. *Pownal*, 1 *Esp. R.* 240; 13 *Martin's Louis. Repts.* 261.

Preble cited in addition, 2 *B. & Ald.* 511; *Thompson* v. *Snow*, 4 *Greenl.* 264; *Emery* v. *Hersey*, *ibid.* 407.

Deblois.

These facts appear in the statement. 1. The cargo of the barque was the property of the defendant, *Joseph Vargas*, and he sold it on a credit to *Winter*. 2. It was shipped on board the barque, then belonging to *Winter*, of *Portland*, consigned to him and to be delivered to him or his assigns at that place, on his own account and risk. 3. *Winter* died insolvent before the vessel arrived at *Portland*. 4. The bills of exchange, drawn by the captain on *Winter* in payment of the cargo, were protested for non-acceptance, and afterwards taken up by *Vargas*. 5. The cargo remained on board the vessel in *Portland* harbor, in possession of the captain, until the Collector of the customs took possession of the same and stored it; and no part of the cargo ever came into the possession of the plaintiffs, till they obtained the possession from *Vargas* by means of their writ of replevin. On these facts what is the law?

Although the doctrine of stoppage *in transitu* was first enforced by Courts of Chancery, the Courts of law have adopted it, and now favor it; as the following cases will shew. *Lickbarrow* v. *Mason*, 2 *T. R.* 63; *Hammond* v. *Anderson*, 1 *New Repts.* 69; *Northey* v. *Field*, 2 *Esp. R.* 613; *Hodgson* v. *Loy*, 7 *T. R.* 440; *Illsley* v. *Stubbs*, 9 *Mass. R.* 72; 2 *Wheat. Ed. of Selwyn's N. P.* 443; 2 *Kent's Com.* 2*d Ed.* 551; *Abbott on Shipping*, 4*th Ed.* 364; *Holt on Mar. Con.* 496.

The main principle, on which the whole case turns, will be stated in the words of Chief Justice *Parsons*.

"The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the termination of the voyage, unless he shall have previously sold them, *bona fide*, and indorsed over the bill of lading to the purchaser." *Stubbs* v. *Lund*, 7 *Mass. R.* 457.

That case is supported by many others of the highest authority, among which are the following. *Illsley* v. *Stubbs*, 9 *Mass. R.* 65; *Feise* v. *Wray*, 3 *East*, 93; *Wiseman* v. *Vandeput*, 2 *Vernon*, 203; *Hodgson* v. *Loy*, 7 *T. R.* 440; *Bohtlingk* v. *Inglis*, 3 *East*, 381; *Inglis* v. *Usherwood*, 1 *East*, 505; 2 *Kent*, 2*d Ed.* 551; *Naylor* v. *Dennie*, 8 *Pick.* 198; *Ellis* v. *Hunt*, 3 *T. R.* 564.

This is the general rule. There are exceptions to it, which however do but confirm it. Our case is not within any of the exceptions.

These are, 1. Where there has been an assignment of the bill of lading, and the rights of third persons have intervened. As in *Lickbarrow* v. *Mason*, 2 *T. R.* 63.

2. Where a partial delivery has taken place. As in *Slubey* v. *Heyward*, 2 *H. Bl.* 504; *Hammond* v. *Anderson*, 1 *New Repts.* 69.

3. Where the cargo has been delivered to some *special agent of the consignee.* As in *Leeds* v. *Wright*, 4 *Esp. R.* 243; *same case*, 3 *B. & P.* 320; *Scott* v. *Pettit*, *ibid*, 469; *Dixon* v. *Baldwin*, 5 *East*, 175.

And a delivery to the master of a vessel is not a delivery to a special agent, so as to come within the exception. *Ellis* v. *Hunt*, 3 *T. R.* 464.

4. Where the cargo is not intended to come to the port where the vendee resides, but is sent from the place of purchase directly to another market. Such was the case so much relied on by the counsel on the other side. *Fowler* v. *McTaggart*, and other cases cited.

With these exceptions, under none of which does this case fall, there is but little conflict, it is agreed in the decisions. They are all in unison with *Stubbs* v. *Lund*, or perfectly reconcilable with it, but in the solitary instance of the case from 1 *Rawle*, 1. There the court were divided three to two, and the opinion of the minority is based on sounder reasons and cites higher authority, than that of the majority. *Chancellor Kent*, in a note to *vol.* 2, 3*d Ed.* 544, considers the majority of the court wrong, and that *Stubbs* v. *Lund*, was rightly decided. So high an

authority, as *Chancellor Kent*, far outweighs any balance against us from the case in *Rawle*.

With respect to the numerous cases cited in relation to transportation by land carriage, it is enough to say, that they have no bearing on this case. The law in that respect has adopted different rules from those settled in regard to transportation by water from one country to another.

If a delivery to the master of a vessel is to be considered a delivery to the owner, as contended for in behalf of the plaintiffs, then the right of stoppage *in transitu* is useless. The cargo purchased on credit is usually put immediately on board a vessel under charge of the captain.

Vargas has done nothing in this case to destroy his exercise of this right.

In drawing the bills of exchange *Peterson* acted, as the mere servant of his owner, and afterwards his acts were sanctioned by *Winter*. The claim now made for the property ratifies the acts of the master; the plaintiffs having no claim to the property, but through him. Payment must be made to destroy this right. Giving security which turns out to be valueless does not prevent its excercise. The case of *Descadillas* v. *Harris*, 8 *Greenl.* 298, is decisive on this point.

The commissions charged were but the small profits made by *Vargas*, where he purchased of others to sell to *Winter*, and were a proper subject of charge. But if they were not, it would only lessen the amount of his claim by that sum, and would not touch the right of stoppage.

This right was seasonably exercised.

As has been said, the right to stop the goods *in transitu*, continues until they come into the possession of the consignee at the port of delivery. In this case that possession was gained only by service of the writ in this action. Long before that time, a demand had been made by direction of *Vargas'* general correspondents; these acts had been ratified by the special agent of the defendant; a demand had been made by him on the Collector who then had possession of the goods, with a request for leave to enter the same for the defendant; and finally possession had been actually taken by him. Any one of these acts was a sea-

sonable and legal exercise of this right. A claim of the right to stop the goods made on any one in possession is sufficient to revest the property in the vendor; even although taken possession of by the public authorities and stored in the public storehouses. But on the part of the consignee a claim is not sufficient. *Wheaton's Selwyn*, 443, 451; *Litt* v. *Cowley*, 7 *Taunt.* 169; *Barrett* v. *Goddard*, 3 *Mason*, 107; 2 *Kent's Com.* 2*d Ed.* 540; *Coats* v. *Railton*, 6 *B. & Cres.* 422; *Naylor* v. *Dennie*, 8 *Pick.* 198. *Mills* v. *Ball*, 2 *B. & P.* 457; *Northey* v. *Field*, 2 *Esp. R.* 613.

Nor was it necessary to make payment or tender of payment of the amount of sales of the outward cargo, or of the value of the freight, before the right to stop the goods *in transitu* could be asserted.

In a case like this between consignor and consignee, the lien on the property shipped is an entire one until it is removed by payment of the amount due; and it makes no difference, if a partial payment has been made, or expenses have been incurred. In this case no freight was due, for *Winter*, the consignee, imported the goods on his own account and in his own vessel. No freight for the transportation of them could be due to any one; for if so, it must be from *Winter* to *Winter*. *Hodgson* v. *Loy*, 7 *T. R.* 436; 2 *Kent*, 554; *Feise* v. *Wray*, 3 *East*, 100.

But if the freight had been due, its payment was waived in this case by *Peterson's* placing his refusal to deliver the cargo on another ground. *Hussey* v. *Thornton*, 4 *Mass. R.* 405.

The freight was due to third persons in the instances, where it was held necessary to pay it on stopping the goods *in transitu.* Perhaps the duties payable on this cargo, after the collector had taken the possession, might come under the principle of the cases cited on the other side; but the amount of duties was tendered to the collector.

Mellen enforced the positions taken by *Deblois*, replied to the arguments of the opening counsel, and commented on the authorities cited.

Preble urged the objections against the claim of *Vargas* to retain the goods against the creditors of *Winter;* and argued, that both principle and the weight of precedent were in his favor.

The action was continued *nisi*, and the opinion afterwards drawn up by

WESTON C. J. — *Joseph Vargas*, having due authority therefor, furnished for the intestate's barque a return cargo of molasses, in part payment of which the net proceeds of the outward cargo were applied. It is insisted, that in this business he acted as factor; and as such could not exercise the right, upon which the defendants' title depends. The circumstance of his having purchased the molasses specially for this purpose, can make no difference. It was paid for out of his own funds; and he stood in relation to the intestate in the character of a vendor, as much as if it had been supplied from his own warehouse. And it has been directly adjudged that a factor or agent, who purchases goods for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor, as to be entitled to stop the goods. *Feise et al.* v. *Wray*, 3 *East*, 93. Every reason, upon which this right is founded, applies with equal force to a purchaser so circumstanced.

The bills drawn by the master, payable to *Vargas*, for the amount due on the purchase of the return cargo, were not equivalent to payment. They were the evidence of the debt due to *Vargas;* and did not deprive him of any other remedy, authorized by law, where the vendor becomes insolvent. This further remedy, arising from the right of stoppage *in transitu*, is analogous to the lien, which the vendor of real estate has in equity upon the estate sold for the purchase money. It is not affected or impaired, by taking the bond, bill or note of the purchaser. 4 *Kent*, 153. The master, in drawing the bills on the owner, was acting on account of the latter; and although sufficiently authorized thereto before, his doings have been since ratified, by the representatives of the owner, in claiming the molasses thus purchased. It was the usual mode of doing business of this sort. And although by the form of the bills, the master may have made himself personally liable, there is no reason to suppose that his security was relied upon by *Vargas*, or that, by accepting it, he waived other remedies. *Descadillas et al.* v. *Harris*, 8 *Greenl.* 298. The master was not acting for himself. He was the mere

agent of the owner. In the case before cited from *East*, where the right of stoppage was recognized, bills had been drawn for the merchandise sold, which had been accepted and negotiated.

Nor do we perceive, that the commissions charged by *Vargas*, for doing the business and negotiating the bills, can deprive him of the right he claims. As indorser of the bills, he became conditionally liable to the holder, if protested for non acceptance, or for non payment. And this business done for the owner, together with the purchase of the molasses, well entitled him to a commission. He became liable upon the bills, not for the benefit of the drawer, but of the holder. It is not easy to conceive how this liability could have the effect to impair any of his remedies against the owner, who was bound to accept and pay the bills. There is very little analogy between this case and that of a factor, who receives a *del credere* commission. The factor there guaranties to his principal the solvency of others, who are the purchasers of his goods. Here *Vargas* became responsible to others, if the principal, for whom he had purchased and who had purchased from him, did not duly honor his bills. In either case, every legal remedy remains in full force against the purchaser. In the case cited from *East*, which in many of its points has a near resemblance to the one under consideration, the party who purchased and supplied the cargo, and who negotiated the bills, charged and was allowed a commission.

The right of stoppage *in transitu*, upon the insolvency of the purchaser, has been well settled in the commercial world. It had its origin in the civil law; was first recognised in *England* in equity, and was subsequently adopted by the courts of common law. It is analogous to the common law right of lien, being an equitable lien, which enables the vendor, after he has parted with his possession, to resume it at any time before the vendee has acquired it, and to retain the goods, until the price has been paid or tendered. The leading principles in relation to the doctrine, have been established by judicial decisions. There is very little conflict of authority, as to who may exercise the right. The principal difficulty has been in some of the cases, as to when the transit ends, upon which the right ceases. In regard to this point, there is not entire harmony in the decisions; and there has

been much refinement in some of the distinctions, upon which they have turned. The right of stoppage is a favored claim; and in general it continues until the goods have come to the possession, or under the direction of the vendee.

It is contended, that the right ceased in this case upon the delivery of the goods on shipboard, because the vessel belonged to the vendee, and because the master was his agent. On the other hand it is urged, that as the goods were destined to be delivered to the vendee at *Portland*, the transit continued, until they were received by him or his representatives at that port. It is conceded that such would have been the fact, had the vessel been a general ship. The decision of the cause will mainly depend upon the question, whether the vessel in this case belonging to the vendee, and in his employment, a different rule is to be applied.

In *Fowler et al.* v. *McTaggard et al.* cited in *Inglis* v. *Usherwood*, 1 *East*, 515, it was ruled by *Grose J.*, that upon the delivery of a quantity of tobacco on board a ship, chartered for three years by the vendee, the transit was at an end, and the right of stoppage ceased. And it appears in *Hodgson* v. *Loy*, 7 *T. R.* 436, where the case was again cited, that a motion for a new trial was overruled. In the case last cited from *East*, *Grose J.*, recognizes it as a general rule, that the delivery of goods by the vendors, on board a chartered ship of the vendee, is a delivery to the vendee himself. *Lawrence J.*, expressed himself to the same effect, but the right of stoppage was there allowed, upon the construction put upon the law of *Russia*, where the goods were delivered. In the case before *Grose J.*, the tobacco was not shipped to be delivered to the vendee, but for a foreign destination.

Where goods are shipped on board a vessel, appointed by the vendee, to be transported not to his residence or to be received by him, but to other markets, there is a termination of the transit, and the right of stoppage by the vendor ceases. *Noble* v. *Adams*, 7 *Taunton*, 59; *Stubbs* v. *Lund*, 7 *Mass.* 453; *Rowley* v. *Bigelow*, 12 *Pick.* 307. And this is the true principle, upon which *Fowler* v. *Taggard* turned, as stated in the opinion of the

court, delivered by *Lawrence J.* in *Bohtlingk* v. *Inglis*, 3 *East*, 381, in which *Grose J.* who tried the former case, concurred. *Lawrence J.* disclaims, for himself and for *Grose*, any intention in *Inglis* v. *Usherwood*, to state, that a delivery on board the vendee's ship was a delivery to him, so as to take away the right of stoppage, except as in the case of *Fowler* v. *McTaggard*, where the goods were sent abroad, stating truly, that *Inglis* v. *Usherwood* was decided upon the law of *Russia*. And he further insisted, that neither case was inconsistent with the judgment then pronounced in *Bohtlingk* v. *Inglis*, that the delivery of goods on board of the chartered seip of the vendee, to be transported to him, did not preclude the right of the vendor or consignor to stop the goods *in transitu*, any more than if they had been delivered on board a general ship. The court there expressly repudiate any distinction, between a general and a chartered ship; saying that they were misunderstood, if any such inference can be drawn from the former cases. And certainly they were competent to explain their own meaning.

It is a little remarkable, that in *Bolin et al.* v. *Hoffnagle*, 1 *Rawle*, 9, the Supreme Court of *Pennsylvania*, although their attention was called to the case last cited, decided otherwise; and principally upon the authority of the cases there commented upon, giving them an effect and bearing, disclaimed by the court, by whom they were decided. The learned Judge, by whom the opinion of a majority of the court was delivered, goes into an elaborate consideration of a delivery actual and constructive; and deduces that it is only where the delivery is constructive, that the right of stoppage exists. A delivery on board the consignee's or vendee's own ship, he calls actual. But a delivery to the servant or agent of the party, is as much actual, as if delivered to the party himself. And whether that servant or agent is specially deputed for the purpose, or some one is deputed, having similar commissions to discharge for others; whether the vendee employs his own vessel or carriage, or causes the goods to be transported for an adequate compensation in that of another, does not appear to us to make any difference. The delivery is actual in the one case, as well as in the other. The sale is complete. The property is transferred. The right of stoppage is not founded

upon any imperfection in the sale, nor does it rescind the contract; it only authorizes the vendor to take the goods, until the price is paid. Two, out of the five members of the court, did not concur in the judgment cited from *Rawle*. The opinion of the dissenting Judges seems to us to be best supported by authority.

Stubbs v. *Lund*, before cited, is a case precisely in point. Chief Justice *Parsons* goes into a consideration of the question directly, whether the vendee of the goods, being the owner of the ship and appointing the master, places the case, in reference to the right of stoppage *in transitu*, upon any different ground, than if the goods were delivered on board a general ship, and he expressly decides, speaking for the court, that it does not. That if goods are put on board the consignee's ship to be transported to him, the transit continues for the purpose of stoppage, until they come to his actual possession; but that the rule is otherwise if shipped to be conveyed to a foreign market. That case has never been overruled; and was decided, while *Maine* was a part of *Massachusetts*. It is true, that in *Illsley et al.* v. *Stubbs*, 9 *Mass.* 65, where the same property was in controversy, under the same facts, the court assign additional reasons for coming to the same result. But *Sewall J.* by whom the opinion of the court was delivered, says, "with the aid however of the doctrine of stoppage *in transitu*, the question in this case may be more conclusively, and with some, more satisfactorily decided." He then, after examining the authorities, and stating his reasons at large, confirms the doctrine, previously laid down in *Stubbs* v. *Lund*. And he shows that the cases, apparently conflicting in *England*, may be reconciled by the distinction, that in the one case, goods were shipped for a foreign destination, and in the other, were to be transported to the consignee.

If this doctrine is not reaffirmed in *Rowley et al.* v. *Bigelow et al.* 12 *Pick.* 307, that case did not require it; turning as it did upon the destination of the goods. There is nothing in it however impeaching the former cases. And we hold it to be well settled law in *Massachusetts* and in this state, and we think also in *England*, that if goods, as in the case before us, are delivered on board the ship of the consignee or vendee to be transported to him, if he becomes insolvent, the vendor has a right to stop them

in transitu, until received by the vendee. It results, as a part of the doctrine, equally sustained by the authorities, that the receipt of goods by the master of the vendee's ship, does not put an end to the transit. He stands in this respect like all other agents, who are employed to transport the goods. In certain cases, where goods have been received by an agent to be forwarded, on the further order of the vendee, to an ulterior destination; or where the vendee, having no warehouse of his own, availed himself of that of a packer; or where the vendee obtained the use of the vendor's warehouse for the storage of the goods, the right of stoppage has been held to cease. In these, and in other cases of the same class, cited for the plaintiffs, depending on their peculiar circumstances, we find nothing necessarily, if at all, conflicting with the doctrine, which we have recognised.

Another point taken is, that *Vargas* should have paid or tendered to the plaintiffs, the amount of the outward cargo and the freight, before he could be allowed to exercise the right he claims. But the right, when enforced, does not rescind the contract. *Hodgson* v. *Loy*, 7 *T. R.* 440. The vendee, or his assigns, may, notwithstanding recover the goods, on payment of the price. And it has been held, that the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment. *Kymer* v. *Sowercropp*, 1 *Camp.* 109. The goods are stopped, to enforce an equitable lien for what remains unpaid. Hence payment in part, has the effect only to diminish the lien *pro tanto* on the goods detained. *Hodgson* v. *Loy*, and *Feise* v. *Wray*, before cited. The net proceeds of the outward cargo were applied in part payment for the molasses. Of the same character is the increased value, arising from the transportation. The freight is equivalent to a partial payment. If the goods stopped are of greater value, from the former payment, and their appreciation here, than is wanted to pay *Vargas* his balance, the plaintiffs have nothing to do but to pay or tender to him the amount due, and they will have a right to reclaim the molasses. But the vendor, to entitle him to exercise his right of stoppage, is under no obligation to refund, what he may have received as part payment.

The goods, not having been paid for, and the vendee having become insolvent, the vendor had a right to stop them *in transitu.* Does it appear to have been seasonably exercised in the case before us? We are of opinion that it does. *Fessenden, Thompson & Co.* were the correspondents of *Vargas,* in this country. They were aware that he was in danger of sustaining loss. They interpose to do an act for his benefit, which tending greatly to promote his interest, it could not but be presumed he would approve. Upon being advised of it, he requests them to take care of his interest. His special agent and attorney, *Nicholas Vargas,* also adopts and approves the course pursued by his correspondents here. *Merrill* was sent on board for them, and upon the arrival of the vessel in the outer harbor of *Portland,* he notified first the mate, and then the master, of the claim of *Vargas.* This claim, thus interposed and thus ratified, we regard as a competent exercise of the right of stoppage.

Notice to the carrier, or to any one having charge of the goods, before the transit ends, is sufficient for this purpose. *Mills* v. *Ball,* 2 *Bos. & Pul.* 457; *Litt* v. *Cowley,* 7 *Taunton,* 169. *Nicholas Vargas,* the undoubted agent and attorney of *Joseph,* renewed the claim of the latter, immediately upon his arrival in *Portland,* of which he notified the collector, while the goods were in his possession, and then lying in the government stores. This of itself was sufficient, according to the case of *Northey et al.* v. *Field,* 2 *Esp. Rep.* 613, where a quantity of wines had been lodged in the King's stores, the duties not being paid, and while there, they were claimed by the agent of the consignor, this was held by *Lord Kenyon* a legal stoppage *in transitu,* although they had been previously demanded by the assignees of the consignee. And this last case, where the assignees had only made a demand, differs from the case of *Holst* v. *Pownal,* 1 *Esp. Rep.* 240, where they had taken actual possession. The latter has been repudiated; but *Chancellor Kent* cites the former with approbation. 2 *Kent,* 430. The right of stoppage, being a favored claim, may be exercised by notice, but no case has been adduced to show that it ceases upon notice, and the interposition of a claim merely, on the part of the consignee.

Judgment for the defendants.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD, MAY TERM, 1836.

MOULTON, *Libellant*, *v.* MOULTON.

In a libel for divorce, the *particeps criminis*, if unmarried, is a competent witness.

IN a libel for divorce, by the wife against the husband for the cause of adultery with an unmarried woman, the *particeps criminis* was offered, as a witness in behalf of the libellant.

S. Emery, for the respondent, objected to her competency; and after remarking, that he could not be expected to produce English authorities in support of the objection, because there adultery was not punished as crime; and after urging that it was against public policy, and an encouragement to crime to permit a divorce to be decreed on such testimony; cited 3 *Dane*, 446, 447.

D. Goodenow, for the libellant, said, that the offence was not adultery in an unmarried woman, and that the practice had been to admit one thus circumstanced to testify, and mentioned two or three cases of this description not reported; and cited *Brown* v. *Brown*, 5 *Mass. R.* 320, as decisive against the objection.

By the Court. We know of no rule of law, which will exclude the witness. The objection goes to her credit, and not to her competency.

SIMEON WING *vs.* JAMES BURGIS.

In giving a construction to a levy on land, or to a deed; where several particulars are named, descriptive of the premises, if some are false or inconsistent and the true be sufficient of themselves, they will be retained, and the others rejected.

It is the object of the law to uphold, rather than to defeat, conveyances, if the subject matter, upon which they are to operate, can be ascertained by any fair intendment.

Where a stake and stones are referred to, as a monument, in a deed or levy, parol proof is admissible to show their location.

WRIT of entry on the demandant's own seizin; who claimed title from the defendant by virtue of the extent of an execution against him on the premises, *July* 5, 1831.

The land set off on the execution is thus described. "A piece or parcel of land situated in *Mexico* in said County, *being a part of lot numbered three* in the first range, beginning at a stake and stones standing in the southeast corner of that part of the lot which said *Burgis* purchased of *Harvey Wait;* thence running north 24½° east on the easterly line of said lot 72 rods to a stake and stones; thence north 65½ west 100 rods to a stake and stones standing in the westerly line of said lot; thence south 24½° west 72 rods on the westerly line of said lot to the stake and stones standing in the southwest corner of the half lot said *Burgis* bought of *J. M. Williams* and *C. L. Curtis;* thence south 65½ east on a line parallel with the north line of said lot, 100 rods, to the *first mentioned stake and stones*, containing forty-five acres." Lot No. 2 lies adjoining No. 3, and directly east of it. *Wait* conveyed to *Burgis* the northerly half of No. 2, but no part of No. 3. *Williams* and *Curtis* conveyed the northerly half of lot No. 3, but no part of No. 2.

The defendant objected, that the levy was void for uncertainty, inasmuch, as the place of beginning is described therein, as on the southeast corner of lot 2, and that following the courses and distances from that point would not include the land demanded. The demandant offered to prove by one of the appraisers, that they actually commenced at a stake and stones, standing on the southeast corner of the half lot of No. 2 purchased by *Burgis* of *Williams* and *Curtis*, and ran the courses and distances men-

tioned in the return, and actually placed at the time stakes and stones at the places so referred to by them in their return; and that the land set off within those bounds is a part of No. 3, and includes no part of No. 2; that they intended to have described the place of beginning, as the southeast corner of the lot of land purchased by *Burgis* of *Williams* and *Curtis*, instead of *Harvey Wait*; and he also offered to prove, that by commencing the location on the southeast corner of land purchased of *Wait*, and running the courses and distances, they will not meet with any of the monuments referred to, and especially will not strike the fourth one, standing in the southwest corner of land bought of *Williams and Curtis*, or any monument in any respect answering that description; but that by commencing at the southeast corner of land purchased of *Williams* and *Curtis*, at the stake there put down at the time by the appraisers, bounds will be found exactly answering the description in the return at every point indicated. All the parol evidence was objected to by the defendant. To bring the question before the court with the least expense, *Parris J.* rejected the evidence offered, and a nonsuit was ordered, which was to be taken off and a default entered, if the whole Court should be of opinion, that on the facts offered to be proved the action could be maintained.

Robert Goodenow, for the demandant.

The description commences by stating that the land set off is part of lot No. 3. The starting point is at a stake and stones, and parol proof has always been held admissible to prove the actual location of such monuments. It is manifest from the whole return, that the land set off is part of No. 3, but a portion of the description is inconsistent with it, the land bought of *Wait* lying in No. 2. If the description is sufficient, after rejecting such inconsistent part, to describe the land by the words made use of in the return, the land passes by it. *Worthington* v. *Hylyer*, 4 *Mass. R.* 205; *Vose* v. *Handy*, 2 *Greenl.* 322. By rejecting the following words, "standing in the southeast corner of that part of said lot which said *Burgis* bought of *Harvey Wait*," the remaining part will accurately and truly describe the demanded premises. All the remaining particulars of the description are perfectly consistent with each other.

One other particular of the description, "the stake and stones standing in the southwest corner of the half lot said *Burgis* bought of *J. M. Williams* and *C. L. Eustis*," is certain, positive and can admit of no possible mistake. By starting from this well known point and running the courses and distances back, a thing in common practice by surveyors, the whole description will be full and perfect, and all true, except the words proposed to be rejected. *Linscot* v. *Fernald*, 5 *Greenl.* 496.

Deblois, for the defendant.

The levy on an execution is a statute purchase, and the rules of construction are the same in a levy, as in a deed. *Waterhouse* v. *Gibson*, 4 *Greenl.* 230.

Parol evidence is not admissible either to contradict the effect of this levy, or explain any latent ambiguity; but these ambiguities must be removed by a sound construction of the words of the levy. *Storer* v. *Freeman*, 6 *Mass. R.* 435; *Albee* v. *Ward*, 8 *Mass. R.* 83; *Stackpole* v. *Arnold*, 11 *Mass. R.* 30.

It was determined in the case, *Worthington* v. *Hylyer*, 4 *Mass. R.* 196, that when the description of the land intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such, as will agree to every particular of the description. As lot No. 3, contains more land, than was levied on, the particular *most necessary* to ascertain the estate is the place of beginning. Where there is a well ascertained place of beginning, as in this case; that must govern. *Jackson* v. *Wilkinson*, 17 *Johns. R.* 146. By commencing at that well known and ascertained point, the premises demanded do not fall within the description.

Parts of a description can be rejected only where the description *was sufficiently certain before*. *Jackson* v. *Clark*, 7 *Johns. R.* 218. Here, if you reject what is called surplusage, you reject the place of beginning, as well as a necessary part of the description. This cannot be aided by parol proof. *Gilbert's law of evidence*, 312; *Tate* v. *Anderson*, 9 *Mass. R.* 92; *Bott* v. *Burnell*, 11 *Mass. R.* 163.

After a continuance, the opinion was drawn up by

WESTON C. J. The land levied upon, is first described generally as part of lot No. 3, in the first range of lots in *Mexico*. Then follows a more particular description. It was to begin at a stake and stones standing in the south corner of that part of the lot, which the judgment debtor bought of *Harvey Wait*. In point of fact, he bought no part of the lot of him. That part of the description then is false. If that is rejected, does enough remain to ascertain the location of the land, upon which the execution was extended? If the debtor bought no part of the lot of *Wait*, there could be no southeast corner of that part, so that the words to be rejected are, "in the southeast corner of that part of the lot which said *Burgis* purchased of *Harvey Wait*." There would then remain, as a point of beginning, a stake and stones standing, and it becomes a question, where? The first line was to run from that stake a certain number of rods on the easterly line of the lot. We must look then for the stake and stones in that line. There is no sort of question, as to the true location of this monument, in the east line of No. 3. It is susceptible of the most satisfactory proof, which was offered by the demandant at the trial.

Parol proof is admissible to show the location of a monument, referred to in a deed. *Linscott* v. *Fernald et al.* 5 *Greenl.* 496; *Prop. of Claremont* v. *Carlton*, 2 *N. H. Rep.* 373. The point of beginning being found, every other part of the description, except the part rejected, corresponds precisely with the demandant's claim, and the location of the land may be ascertained with the most perfect certainty, if regard were had merely to the courses and distances. There is besides a monument referred to, at each of the other three corners, the location of which the demandant offered to prove. We have then the four corners, the location of which is ascertained, the courses and distances of the four sides, the fact that one of the sides is on the east line, and another on the west line of No. 3, and that one of the corners is also the southwest corner of the half lot, the execution debtor bought of *Williams* and *Eustis*.

A description, so certain, precise and definite, ought not to be defeated, merely because the appraisers were under a mistake as to the person, of whom the debtor purchased. Errors in descrip-

tion will sometimes creep in, in spite of care, vigilance and caution; and deeds are often drawn by unskilful and inexperienced hands. It is the object of the law to uphold, rather than to defeat, conveyances, if the subject matter, upon which they are to operate, can be ascertained by any fair intendment. The rule by which courts are governed in these cases, is laid down with great clearness by the late Chief Justice of this court, in *Vose* v. *Handy*, 2 *Greenl.* 322. He says, "where several particulars are named, descriptive of the premises conveyed, if some are false or inconsistent, and the true be sufficient of themselves, they will be retained and the others rejected, in giving a construction to a deed." *Worthington et al.* v. *Hylyer*, 4 *Mass. R.* 196, is an authority to the same effect.

To give operation to the levy, according to its plain and manifest meaning, we are all of opinion that the words, before adverted to, being false and inconsistent with the other parts of the description, general and particular, should be rejected; and that there will then remain enough, with such parol proof to locate the monuments, as if legally admissible, to sustain the title of the demandant. The nonsuit is accordingly set aside.

Tenant defaulted.

Farnum Abbott, 2d. *vs.* Phinehas Wood.

A privilege reserved in a dwellinghouse to a person, for a limited time and for a special purpose, does not constitute him a tenant in common of the estate.

Where a lessee for years assigns his lease to the proprietor of the fee, "reserving the privilege, if H. moved into the house to have a man board with him to feed out the hay in the barn, or if H. should not move in, reserving the right of having a man cook and board in the house, and also reserving the right to remove his property from the house;" such reservation does not make the lessee a tenant in common of the estate.

Where a person has lawful authority to enter the dwellinghouse of another for one purpose; if he enter forcibly for a different one, for which he has no authority, he thereby becomes a trespasser.

This was an action of trespass *quare clausum*, and came before the Court on a statement of facts. The general issue was pleaded

and a brief statement filed in which the plaintiff alleged, that at the time of the act complained of he was tenant in common in the premises with the plaintiff

The plaintiff had an undisputed title to one undivided half of the premises from *Enos Abbott*, by deed dated *May* 4, 1827. The title to the other half stands thus. On the 4th of *May*, 1827, *Enos Abbott* conveyed the other half to one *Farrington*, who on the 6th of *November*, 1830, conveyed the same by quit-claim deed to the said *Enos Abbott* and his wife; and on the same day, *Enos Abbott* and wife by deed of warranty conveyed that half to the plaintiff.

In *September*, 1829, *Enos Abbott* leased one undivided half of the premises to *Wood*, the defendant, for the term of six years, of which the plaintiff had knowledge. The defendant entered under his lease and made a parol division with the plaintiff, and occupied under it until the autumn of 1833, when he leased his right to one *Hodgman*, "reserving the privilege, if *Hodgman* moved into the house, of having a man board with him to feed out the hay in the barn, belonging to *Wood*, to his cattle; or if *Hodgman* should not move in, reserving the right of having a man cook and board at the house; and also reserving the right to remove his property from the house." In *February*, 1834, *Hogman* "underlet" that half of the house to the plaintiff, who entered into the possession of that, as well as the other part of the house. At this time the plaintiff was not informed of the reservation made in favor of *Wood*, but had knowledge of it a short time before the act complained of was committed.

In *March*, 1834, *Wood* broke and entered the house, as alleged in the writ. The house was then closed, and the plaintiff forbid *Wood's* entry, stating that if *Wood* had any thing in the house it should be handed out to him. The breaking and entering by the defendant was at the front door; and he was accompanied by an officer to whom he had delivered an execution in his favour against the plaintiff, and who although requested by *Wood* to break and enter, refused; and therefore *Wood* broke open the door, and was followed in by the officer. At this time *Wood* had some grain in a chamber of the house, and when he

demanded an entry said it was for the purpose of obtaining the grain.

D. Goodenow and *P. C. Virgin*, for the plaintiff, said, the only question was, whether the brief statement was supported by the facts agreed in the case? and contended:

1. That the plaintiff was in quiet and peaceable possession of the house, and that even, if the defendant had a legal right to the possession by superiour title, still he had no right to enter by violence.

2. The right reserved by *Wood* did not make him a tenant in common with the plaintiff. At most it was a mere privilege in the house, for the interruption of which a personal action might possibly lie. It was not real estate for which a writ of entry, or trespass *quare clausum* will lie, nor is it subject to partition. *Taylor* v. *Townsend*, 8 *Mass. R.* 417; *Lord* v. *Lord*, 3 *Fairf.* 88; *Chandler* v. *Thurston*, 10 *Pick.* 207; *Inhabitants of Worcester* v. *Green*, 2 *Pick.* 425; *Chetham* v. *Williamson*, 4 *East*, 469.

Wood's reservation was only by parol, and could not possibly give more, than a tenancy at will, and this was determined either by the plaintiff's entry under his assignment, or by his forbidding *Wood* from entering.

3. Here was a permanent injury to the building, of which the plaintiff was sole and entire owner, for which this action will lie. *Starr* v. *Jackson*, 11 *Mass. R.* 519.

4. *Wood's* object was not to enter for any purpose reserved, when he assigned to *Hodgman*, but for a different one, which that reservation does not reach and cannot justify. *Chandler* v. *Thurston*, 10 *Pick.* 210.

S. Emery, with whom was *Rawson*, said, that the general question upon the facts agreed is, whether the action can be supported.

1. As the legal title was in *Farrington* at the time the lease was given to *Wood*, perhaps nothing passed to him then; but the subsequent conveyance of *Farrington* to the lessor of the defendant enured to his use and perfected his title for the residue of his term, upon the settled principle, that if a man sell lands to which he has no title, and afterwards purchase of the owner, such pur-

chase will enure to the use of his grantee. *Adams* v. *Frothingham*, 3 *Mass. R.* 356; *Porter* v. *Hill*, 9 *Mass. R.* 34.

2. *Wood's* interest under the lease remained unaffected by the deed from *Enos Abbott* to the plaintiff of that moiety. *Wood* had long before entered under his lease; the defendant had knowledge of it, and made a parol partition with him. The plaintiff therefore could hold nothing more, than the remainder, after the determination of the defendant's term. *Trull* v. *Bigelow*, 16 *Mass. R.* 406.

3. As there is nothing to impair the validity of the lease, the inquiry is, what rights *Wood* retained, when he underlet to *Hodgman*? The reservation made, left *Wood* in the full possession of the property leased, to the full extent of these reservations. *Hodgman* could convey to the plaintiff no more, than he owned. Whether he did or did not know what these reservations were is immaterial. By denying to the defendant his legal right of entering the house and attempting to keep him out, the plaintiff, not the defendant, became the trespasser.

4. Nor is the act of the plaintiff to be deemed an ouster of the defendant requiring a resort to his action for possession. He cannot become disseisor by election; that right belongs to the defendant, and he has elected to consider the plaintiff a mere trespasser.

5. If the acts of the plaintiff amounted to an ouster, the defendant was not a trespasser by his entry. The law is settled, that if a person, who has right, make a forcible entry, the wrongdoer upon whom he entered with force cannot maintain an action of trespass for such entry. *Stearns on Real Actions*, 22; *Hyatt* v. *Wood*, 4 *Johns. R.* 150; *Stuyvesant* v. *Tompkins*, 9 *Johns. R.* 61.

6. The plaintiff's offer to hand out articles belonging to the defendant is an immaterial circumstance. It could not take away the plaintiff's right to enter and examine and take his property. He had a right to take with him any assistant he liked best, and if such assistant should do any illegal act, the remedy by action was open to the plaintiff.

7. If it were true, that the right of *Wood* was a mere tenancy at will, still the law would allow him a reasonable time after

notice to enter and remove his property. *Ellis* v. *Paige*, 1 *Pick.* 49.

The action was continued for advisement, and the opinion of the Court, at a succeeding term, was delivered by

WESTON C. J. — We are of opinion, that the right of ingress and egress, for the removal of his property in the house, reserved in the lease made by the defendant to *Hodgman*, and the reservation of the right to have a man cook and board in the house, to feed out the hay in the barn belonging to the defendant to his cattle, did not constitute the defendant a tenant in common in the estate. It was a privilege reserved for a temporary purpose. If it might be exercised even forcibly, against the will of *Hodgman*, or those claiming under him, by the defendant without being charged as a trespasser, it gave him no interest in common in the estate. It was not in its nature tangible or capable of partition. Whether it had the character of an easement, or by what remedies it might be enforced, it is not now necessary to decide. It does not support the brief statement, in which the defendant avers, that he is tenant in common with the plaintiff.

Had the defendant entered the house, even with force if necessary, for the purpose of removing his grain, we are not prepared to say, that trespass could have been maintained against him. That right he had reserved to himself, when it belonged to him to prescribe, on what conditions he would part with his interest. But it is very manifest that his object was to put the officer, having an execution in his favor against the plaintiff, into the house; and there is reason to believe, that the removal of the grain at that time, was to give color of right to the transaction. He claimed access for the officer, and called upon him to break the door; and when he declined, the defendant forced an entrance for him. The plaintiff had before offered to deliver to the defendant any articles of his own, he might desire to remove from the house. It appears to us, that the defendant has made out no justification for the act, with which he is charged, but that an entry was forced through the outer door of the plaintiff's house without right, and against law, to enable the officer to serve therein civil process.

Defendant defaulted.

Isaiah C. Caldwell *vs.* Sumner Cole.

One joint owner of personal property is, from interest, an incompetent witness for the other, where the title to such property is in issue.

Where a Judge of the Court of Common Pleas rejects a deposition on account of interest in the deponent, and the party offering it moves for a continuance for that cause, and the continuance is refused; such refusal is but an exercise of discretionary power, and not matter on which exceptions can be sustained.

Exceptions from the Court of Common Pleas.

The action was *trover* for the conversion of a watch on the 10th of *Nov.* 1834, and was tried on the general issue before *Whitman C. J.*

The plaintiff proved by one *Perry*, that the defendant and *Nathaniel Ward* stated, that they were joint owners of the right of using a patent threshing machine for a certain territory and that the plaintiff and *Perry*, the witness, agreed to purchase of the defendant and *Ward*, on certain conditions; that the watch sued for was delivered by the plaintiff to the defendant to go in part payment for the right to use said machine, if the bargain was completed. The defendant offered in evidence the deposition of said *Ward*, the substance of which sufficiently appears in the opinion of this Court; which deposition was objected to by the plaintiff's counsel on the ground, that *Ward* was interested in this suit, as appeared by the testimony of *Perry* and his own statement in the deposition. The Judge sustained the objection, and refused to permit the deposition to be used. Whereupon the defendant's counsel moved the Court for a continuance upon the ground, that as his deposition was now rejected, he was taken by surprise by the objection, and was not now prepared for trial, and that if a continuance were granted, *Ward* would discharge himself from all interest he might have in the watch. The Judge refused to grant a continuance, and directed the cause to proceed to the jury. The jury returned a verdict for the plaintiff, and the defendant excepted to the ruling of the Judge, both in rejecting the deposition and in refusing to grant a continuance.

D. Goodenow, for the defendant, argued in support of the objections taken in the Court of Common Pleas, and cited on the first point; 1 *Phillips' Ev.* 38; *Hasbrouck* v. *Lown*, 8 *Johns.*

R. 377; 2 *Starkie on Ev.* 755, 764, 765, 766; *White* v. *Philbrook*, 5 *Greenl.* 147; *Standish* v. *Parker*, 2 *Pick.* 20.

He cited on the second point, 1 *Greenl.* 417, *Rule* 23; *Stat. ch.* 193, *sec.* 5.

S. Emery argued for the plaintiff, and cited *Gage* v. *Stewart*, 4 *Johns. R.* 293.

After a continuance *nisi*, the opinion of the Court was delivered by

WESTON C. J. — The defendant attempted to prove at the trial in the Common Pleas, that the watch in controversy did not belong to the plaintiff, but had been transferred to him and one *Ward*, on a contract made between them, in regard to a patent right. He offered the deposition of *Ward*, from which it appears, that the defendant had delivered the watch, in part fulfilment of the purchase, the plaintiff and one *Perry* had agreed to make. The interest of *Ward* is very manifest. He sets up a joint property in the watch, and if the defendant prevails, it will be equally for the benefit of *Ward*, and they will hold it, free of any claim, on the part of the plaintiff. For if he cannot charge *Cole*, who received the watch, he can hardly hope to prevail against *Ward*. But if he should bring an action against the latter, if *Ward* is a good witness for *Cole*, he is equally so for *Ward*; and between them both, the plaintiff may be defeated; and that for their joint benefit.

Whether the cause should be continued or not, vested in the discretion of the Judge below; and is not matter, upon which exceptions can be sustained.

Exceptions overruled.

JOSEPH HOWARD *vs.* COTTON LINCOLN.

By a reservation in a deed of "all the pine timber on said land above the size of ten inches in diameter, twenty feet from the stump," such timber trees continue the property of the grantor, while they remain, with the right in so much of the soil, as is necessary to sustain them.

A sale of a certain description of standing timber trees, to be taken off within a specified time, is a sale only of so many of the trees specified, as the vendee may take off within the time limited.

The owner of timber trees, standing on land of another, may maintain trespass against any person for cutting and carrying them away.

EXCEPTIONS from the Court of Common Pleas.

The action was trespass for cutting and carrying away 408 white pine logs on the 19th of *March*, 1830. The suit was brought on *May* 20, 1835. The plaintiff was originally the owner of the land on which the trees stood, and on *May* 5, 1825, conveyed the same to one *Smith* with a reservation in the deed in these words. "Reserving all the pine timber on said land above the size of ten inches in diameter twenty feet from the stump." On the 13th of *August*, 1829, *Smith* conveyed the same to the defendant. "To shew the intent of this reservation and control the effect thereof, the defendant offered a bill of sale from the plaintiff to *Alpheus Spring*, dated *January* 3, 1824," which bill of sale was afterwards assigned to the defendant. By this instrument the plaintiff sold to said *Spring* "all the white pine and hard pine timber fit for board logs, which will make one log twenty feet in length and fourteen inches in diameter at the top, and all of a larger size, which are now standing lying or being" on the tract of land conveyed afterwards to *Smith*; "said *Alpheus* to have the term of three years from the date hereof to haul said timber." On the back of this paper was a writing subscribed by the plaintiff in these words. "*Hiram, September* 30, 1824. This memorandum witnesseth, that I *Joseph Howard, jr.* hereby sell and convey to *Alpheus Spring* all the pine timber on the foregoing lot down to as small as ten inches in diameter and twenty feet in length."

Whitman, Chief Justice, instructed the jury, "that the plaintiff, at the time of the taking was the owner of all the trees then standing on the lot by him conveyed, which at the time of mak-

ing his said deed were ten inches in diameter at the distance of twenty feet from the stump; and that the defendant must be held liable in this action therefor, if they were satisfied he had taken any such away." The jury thereupon returned their verdict for the plaintiff, and the defendant excepted to the ruling of the Judge.

Jameson, for the defendant, contended that by the bill of sale of *January* 3, 1824, with the memorandum of *September* 30, 1824, the plaintiff had disposed of all the right to take off timber, which he reserved in his deed to *Smith*, and that therefore the action could not be maintained. The reservation is merely of a particular description of the timber standing, and does not amount to any right to take any other trees, or to have those reserved remain and incumber the land, or grow more valuable. *Pease* v. *Gibson*, 6 *Greenl.* 81.

As no time for taking off the timber reserved was mentioned in the reservation in the deed, a reasonable time only is allowed by law. As more than five years had elapsed before the alleged trespass, the reasonable time had expired, and the plaintiff had ceased to have any rights there. If *Spring*, or those claiming under him, did not take off the timber within the three years, it belonged to the defendant, as owner of the soil, and not to the plaintiff. This suit was not brought until ten years after the reservation was made in the deed, which is a practical construction of the reservation on his part, shewing that he claimed nothing there.

Codman, for the plaintiff, said, that the legal effect of the reservation in the plaintiff's deed was to retain to himself, as if the deed had never been given, all the timber of the description mentioned. This gave him an interest in the soil, as well, as in the trees; and trespass will lie for any invasion of this interest. The license to *Spring*, under whom the defendant claims, was a limited one, and gave him no right to cut these trees at the time of the alleged trespass.

He cited the following authorities. *Liford's case*, 11 *Coke*, 46; *Clap* v. *Draper*, 4 *Mass. R.* 266; *Rehoboth* v. *Hunt*, 1 *Pick.* 224; *Safford* v. *Adams*, 7 *Greenl.* 168.

After a continuance for advisement the opinion of the Court was prepared by

WESTON C. J. — By the reservation in the deed of *May*, 1825, from the plaintiff to *Theophilus Smith, Jr.*, under which the defendant claims, the trees therein described continued the property of the plaintiff, with the right, while they remained, in so much of the soil, as was necessary to sustain them. *Liford's case*, 11 *Coke*, 46. The plaintiff has therefore a right to maintain this action, unless he has parted with his interest in the trees, cut and carried away by the defendant. By his bill of sale of *January*, 1824, to *Alpheus Spring*, with the memorandum thereon, the plaintiff sold to him the trees subsequently reserved. And the right thereby acquired was, through certain mesne assignments, transferred to the defendant. But the bill of sale contains a provision in these words, "said *Alpheus* to have the term of three years from the date hereof, to haul said timber."

In *Pease et al.* v. *Gibson*, 6 *Greenl.* 81, this court has decided, that an instrument of this sort, is a sale only of so much of the timber specified, as the vendee may get off, within the time limited. What remained on the land, after the lease of three years, continued the property of the plaintiff, in virtue of his reservation in his deed to *Smith*. The timber in question, being cut and taken from the land by the defendant, long after the termination of that period, the plaintiff has a right to maintain trespass against him therefor.

Exceptions overruled.

ELIPHALET TUCKER *vs.* MARSHALL ANDREWS, *and* PERES ANDREWS.

A voluntary conveyance of her property made by a woman after a marriage contract and before the marriage, which conveyance is intentionally concealed by the parties to it from the intended husband, is fraudulent in equity as to him, and will be set aside.

It is the settled practice of a court of equity to direct a proper provision for the wife, whenever her property becomes subject to its jurisdiction.

THIS was a bill in equity, and was heard on bill, answer and proof. The principal allegations in the bill were, that the plain-

tiff had made a contract of marriage with a *Mrs. Bates*, who had personal property to the amount of fourteen hundred dollars, and that the marriage took place between them *April* 5, 1832; that the defendants aspersed the character of the plaintiff, and by false and fraudulent representations influenced and induced *Mrs. Bates*, without the knowledge of her intended husband, on the morning of the day of the marriage, with full knowledge, that it was expected to take place that day, and with the view of defrauding the plaintiff of the rights which would accrue to him when this marriage contract was perfected, to convey all her personal property to the said *Marshall Andrews*, on the said *Marshall's* sole promise to pay her twenty-five dollars annually during her life, taking his bond for the payment thereof without security, as the sole consideration. The bill also charged, that *Mrs. Bates* was a weak and ignorant woman, and signed the papers without a knowledge of their contents, and that they were different from her expectation: alleged a demand of the property, and refusal to deliver it; and concluded with a prayer for a discovery of the property, and that a conveyance of it to the plaintiff might be ordered.

The defendants made answers severally. *Peres Andrews* denied, as far as related to himself, every allegation in the bill.

Marshall Andrews admits, that the marriage contract was entered into, and that the marriage took place, as stated in the bill, and that she had certain personal property particularly specified. He says, that a short time before the marriage, *Mrs. Bates* of her own motion, and without any intimation from him, commenced a conversation in which she expressed a determination to place her property in a situation, that she might be able to receive a certain stipulated sum annually in place of it, and requested him to consult counsel, as to the mode in which it could be done; that he did so consult counsel and inform her of the result; that she told him, she had property and no children; that she chose to dispose of her property to her own liking; that as he was her nephew with whom she had lived a number of years, and from whom she had received many acts of kindness and attention, she resolved to repay him, as she had an undoubted right to do; and that she then solicited him to accept an assignment of the property secur-

ing her twenty-five dollars annually, that sum, as she remarked, being as much as she wanted; and that in consequence of this request he did accept the assignment, and gave her his bond to pay that sum annually, and offered to procure a surety, but she did not wish it. He says, that the time of doing the busines was fixed on by the gentleman who made the papers; that they were read, examined and well understood at the time; that while the subject of the marriage was in contemplation, she expressed her determination to the plaintiff, that she would not marry him on any condition, but to have her property secured to her, or to remain at her own disposal, or that he should allow her to secure the same in any way she thought proper, without said *Tucker's* exercising any control over the same in any way whatever; that he, the respondent, believes that *Tucker* then and there acquiesced and consented to these terms; that although the interest was more then twenty-five dollars per year, that this was well understood by her; that before and since the demand of the plaintiff, *Mrs. Tucker* has earnestly requested the respondent to keep the property and perform his agreement with her; that she has since then received money on said bond; and that the bond is still retained in force against him.

All the other allegations in the bill are wholly denied, and proof called for.

The proof in the case was voluminous but its import will be found in the opinion of the Court, and therefore is not given here.

The arguments were in writing.

Deblois, for the plaintiff, cited the following authorities, and made extracts from many of them. *Newland's Eq.* 417; *Payton* v. *Bladwell*, 1 *Vernon*, 240; *Redman* v. *Redman*, *ibid*, 348; *Lambe* v. *Haman*, 2 *Ver.* 348; *Kemp* v. *Coleman*, 1 *Salk.* 156; *Gale* v. *Lindo*, 1 *Ver.* 475; *Drury* v. *Hooke*, *ibid.* 412; *Keat* v. *Allen*, 2 *Ver.* 588; *Thurston* v. *Benson*, 1 *Peere Wms.* 459; 2 *Powell on Con.* 162 to 167; *Pitcairn* v. *Oglander*, 2 *Vesey*, 374; *Small* v. *Brackly*, 2 *Ver.* 602; 2 *Fonbl. Eq.* 266; *Carleton* v. *Earl of Dorset*, 2 *Ver.* 17.

S. Emery argued for the defendants.

The opinion of the Court was drawn up by

WESTON C. J. — *Peres Andrews* has, in his answer, denied all the allegations made in the bill against him; and as they have not been sustained by proof, he is to have judgment for his costs.

Whatever controversy there may be with respect to some of the facts, charged in the bill against *Marshall Andrews*, it is manifest from the bill, his answer and the proof, that the plaintiff's wife, when on the eve of marriage, and on the morning of the day when it was solemnized, assigned her property to *Marshall*, for the avowed purpose of keeping it from her intended husband. The answer states, that at a prior period, she expressed to the plaintiff her determination to take this course, in which he appeared to acquiesce. It may admit of doubt whether this averment is so far responsive to the bill, as to entitle it to be regarded as established, until disproved. It is apparent, however, from the proof, that the business when done, was intended to be concealed from the plaintiff; and to *Philip Farrar*, *Marshall* spoke of his disappointment, when the facts came to his knowledge.

If we take the answer as true upon this point, her requisition was, that her intended husband should secure her property to her separate use, or allow her to do so. He was to do the one or the other. The alternative was proposed for his acceptance, contemplating evidently an arrangement, in which he was to be consulted. From the manner in which the business was done, behind the back of the plaintiff, as well as the subsequent declarations of *Marshall Andrews*, it is sufficiently apparent that he was conscious, that the disposition actually made of her property, would not have received the plaintiff's approbation. To the *Farrars*, *America* and *Philip*, he declared that the plaintiff had an eye to her property, in forming the connexion, and expected to enjoy it, and that he was disappointed, when he found his expectations defeated. And yet the answer avers, that he was apprized from the beginning, that he was to derive no benefit from it, and expressed his acquiescence. If these declarations do not disprove this part of the answer, they establish the fact, with the other testimony, that he was fully aware that his trans-

actions with the plaintiff's wife, were such as could not have been satisfactory to him.

It is true, *Mrs. Tucker* had a perfect right to dispose of her property at pleasure. And if all had been done openly and fairly, the husband could have had no just right to complain. She had a right to prescribe her own terms in forming the connexion, which he was equally at liberty to accept or decline. But she had no right to enter into secret transactions, in reference to her property. Nor could others lawfully conspire with her, to disappoint his just expectations, or in making a disposition of her property, without his knowledge.

If the transaction was fair between the immediate parties, in regard to which it is not necessary to give an opinion, it is constructively fraudulent in contemplation of law, if imposition upon the husband was meditated by intentional concealment, which we cannot but regard as satisfactorily proved.

Courts of equity have frequently interposed to afford relief in cases of fraud, actual or constructive, in marriage settlements. Many authorities to this effect, have been cited for the plaintiff. And where no formal marriage settlement has been entered into, any disposition made by a woman, in contemplation of marriage, of her property to her own separate use, without her husband's privity, has been held void, being in derogation of his marital rights and just expectations. *Bowes* v. *Strathmore*, 2 *Bro. Ch. R.* 345; *Jones* v. *Martin*, 5 *Vesey*, 266, *note*; *Fortescue* v. *Hannah*, 19 *Vesey*, 66; 1 *Story's Com. on Equity*, 271. And a secret conveyance made by a woman thus circumstanced, in favor of a person, for whom she was under no obligation to provide, has been vacated. *King* v. *Colton*, 2 *P. Will.* 357, 674. But a reasonable provision made for the children of a former marriage, under circumstances of good faith, would be sustained.

The husband in this case has preferred his suit to this Court, sitting as a Court of equity, to recover the personal property of his wife. It is the settled practice of a court of equity, to direct a proper provision for the wife, whenever her property becomes subject to its jurisdiction, whether the suit be instituted by the husband, to recover her property, not yet reduced to his possession; or whether it be by his representatives or assignees; or by

the wife or her trustee, seeking a provision out of the property. The doctrine by which the equity of the wife is protected in such cases, and the authorities upon which it is based, were examined by *Chancellor Kent,* in the case of *Kenny* v. *Udall et al.* 5 *Johns. Ch. R.* 464, to which we refer, as a very satisfactory elucidation of the law and practice of courts of equity upon this subject. We sustain the bill; but shall direct a suitable provision for the wife.

The Court in this case appoint *Samuel T. Brown,* trustee of the wife, who is required to give bond to the Judge of Probate for the county of Oxford, with sufficient surety or sureties, in the penal sum of twelve hundred dollars, conditioned for the faithful performance of his trust. And they do hereby order and decree, that the said *Marshall Andrews* pay over to said trustee the sums of money by him collected, with the interest thereof, on the demands assigned to him by *Mrs. Tucker,* deducting therefrom such sums, as he may have already paid to her; and that he deliver to said trustee such of the demands as may not have been collected, cancelling the assignment thereof, and that he deliver and assign to said trustee such substituted demands, as he may have received; whereupon the bond, by him executed to *Mrs. Tucker,* is to be given up to him to be cancelled.

And it is further ordered and decreed, that if the said *Eliphalet Tucker* shall give bond, with sufficient surety or sureties, to the said trustee in the penal sum of one thousand dollars, conditioned that the amount of said demands, which has been or which may be collected, shall be paid to his wife, *Mercy Tucker,* for her own use, if she shall survive him; and that the interest thereof, with such part of the principal as the court may hereafter order, shall be paid to her separate use, whenever during his life, he may cease to maintain and support her, then the said trustee is to deliver said monies and said demands to the plaintiff for his use; otherwise the said trustee is to retain the same, until the court shall make further order and decree in the premises.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN, MAY TERM, 1836.

RUFUS BLAKE *vs.* GEORGE R. FREEMAN.

Where during the pendency of a real action, the town in which the land lies is set off to another county, the action must proceed and be tried in the county where it was commenced.

Where an action, local in its nature, is brought in the wrong county, the defendant may either plead the fact, or demur if it appear on the record, or take advantage of the objection on the trial.

The *stat.* of 1824, *ch.* 307, is prospective in its operation.

THIS was a writ of entry demanding a small tract of land in *Litchfield*, and was tried on the general issue before *Emery J.* The demandant made out his title by deed, and the controversy in the case arose from the defendant's setting up a title in himself by disseisin, and the demandant's deed was inoperative, because his grantor was disseised, when the deed was made. All the testimony was given at length in the report of the Judge. It appeared, that the defendant had passed over the land in going to and from his house, and had during the summer season fenced in a cowyard on the tract, suffering the fence to be down in the winter. The defendant and others had sometimes piled lumber there. It appeared also, that about the time of the purchase by the plaintiff of this tract, that the defendant had made use of expressions of regret, that he did not purchase the land in dispute.

The Judge instructed the Jury, that it was a desirable circumstance, that titles to real estate, in trials at law, should be traceable by deeds on record, as far as practicable; that still titles might be acquired by disseising the true owner; by open, notori-

ous and exclusive possession of the defendant for more than twenty years.

That they would carefully weigh and consider all the evidence in this case, and gather from it, whether such acts, as were proved by the defendant, were made under a claim of right, or whether they were merely temporary acts of convenience. That sometimes a man from cupidity, oddity of temper, or from some pressing occasion, might attempt to use his neighbor's land, and actually enter upon it without leave; and the owner from reluctance to quarrel, from diffidence, or unwillingness to deny accommodation, might omit immediately to assert his right. In such case, if the property were enclosed with a fence, and exclusively occupied by a person, originally having no right, for twenty years; he would acquire a title by disseisin. But the circumstance of one's passing over another's ground for a dooryard, without its being enclosed by fence for twenty years, though it might be convenient, would not divest the owner of the fee in the land. Nor would the building of a cowyard, and using it in the summer season, and then suffering it to be removed in the winter. They would carefully consider the nature, extent, and continuance of the defendant's possession, and the jury would judge from the testimony of *Levi Kendall*, whether the defendant could have pretended any right, when he expressed his sorrow, that *Kendall* had sold the possession, for the defendant meant to have bought it. And from the testimony of *James Jewett*, as to his information about the property, and that he never heard of *Mr. Freeman's* pretending to own the heater piece till since *Mr. Blake* bought of *Mr. Parks*. That the defendant shewed no deeds conveying any right to him; that they would determine which was the better title: there was nothing to prevent the operation of the deed to the plaintiff, unless *William Parks* was disseised at the time it was made. And if he was not then disseised, they would find a verdict for the plaintiff. But if they were satisfied, that the defendant openly occupied and improved the land exclusively, by surrounding it with fence and continuing the fence for twenty years before the commencement of the plaintiff's action, they would find a verdict for the defendant.

The Jury found a verdict for the plaintiff, which was to be set aside, if the Judge's instructions were wrong.

The land in controversy was in *Litchfield*, and after the commencement of the suit, and before the trial, that town was annexed to and became a part of the county of *Kennebec*. And for that cause the counsel for the defendant filed a plea in abatement, and also a motion to dismiss the action for want of jurisdiction.

Mitchell and *Barnard*, for the defendant, contended,

1. That the grantor of the demandant was disseised, and that nothing passed by his deed. 3 *Mass. R.* 573; *Porter* v. *Perkins*, 5 *Mass. R.* 233; *Gould* v. *Newman*, 6 *Mass. R.* 239; *Davis* v. *Hayden*, 9 *do.* 514; *Pixley* v. *Bennett*, 11 *Mass. R.* 298; *Hathorn* v. *Haines*, 1 *Greenl.* 238.

A conveyance by a disseisee is void, and the title still remains in the grantor. *Thorndike* v. *Barrett*, 2 *Greenl.* 312; *Brinley* v. *Whiting*, 5 *Pick.* 348. In a writ of entry the tenant, under the general issue, may disprove the seisin alleged. *Stanley* v. *Perley*, 5 *Greenl.* 369.

An entry into land to defeat a disseisin should be done with that intention, sufficiently indicated either by the act, or by words accompanying it. *Robinson* v. *Sweet*, 3 *Greenl.* 316.

2. The instruction of the judge, that a fence was necessary to create a title by disseisin was erroneous. The *stat.* of 1825, *ch.* 307, has altered the law in that respect. *Pro. of Ken. Pur.* v. *Laboree*, 2 *Greenl.* 287. A fence is but evidence of possession, not essential to it. *Dennett* v. *Crocker*, 8 *Greenl.* 239. A disseisin may be affected without the actual knowledge of the owner of the land. *Poignard* v. *Smith*, 6 *Pick.* 172. Where a disseisor employed an agent to procure a deed from the owner of the land, and took the deed in his own name, the disseisin was not purged, and nothing passed by the deed. *Small* v. *Proctor*, 15 *Mass. R.* 495. An offer to purchase of the true owner, made by the tenant in possession of land not his own does not prejudice his right to betterments. *Blanchard* v. *Chapman*, 7 *Greenl.* 122; *Little* v. *Libby*, 2 *Greenl.* 242.

The declaration of *Freeman*, that he regretted he had not purchased of *Kendall*, can have no legal operation against him.

A proposal to purchase does not purge a disseisin. *Small* v. *Proctor*, 15 *Mass. R.* 495; *Blanchard* v. *Chapman*, 7 *Greenl.* 122.

A recorded deed alone does not constitute a disseisin of itself. *Pejepscot Prop.* v. *Nichols*, 1 *Fairf.* 262.

On the motion in arrest of judgment.

There is nothing in the act setting off *Litchfield* to *Kennebec* saving in any manner any right whatever.

The action is local, and must be tried in the county where the land lies. *Ancient Charters*, 44; *Phelps* v. *Decker*, 10 *Mass. R.* 267. Actions abate by acts taking place after the suit is commenced. *Ryder* v. *Robinson*, 2 *Greenl.* 127. And this may be taken advantage of on motion. *Adams*, v. *Leland*, 7 *Pick.* 62.

Nor is there any difficulty in the case, for the venue may be changed at any time before the trial. *Tidd's Pract. Venue; Cowper*, 409.

F. Allen, for the plaintiff, argued, that as there was no motion to set aside the verdict, because the jury had drawn wrong conclusions, the only question on the report was, whether the Judge's instructions were correct.

The first of these is not opposed to the defendant. The second one, that it was necessary, that fences should be continued for twenty years was unquestionably correct. The instruction does state, that to be the only mode of acquiring title by possession of land unoccupied by buildings. The *stat.* of 1825, does not profess to be retrospective, and if it did, it would be unconstitutional and void. As to the other instructions, disseisin is always a question of fact. The law is stated by the court, and the jury settle the facts. As to the fence, the judge merely put it to the jury to say, whether from the fact of its being removed in the winter, it was intended to be the boundary line of his land; an instruction quite as favourable to the defendant, as the law would warrant. There is no principle of law involved in the comments upon the testimony of the witnesses. The law of disseisin in this State is too clearly settled to render it proper to cite authorities to shew what disseisin is.

As to the objection, that the court has not jurisdiction. The action was brought in the right county, and no alteration in the county lines made afterwards can take from the court the power to proceed with the action. Neither by our statutes or practice is an action sent from one county to another to be tried. The court having once lawfully acquired jurisdiction in this county will hold it until the case is finished. *Carver* v. *Astor*, 4 *Peters*, 1.

WESTON C. J. — It is a principle of law well settled, that every action for the recovery of the seisin or possession of land, shall be brought in the county where the land lies. This action then was rightfully brought in the county of *Lincoln*. Where an action, local in its nature, is brought in the wrong county, the defendant may either plead the fact, or demur, if it appears on the record, or take advantage of the objection at the trial. *Hathorne* v. *Haines*, 1 *Greenl.* 238. Subsequent to the action, but prior to the trial, the town of *Litchfield*, where the land is, was by law detached from the county of *Lincoln*, and made a part of the county of *Kennebec*.

The court in the county of *Lincoln*, being once lawfully possessed of jurisdiction of the action, had a right to proceed to judgment. It could not be transferred to *Kennebec*. A change of the venue is not known in our practice. The mere civil relations assumed by *Litchfield*, in pursuance of law, could never be intended to abate or defeat actions actually pending, for the recovery of lands in that town. If the action must by law be brought in the county of *Lincoln*, it must of necessity be there tried. Where an injury has been committed in one county to land situate in another, or wherever an action is founded upon two or more material facts, which took place in different counties, the venue may be laid in either. *Bulwer's case*, 7 *Coke*, 27; *Gregson* v. *Heather*, 2 *Strange*, 727. *Scott* v. *Best*, 2 *T. R.* 238. If in these cases, the locality of actions is affected by special circumstances, there is in this case a stronger necessity, that the action should be tried in the only county, in which it could have been brought. And we are of opinion, that the plea

in abatement of the action, and the motion to the same effect, were properly overruled and rejected.

With regard to the instructions, the presiding Judge left it to the jury to determine, whether the acts and occupation relied upon, as constituting a disseisin, were under a claim of right, or adverse in their character. To this there could be no objection. The greater part of the time, during which the tenant relied upon a disseisin by himself, or those under whom he claimed, was anterior to the *statute* of 1825, *c.* 307, upon which his counsel relies, as introducing a new rule of law, on the subject of disseisin; and what the judge stated in regard to fences, was in conformity to the rule of law applicable to that period. And what was a disseisin before, would be subsequently. The *statute* of 1825, however, declares surrounding fences, or other equivalent obstructions, not essential to a disseisin, but that it may be proved by a possession, occupancy and improvement, open, notorious and exclusive in its character, and comporting with the ordinary management of similar estates, in the occupancy of those, who have title thereto. The Judge, in submitting the case to the jury, gave it as his opinion, that the passing over the uninclosed ground of another as a dooryard, or the building of a cowyard upon the land of another, using it as such in the summer, and then taking away the fence, would not constitute a disseisin.

These intimations had reference to, and are qualified by, the facts and circumstances of the case, which had been submitted to the jury. It appears that the triangular piece of land in controversy, was not considered worth fencing by the owner, and was left open. The use occasionally made of it by the tenant, has the appearence rather of a matter of favor and indulgence, than as an adverse claim, calculated to put the owner upon his guard. No witness has been brought to state, that the tenant ever claimed the land as his own. Upon the whole, it appears to us, that there was no sufficient evidence of a disseisin, either prior to the statute of 1825, or under any new rule, which that statute may have established.

Judgment on the verdict.

JOSIAH W. DODGE *vs.* MOSES KELLOCK.

No action can be maintained on a recognizance, entered into before a Justice of the Peace, to prosecute an appeal; unless the jurisdiction of the justice rendering the judgment, and the cause for which it was rendered, appear in the recognizance.

No presumption is to be made in favor of the jurisdiction of a Justice of the Peace.

THE action was *debt* on a recognizance entered into before a Justice of the Peace, and was brought originally in the Court of Common Pleas. At the first term in that court, the defendant demurred generally to the declaration. In this court, 1 *Fairf.* 266, the declaration was adjudged bad; but leave was given to amend on terms. To the amended declaration the defendant, after oyer of the recognizance declared on, demurred specially, assigning ten causes of demurrer. The plaintiff joined in demurrer.

The recognizance was entered into before *Ebenezer Thatcher*, as a Justice of the Peace, by *Findley Kellock*, as principal, and the defendant as surety, in the sum of fifty dollars, to be levied, &c. if default should be made in performance, of the following condition. "The condition of the above obligation is such, that if the above named *Findley Kellock* shall at the next Court of Common Pleas for said county of *Lincoln*, which is to be holden at *Topsham*, in said county, on the fourth *Tuesday* of *August* next, prosecute with effect an appeal by him made from a judgment obtained against him by the said *Josiah W.* at a Justices' Court, which was holden before me, the said justice, at my office in said *Thomaston*, on the day and year aforesaid, and also to pay all intervening costs and the rent of the premises, if judgment be given for complainant; then the above obligation to be void — otherwise to remain in full force."

M. Smith read the written argument of *Ruggles*, for the defendant, in support of the demurrer.

It is well settled, that a recognizance taken by a magistrate of inferior jurisdistion, in favor of which nothing is to be presumed, must recite so much of the cause of caption, as to enable the court to judge, whether he had jurisdiction of the subject, and

had a right to require such recognizance. *Bridge* v. *Ford*, 4 *Mass. R.* 641; *Same case*, 7 *Mass. R.* 209; *Commonwealth* v. *Downey*, 9 *Mass. R.* 520; *Commonwealth* v. *Daggett*, 16 *Mass. R.* 447; *Harrington* v. *Brown*, 7 *Pick.* 232.

There is nothing in the recognizance in this case by which any one can conjecture what was the cause of action, or even whether there was any. It mentions a judgment, but what right to render a judgment of any kind against *Findley Kellock*, does not appear. Nor does it shew, if any action was pending, what its nature was; whether ejectment, trespass, replevin or debt. No defect in the recognizance can be remedied by any allegation in pleading. It is itself the record declared on. It is the only record which, as a foundation for a suit, is required to be returned into the Court, where the suit is brought, and is the only record in this case alleged to be returned. The judgment alleged in the declaration to have been recovered against *Findley Kellock*, in the C. C. Pleas, cannot be made to cure any defect in the recognizance, even if the declaration had alleged, that the judgment was recovered in the same action or proceeding in which the appeal was made. It could not be used, but for proof of a breach of condition. *Commonwealth* v. *Daggett*, before cited.

There is no sufficient breach assigned. The declaration merely states, that the plaintiff recovered against *Findley Kellock* costs of suit, and that those costs have not been paid. There is no allegation, that the appeal was not prosecuted, nor that the costs recovered were in the same suit, and none, that intervening costs were recovered. There might be a recovery of costs, but none after the appeal.

A want of notice before the suit of intervening costs having been recovered, and the amount, is fatal to this action. The settled rule is, that when the event upon which a certain act is to be done, or liability arise, is equally within the knowledge of both parties, no notice is necessary. But if it be more within the knowledge of the conusee or obligee, than in that of the conusor or obligor, notice must be given before the action will lie. 1 *Chitty on Pl.* 360; 2 *Saund.* 62, *n.* 4; *Com. Dig. Pleader, C.* 73. This objection was overruled in *Hobart* v. *Hilliard*, 11

Pick. 143, but that was on the ground, that the defendant was the attorney and entered the action, and therefore must be presumed to know the fact. But in this case, the plaintiff must necessarily know how the fact was, and the defendant had no better means of knowing, than any indifferent person.

There should have been a demand. The undertaking of the defendant was but conditional and collateral. The plaintiff might have elected to proceed against *Findley Kellock* on the execution; and therefore a demand was necessary, and a refusal, before a suit can be maintained against the defendant.

But the justice had no right to take such a recognizance in any suit whatever. None such is authorized by law in any case. There is a very material difference between this and that most resembling it, the proceedings by complaint for forcible entry and detainer. By the provisions of that act two sureties are required for the prosecution of the appeal and the payment of costs, and but one for the payment of rent. Here being but one, he must be considered surety for the rent, if anything; the justice had no power to require one to pay costs. And for that cause the recognizance is void. The condition of this recognizance is to pay intervening costs only. The statute requires the recognizance, in this process, to be to pay all costs. If it be said, that the error is in favor of the defendant, and that therefore it is not for him to object, the reply is, that it is a judicial proceeding prescribed by law, and not arising from contract. The justice has no right to take any other, than the one prescribed by statute.

The condition of this recognizance is "to pay the rent of the premises." The statute requires it to be to pay "such reasonable intervening rent for the same lands, as the justice shall adjudge." In this respect the recognizance is erroneous and void.

But had the proceedings been correct in point of form, yet the recognizance would be void, because a justice of the peace has no jurisdiction of forcible entry and detainer. It is cognizable only by a justice of the peace and of the quorum. The declaration as well as the recognizance shows, that he acted as a justice of the peace only.

Mellen and *Farley*, for the plaintiff.

It appears by the condition of the recognizance, that a judgment had been rendered by justice *Thacher* against *Findley Kellock*, and that he had appealed from it to the Court of Common Pleas; and these facts appear on oyer. It is too late now to allege want of jurisdiction of the the justice. He should have pleaded want of jurisdiction, and thus have prevented a judgment against him. By the declaration demurred to, it appears, that the judgment appealed from was confirmed in the Court of Common Pleas, and that judgment is in full force. It is a good and binding judgment until reversed.

By the statute of 1824, *ch.* 268, § 3, justices have the right to require such recognizances for payment of costs and reasonable rents. The justice did not give judgment for any rents, and therefore the amount does not appear in the recognizance. The declaration refers to the record, and the record gives the perfect and legal history of the proceedings of the justice, and therefore perfect certainty is obtained by it.

In making up costs, the whole costs are taxed together, and the judgment is entire. The declaration states that costs were recovered in the Court of Common Pleas, and that they were unpaid. They must necessarily be intervening costs, and when judgment is made up in this suit, if there is any chancery on a recognizance, the amount will be ascertained.

The declaration does state, that the record of the justice and the recognizance were returned to the Court of Common Pleas, and that judgment was recovered in the same process for possession and for costs. This is sufficiently certain.

It appears by the condition of the recognizance, that *Ebenezer Thacher* was a justice of the peace, at the time he tried the cause; and if he was not of the quorum, and therefore had not jurisdiction of the cause, the want of it should have been pleaded in abatement, as has been said. In the judgment referred to, it is stated, that *Thacher* was a justice of the quorum.

The defendant bound himself for the doings of his principal, and was thereby as much bound to know what the judgment was, as the principal. No demand was necessary prior to the commencement of the suit, any more than if he had signed a bond for the payment of money, which had become due.

After a continuance for advisement, the opinion of the Court was drawn up by

WESTON C. J.— Under leave to amend, a new count has been added to the plaintiff's declaration, which has removed the objection, which was sustained upon the former joinder in demurrer, between these parties. 1 *Fairf.* 266. But we are constrained under the authority of former decisions, to give effect to other objections, which cannot be removed by amendment.

In *Bridge* v. *Ford*, 4 *Mass. R.* 641, which was debt on a recognizance taken before a justice of the peace, *Parsons C. J.* in delivering the opinion of the court, says that no presumption is to be made in favor of the jurisdiction of an inferior magistrate, and that "in the condition of the recognizance the justice ought to have recited so much of the cause, that it might appear that he had legal cognizance of it." And in the *Commonwealth* v. *Downey*, 9 *Mass. R.* 520, which was *scire facias*, upon a recognizance entered into by the defendant, in the municipal court for the town of *Boston*, conditioned to prosecute an appeal, "from a judgment given against him in the municipal court," the action was not sustained, because the recognizance did not recite the cause of its caption. This was held fatal, as well as another objection of a different character. In this last case the nature of the judgment, and the cause for which it was rendered, could have been ascertained by the judgment itself, as it might in the case before us. In neither is there any direct reference to the judgment, as remaining of record in the court, by which it was rendered.

As therefore neither the jurisdiction of the justice rendering the judgment, nor the cause for which it was rendered, appears in the recognizance, it presents no sufficient cause, upon which to charge the defendant. If we could go out of the recognizance to the other proceedings in the case, enough may be found to supply these omissions; but we do not feel at liberty to do so, against the authority of the foregoing decisions, by which it was held necessary, that the cause of caption, and the jurisdiction of the court or justice, taking a recognizance, should appear in the condition.

Declaration adjudged bad.

MICHAEL SEVEY *vs.* MARY CHICK.

Where in a writ of entry the counsel for the respective parties made and filed in the case a written agreement, that the title to the demanded premises of the lessor of the tenant might be given in evidence in defence; and such lessor, in the same manner, under his hand, agreed, "that his title should be tried in that action, the same, as though the suit was against him"; and on the trial this title was given in evidence, a verdict returned for the demandant, and judgment rendered thereon; such judgment is an estoppel against an action, demanding the same premises, brought by such lessor against the grantee of the demandant in the first action.

Such judgment may be given in evidence under the general issue.

EXCEPTIONS from the Court of Common Pleas.

This was a writ of entry wherein the demandant, counting on his own seisin, demanded a tract of land in *Wiscasset*, and was tried before *Smith J.* upon the general issue.

The plaintiff, in support of his action, read in evidence a deed from *Joseph Munsey* to *Samuel Munsey*, *Aug.* 14, 1823, and from *Samuel Munsey* to himself, *Sept.* 6, 1828, and there rested his case.

The tenant then offered in evidence the record of a judgment in favor of *Thomas Kennedy* against *Joseph Munsey*, in *December*, 1826, and an execution upon it, and levy of it upon the demanded premises, *January* 23, 1827, in due form and duly recorded. Also a deed from said *Kennedy* to *Silas Chick*, now deceased, husband of the tenant, dated *May* 5, 1831. Also the record of a judgment of the Supreme Judicial Court for said county of *Lincoln*, rendered at the *Sept. Term* thereof, 1830, in favor of said *Kennedy* against said *Joseph Munsey* in a writ of entry, in which the general issue was pleaded and joined. Said record or process containing, and filed in the case, the following papers used in the said trial, as certified by the clerk, viz.

"*Thomas Kennedy* v. *Joseph Munsey*. The plaintiff agrees, that the defendant, under the general issue, may give in evidence the supposed title of *Michael Sevey* to the demanded premises in the same manner, as if the said *Munsey* held a deed from said *Sevey* instead of a lease which he now holds.

"*Sept.* 14, 1830. *John H. Sheppard*, attorney for plaintiff.

"The defendant also agrees to the above. By *J. Bailey*, his attorney.

"And the said *Sevey* agrees his title shall be tried in this action, the same, as though the suit was against him.

"*Michael Sevey.*

"Attest, *Nathaniel Coffin, Clerk.*

"I also certify, that there were used, in the trial, and are now on file in the above case the following papers, viz.—a deed of *Joseph Munsey* to *Samuel Munsey*, dated *Aug.* 14, 1823, deed *Samuel Munsey* to *Michael Sevey*, dated *Sept.* 6, 1828, and a lease from *Michael Sevey* to *Joseph Munsey*, dated *Sept.* 19, 1828, of the same land described in the plaintiff's writ.

"Attest, *Nathaniel Coffin, Clerk.*"

It was admitted by the parties, that these signatures were genuine, and that a trial was had and a verdict rendered in that case in favor of said *Kennedy* against said *Jossph Munsey*, at said *Sept.* term, 1830, that said *Joseph* did disseise the said *Kennedy*, and that judgment was duly rendered thereon.

The defendant thereupon contended, that the plaintiff was estopped in the present action. The Judge of the Common Pleas directed the jury, that the defendant was estopped by the former judgment; and by consent of parties a verdict was returned in favor of the tenant. To this direction the plaintiff excepted.

Barnard, for the plaintiff.

If the defendant intended to rely upon the judgment, *Kennedy* v. *Munsey*, as an estoppel, it should have been pleaded, or filed in a brief statement, instead of a plea under the statute. If instead of pleading the estoppel, issue is taken on the fact, the jury are at liberty to find the truth. 1 *Stark. Ev.* 205; *Howard* v. *Mitchell*, 14 *Mass. R.* 241; *Adams* v. *Barnes*, 17 *Mass. R.* 369.

Estoppels are not to be favored, because thereby the truth is excluded. *Leicester* v. *Rehoboth*, 4 *Mass. R.* 180; *Bridgwater* v. *Dartmouth*, *ibid.* 273. The doctrine of estoppel is to be received in great strictness, and no fact is to be taken by inference. *Guild* v. *Richardson*, 6 *Pick.* 369. No man is barred of his right by way of estoppel, in a case like the present, but by record or deed. 1 *Stark. Ev.* 185; *Whitney* v. *Holmes*, 15 *Mass. R.* 152. And none are estopped by deed or pleadings,

but parties or privies. *Braintree* v. *Hingham*, 17 *Mass. R.* 432; 1 *Stark. Ev.* 185, 190.

In the case now in hearing, the plaintiff ought not to be estopped from trying his title, because the agreements of counsel, and the paper signed by the plaintiff, are no part of the record; nor does it appear from the record, that these papers, or the plaintiff's title, ever went to the jury. The report of a Judge is no part of the record; nor are the papers or documents filed in a case. *Coolidge* v. *Inglee*, 13 *Mass. R.* 51. A record is evidence only of what is in issue, and what appears on the record only is conclusive of the matter; and therefore evidence is not admissible to shew, that any matter occurred at the trial not appearing on the face of the record. *Sintzenick* v. *Lucas*, 1 *Esp. R.* 43.

The case shews, that the plaintiff holds the elder title, and that it was on record prior to the former suit. If the writing signed by the plaintiff is to have the effect of an estoppel, it will operate as a conveyance, a release and confirmation of the land to *Kennedy*. It is contended this cannot so operate. *Whitney* v. *Holmes*, 15 *Mass. R.* 152; *Adams* v. *Barnes*, 17 *Mass. R.* 369. Estoppels to be binding must be mutual; and as this could not bind *Kennedy*, *Sevey* is not bound by it. *Worcester* v. *Green*, 2 *Pick.* 425.

Wood, for the tenant, contended, that the demandant was estopped by the record referred to in the case. In that case *Munsey* claimed under the present plaintiff, as lessor, and he might have vouched in *Sevey* to defend him. But *Sevey* came in voluntarily and took upon himself the defence of the action, and agreed to become the real defendant and have his title tried in that suit. If he had been the nominal, as well as real defendant, it is certain, that he would be estopped to try the action over again in a suit against the present defendant. The estoppel runs with the land, and extends to all who are privies in estate. *Adams* v. *Barnes*, 17 *Mass. R.* 365. It is said, that estoppels are odious, but they ought not to be so considered, where they tend to prevent multiplicity of suits, and constitute a part of the title to the land. The husband of the tenant might well believe he was not purchasing a lawsuit, after a solemn decision of the title in favor of his grantor. *Haines* v. *Gardner*, 1 *Fairf.* 383; 6

Dane's Abr. ch. 177, *art.* 5; *ibid, ch.* 160, *art.* 7, 8; *Com. Dig. Estoppel B*; *Williams* v. *Gray*, 3 *Greenl.* 213.

The agreements are as much a part of the case, as the issue, or any other part, and if they are not entered, as such by the clerk, they should be, and the court will not suffer any omission of his to prejudice parties. But it clearly appears, that the title to the demanded premises was tried in the former suit between him, as the real party, and *Kennedy*, under whom the tenant claims, a verdict returned in *Kennedy's* favour and a judgment upon it. Unless that suit settles the title, every time there shall be a new owner, the plaintiff may bring a new suit, and try his claim over again.

It was unnecessary to plead the estoppel; it may be given in evidence. *Williams* v. *Gray*, before cited.

The action was continued *nisi*, and the opinion of the Court subsequently drawn up by

WESTON C. J. — The agreement of the immediate parties, by their counsel, in the suit *Thomas Kennedy* v. *Joseph Munsey*, and of *Michael Sevey* for himself, certified by the clerk, is to be regarded as part of the record in that case. It must have been so intended and so received. It gave a direction to the cause, which could not otherwise have been legally admissible. The agreement of *Sevey* is subjoined to that of the immediate parties, recognizing what they proposed and stipulating that his title should be tried in that suit, as if brought against himself.

It is deducible from this arrangement, that the demandant there was desirous of having the validity of his title determined, and accordingly brought his action against *Joseph Munsey*, the tenant in possession. As it turned out that he was not tenant of the freehold, but the mere lessee of *Sevey*, that object was in danger of being defeated. But as *Sevey* was equally desirous, that it should be ascertained in that suit, which had the better title, the arrangement made was adopted, as an expedient for their mutual accommodation. It brought before the court, by the consent of all concerned, the parties in interest. *Sevey* was not a mere stranger. There was a privity between him and *Munsey*. The course pursued became virtually a rule of court. It must have

received their sanction. The effect of it was, to permit *Sevey* to take the place of the party defendant, it having been expressly stipulated, that if he could show the better title, a verdict and judgment thereupon, should be rendered against the demandant.

In the position, which *Sevey* was permitted to occupy, he had the same right, either to assail the demandant's title, or to establish his own, which he would have had, if the action had been brought against himself. He was indeed at his own request, and by the consent of the other parties, and by the permission of the court, received as a party. If the action had been brought against him, his title, as compared with that of the demandant, would have been tried and determined, and he would have been concluded by the result. He agreed that his title should be tried, as if it had been so brought; and it was tried accordingly. If he is not to abide by the determination, the other side was deceived and misled, and the court trifled with. The parties merely beat the air. It was a conflict without end or aim, deciding nothing, and leaving the combatants at liberty to renew the controversy.

The former trial must have turned upon the question, whether the deed from *Samuel* to *Joseph Munsey* was operative, as against the creditors of *Samuel*. *Kennedy* succeeded at that time, by testimony then in his power to adduce, in defeating that deed. *Sevey* had opportunity to cross examine his witnesses, and to introduce repelling testimony. Failing then, if he may lay by, until the witnesses against him have disappeared, by death or otherwise, or until the facts have faded from their memory, and then litigate the question anew, he has an advantage, which it might be difficult successfully to resist. His evidence, resting in written documents and in the public registry, is preserved. Time weakens, and soon destroys that which was relied upon on the other side. *Kennedy* may be presumed to have been off his guard, taking no measures for its preservation, confiding in the result of the former suit, and in the faith of *Sevey* then pledged of record, under the eye and with the sanction of the court. He now invokes the aid of the same court to enable him to escape from the consequences of an engagement, thus solemnly made, and to open a controversy, supposed to have been put at

rest, after a fair trial, in which he had the fullest opportunity to be heard.

Authorities have been adduced to show, that a stranger cannot take advantage of an estoppel, and is not bound by it. It does not appear to us, that *Sevey* was a stranger to the former suit. It was brought against his lessee. He presented himself and was received as a party; and we think he ought not now to be permitted to assume that he was not. It was there determined that *Kennedy's* title was better than his. The husband of the tenant held under *Kennedy*, and she under her husband. She is then privy to that judgment, and may take advantage of it. The estoppel raised by that judgment, between *Kennedy* and *Sevey*, became part of *Kennedy's* title, and passed with the land to his assignees, and such an estoppel, when given in evidence, is to have the same effect, as when specially pleaded. *Adams* v. *Barnes*, 17 *Mass. R.* 365. The opinion of the Court is, that the decision of the Judge in the court below, ought to be sustained.

Exceptions overruled.

Inhabitants of WHITEFIELD *vs.* SEWALL LONGFELLOW *& als.*

If a man execute a bond for fear of unlawful imprisonment, he may avoid it on the ground of duress.

Where a man is lawfully arrested, and offers to give such bond, as entitles him by law to be set at liberty, but the bond is refused, and the person detained under arrest through ignorance, and an obligation is given by him through fear of such unlawful imprisonment, it may be avoided.

But if such person act freely and voluntarily, although under such unlawful detention, the obligation is valid.

EXCEPTIONS from the Court of Common Pleas.

This was an action of debt on a bond executed by *Longfellow*, as principal, and the other defendants, as his sureties, and conditioned to pay the "laying in" charges of one *Mary Jenny*, then pregnant with an illegitimate child, and to pay the bills which should accrue for the necessary support of her child, until it

should be three years old. The general issue was pleaded and joined, and a brief statement filed alleging, that said bond was obtained from said *Longfellow* by duress of imprisonment, and by threats of the same. The plaintiffs proved the execution and delivery of the bond, and that the charges, and support of the child, of said *Mary Jenny*, previous to the commencement of the suit, amounted to seventy-five dollars.

Mary Jenny was resident at *Hallowell*, but had her legal settlement in *Whitefield*. A complaint was made by the said *Mary* to a justice of the peace of the County of *Kennebec*, under the *statute, ch.* 72, who issued a warrant on the complaint, which was delivered to an officer, and *Longfellow* was arrested thereon and brought before the same justice on the morning of the following day, and the bond was executed about two o'clock in the afternoon. The whole evidence given on the trial is set forth in the exceptions. It appeared, that there were present, in addition to the justice, the officer, *Longfellow*, the overseers of the poor of the town of *Whitefield*, and the father-in-law and brother-in-law of *Longfellow*, who was a married man. *Longfellow* offered to give bond for his appearance at court and had procured sureties; but as he was a married man, the justice and officer, thought that a bond for his appearance at court could not be taken, and said that he must settle or be committed to prison. But at the same time the justice offered to give further time, that he might consult counsel, and the officer offered to take him before any other justice, or take him to a place where he might consult counsel. It did not appear, that any threats were made use of from any source to induce *Longfellow* to sign the bond, but he was kept in custody of the officer until it was signed. The witnesses did not relate the conversations, which were had, in the same manner; but it is believed, that the law on the subject is the same in any view, which can fairly be taken of the evidence. The particulars of the testimony therefore are not given.

Upon the whole evidence, *Smith J.*, before whom the action was tried, instructed the jury, that there was no question, if they believed the witnesses, that the arrest of *Longfellow* by the officer upon the complaint and warrant was legal, and so continued until the said *Longfellow* was brought before *Freeman*, the jus-

tice, for examination. That after the officer had brought the defendant before the magistrate, it was the duty of the officer to have detained him in custody, until the magistrate had upon examination, either ordered him to be discharged as not guilty, or required him to give bond with sufficient surety for his appearance at the Court of Common Pleas; that in the latter case, it was the duty of the magistrate to have received the bond of the defendant, if the sureties were sufficient; and if he refused to receive such bond, and discharge the defendant, the imprisonment from that time was unlawful, and if the obligation declared on was obtained from the defendants during such unlawful imprisonment, and in consequence thereof, the defence was well made out. But on the other hand, if the magistrate had given no such orders, and through ignorance of the law was honestly inquiring what his duty required, in order to arrive at a correct decision, it was the duty of the officer to have retained the defendant in custody, till a decision was had, or to have carried him before some other magistrate, if the said *Freeman* had declined to act as such. And although said obligation was executed by the defendants, while *Longfellow* was held in custody, and before the magistrate had decided what course to pursue, it could not be avoided by duress of imprisonment, and the jury ought to find for the plaintiffs.

After the Judge had summed up the evidence, and thus instructed the jury, the counsel for the defendants requested him to instruct the jury: —

1. That if they should find, that said Justice *Freeman* informed *Longfellow*, while before him, that he could not take a bond for his appearance at court when offered with good sureties, and that he must either settle or be committed, and that said bond was executed under the influence of such information, that said bond was void in law.

2. That if the facts in the above request are found to have been communicated to *Longfellow* by the officer, or by any one else, in the presence of said Justice, and the bond was made under that information it would be void.

3. That if the jury should find, that said *Freeman* refused the first request of *Longfellow* to receive a bond for his appearance

at court, the offer of the officer to carry him before some other justice, four or five miles distant, will not obviate the objection urged against said body arising from duress.

4. That if the jury should find, that the justice refused to permit *Longfellow* to give a bond for his appearance at court after he had received the warrant from the officer with his return thereon or to discharge him, that the holding him in custody after that time was false imprisonment; and if the giving of the bond declared on was done to procure his enlargement, it would be void. But the Judge declined giving said instructions; and a verdict was returned against said defendants.

The counsel for the defendants excepted both to the instructions given and to the refusal of the Judge to give the instructions requested.

F. Allen argued for the defendants, and cited *Stat. ch.* 72; *Commonwealth* v. *Canada*, 13 *Pick.* 86; *Page* v. *Trufant*, 2 *Mass. R.* 159; *Watkins* v. *Baird*, 6 *Mass. R.* 506; *Worcester* v. *Eaton*, 11 *Mass. R.* 368; 13 *Mass. R.* 371; *Crowell* v. *Gleason*, 1 *Fairf.* 325; 5 *Dane Ab.* 373; *Horton* v. *Auchmoody*, 7 *Wend.* 200.

Barnard argued for the plaintiffs, and cited *Dickinson* v. *Brown*, *Peake's N. P. R.* 253; *Crowell* v. *Gleason*, 1 *Fairf.* 325; 1 *Black. Com.* 136; *Kavanagh* v. *Saunders*, 8 *Greenl.* 426; *Chitty on Con.* 53; 2 *Stark. Ev.* 504; *Brown* v. *Getchell*, 11 *Mass. R.* 11; *Springer* v. *Bowdoinham*, 7 *Greenl.* 442; *Copeland* v. *Wadleigh*, *ibid.* 141; *Bond* v. *Cutler*, 7 *Mass. R.* 205.

The action was continued *nisi*, and the opinion of the Court drawn up by

Weston C. J. — A lawful detention or imprisonment of the person, does not constitute duress. The arrest or restraint of the principal defendant was warranted by law; and it does not appear to have been unreasonably extended. While before the magistrate, some time was taken up in endeavoring to negotiate an adjustment; and the magistrate might take a reasonable time, to consider what it was proper for him to do. But if a man executes

a bond for fear of imprisonment, that is, of unlawful imprisonment, he may avoid it on the ground of duress.

It appears from the testimony of the magistrate, that the defendant offered to give bond for his appearance at court, with sureties, who were in his judgment adequate, but he doubted whether he could take a bond, and upon the officer's saying, that he could not, but that the defendant must settle or go to gaol, the justice, supposing he could not take a bond, took the defendant aside, and told him he had better settle, than go to gaol. This was manifestly adopting the views of the officer, and calculated to produce an apprehension in his mind, that if he did not settle, he must be sent to gaol; although he was ready to give bond, with adequate sureties, for his appearance at court.

Such an imprisonment would have been unlawful. He had a right to be liberated, upon giving such a bond. And if he did not execute the bond in suit freely, but through fear of unlawful commitment, he acted under the influence of such moral compulsion, as constitutes duress. We think the jury should have been so instructed; and that it may be considered as embraced in some of the requests, made by the defendant's counsel.

There is much reason to believe from the whole testimony, that the principal defendant acted freely, notwithstanding the misapprehension of the justice. The jury however have not passed upon the question, which is to be considered as having been legally at issue before them, whether he did act freely, or whether under the fear of unlawful imprisonment. The exceptions are therefore sustained, and a new trial granted; that it may be distinctly presented to a jury, for their determination.

Robert L. Dodge *vs.* David Hills.

Where indentures of apprenticeship are signed and sealed by the father, minor son and master, and conclude with the words "to the true performance of the foregoing agreement we have hereunto signed and sealed the same;" it is a sufficient consent by the minor in the deed, under the statute, *c.* 170.

Where in the indenture, the master "agrees and obligates himself to pay the said J. H. and J. H., jr. (the father and minor son) fifty dollars per year for the said J. H. jr's services until he is twenty-one years of age, which sum is to be in full for all his labor and clothing and doctor's bills"; this is such security to the use of the minor, as will comply with the requisitions of the statute.

This was an action of the case for enticing away and harboring *John Hayden, jr.* the apprentice and servant of the plaintiff. The declaration alleged, that the said *Hayden*, on, &c. "was and still is the plaintiff's apprentice and servant, duly bound to the plaintiff to dwell with and serve him for and during the term of three years." To prove that *Hayden, jr.* was the apprentice and servant of the plaintiff, the plaintiff offered in evidence an indenture or agreement, dated the 3d of *April*, 1833, under the hands and seals of the plaintiff and *John Hayden* and *John Hayden, jr.* This was objected to by the counsel for the defendant. But *Emery J.* who tried the action, admitted it, and instructed the jury that the agreement or indenture, with proof of enticing away or harboring the said *John Hayden, jr.*, with notice of his employment, as the plaintiff's servant, was sufficient to sustain the action. The jury found for the plaintiff: and if the instructions were right, judgment was to be entered on the verdict; otherwise it was to be set aside and a new trial granted.

After the date and description of the parties, the writing proceeds. "The said *John Hayden* and *John Hayden, jr.* agree, obligate and bind themselves, that *John Hayden, jr.* shall work with said *Robert L. Dodge* faithfully, &c. until the said *John, jr.* shall be twenty-one years of age, excepting one month in each year during the time of service, said *John, jr.* is to have for his own benefit and use, and is to board himself or pay for his board." "And the said *Robert L. Dodge* agrees and obligates himself to pay the said *John Hayden* and *John Hayden, jr.* $50 per year for the said *John, jr's* services, as above stated, until he is twen-

ty-one years of age, which sum is to be in full for all his labor and clothing, and doctor's bills." "To the true performance of the foregoing agreement we have hereunto signed and sealed the same."

Mellen, for the defendant, made the following points.

1. At common law a father has no right, for his own profit, to transfer the liberty and services of his son, or daughter, under age, to the exclusive jurisdiction of a master.

2. That if such right existed at common law, the exercise of the right is, by our statute, so limited, and the rights of the child are so guarded, that he cannot render his son or daughter, of any age under twenty-one years, at his own pleasure and for his own benefit, an exile from the paternal roof; and deprive either of the blessings of education and proper government, and the indiscribable comforts of "Home: sweet home."

3. Although a minor, who has no parents, may bind himself with the approbation of the selectmen or overseers; yet, when the father is living, the father must bind the son, with his consent, and the consideration on the face of the paper, must be secured to the use and benefit of the minor; or the whole will be void.

4. In this case there is no consent of the minor in the indenture.

These authorities were cited: *Stat. ch.* 170; *Day* v. *Everett*, 7 *Mass. R.* 145; *Smith* v. *Birch*, 1 *Burns' Just.* 60; *King v. Inhabts. of Cromford*, 8 *East*, 25; *King* v. *Inhabts. of Arnesby*, 3 *Barn. & Ald.* 584; 2 *Kent's Com.* 2d *Ed.* 264; *United States* v. *Bainbridge*, 1 *Mason*, 71; *Squire* v. *Whipple*, 1 *Vermont R.* 69; *Commonwealth* v. *Wilbanks*, 10 *Serg. & Rawle*, 416; *King v. Inhabts of Bow*, 4 *M. & Selw.* 383.

I. G. Reed and *Knowles*, for the plaintiff, contended:

1. This indenture does substantially conform to the statute. The parties all sign, father, son and master. The consideration for the services was one month's work each year "for his own benefit and use," and fifty dollars per year for his clothing and doctor's bills. The father receives nothing, but the whole goes to the son.

2. If the binding was not a legal statute binding, it was an assignment over by the father of the services of his son for a limited time. And if liable to be revoked, still is good until revoked.

3. *Hayden, jr.* was *de facto*, the servant of the plaintiff, and in his employment. And this is sufficient to enable the plaintiff to maintain this suit.

4. If this be not a valid statute binding, and the parties to it can avoid it, still it is voidable only, and the parties have not done it, and third persons, like the defendant, cannot.

They cited the following authorities. *Day* v. *Everett*, 7 *Mass. R.* 145; *Barber* v. *Dennis*, 1 *Salk.* 68; 1 *Dane's Ab.* 255, § 1; 2 *Petersdorff's Ab.* 22; *Lightly* v. *Clovston*, 1 *Taunt.* 112; *Foster* v. *Stewart*, 1 *M. & Selw.* 191; *Rex* v. *St. Nicholas*, 1 *Burr, Sett. cases*, 94; *Gray* v. *Cookson*, 16 *East*, 13; *Rex* v. *Inhabitants of Laindon*, 8 *T. R.* 379; *Ashcroft* v. *Bertles*, 6 *T. R.* 652; 3 *Dane*, 589; *Matter of M'Dowles*, 8 *Johns. R.* 327.

The opinion of the Court, after a continuance for advisement, was drawn up by

Weston C. J. — It is insisted that the relation of master and apprentice or servant did not exist between the plaintiff and the minor, for the enticing and harboring of whom, this action is brought. Two objections are taken to the indenture, as a binding under the statute; first, that the consent of the minor is not expressed in the deed; secondly, that the consideration allowed by the master, for the services of the minor is not secured to his sole use. He does "agree" to the indenture; and he binds himself to the true performance of the "agreement" stated therein. His consent then is expressed in terms not to be misunderstood.

The master is to board the apprentice, to allow him a month in each year for his own benefit, and to pay him and his father, every year, the sum of fifty dollars. But it is very manifest, that whatever might be received by the father was in trust for the son, to be applied to his use. It was to purchase his clothing, and to pay for medical attendance, whenever it might be necessary. The three years, in which he was to serve the plaintiff, were from

eighteen to twenty-one. Suitable clothing for that period would exhaust the fund provided. The agency of the father in the application of part of it, was for the benefit of the child. It is fair to presume, that it would be more discreetly expended. It does appear to us, that the whole consideration is virtually and substantially secured to the apprentice; and that the father is made the recipient of part, not for himself, but to be applied to the necessities of the son.

We are of opinion, that the indenture may be sustained, as a binding under the statute; and that the relation of master and apprentice was thereby created. It is unnecessary therefore to consider the question, whether if the statute had not been complied with, the minor was an apprentice or servant *de facto*, or what rights may remain to the father at common law, in disposing of the services of his minor son.

Judgment on the verdict.

Edgar Bugnon & *al.* *vs.* Joseph Howes.

Although it is essential to the validity of the return of an extent, that it should show that the debtor was duly notified to choose an appraiser; yet such notice may be implied from the return of the officer, that the debtor had *neglected* to choose an appraiser.

This was a writ of *entry*, demanding a tract of land in *Dresden*. The tenant pleaded the general issue which was joined, and by brief statement claimed an eighth as his own, and disclaimed the residue. The demandants claimed an undivided fourth part as heirs of *James Bugnon*, who was once seised of it.

To maintain his title to the one eighth claimed by him, the tenant gave in evidence the extent of an execution in favor of *George Houdlette* and *Llewyllyn W. Lithgow*, upon the undivided fourth part of said *James Bugnon*, as his property; and shew a conveyance of the interest acquired thereby by *Lithgow* to himself.

In the execution said *James Bugnon* is described, as of *Dresden;* and the part of the officer's return, material to the present enquiry, was in these words. "Three disinterested and discreet men, being freeholders in said county, *viz:* D. C. chosen by E. C. attorney to the creditors, G. T. chosen by myself, and J. C. chosen by me for said *James Bugnon*, who neglects to choose."

The counsel for the demandants objected to the validity of this extent on the ground, that it appeared by the officer's return, that he appointed two of the appraisers, but that it does not appear, that the debtor was notified; and that for this reason the extent was void.

Emery J. before whom the trial was had, was of opinion, that the extent was valid; and a nonsuit was entered by consent, subject to the opinion of the whole Court. If the Court shall decide, that the extent is valid, the nonsuit is to remain; otherwise to be taken off.

S. W. Robinson, for the plaintiffs.

This case presents but a single point; whether the officer's return gives any legal cause for his appointment of two of the appraisers.

The same question, on this very return, has been before the Court, in *Carney, Pet'r* v. *Bugnon*, and decided by the C. C. Pleas, and by one Judge of this Court in our favor, and acquiesced in by the petitioner. The case on which we now rely, *Means* v. *Osgood*, 7 *Greenl.* 146, was then considered as conclusive in our favor.

The return does not, in any part of it, state that *Bugnon*, the debtor, was notified. The return of neglect to choose does not necessarily imply, that notice was given to the debtor, as he would equally neglect, whether notified or not. Our statute differs from the *Massachusetts* statute on the same subject, and in express terms requires notice to be given. This positive provision of law cannot be dispensed with by implication. We have in our favor a direct decision of our own Court, and a positive provision of our own statute. In *Massachusetts* the return in the words of the statute may be good, as notice may be implied in the return, as well as the necessity of giving it in the statute. But here, where the statute positively requires the officer to give

notice to the debtor, the omission to return it cannot be implied, for a material statute requisition is omitted.

F. Allen, for the defendant, remarked, that the form, used by the officer in making his return in this case, had been generally followed since the separation; and that the mischief would be very great, if all such levies were to be held void. The Court will decide the law, as it is; but this affords ground for looking at the case with some greater care, than if the land now in controversy alone was in question.

In this case, the return shews, that the officer appointed two of the appraisers, because the debtor neglected to choose an appraiser. Now the debtor could not neglect to avail himself of his right to make choice of one appraiser, unless he had been notified, that the levy was to be made. And if an officer should return, that the debtor had thus neglected, when no notice had been given, an action would lie for a false return. *Blanchard* v. *Brooks*, 12 *Pick.* 47. In that case, the reason assigned by the officer for choosing two of the appraisers was the same as in this, and expressed in precisely the same words. The case of *Stinson* v. *Gurney*, decided in this Court, *May Term*, 1835, was upon a state of facts precisely like the present, and the decision was in accordance with *Blanchard* v. *Brooks*, and directly opposed to *Means* v. *Osgood*. (The Chief Justice remarked, that when the case, *Stinson* v. *Gurney*, was opened for argument, the attention of the counsel was called to *Blanchard* v. *Brooks*, and enquiry was made, whether any distinction could be made between the two cases; and thereupon the argument was pressed no farther, and the case went off without consideration. But that on the same circuit, there was a case in *Cumberland*, *Sturdivant* v. *Sweetser*, where the court held a levy to be good, where the officer returned, as the cause of his appointing two appraisers, that the debtor refused to choose one.)

Allen. The principle for which we contend was yielded in *Sturdivant* v. *Sweetser*, that the return need not state in words, that notice was given, and that it may be implied from his refusing or neglecting to avail himself of his right.

The counsel commented on *Means* v. *Osgood* to shew, that this point in the case passed without consideration, either by counsel or Court, and was entitled to little weight compared with the more recent and better considered cases on his side.

The variation in the statutes is an immaterial one, and the additional words in ours are but surplusage. The statutes have precisely the same meaning, whether the words are put in or left out.

After a continuance, the opinion of the Court was prepared by

WESTON C. J. — The case of *Means et al.* v. *Osgood*, 7 *Greenl.* 146, is exactly in point, as an authority for the demandants. The necessity of notice to the execution debtor, and that it should appear to have been given by the officer's return, was not there controverted. That both were implied in the return then under consideration, was a view of the case not presented to the court in argument, nor did it suggest itself to them, in the final determination of the cause. It seemed to be conceded that the return was fatally defective; and the attention of the court was principally drawn to the propriety of allowing the officer to amend it, by inserting the fact of notice to the debtor, upon the motion of the demandants' counsel; and the greater part of the opinion of the court, delivered by *Parris J.*, is taken up in discussing and settling the extent and limitation of such amendments. Upon this last point it has been regarded as a leading case, while the facts upon which it was based, have not until this time, since that decision, been presented to the court, nor did they occur to them, in the discussions which have arisen in other cases on the question of notice to the debtor by implication. Thus in the case of *Sturdivant* v. *Sweetser et al.* decided last year in *Cumberland*, 3 *Fairfield*, 520, it was held, that such notice was implied from the return of the officer, that the debtor had refused to appoint an appraiser. And in *Stinson* v. *Gurney*, which was pending in this county not reported, the same deduction was made from the return of the officer, that the debtor had neglected to appoint one. In neither of these cases was that of *Means* v. *Osgood* cited; and if consistency has not been observed, it has been because these cases have never been before compared; but

principally because the idea of notice by implication did not present itself to counsel or to the court in that case.

Upon this point, the statute of *Maine* is not precisely like that of *Massachusetts*. In the former notice to the debtor is expressly required. In the latter it is also required, but not in express terms. We say required, because the highest court in that state have so adjudged. *Whitman* v. *Tyler et als.* 8 *Mass.* 284; *Blanchard* v. *Brooks et al.* 12 *Pick.* 47. What the statute of *Maine* then is, in direct terms, that of *Massachusetts*, is by implication and judicial construction. In the last case the court say, that it must substantially appear by the return that the debtor had notice; "and if it does not so appear, when the return shows that the officer chose two appraisers, the levy will be void." They then remark, that as the statute had prescribed no mode of notice, in regard to which our statute is equally silent, it need not appear by the return how the notice was given; and as the officer had there returned, as here, that the debtor had neglected to appoint an appraiser, they deduced therefrom, that he must have had notice of the time, place and occasion. They add, "the return therefore, by necessary implication, alleges that he had notice; and if in point of fact he had not, it would be a false return."

This is direct authority for the deduction of notice by implication, where the officer returns that the debtor neglected to appoint. It would undoubtedly be much better, that the fact of notice should be stated directly and affirmatively by the officer. Such a form would call his attention to the duty, which the statute prescribes; and it is one certainly most to be approved. If we sustain and tolerate the return in question, it will be only, *ut res magis valeat, quam pereat.* It pursues a form, which has been, we understand, extensively used, and many titles in this State depend upon it. It is always with reluctance, that a court finds itself constrained to defeat proceedings upon formal objections, where substantial justice may be better promoted by upholding them.

By adopting the views of the Supreme Court of *Massachusetts* in regard to notice by implication, the rights both of creditor and debtor will be preserved. Of the creditor, by giving effect

to his levy; of the debtor, by holding the officer liable for a false return, if the debtor lived in the same county, and was not notified as the statute requires. Nor will this be a hardship upon the officer; for he violates his duty, if he does not give such notice. Upon the whole, we hold the levy in question valid; and if we overrule part of what was decided in the case of *Means* v. *Osgood*, we do it upon a distinction not there raised, and follow, to uphold proceedings, a very respectable authority in a sister State, in relation to a statute, which by their construction is substantially like our own.

Nonsuit confirmed.

Inhabts. of THOMASTON *vs. Inhabts. of* VINALHAVEN.

Where territory, before unincorporated, was with the inhabitants thereof incorporated into a town, prior to the *Massachusetts* settlement act of 1793; an alien, residing thereon at the time, did not thereby gain a settlement in such town.

EXCEPTIONS from the Court of Common Pleas.

This was an action of *assumpsit* for supplies furnished one *Eunice Lindsey* and her child, alleged to be paupers, and to have their legal settlement in *Vinalhaven*. *Eunice Lindsey* was the daughter of *James* and *Huldah Lindsey*. *Huldah Cooper*, the mother of *Eunice*, was born and lived on one of the *Fox Islands* in *Penobscot Bay*, and without the limits of any incorporated town until the year 1788, when she was lawfully married to *James Lindsey*, the father of the pauper. *James Lindsey* was an Irish seaman, and came to *Castine*, in 1785, from an English ship, having served with the *British* in the war against the *Colonies*; and lived with his wife on the territory now *Vinalhaven*, at the time of its incorporation into a town, *June* 25, 1789. *Lindsey* was a poor man and resided in *Vinalhaven* until 1809, when he removed to unincorporated land, and there died in 1818. Neither the said *Huldah*, nor *Eunice*, the pauper, ever gained a settlement in their own right.

By said act of incorporation, the territory, now *Vinalhaven*, " with the inhabitants thereof " became a town.

The plaintiffs contended, that said *James Lindsey*, though he was not a citizen of *Massachusetts* at the time, by the act incorporating *Vinalhaven*, with his wife, gained a settlement in that town, it being prior to the settlement act of 1793. *Smith J.* before whom the action was tried, being of opinion, that *James Lindsey*, and consequently his wife and child, did not acquire a legal settlement in *Vinalhaven* by virtue of said act of incorporation, by consent of parties, directed a nonsuit with leave to file exceptions. The exceptions were filed.

F. Allen and *Cilley*, for the plaintiffs, relied on the act incorporating *Vinalhaven*, as a town, *June* 25, 1789, as giving a settlement to the father of the pauper. As she has gained none in her own right, she retains that derived from her father in *Vinalhaven*. Before the passing of the *Massachusetts* settlement act of 1793, an alien acquired a settlement by living on the territory incorporated into a town, as well as a citizen. The act is itself sufficiently broad to include aliens, as well as citizens of the State. The expression is, " with the inhabitants thereof." The cases *Buckfield* v. *Gorham*, 6 *Mass. R.* 445 ; and *Bath* v. *Bowdoin*, 4 *Mass. R.* 452, are directly in point in our favor.

Foote and *C. R. Porter*, for the defendants, contended, that *James Lindsey*, being a foreigner, was not included by the term " inhabitants" used in the act of incorporation. Inhabitants has a technical meaning equivalent to citizens, and excludes aliens. 2 *Kent's Com.* 54, 55.

The settlement statute of 1789, passed two days before the incorporation of *Vinalhaven*, takes away the foundation of the decisions in the cases *Buckfield* v. *Gorham*, and *Bath* v. *Bowdoin*. By this act, as well as by the act of 1793, aliens do not gain a settlement by residing on a plantation, when it was made into a town. That an alien gained no settlement by residing on land incorporated into a town was determined in *Jefferson* v. *Litchfield*, 1 *Greenl.* 196. Nor can the wife gain a settlement, unless the husband does. *Ibid.* The only difference between the acts of 1789 and 1793, in this respect, is, that in the former

the word "inhabitant" is used, and in the latter, the word "citizen;" and they both have the same meaning.

After a continuance for advisement, the opinion of the Court was drawn up by

WESTON C. J. — It has been laid down by the Supreme Judicial Court in *Massachusetts*, referring to cases prior to 1793, in *Bath* v. *Bowdoin*, and in *Buckfield* v. *Gorham*, cited for the plaintiffs, that upon the incorporation of a place before unincorporated into a town, all the inhabitants thereof had thereby their settlement fixed in such new town. But in neither of these cases was that the point decided, whether the attention of the court was called to the fact, that no statute to this effect existed prior to that of 1793, *ch.* 34, does not appear. As the settlement of paupers depends upon the express provision of law, it might deserve very serious consideration, whether a mode of settlement so sweeping in its effect should be established by construction. By the statute before cited, it was provided by law, that all persons, citizens of the *United States*, dwelling and having their homes in any unincorporated place, at the time when the same shall be incorporated into a town, shall thereby gain a settlement therein.

As no such provision existed in any former statute, this would seem to be the appointment of a new mode of gaining a settlement; and when it is considered that the liability of towns for the support of paupers, has been held to be matter of strict law, we are not satisfied, notwithstanding the intimation in the cases cited, that it existed before by construction. If it did, the statute of 1793 indicated the sense of the legislature, that it should be limited to citizens. But admitting the correctness of the construction contended for, what effect did the incorporation of the territory, now constituting *Vinalhaven*, "with the inhabitants thereof" into a town, have upon *James Lindsey*, an alien, then resident there? Upon the incorporation, the inhabitants who were parties to it, acquired certain constitutional and municipal powers. If they then had, or whenever they might have, the requisite number of rateable polls, they had a right to send a representative to the general court. They had a right to vote also in the

election of Governor and Senators. In these privileges, an alien could not participate. Nor could the character of a citizen be conferred upon him, by the act of a state; the regulation of that subject having been assigned to the general government.

A State might undoubtedly impose upon towns the support of aliens; but the question is, whether *Lindsey* was so far one of the inhabitants, upon whom the corporate powers or franchise was bestowed, as that there did thence result an obligation on the part of the town, to support him, if he stood in need of relief, or relief might at any time become necessary for his wife or children. We cannot say that it appears to us, that this charge or obligation was imposed, or is deducible from the act of incorporation. We think we ought to require clearer evidence of its existence, than is there discoverable. It does not appear to our satisfaction, that *Lindsey* acquired a settlement in *Vinalhaven*. Nor are we aware, that any such construction of the law formerly obtained as to aliens. Prior to our separation, they were generally supported, when they became chargeable, by the State. And if the husband gained no settlement in *Vinalhaven*, the wife did not. *Jefferson* v. *Litchfield*, 1 *Greenl.* 196. It results that the pauper could have no derivative settlement in that town. And the opinion of the court is, that the decision of the Judge in the court below to this effect, is legally sustained.

Exceptions overruled.

ELKANAH MORTON, *Plff. in review vs.* ROBERT THOMPSON *& als.*

The process of forcible entry and detainer cannot be maintained, under the *stat.* of 1824, *ch.* 268, against one who has been in quiet possession for three years or more.

And it is immaterial, whether such possession be in submission to the title of the true owner, or in opposition to it.

THIS was a process of forcible entry and detainer under the *stat.* of 1824, *ch.* 268, brought by the defendants in review against the plaintiff in review, before a Justice of the Peace and of the quorum. The plaintiff in review had been in the lawful occu-

pancy of the premises under the will of *John Thompson*, the owner of the estate, and under whom the defendants in review claimed the reversion, for the term of three years, ending in *October*, 1829; after that time, said *Morton* continued his occupation of the premises until the commencement of the process, but produced no evidence of any legal right to the occupancy, after *October*, 1829; nor did he produce any evidence of his claiming title to the premises prior to that time. On the 10th of *Feb.* 1832, *Morton* was notified in writing by the defendants in review, the owners of the reversion, to quit the premises and deliver the same up to them. On the first of *June*, 1832, the agent of the defendants in review, and acting in their behalf, went to the house and requested *Morton* and his family to leave the premises and give him possession, and attempted to enter into actual possession. *Morton* refused to yield up the possession, and forcibly kept the agent out. *Morton* pleaded the general issue and filed a brief statement, that he had been in the quiet possession of the premises for three whole years together next preceding the filing of the complaint.

There were many other objections taken to the proceedings; but as the decision of the court had no reference to them, this being decisive of the whole case, they are not noticed.

J. S. Abbott, for the plaintiff in review, contended, that this process would not lie in this case. By the 4th section of the *stat.* of 1824, *ch.* 268, it is provided, " that this act shall not extend to any person who has been in the quiet possession of any lands or tenements three whole years together next preceding the filing of such complaint." In this case *Morton* had been in the peaceable occupancy of the premises for more than five years before any notice was given of the claim of the defendants in review. If the land is theirs, they may obtain the possession by bringing their suit.

F. Allen and *Harding*, for the defendants in review.

John Thompson was the original owner, and his title is in the defendants in review. *John Thompson* devised the premises to *Morton* for the term of three years free of rent, and this was all the title he ever had. The three years under the will expired in *October*, 1829. The complainants in the original process had

no rights to the possession until that time, and before three years afterwards, they gave the statute notice, and brought the statute process. The three years intended by the statute are three years holding without legal right. Where one man leases to another for the term of three years, and the lessee holds beyond his term, the proviso in the statute was never intended to take away the benefit of it from the lessor, if he pursued the remedy pointed out in it before three years from the expiration of the lease.

The opinion of the Court, after a continuance, was drawn up by

WESTON C. J. — Upon the decease of *John Thompson*, the owner of the estate in controversy, which took place in *October*, 1826, the plaintiff in review became in virtue of his will, entitled to the use and occupation of the same estate, for the period of three years. He held over; and thus continued the tenant at sufferance of the heirs at law of the deceased, who were entitled to the reversion, which had not been devised. On the first day of *June*, 1832, when the forcible detention is proved to have taken place, the plaintiff in review had been in quiet possession of the premises for nearly six years, from the decease of *John Thompson*.

By the *statute* of 1824, *ch.* 268, directing the proceedings in forcible entry and detainer, § 4, it is provided, that the act shall not extend to any person, who has been in quiet possession of any lands or tenements, three whole years together, next preceding the filing of the complaint. By this act the former statute of 1821, *ch.* 79, was repealed. That statute, as well as that of *Massachusetts*, *statute* of 1784, *ch.* 8, 1 *Mass. Laws*, 193, has the same provision; to which however there is subjoined this qualification, "and whose estate therein is not ended or determined."

Under the prior laws, the estate of the plaintiff in review having ended, a forcible detention would have rendered him liable to this process. But since the *statute* of 1824, the legislature have thought proper to leave the party injured to the ordinary legal remedies, and have withheld from him the remedy here sought, where the party resisting his right, has been in quiet possession for three years or more. The omission of the qualification in the

last act, leaves the proviso to its full operation, which very clearly forbids this process against a party so long in possession. To sustain it then, under these circumstances, would be an open and direct violation of the statute. Upon the facts in the case, we are therefore of opinion, that the plaintiff in review is entitled to judgment.

JOSIAH F. DAY *& als. vs.* JOHN SWANN *& als.*

Where several individuals, acting as partners and in their partnership name, became sureties for another partnership; and after the dissolution of both partnerships were called upon to pay, and jointly paid the amount for which they were so liable; a joint action for the amount thus paid may be maintained.

THIS case came before the Court on a statement of facts referring to a deposition of one *Campbell*, as a part of it. From the statement and deposition, it appeared, that on the second day of *October*, 1829, the plaintiffs, *Josiah F. Day*, *Lewis Bachelder*, and *Cyrus G. Bachelder*, being partners in the business of making paper, in the name of *Day, Bachelder, & Co.*, and the defendants, transacting the same business in partnership, in the name of *Swann, Woodcock & Co.*, had purchased of *Campbell & Mills* a quantity of paper rags. The plaintiffs gave their note to *Campbell & Mills* for the amount of their purchase, and the defendants signed, as their sureties. This note was paid by the plaintiffs. At the same time, the defendants gave to *Campbell & Mills* a note for the amount of their purchase, signed by the defendants, as principals, and by the plaintiffs, as sureties. In each case, the partnership name was subscribed by one of the partners. The note so given by the defendants, as principals, and the plaintiffs as sureties, was put in suit, judgment recovered against both plaintiffs and defendants; and an execution was issued thereon, and given to the sheriff for collection. *On Nov.* 11, 1833, the sheriff, as appears by his return on the execution, received "of *Josiah F. Day*, *Lewis Bachelder*, and *Cyrus G. Bachelder*, $91,78;" and if the evidence is admissible, would testify, that he received a third from each. Prior to the payment of the $91,78, both partnerships had been dissolved.

The action was assumpsit for money paid, laid out and expended.

J. S. Abbott, for the plaintiffs.

The only question, which can be made in this case, is whether the plaintiffs can jointly maintain this action, or must bring three suits instead of one. The contract of indemnity implied by law in favor of the plaintiffs against the defendants took place when the note was signed, and both partnerships were subsisting. But it does not follow, that by a dissolution of the partnership, there were no partnership transactions unadjusted, and no partnership funds on hand. As the money was paid by the three, it is to be presumed, that the payment was from partnership funds, unless the contrary is made to appear. The sheriff cannot contradict his own return; and if he could, it would not show, that the money paid, was not joint property.

Harding, for the defendants.

There seems to be a tendency to destroy any certainty in the law, which yet exists; and it is hoped, that if the substance is to be lost, that the form may be preserved.

The law is very clear, that if any cause of action exists, the remedy is by several actions, and not a joint one. Nor is this matter of form only, because the defendants may have a perfectly good defence against some of the plaintiffs, when they may not against all. The money was paid after the dissolution of the partnership, and there is no evidence of any payment from partnership funds. The presumption is against it. *Doremus* v. *Selden*, 19 *Johns. R.* 213, *Graham* v. *Robertson*, 2 *T. R.* 282; 2 *Chitty on Pl.* 8; 1 *Esp. N. P. Repts.* 183; *Buller's N. P.* 152; *Gould on Pl. ch.* 4, *sec.* 52 and 62, *ch.* 5, *sec.* 102.

The same cases shew, that signing notes, as sureties for others, is no part of any partnership business, and cannot bind any but him who signs the name.

The opinion of the Court, after a continuance, was drawn up by

Weston C. J. — The two firms became sureties for each other in a transaction, from which each received equal benefit. Each firm had an equivalent for its suretyship, by an accommodation of

the same character. There was a perfect reciprocity. An interchange of liability is frequently indispensable; and each firm in giving the notes, was acting on partnership account. The liability, upon which the plaintiffs were charged, was joint. It was assumed before the dissolution of their firm. While obligations existing against them as a firm remained uncancelled, their concerns could not be entirely adjusted. With regard to them, their joint connection still continued. They pay the money, for which they had become sureties, and thence arises a remedy over, against the principals. Why should not that remedy be joint? It is more favourable to the defendants, subjecting them to one action, instead of three. A promise of indemnity may be implied when the suretyship was assumed, and as that was joint, so was the promise implied.

In the case of *Doremus et al.* v. *Selden*, 19 *Johns. R.* 213, the plaintiffs had transferred the liability, which the defendants had assumed as indorsers of the note of hand to them, to whom they had indorsed it. The subsequent claim of the plaintiffs was founded altogether upon their payment of the note, which being a debt, for which the defendants stood previously liable to the holders, they thereby acquired a new claim upon the defendants. And this payment having been made severally and unequally by the plaintiffs, their right to remuneration was held to be several. But the plaintiffs in the case before us, had jointly an implied promise of indemnity from the defendants, from the time they became sureties, which was not assignable in its character, as is the liability of the makers or indorsers of a negotiable note. In *Graham* v. *Robertson*, 2 *T. R.* 283, the difficulty was, that all the partners had not joined in the action.

If the plaintiffs had brought three actions, instead of one, the defendants might well have insisted, that they had jointly become sureties on their account, and that the plaintiffs' claim being founded on their implied promise as principals to indemnify them, their action should have been joint. The sheriff has returned a joint payment from the plaintiffs; and if it were competent for the defendants to show by parol, that one third came from the pockets of each, they might each be in possession of partnership property. They chose to regard the payment as joint. And if

they had prematurely divided the partnership funds, each might restore his portion of what was found to be necessary to meet a joint liability.

Upon the facts agreed, the opinion of the Court is, that the plaintiffs are entitled to judgment.

Eleazer Wyer & *al.* *vs.* Lemuel Andrews.

Where an officer returned an execution in no part satisfied, and an action is brought upon the judgment on which the execution issued; the officer will not be permitted by his testimony to defeat such action, by shewing his return to be false.

If an officer, after the return day of an execution in his hands, without authority from the creditor receive the amount of such execution from the debtor, it is no satisfaction of the judgment.

The testimony of officers and counsellors, to shew that an officer is generally considered, as having authority to receive the amount and discharge an execution remaining in his hands, after the return day, is inadmissible.

This was an action of *debt* on a judgment recovered before the Court of Common Pleas for the county of *Lincoln*, at the *April Term*, 1828, for $66,33, debt, and 9,93, costs. The defendant pleaded payment of the judgment to the plaintiffs, and in a brief statement alleged, that he paid the amount of the judgment to one *Mason*, then a deputy-sheriff, and as such holding an execution issued on said judgment for the amount thereof. The issue was joined. The judgment was proved, and an execution appeared to have been issued thereupon, dated *Sept.* 29, 1828, returnable to the then next term of the C. C. Pleas, to be holden on the 4th *Tuesday* of *Dec.* then next. On the back of this execution was a return in these words:

"*Lincoln, ss. Jan.* 1, 1829. I return this execution in no part satisfied. *Jonas Mason*, Dept. Sheriff."

It appeared from a certificate of the clerk of the Courts, that the execution had not been returned into the clerk's office, *May* 6, 1835. The defendant objected that this return could not be used in evidence, because it was dated after the return day of the execution. He also offered the deposition of said *Mason* to

shew, that said return was in fact made in *July*, 1834. *Emery J.* before whom the action was tried, overruled the objection, and rejected the deposition. The defendant then offered to introduce the deposition of said *Mason* to prove, that the amount of the execution was in fact paid to him after the return day of the execution, and that the execution remained in his hands until the attorney of the plaintiffs called on him for it in *July*, 1834; that he told the attorney, that as between *Andrews* and him, it was considered paid; that the attorney informed him, that this was a business between the debtor and him, and that he had no right to return satisfaction of the execution after the return day was passed; and that although the return he made was dated back to *Jan.* 1, 1829, it was in fact made in *July*, 1834. The Judge refused to admit the deposition. The defendant then offered evidence to prove, that at a time subsequent to the return day of the execution, and before the return was actually made, that said *Mason* received the amount of the judgment, and that he was then agent of the plaintiffs, and had authority to act in the premises and receive payment for the plaintiffs; but not however by shewing any direct authority from the plaintiffs, or their attorney, but by calling sheriffs, deputy-sheriffs and counsellors to prove, that officers having executions in their hands after the return day, are considered as having such authority. The Judge excluded the testimony offered for that purpose; and ruled, that the officer's return was conclusive.

Thereupon the defendant was defaulted; and if the ruling of the Judge was incorrect, the default was to be taken off, and the action was to stand for trial.

M. H. Smith, for the defendant, contended, that the officer had no right to make a return after the return day of the execution. This return therefore is wholly void. If the officer had enough authority to make a return on it, he certainly had enough to receive payment of it. It is competent to shew, when the return was actually made, or that the return was made in ignorance of the law, or through inadvertency. *Commonwealth* v. *Bullard*, 9 *Mass. R.* 270.

The return, made when this was, is no evidence that the judgment was unsatisfied. If the judgment is actually paid, it is satisfied; and if unpaid, it is not; and whatever return is made on the execution is of no importance. When an officer has once sold property on an execution, there too is a satisfaction of the judgment, and no return made by the officer afterwards can give force to a satisfied judgment. *Ladd* v. *Blunt*, 4 *Mass. R.* 402. And if satisfied, no action can be supported on it. But the evidence offered was admissible. It contradicts no return. It shews when the words, called a return, were actually written. Being written on a paper, once an execution, but under which the officer had no power to act at the time, it was no return. If the suit had been against the officer, then he might not be permitted to say, that it was untrue, but between third persons, the evidence was admissible.

The officer kept the execution six years, and the plaintiffs must be considered as assenting to and ratifying his acts. The officer is competent to testify to any facts in relation to the execution, taking place after the return day. It has been decided in *New York*, that after the return day of an execution, an officer cannot enforce it, and therefore cannot make a legal return on it. *Reed* v. *Pruyn*, 7 *Johns. R.* 426.

Reed and *Knowles*, for the plaintiff.

The first question is, whether the officer shall be permitted to contradict his own return, where third persons are interested, as in this case. It was decided, that he could not, so early, as in *Gardner* v. *Hosmer*, 6 *Mass. R.* 325. The plaintiff in a suit against the officer may shew the return to be false, but the officer cannot do it. *Simmons* v. *Bradford*, 15 *Mass. R.* 82; *Winchell* v. *Stiles*, 15 *Mass. R.* 230; *Estabrook* v. *Hapgood*, 10 *Mass. R.* 313.

To permit his deposition to be used to contradict his return, would be much worse, than to permit him to alter it. When he testifies as a witness, he is not subject to the same liabilities, as when he makes a return.

As to its being no return, because made after the return day, it was made on the execution during the sitting of the Court to which it was returnable; and a return, that an execution is unsat-

isfied must necessarily be made after the officer had no power to collect the execution. But if the officer had no power to make this return, because the return day was passed, then he had, for the same reason, no power to discharge the execution or to receive the money for the creditor, and the judgment remains unsatisfied and in force.

The officer never was the agent of the plaintiff at any time. He acted only under the authority of the law; and proof of what deputy-sheriffs and lawyers supposed the law to be would be little better, than suffering them to make a law for each case. The case, *Green* v. *Lowell*, 3 *Greenl.* 373, is conclusive on this point.

After a continuance for advisement, the opinion of the Court was drawn up by

EMERY J. — An execution issued upon the judgment declared on, returnable on the 4th Tuesday of *December*, 1828, was placed in the hands of *Jonas Mason*, a deputy-sheriff of the county of *Lincoln*, for service and return. The execution bore date *Sept.* 29, 1828. On the back of that execution is written, *Lincoln ss. January* 1, 1829. I return this execution in no part satisfied.

Jonas Mason, Deputy-Sheriff.

At the opening of the case the deposition of this *Mr. Mason* was proffered to shew that this return was in fact made in *July*, 1834; and that the whole amount of said execution and his fees were paid to him by said *Andrews*, while it remained in said *Mason's* hands, but some time after said execution was returnable.

The deposition also details a conversation with *John Ruggles, Esq.* and the statement made by said *Ruggles*, in *July*, 1834.

This deposition was rejected by the Judge. And the question is, whether it ought to have been admitted. No time need be spent in deciding, that the statement alleged to have been made by *Mr. Ruggles* is inadmissible, as it is only hearsay, and he is alive.

It remains to inquire whether the residue should have been received.

The sheriff is obliged by the duty of his office to execute every process directed to him by lawful authority, with the ut-

most expedition, or as soon after he receives it, as the nature of the thing will admit of. And there cannot be a surer rule for him to go by, than a strict observance of what is enjoined upon him by the writ. He is not to shew favor, nor be guilty of unreasonable delay, nor be guilty of oppression, nor make use of greater force or violence than the thing requires.

He cannot arrest before the writ issues. Nor can he execute it after the return, not even the very next day after. *Sid.* 229, *Ellis* v. *Jackson;* unless the levy be commenced before the precept is returnable.

A return ought to shew obedience to the writ, or a good excuse for omission. 6 *Com. Dig. Retorn, D.* 1. As he may say, *quod breve adeo tarde venit, quod exequi non potuit.*

No averment lies against any returns of writs, that are definitive to the trial of the thing returned, as the return of a sheriff upon his writs, &c. But it may be, where such are not definitive. *Dyer,* 348; 8 *Rep.* 121; 2 *Cro.* 13.

If the return be false in substance though true in words an action lies against the sheriff. *Douglass,* 159.

And a sheriff cannot make a return contrary to his former return on record. 6 *Com. Dig. Retorn, E.* 4.

And generally he is not to be let into parol proof to alter the state of facts as returned. Amendments in proper time and manner he may make, and he may shew that a mistake was committed, as to ownership of property, and in some other cases.

In *Purington* v. *Loring,* 7 *Mass.* 388, the action was trespass against a deputy-sheriff. He sold the goods after advertising them 24 hours, and as the report is, he proposed to prove by parol, that he did in fact advertise four days, probably a mistake, instead of 48 hours.

The Court say, the officer's return must be in writing, and when made upon his precept, and regularly returned, it must be presumed to be true, until the falsity of it be proved. If parol evidence was admissible, there would be great danger of fraud and perjury. If the officer has acted legally, he is liable to no inconvenience in returning truly his proceedings. And if he has not, he ought not to be protected by a false return, whether in writing or by parol.

In 3 *Mass. R.* 349, *Wakefield* v. *Lithgow*, it is said by the Court, that the money, which the sheriff received after the return day, he had no legal authority to receive by virtue of the execution. True he might detain it against the debtor to indemnify himself against his exposure to damages from the plaintiff's claim. But unless the plaintiff accepts the money, and so ratifies the acts of the deputy, the matter is to be arranged between the debtor and the officer. But the officer upon principles of law is not to be heard to contradict or invalidate his own return, made under oath, by his own testimony. The deposition therefore was rightly rejected.

Nor can we give countenance to the offer to prove that said *Mason* was agent of the plaintiffs and had authority to act in the premises and receive for the plaintiff payment of said judgment, not however by shewing any direct authority from the plaintiffs constituting *Mason* their agent, but by calling sheriffs, deputy-sheriffs, and counsellors to prove officers situated, as *Mason* was, are considered, as having such authority.

Such estimation of the authority of officers is calculated to encourage laches in their duty. And to let in that description of proof of authority from the plaintiffs without their own concurrence or acts, would be subversive of the wholesome rules of law. The default of the defendant entered in this action must stand.

Willard Walker *vs.* Ambrose Merrill.

The parties, by an agreement under their hands, submitted to arbitrators all claims and demands between them. The arbitrators made and signed an award, directing one certain sum to be paid by the defendant to the plaintiff in full of all demands. By another paper of the same date, the arbitrators certified, that the sum awarded included a small specified sum for costs of the hearing, and that the remainder of the amount awarded was for the balance due in full of all demands. Both the award and certificate were notified to the parties at the same time. *Held*, in an action on the award, that the plaintiff was entitled to recover the amount of the balance thus certified to be due; but that he could not recover the costs.

This was an action of debt upon an arbitration bond. The parties agreed on a statement of facts; and further agreed, that

the Court should draw any inferences from the facts agreed, which a jury might reasonably infer from them. From the statement, it appeared that the parties agreed, by a sealed instrument, to submit to arbitrators all claims, which they had against each other; the claims for and against *Merrill & Higgins* to be considered, as *Merrill's* own. And they further agreed, that the costs of former cross actions between them should also be taken into consideration by the arbitrators, but the submission was entirely silent in relation to costs of the reference. They mutually agreed to pay any sum awarded against them, forthwith as soon as the award should be made known to the party against whom it was made.

The arbitrators made out and signed an award, that the plaintiff should recover of the defendant fifty-five dollars and thirty-three cents in full of all claims and demands aforesaid. In this award, dated *Sept.* 9, 1834, there is no mention of costs. Afterwards, on the same day the arbitrators made and signed, another writing certifying, that of the said sum of $55,33, the sum of $7,78, were for costs and expenses of the reference, and $47,55 were for debt and costs of the former suit.

Both the papers were shewn to the parties, and before the commencement of this suit, the plaintiff demanded of the defendant the sum of $47,55.

Randall, for the plaintiff.

1. The plaintiff claims judgment for the full amount. No affidavits, or testimony of the arbitrators are admissible to vary, or impeach an award under their hands; nor can an award, regular on its face, be in any mode impeached, or inquired into, except for misbehaviour or corrupt conduct of the arbitrators. If arbitrators exceed their powers, the excess must appear on the face of the award. 1 *Dane's Ab.* 127; The leading case is *Newland* v. *Douglas*, 2 *Johns. R.* 62, confirmed in *Barlow* v. *Todd*, 3 *Johns. R.* 363. In our own State, the Court have sanctioned the principal positions stated above. *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21. Where the reference is in any way under the control of the Court, so that the report can be recommitted, the Courts have adopted different rules from those acted

upon in common law awards, where no recommitment can be made.

2. The paper accompanying the award is no evidence in the case, and should be wholly rejected. 5 *Pick.* 291; 3 *Greenl.* 85; *Henfree* v. *Bromley*, 6 *East*, 309.

3. But if the paper is admissible, it shews how much is debt, and how much costs of reference. It is good then for all but the costs, for where an award is good for part, but not for the whole, judgment will be rendered for so much, as is good. *Addison* v. *Grey*, 2 *Wilson*, 293; *Willes' R.* 64; *Same*, 253; 2 *Bos. & Pul.* 371; 3 *East*, 18; *Gordon* v. *Tucker*, 6 *Greenl.* 247.

If the paper is not admissible, then the award is good for the whole; if it be admissible, it separates the costs of reference from the rest, and then we are entitled to judgment for all but the costs of reference.

Groton and *Tallman*, for the defendant.

The action is founded on the award; and if that is duly made, the action may be supported; but if not made according to the submission and within the power given in the submission, the action must fail. A fatal objection is, that the arbitrators have included in their award, in one gross sum, the costs of the reference, for which they had no authority. Where they award two distinct, separate sums, and have authority, as to one, and none, as to the other, the action may be maintained for the sum awarded within the submission; but where it is in one sum, there can be no separation, and the award is wholly void. *Gordon* v. *Tucker*, 6 *Greenl.* 247; *Thrasher* v. *Haynes*, 2 *N. H. Repts.* 429.

The paper signed afterwards is admissible to shew, that the referees exceeded their authority. *Bean* v. *Farnham*, 6 *Pick.* 269. But it cannot be taken as part of the award. When the referees had once made up and signed the award, they had no power over it, any more than mere strangers. *Woodbury* v. *Northy*, 3 *Greenl.* 85. Even a Court of Equity either enforces an award, as it is made, and as it appears on its face, or sets it wholly aside. 11 *Wheaton*, 446. The well settled rule is this, where the award is entire, or an entire sum is awarded to be paid, if the arbitrators have exceeded their authority in any part,

the award is void, and cannot be enforced. *Peters* v. *Pierce*, 8 *Mass. R.* 398; 5 *East*, 139; *Watson on Awards*, 161; 1 *Wash. Cir. C. R.* 56; 7 *Serg. & Rawle*, 230; 1 *Dane's Abr.* 272.

The opinion of the Court, after a continuance for advisement, was drawn up by

EMERY J. — The suit is an action of debt arising on an award of arbitrators. By the submission, which was under seal, the parties agreed to submit all claims and demands of each against the other, and also all claims of *Merrill & Higgins* against *Walker*, and all claims of *Walker* against *Merrill & Higgins*, and each covenanted to abide by and perform the award and pay the other whatever sum may be awarded as soon as said award shall be made known to him. And it is further agreed that the costs incurred in the late cross suits of the parties shall be taken into consideration, and awarded according to equity. The defendant objects to the right of the plaintiff to maintain this action upon the award, because although it was first made for $55,33, and below that award which was in full of all claims and demands aforesaid, of every name and nature, is the following: "The undersigned, appointed referees or arbitrators to settle all claims between *Willard Walker* and *Ambrose Merrill*, hereby certify that in their award made this ninth day of *September*, 1834, awarding to said *Walker* to recover the sum of fifty-five dollars and thirty-three cents, in full of all claims and demands, we have awarded seven dollars and seventy-eight cents only for costs and expenses of said reference, and forty-seven dollars and fifty-five cents debt and costs of former suit of said *Walker* against said *Merrill*," which as well as the award is signed by all the arbitrators. It is insisted that they have included in the award costs, which was not authorised by the submission, and that the award is void. It is also objected, that the arbitrators could not make any explanatory statement, or correct errors, and that the Court cannot perform the office for them. That even a Court of Equity enforces an award or sets it aside, and that if the bad part of the award be not distinct and independent of the rest of the award, the award is bad in the whole.

We are to regard principally the intention of the parties in the

interpretation of submissions, and put upon them a fair and liberal construction. And a like favorable consideration is to be extended to the award.

There is no limitation to a particular day in the submission within which the award is to be made, but the arbitrators are to decide as soon as may be. It is not that it shall be ready to be delivered in writing to the parties, but the stipulation is to pay whatever sum may be awarded as soon as the award shall be made known to him who is to be charged. And there is nothing in the statement of facts which compels us to the conclusion, that there was any award made known to the parties, but what has been termed the award and the explanatory award. They bear date on the same day, and the explanation was shewn to the defendant, and there is no agreement in the statement of facts that the other award was first shewn to him. We are authorised by the parties to infer any further facts from those agreed that a jury might reasonably infer. It would reasonably be inferred that the arbitrators, to prevent misapprehension of the amount in which they had attempted to charge the defendant, were desirous of setting out how much was for costs of reference, which they had not been expressly authorised to award, and how much for debt and costs of a former suit, which they were by the submission authorised to make.

We think there is much good sense in the ideas suggested in the *New York* case of *Strang* v. *Ferguson*, 14 *Johns.* 161, that costs may be awarded as a necessary incident to the authority. Yet this subject was settled in the case of *Gordon* v. *Tucker*, 6 *Greenl.* 247, that the costs of reference cannot legally be allowed. To this extent there is displayed an excess of authority. But the whole of the award is not void. We can well separate that part. We are satisfied that the plaintiff is entitled to sustain his action. And according to the agreement of the parties the defendant is to be defaulted, and judgment rendered for the plaintiff, for forty-seven dollars, fifty-five cents, debt, with interest thereon from the date of the writ.

Ebenezer Alden *& ux. vs.* Rufus Gilmore.

Building upon, or enclosing, the land of another, without right, is constructive notice to the owner of an adverse claim to it.

But if one enter upon another's land by his consent, or as his tenant; the owner is not disseised, but at his election, until he has had notice, that the occupancy is adverse, or there has been some change in the nature of such occupancy calculated to put him on his guard.

Declarations to a stranger to the title by the lessee, that he holds adversely to the owner, is not evidence of a disseisin.

This was a writ of entry and was tried before *Emery J.* *Jonathan Amory* was once the undisputed owner of the demanded premises, and on *August* 3, 1792, made a deed thereof to *David Gilmore*, the elder, who made a deed of the same, dated *October* 13, 1826, to his daughter, *Patience Alden*, one of the plaintiffs, and wife of the other. Both these deeds were duly acknowledged and recorded.

In defence, there was testimony offered for the purpose of shewing, that a title to the premises had been acquired by the defendant and one *David Gilmore, Jr.*, by disseisin; and it was attempted to be shewn, that nothing passed by either of these deeds, because the grantors, at the times they were made, were disseised. These attempts were met by opposing testimony on the part of the demandant. There was also some attempt to shew, that *Mr. Alden* had refused to accept the deed to his wife, and that it had been returned to her father, after it was given. The evidence is given in full and at great length in the report of the case, but the nature and purport of it sufficiently appear in the opinion of the Court.

On the whole evidence, the Judge instructed the jury, as follows:

That if they believed, that *Rufus Gilmore* went on to the land, and remained even for forty years acknowledging the title of his father, and in submission thereto, a change of intention on the part of *Rufus* to hold adversely to his father would not operate a disseisin of his father, unless a knowledge of that change of intention was communicated to him. And that, unless notice was communicated, or had been communicated, to said *David Gilmore*, the grantor, at the time said deed was given to said

Patience Alden, that said *Rufus* then held adversely to his father, the deed was operative and conveyed title and seisin to the demandants. And that it was not in the power of said *Alden* to defeat the operation of the deed to his wife from *David Gilmore* by returning it back again to the grantor without the consent of his wife: that arrangements of parents with their children, as to property, were to be favourably considered; that affection and foresight led them to permit the occupancy by the child, while the parent retained the title for the mutual accommodation of both parties; that the interest of a wife in real estate conveyed to her by her father, or any other person, could not in any way be destroyed by her husband without her consent.

The verdict was for the demandant, and was to stand, if the instructions were correct; otherwise to be set aside.

Harding, for the tenant, commented on the testimony reported, and drew from it the conclusion, that if the jury had been rightly instructed in the law, the verdict must necessarily have been the other way. He said, that by the terms of the report, the verdict was to be set aside, if the instructions were erroneous, and contended, that every proposition laid down in them was wrong. Possession and claim of ownership is sufficient to constitute disseisin, whether the owner knows such possession and claim or not. *Stearns on Real Actions*, 1*st. Ed.* 38. Disseisin may take place without the knowledge of the owner of the land. *Poignard* v. *Smith*, 6 *Pick.* 172. Where lands are cultivated and included within fences, as these were, such occupation is evidence to all the world of the claim of the occupant, and will operate as a disseisin against the true owner. *Pro. Ken. Pur.* v. *Springer*, 4 *Mass. R.* 416.

If the cases cited are good law, then the instructions were wrong, and the verdict must be set aside.

F. Allen and *J. S. Abbott*, for the demandants.

The first branch of the instructions were strictly correct. When *Gilmore*, the father, knew that his son went on and occupied under him, as between them, that relation must necessarily continue until some notice was given, or something was done, to shew, that he intended to hold adversely.

Nor is it in the power of the husband to defeat a deed made and delivered to his wife, by returning it back without her consent. 2 *Black. Com.* 293; *Scenlan* v. *Wright*, 8 *Pick.* 528.

That the husband cannot defeat and destroy the interest of the wife in land conveyed to her is also correct. But if it was not, it is immaterial, as the husband never has dissented from the conveyance to his wife, and has accepted the deed, brought this action upon it, and produced it in Court.

There is no testimony in the case tending to shew, that there was any disseisin of the father prior to his deed to *Mrs. Alden* in 1826. However long the possession may remain, if it be under the true owner, it is no disseisin. *Church* v. *Burghardt*, 8 *Pick.* 327; *Sewall* v. *Sewall*, 8 *Greenl.* 194.

The instructions given in relation to the law of disseisin were not material, and a verdict will not be set aside on account of abstract questions of law, however erroneous. *Fleming* v. *Gilbert*, 3 *Johns. R.* 528; *Prince* v. *Shepard*, 9 *Pick.* 183.

The jury could not have been misled by the instructions given. They were correct or irrelevant.

The opinion of the Court, after a continuance was drawn up by

Weston C. J. — The case finds, that in 1792, when *David Gilmore*, the elder, took his deed of *Jonathan Amory*, of a tract of land, embracing the demanded premises. *David*, the younger, was in the possession and occupancy of them. But his possession does not appear to have been adverse to the title of his father. He continued his occupation, until in 1803, he was succeeded by his brother *Rufus*, who held under his father, in the expectation that he should become the owner, by a conveyance from him in his lifetime, or by will, upon his decease. It is very apparent, that in consequence of the relation subsisting between them, both the sons were permitted to enjoy the land, by the indulgence of their father, without payment of rent, subject to such final disposition of it, as he might appoint. The title of *Amory* then passed by his deed to the elder *Gilmore*. There was no adverse seisin or impediment to the transmission of the fee to him, with whom it remained by law, until divested by disseisin, or lawfully conveyed.

On the thirteenth day of *October*, 1826, he conveyed the land, now in controversy, by deed of warranty to *Patience Alden*, one of the demandants, and the wife of the other. It was duly delivered and acknowledged, and on the twenty-sixth of the same *October*, was recorded. The husband has assented to the conveyance, if his assent was necessary, by bringing this action, and producing the deed at the trial. The operation of this deed, could not be countervailed by the impression of *Walter Blake*, the witness, that *Mrs. Alden* had had two deeds, and that they had both been returned to the westward. By whom returned, to whom, for what purpose, or whether done by the knowledge or assent of the husband, does not appear. One of the deeds could not have been that, upon which the demandants rely, and whether the other was is not stated or proved. Without determining the correctness of the instruction to the jury, as to the effect of an express dissent by the husband to the conveyance, we are of opinion that this objection cannot prevail, as no such dissent appears.

The proof very clearly is, from the repeated and uniform declarations of the tenant, except in some of his conversations with *Walter Blake*, that he occupied the land under his father, and with his permission. He was then his tenant at will, at least up to the period when he began to meditate setting up a possessory title. The first intimation he made to *Blake* of such an intention, he testified was in 1824, when *Elliot* was tried for murder, at *Castine*. This, however, is not consistent with another part of his testimony, in which he says that the tenant never intimated that he had any claim, until after the deed was given to *Mrs. Alden*. In the conversation, which he testified took place in 1824, if he was under no mistake as to the date, the tenant said his father had promised the land to him, that he expected it by deed or will, but had been in possession of it long enough to hold, although *Blake* reminded him of what he had formerly told him, that the land belonged to his father, and he occupied it under him, which the tenant did not deny, but said it made no odds. This seems to have been an intimation of what the tenant had in contemplation, but of which he thought better upon reflection, for the same witness testified, that in 1827 or in 1828, he told one *Vaughan*

and *Mowry*, he had no title to the land, but that it belonged to his father.

Upon the whole, the testimony taken together, negatives any pretence of an adverse seisin in the tenant, until after the deed to *Mrs. Alden*. The seisin being in her grantor, he had a right to convey, and his title passed by his deed to her, and to her husband in her right. There being at that time no adverse seisin, no legal question as to the necessity of notice of such a fact to the true owner of the land can arise. Building upon or enclosing the land of another without right is constructive notice to the owner of the adverse claim. *Poignard* v. *Smith*, 6 *Pick.* 172. Of a very different character is the case of one, who enters upon land by the consent, and as the tenant of another. If he could disseise his lessor, except at his election, which is not admitted, it certainly could not be done by a mere declaration to a stranger, of which the lessor has no notice, without any change in the nature of the occupancy, calculated to put him upon his guard.

Judgment on the verdict

Alexander Greenlaw, *by Guardian, vs.* Ruth Greenlaw.

Where a mortgage is made to husband and wife, for a consideration moving from him, conditioned to support them and the survivor of them during life; the husband may maintain a writ of entry on the mortgage in his own name without joining the wife.

The demandant, in a writ of entry, may offer in support of his action two independant, and even inconsistent, titles to the premises demanded.

Thus, where the demandant shews title in himself, and the tenant then produces against him a deed from him to the grantor of the tenant; the demandant is at liberty to offer evidence to show, that the deed from him was void in law, and at the same time rely on a mortgage made to him by the tenant, claiming title from him under the deed alleged to be void.

This case came before the Court on exceptions from the Common Pleas.

This was a writ of *entry*, wherein the demandant counted on his own seisin, and the general issue was pleaded and joined.

The demandant read a deed from one *Cox* to him, and there rested. The tenant then read a deed from the demandant to *Thomas C. Greenlaw*, a son, dated *March* 27, 1822, and a deed from *Thomas C. Greenlaw* to *Ebenezer Greenlaw*, another son now deceased, and late husband of the tenant, dated *Dec.* 12, 1827. The demandant, by his guardian, then endeavoured to avoid these deeds by testimony, that he was insane at the time he executed said deed; and the defendant introduced witnesses to repel such testimony. The plaintiff then introduced a deed of mortgage from said *Ebenezer Greenlaw* to him and his wife *Lydia*, given at the same time of the deed from *Thomas* to *Ebenezer*, conditioned to support and maintain the demandant and his wife during their lives, and by the terms of which the said *Ebenezer* was to remain in possession, until a breach of the condition of the mortgage. This mortgage was substituted for one of the same tenor given by *Thomas* to his father, when he received the deed from him. The counsel for the tenant then objected, and contended, that as the demandant had attempted to prove, and still insisted on a verdict in his favor on that ground, that the deed from him to *Thomas* was void; that he could not, while insisting on that ground, set up a title under the mortgage and shew a breach of the condition. *Smith J.* before whom the trial was had, overruled the objection, and ruled that the demandant might give evidence of both grounds, and recover upon either.

The tenant then contended, that the husband and wife, by the mortgage took, as joint tenants, and both being alive, that this action could not be sustained on the mortgage without joining the wife. But the Judge ruled, that the demandant might recover on the mortgage, if there was a breach of it, without joining the wife. The jury returned a verdict for the demandant; and the tenant filed exceptions to the instructions and rulings of the Judge.

F. Allen, for the tenant, in his argument supported the following points.

1. The grounds taken by the demandant were repugnant; *viz.* that his deed was void by reason of insanity, and that it was valid and passed the land, and that it was reconveyed by the mortgage.

2. The deed of mortgage to the demandant and his wife made them joint tenants of the estate under it; notwithstanding the

Mass. stat. of *March* 9, 1786. They are in that respect to be considered, as one person. *Shaw* v. *Hearsey*, 8 *Mass. R.* 5 *Mass. R.* 521; *Fox* v. *Fletcher*, 8 *Mass R.* 274; *Varnum* v. *Abbott*, 12 *Mass. R.* 474; *Draper* v. *Jackson*, 16 *Mass. R.* 480.

Our *stat.* of 1826, *ch.* 347, *sec.* 7, it is true, provides, that joint tenants may join, or sever, but that cannot apply to this case, because here the wife can bring no action separate from her husband.

3. By permitting the demandant to recover the estate in an action in his own favor, he thereby defeats the estate of his wife. In case of his death the estate would go to his heirs, and she would lose the whole. So if the conditional judgment be rendered for a sum for the damages for not supporting both, and he should die, the amount would go to his administrator, and she would get nothing.

4. Should she survive, she could bring no action for her support on the mortgage, for this judgment would be a bar.

5. The general rule is, that if the husband sues for land in which his wife has an interest, she must join. 5 *Dane's Ab.* 646.

Foote and *Bulfinch*, for the demandant.

This action is a writ of entry declaring generally for the land. When the title is under a mortgage, it is not necessary to set out or mention the condition in the declaration, and if the tenant wishes the judgment to be conditional, he must set forth the condition in his plea. As in this case, the general issue only is pleaded, the judgment was rightly for the land, and the action could be maintained on his original title, or on the mortgage back. *Green* v. *Kemp*, 13 *Mass. R.* 515.

By the *stat. ch.* 347, *sec.* 7, joint tenants may join or sever in a writ of entry. This statute changes the common law.

The husband during his life is entitled to the possession of the whole, and during the coverture the wife cannot have the possession. But if the verdict is for too much, the demandant may release a moiety. During the coverture the husband and wife are but one person in law, and after the death of either, in a case like this, the survivor takes the whole. The demandant therefore can recover in the same count either on his original title, or by virtue of the mortgage. *Draper* v. *Jackson*, 16 *Mass. R.*

480. *Jackson on Real Actions*, 69. In this case, however, the husband and wife ought not to be considered, like strangers when joint tenants. Husband and wife take by entireties, and not by moieties. 2 *Kent's Com.* 111.

The opinion of the Court, after a continuance, *nisi*, was drawn up by

WESTON C. J. — The demandant in his opening had shewn title, by introducing a deed to himself of the demanded premises from *Israel Cox*. The tenant then adduced in evidence a deed, subsequently made by the demandant, of the same premises to *Thomas C. Greenlaw*, under whom the husband of the tenant claimed. An attempt was made to show that deed inoperative. Its validity and effect was open to inquiry; and it was competent for the demandant to show, if he could, that nothing passed by that instrument. It was repelling proof, to which he had a right to resort. If he failed upon this ground, there was nothing to prevent his availing himself of any condition in that deed, or of any defeasance executed at the same time, or of any reconveyance made to him, either absolute or conditional. An unsuccessful attempt to defeat a deed, to which he was a party, did not subject him to a forfeiture or waiver of any interest, to which he was legally entitled in the land in controversy. We are aware of no principle of law, which forbids his submitting both grounds at the same time to the jury; that if the first failed him, he might have the benefit of the second. And we are of opinion that the Court below rightfully permitted this course.

The mortgage deed, executed by the husband of the tenant, was substituted for one having the same conditions, previously executed by *Thomas C. Greenlaw*; and that was in consideration of the conveyance of the same land to him, which was previously the demandant's sole property. Both mortgages secured a benefit to his wife. Her interest, being purchased with his property, might have been defeated by his creditors. The principal contract, collaterally secured by the mortgage, was to support the demandant and his wife for their lives, and the life of the survivor. This contract procured by the husband, and for a consideration moving from him, he might release or discharge.

In *Draper* v. *Jackson et ux.* 16 *Mass.* 480, cited in the argument, *Jackson J.* by whom the opinion of the court was delivered, reviews the authorities, and goes into an elaborate consideration of the rights of the wife, upon securities, which the husband procures to be given jointly to her and himself, by which he is to be understood as intending to secure a benefit to her. "It is true," he says, "that the husband may afterwards change his mind, and may release the demand, or take a new security for it, or bring the action in his own name; and if he recovers the money, he will retain it to his own use." These remarks may be considered as referring to personal demands, but their release or discharge would also defeat any mortgage of real estate, by which they might be collaterally secured.

The husband may sue in his own name a bond given to the wife alone, during coverture, and it is held that he may do so, upon a bond given to her alone before marriage. 2 *Kent*, 120, and the cases there cited. If a bond given to the wife after marriage, is secured by a mortgage also given to her, he may bring an action on the bond in his own name, and why may he not also on the mortgage, with proper averments, showing his rights and the legal effect of the security? The money due on the bond is his, and if the land mortgaged is taken to enforce payment, or as payment, if not redeemed, there seems no good reason, why that also might not be claimed and held in the name of the husband.

It is a doctrine, well established by the authorities cited for the tenant, that when real estate is conveyed to husband and wife, they become joint tenants, and of a peculiar character; for they do not take by moieties, but by entireties, the husband and wife being regarded by law as one person. Hence if an estate be conveyed expressly in joint tenancy to husband and wife and to a stranger, the latter shall take one moiety, and the husband and wife, as one person, shall take the other moiety. *Shaw et al.* v. *Hearsey et al.* 5 *Mass. R.* 521. If then there could be any question, whether the husband could bring an action in his own name, upon a mortgage given to secure a support for the wife, which enures to the benefit of the husband, who is otherwise bound for her support, if such mortgage is given to husband and wife, we are of opinion, that he thereby acquires such a seisin,

as will enable him to maintain an action in his own name. The husband is most interested in the maintenance of the wife; and to him the duty may safely be confided. He conveyed his land to another, and took a reconveyance to himself and her, which the grantor was to hold however, if he furnished suitable maintenance for them both. Failing to do so, the husband has a right to take the land, which he had appropriated for this purpose, and which was the source from which the support was to come, into his own hands, that he may be enabled thereby to provide for himself and her.

Exceptions overruled.

JOSEPH BERRY *vs.* ELKANAH SPEAR.

In computing the three months within which an extent on lands is required by the statute to be recorded, the day on which the levy is made should not be included.

Where it appears from the record of a judgment, by inspection of the respective dates, that the writ was not made until after the return of an officer, on the back thereof, of an attachment of real estate, such attachment is void.

An officer will not be permitted to amend a return of an attachment of real estate upon a writ by altering the date thereof, when the rights of third persons have intervened.

THIS was a writ of entry on the demandants' own seisin, and was tried, upon the general issue, in the Court of Common Pleas, before *Smith J.* The demandant claimed title under the levy of an execution in favor of the *Thomaston Bank* against *Halsey Healey*, and a deed from the *Bank* to him. The writ was dated *January* 23, 1830; the officer's return, attaching the demanded premises, was dated the same day; the judgment was rendered at the *August* term of the C. C. Pleas, 1830; the execution was levied on the 10th of *September*, 1830; and the levy recorded, on the 10th of *December* following. The tenant claimed title under the levy of an execution in favor of *John Dresser* upon the same premises, as the property of said *Healey*, and a convey-

ance of *Dresser's* interest to him. The writ in favor of *Dresser* against *Healey* was dated on the eighteenth day of *January*, 1830; the attachment of the premises by the officer on the writ was dated the eighth day of the same *January;* judgment was rendered at the *April Term* of the C. C. Pleas, 1831; the levy was made within thirty days and seasonably recorded.

The counsel for the tenant contended, that the attachment made on the writ in favor of *Dresser* was valid, and being prior to that of the *Bank*, would hold the estate.

The Judge ruled, that it did not appear by the said return, dated the 8th of *January*, 1830, which was before the date of the writ, that the attachment on *Dresser's* writ was prior to the attachment made on the writ of the *Bank*. The tenant then offered to prove by the attorney, who made the writ, that the writ of *Dresser* was actually made on the 18th of *January*, and by him handed to an officer on the same day with directions to attach immediately all the real estate of said *Healey;* and that on the back of the writ, where the return now is, it was then entirely blank, without any words or figures thereon. This evidence was rejected by the Judge. The tenant then moved for leave to be granted to the officer to amend said return, so that it should read 18th, instead of 8th of *January*. But the Judge overruled this motion.

The counsel for the tenant then requested the Judge to instruct the jury, that the levy of the *Bank* against *Healey*, bearing date the 10th of *September* and not having been recorded until the 10th of *December*, was not in season, and was void, as it respected those claiming under the levy of said *Dresser*. The Judge declined so instructing them, and did instruct them, that the levy of the *Bank* was seasonably recorded, and that the demandant was entitled to recover.

A verdict was returned for the demandant.

To all these rulings and opinions of the Judge, the tenant excepted.

F. Allen and *Cilley*, for the tenant, contended; that as both parties claimed from *Healey* by levies, and the tenant's attachment was first in the order of time, this must prevail if valid. The return of the officer is, that by virtue of the within writ he

attached the land. This is made under oath, and is to be treated as a record, and cannot be shewn to be untrue in controversies between third persons. But the date of the writ is immaterial, when the Court, as in this case, was rightly described without it. If there had been no date, or an impossible one, it would not have made the writ or the attachment void. It is not necessary, that the writ should pursue the precise outline of the form of writs given in the *statute*. *Cook* v. *Gibbs*, 3 *Mass. R.* 193; *Wood* v. *Ross*, 11 *Mass. R.* 276. The date is immaterial, and the return fixes the true time, when the writ was sued out, and the attachment holds good from that time. Even the test of a writ by the first Justice, although a provision of the constitution of *Massachusetts*, was there held to be mere matter of form. All irregularities in the process must be taken advantage of by motion or plea of abatement in the first stages of the process. *Ripley* v. *Warren*, 2 *Pick.* 592; *Prescott* v. *Tufts*, 7 *Mass. R.* 209. This error in date was nothing more, than an irregularity, which the defendant in the action might waive, and did waive by appearing in the action, and then suffering the judgment against him.

The motion to amend is not abandoned, though considered of less importance, than the other objections to the Judge's decisions.

The levy of the *Bank* was not recorded in season. The words of the *statute* are "within three months." As the levy could be recorded on the same day that it was made, that must be included. The tenth of *December* therefore must be excluded, or the creditor would have more than three months. *Presbrey* v. *Williams*, 15 *Mass. R.* 193.

E. Smith and *Farley*, for the demandant, remarked, that the case shew, that the main ground now assumed in defence was wholly different from that taken at the Common Pleas, and wholly inconsistent with it. If the Court of Common Pleas decided rightly, on the case before them, there should be judgment on the verdict.

The return was made on the eighth of *January*, before the writ was made, on a mere blank. If amending a writ, so as to introduce any new cause of action destroys an attachment, much

more should making the whole writ do it. Whatever may be written on a blank piece of paper by an officer, it is no return.

The attempt to prove the officer's return wrong in date is abandoned, and a directly contrary course now taken.

Nor is the motion for leave to amend scarcely insisted on. The authorities are clear against the right. *Means* v. *Osgood*, 7 *Greenl.* 146; *Thacher* v. *Miller*, 13 *Mass. R.* 270.

The day on which the levy was made cannot be included, because the levy might be made on the last moment of the day. The statute contemplates, that the creditor should have his full three months.

But the tenant has no right to contest this question. His attachment was void, and his levy was not made until long after ours had been recorded. *McLellan* v. *Whitney*, 15 *Mass. R.* 137.

After a continuance, the opinion of the Court was drawn up by

Weston C. J.—Both parties claim under the title of *Halsey Healy*. The demandant makes out a title derived from him, the legal operation of which commenced on the twenty third of *Jan.* 1830, provided the levy of the *Thomaston Bank*, his immediate grantors, was seasonably recorded. The levy of the execution on the real estate in controversy, was made on the tenth of *Sept.* and it was recorded on the tenth of *Dec.* 1830. The statute requires, that this should be done within three months of the levy. In the computation of time, there is no settled and uniform rule, whether the *terminus a quo* shall be included. It is excluded in instruments for the payment of money, in a certain number of days. According to the reasoning of the court, in *Presbrey et als.* v. *Williams*, 15 *Mass. R.* 193, it should be included; for there is no doubt but the levy might have been recorded on the day it was made. We have been referred to no authority directly in point; and the decisions have been so various, that we have no settled principles for our guide. We have no doubt the statute intended to give the levying creditor full three months, within which to record his levy. The whole or the greater part of the day of the levy may be, and usually is consumed in examining the land, making the appraisement, and completing the return.

If that day is computed as part of the three months, the creditor will not be allowed that full period, after his levy is in a condition to be recorded. And upon the whole, our opinion is, that the registry on the tenth of *Dec.* was seasonable under the statute. And if it had not been, there having been no intervening attachment, levy or purchase, the title of the attaching creditor could not have been defeated upon this objection, according to the case of *McLellan* v. *Whitney*, 15 *Mass. R.* 138.

The demandant having made out his title must prevail, unless the tenant, who claims also under *Healey*, can show that his title commences from an earlier date. He shows an attachment by *John Dresser*, under whom he claims, which purports to have been made on the eighth of *Jan.* 1830, and if this point is established, or he can show a lawful attachment, prior to the twenty-third of the same *January*, such proceedings have been had, as would give effect to *Dresser's* attachment. But *Dresser's* writ is dated the eighteenth of *January*, upon which a service is returned as having been made on the eighth. Both cannot be right. It is said however, that this was matter in abatement; and that the judgment which followed was rendered by the consent of *Healey*, the defendant. That judgment was doubtless valid against him; but other attaching creditors have a right to require, that it should be made to appear affirmatively, that *Dresser's* attachment had precedence of theirs. The writ necessarily precedes the service. It is a part of the record, and it has an equal claim to the verity, which belongs to that species of evidence. It may be within the power of the court to order an amendment, either of the writ or the return.

The counsel for the tenant insists, that the date of the writ is right, and that of the service wrong; and he offers to prove it by the attorney by whom the writ was made. Upon the facts of the case, two inquiries are presented; first, whether *Dresser's* attachment, as the record stands, appears to have been prior to that of the *Thomaston Bank;* and secondly, whether the court below should have received the testimony, and allowed the amendment proposed. We are of opinion, that as the service could not have been made before the date of the writ, if made after, it is entirely uncertain as it stands, when it was made; and

therefore that it cannot have precedence of the bank attachment, about which there is no uncertainty. And we are further of opinion, that the rights of other attaching creditors having intervened, the presiding Judge properly refused to permit the officer's return to be amended. This question was fully considered and settled in *Means et al.* v. *Osgood*, 7 *Greenl.* 146. The exceptions are accordingly overruled.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC, MAY TERM, 1836.

ISRAEL HERRIN *vs.* JOSEPH EATON, SOLOMON EATON *and* CHARLES F. PAINE.

One tenant in common of a personal chattel may maintain an action against his co-tenant, by whom such chattel was received as a common carrier, and by whose negligence and carelessness it was destroyed.

Where the declaration alleges, that the three defendants received from the plaintiff a personal chattel, to be safely carried to a market, and that the boat in which it was put to be transported, was filled with water through the carelessness and negligence of the defendants, and that the property was thereby lost; and the defendants in a plea in abatement state, that the same property, at the time it was *lost and destroyed*, was owned by the plaintiff and two of the defendants, as tenants in common; *held*, on general demurrer, that it sufficiently appears, that the property was destroyed.

THIS was an action of *trespass* on the case. The first count alleged, that the defendants, being common carriers between *Clinton* and *Hallowell*, received from the plaintiff, on board their boat, to be safely carried, 758 bushels of oats, to be delivered at *Hallowell;* and that the defendants did not deliver the same, but carried them in so negligent and careless manner, "that the boat was filled with water, and the oats were lost." The second count was in *trover* for the oats.

The defendants filed a plea in abatement, stating in substance, that at the time when "the oats mentioned in the plaintiff's writ and declaration were lost and destroyed," the said *J. & S. Eaton* were owners and jointly interested in the same oats, and ought to

have been made plaintiffs in the writ with *Herrin*. To this plea in abatement the plaintiff replied, that "prior to the loss, destruction and conversion of said oats" by the defendants, the plaintiff and the said *J. & S. Eaton* were jointly interested, as tenants in common, in said oats, and that the said *J. & S. Eaton* afterwards entered into the business of common carriers with said *Paine*, "and said oats were lost, destroyed and converted by them, as mentioned in the plaintiff's declaration. To this replication the the defendants demurred, and the plaintiff joined in demurrer. The case was argued in writing.

Boutelle, in support of the demurrer.

It is clearly established law, that where an action is brought for an injury to an indivisible chattel, all the owners must be joined, though the nonjoinder can only be taken advantage of in abatement. 1 *Saund. R.* 291, *note f; Thompson* v. *Hoskins*, 11 *Mass. R.* 419. The replication attempts to avoid the facts stated in the plea by alleging that the *Eatons* were tenants in common with the plaintiff in the oats before they became common carriers, and undertook to carry them with *Paine*, and insists that this is a severance. But *Paine* has done no act, which will enable the plaintiff alone to maintain an action against him, and recover of him one third or one sixth of the value. *Sedgworth* v. *Overend*, 7 *T. R.* 278; *Holland* v. *Weld*, 4 *Greenl.* 255. But as the plaintiff has a count in trover, it is said the action may be maintained by the plaintiff against his co-tenants for an injury to the common property. But if the action can be maintained, it is only against the defendants in their character of common carriers. The action arises *quasi ex contractu*, and thence it is, that in an action against a common carrier, though framed in case, the defendant may plead in abatement the nonjoinder of the other owners. *Buddle* v. *Wilson*, 6 *T. R.* 369; *Powell* v. *Layton*, 2 *New R.* 365; *Max* v. *Roberts*, *ibid*, 454. But if the plaintiff could maintain his action of trover against the *Eatons*, as his co-tenants, for an injury to the common property, still it cannot be maintained on that ground against *Paine*, for he never had any ownership in the oats. It cannot be maintained against the *Eatons*. One tenant in common cannot maintain tro-

ver against a co-tenant, unless it shall appear, that the defendant has destroyed the common chattel, because each in law has a right to the possession. If one tenant in common forcibly take the chattel owned in common from his co-tenant, trover will not lie. 2 *Starkie's Ev.* 1495. It is said, that justice requires that this action should be maintained. There are many cases, where the parties are so situated, that one cannot maintain an action against the other. *Mainwaring* v. *Newman,* 2 *Bos. & P.* 120. If the law is to be made to bend to the supposed justice of every case, then it is useless to have law.

Wells, for the plaintiff.

It is a well settled principle, that in actions of tort, the plaintiff is entitled to recover, if he maintain his action against any one. The objection therefore is not to the number of defendants. But the plea in abatement states that two of the defendants should have been joined with the plaintiff, because they "were owners and jointly interested" with him in the oats. The case therefore presents this question: can one, who is owner and jointly interested with another, maintain an action against his co-tenant for the causes alleged in the plaintiff's declaration? That one co-tenant of a chattel, owned in common, has a right to use it is not denied. But if the chattel owned in common is destroyed or injured by one co-tenant, he is liable for the injury to the other. *Chitty on Pl.* 170; *Waterman* v. *Soper,* 1 *Ld. Raymond,* 737; *Martyn* v. *Knowllys,* 8 *T. R.* 145.

The action therefore lies against *J. & S. Eaton,* and the objection, that they should be made plaintiffs is removed. They are liable to the plaintiff, and not the less so, because another man is jointly liable with them.

Again, the replication states, and its truth is admitted by the demurrer, that the three defendants formed a partnership as common carriers, and they acted in concert with *Paine* in every thing alleged to be done in the declaration. For any injuries to their property occasioned by the joint acts of *Paine,* and themselves, they could maintain no action against him. This, therefore, may be considered a severance of the cause of action the plaintiff has for an injury to his property; and he certainly can sustain the

action against *Paine*, even if he cannot against the other defendants. *Holland* v. *Weld*, 4 *Greenl.* 255.

The opinion of the Court was drawn up by

WESTON C. J. — The point more directly presented to our consideration upon these pleadings is, whether the *Eatons* should have been joined, as plaintiffs in this action. This will depend upon the question, whether upon the facts set forth in the plaintiff's declaration, one tenant in common of a chattel can maintain an action, like the one before us, against his co-tenants.

If one tenant in common destroy the common property, trespass lies against him by his companion. *Coke Litt.* 200 *b.* So if one misuse a chattel owned in common, he is liable to the action of his co-tenant for the misfeasance. *Martyn* v. *Knowlleys*, 8 *T. R.* 145. In *Fennings* v. *Lord Grenville*, 1 *Taunton*, 241, the court admit that trover will lie by the party injured, where one tenant in common destroys the common property. To the same effect is *Mersereau* v. *Norton*, 15 *Johns.* 179. In *Oviatt* v. *Sage*, 1 *Conn. R.* 95, the court held, that a destruction of the chattel owned in common by one co-tenant, will render him liable in trover at the suit of another. And this was decided by the Court to be the settled doctrine in *Hyde* v. *Stone*, 7 *Wendell*, 354, and in *Gilbert* v. *Dickerson*, *ibid.* 449.

The defendants are charged in the plaintiff's declaration, with having carried the oats, confided to their care, in so negligent and careless a manner, that the boat in which they were transported, was filled with water, and the oats lost. Is this equivalent to an averment of the destruction of the oats by the *Eatons*, who were co-tenants with the plaintiffs? We are of opinion that it is. It is not traversed by the plea in abatement, but the defendants there pleaded the joint interest of the *Eatons*, at the time the oats mentioned and described in the plaintiff's declaration, "were lost and destroyed." They very properly understood the term, lost, to have had the same meaning as, destroyed, in the connection in which it stands.

There are cases in the books, where evidence of destruction by co-tenants much less strong, has been held sufficient. In *Barnardiston* v. *Chapman et al.* reported by *Lawrence J.* in the case

of *Heath* v. *Hubbard*, 10 *East*, 121, the plaintiff was owner of one moiety of the ship *Triton* in common with the defendants, who were the owners of the other moiety. The plaintiff, being in possession of the ship, the defendants took her forcibly, secreted her from his knowledge, changed her name, and sent her to *Antigua*, where she was lost. Trover by the plaintiff against the defendants was sustained, the jury having found, under the direction of the presiding Judge, the destruction of the ship by the defendant's means; and the Court of Common Pleas, on motion, refused to grant a new trial.

In *Sheldon* v. *Skinner*, 4 *Wendell*, 525, the parties were tenants in common of a number of swine, which had been fattened and in the possession of the defendant. He gave notice to the plaintiff to attend to a division of them, which he declined. The defendant then divided them himself, and turned the plaintiff's proportion into the street. This was held to be *prima facie* evidence of the destruction of them, and such as would enable the plaintiff to maintain trover against the defendant his co-tenant.

If upon the facts in the plaintiff's declaration, he is entitled to sustain either trover or case, against the defendants, his co-tenants, which we hold to be warranted by the authorities before cited, *Paine*, being a participant in the wrong, is equally liable. We accordingly adjudge the plea in abatement bad.

Judgment of respondeas ouster.

ALVAN BRADLEY *vs.* PEABODY H. RICE *& als.**

In a conveyance, where the land is bounded on a pond, the grant extends only to the margin of the pond.

And in such case, the grant is limited by the margin of the pond, as it existed at the time of the conveyance; whether it was then in its natural state, or raised above it by a dam, or depressed below it by the deepening of its outlet.

To, *from*, or *by*, are terms of exclusion, unless by necessary implication they are manifestly used in a different sense.

THIS was a complaint under the statute for flowing the complainant's land, by means of a dam, at the outlet of *Flying Pond*, in *Vienna*. At the time of the injury complained of, the lands upon the margin of *Flying Pond*, including the complainant's, were flowed by the dam of the defendants, more than they were by the pond in its natural state, but not more than they were at the time of the giving of the deeds in 1792, under which the complainant claims, by an old dam made by the proprietors of *Wyman's* plantation, now *Vienna*, prior to that time. So much of these deeds as is pertinent to the present case is stated accurately in the opinion of the Court. The defendants own the land, unless conveyed by the deeds under which the complainant claims.

The trial was before *Weston C. J.*, who instructed the jury, that the defendants had a right to raise the water, by means of their dam, above its natural level, but not higher than the first dam raised it in 1792, when the deeds under which the complainant claims were given. The verdict was for the defendants. If the Court should determine, that this instruction was wrong, and that the complainant's title covers the land to the pond in its natural state, then the verdict was to be set aside.

R. H. Vose, for the complainant, argued in support of the following positions.

1. That, as the deeds under which the complainant holds bound him upon *Flying Pond*, and give him an extent back until an hundred acres are completed, his land extends to the margin of the pond in its natural state.

* *Mem.* Parris Judge, having been called home by sickness in his family, was not present at the argument of this case.

In considering this question, it should be recollected, that it is a settled rule of construction, that in deeds between individuals, all doubtful expressions are to be taken most strongly against the grantee, he being supposed to select the words. *Canning* v. *Pinkham*, 1 *N. H. Repts.* 353; *Adams* v. *Frothingham*, 3 *Mass. R.* 361; *Worthington* v. *Hylyer*, 4 *Mass. R.* 205; *Watson* v. *Boylston*, 5 *Mass. R.* 411.

If the natural pond is intended by the expressions in the deed, then that boundary will be fixed and certain, and from it the proprietor may find a certain boundary of the other end of the lot. But if the pond, as it happens to be flowed, is intended, then the owner will have an ever varying line of boundary, depending on accident, or on the caprice of the occupant of the dam.

2. But the complainant is bounded upon the pond in its natural state, or as flowed by the dam; and in either case by law his land extends to the centre of the pond.

When the deeds under which he claims were given, the grantors owned the whole land, and had the power to grant as much as they chose, and on such terms as they pleased. There is nothing in the case, or out of it, to distinguish this from the multitude of small ponds in the country into and from which streams run. However the law may be in regard to large lakes, the principle is well settled, that when the grantee is bounded upon a common river, or pond, his grant extends to the centre of such river or pond. *Angel on Watercourses*, 80; *Lunt* v. *Holland*, 14 *Mass. R.* 149; *Hatch* v. *Dwight*, 17 *Mass. R.* 289; *Hathorn* v. *Stinson*, 1 *Fairf.* 238. Where land is conveyed, which is covered with the water of a mill-pond at the time, the purchaser is entitled to his damages accasioned by the flowing under the statute. *Hathorn* v. *Stinson*, before cited.

R. Williams and *Wells*, for the defendants.

1. The deeds under which the complainant derives his title bound his grantors upon the pond, or by the pond, or running to the pond. His land extends only to the margin of the pond, as it was at the ordinary height of the water of the pond, as it then was, flowed by the dam. And it can make no difference, whether this be a natural pond in its natural state, or flowed by a dam, or an artificial pond. The pond, as it then existed, is his boundary,

and he can go no farther. There is no greater difficulty in finding where the margin of a pond, raised by a dam, or entirely artificial, is, than of a natural pond in its natural state. The intention of the parties to a deed must govern, and in this case, it could not have been the expectation of either, that the owner of the whole property would retain the mill, and sell his mill-pond.

2. The title deeds, under which the complainant holds, refer to a plan of the plantation. This plan is as much a part of the deeds, as if copied into them. By an inspection of the plan, it will be seen, that no part of the pond is included in that lot.

It has been said, that the same authorities, which decide, that a grant bounded on a small fresh water-stream will carry the grantee to the centre of the stream, also extend the principle to the case of ponds. It is enough, that this grant extends only to the margin of the pond; and had it been a small stream instead of a pond, the result would have been the same. But none of the authorities cited extend the principle to the case of ponds. In the application of the principle, we know of no difference between a pond of half a dozen miles in circumference and *Moosehead* lake, or lake *Erie*. It is utterly impracticable to carry those principles into effect in case of a circular pond or lake.

The opinion of the Court was drawn up by

WESTON C. J. — The counsel for the complainant abandons in argument any claim for flowing any part of lot number eighty-five. By the deed of the westerly part of lot number eighty-four, it was bounded southerly on *Flying Pond*, and to extend thence northerly, until one hundred acres were completed. The easterly part of eighty-four was conveyed to run southerly to the same *Pond*, referring to a plan. By that plan that lot is laid down as running to, but not into, the *Pond*. The grantors of eighty-four had previously, by a dam, raised the waters of the *Pond* above its natural margin, for the purpose of creating a reservoir, to feed their mills.

The first question presented is, whether by these deeds, under which the complainant derives title, *Flying Pond* is made a boundary, as it then was, or in its natural state. And we are of opinion, that the *Pond*, as it then was, was the monument contemplated and intended by the parties. The accumulation of

water created by the dam, and that which had naturally collected, formed one aggregate. By the *pond* must be understood the whole collection of water, as it then existed, and as it presented itself to the eye. So if instead of extending its margin by a dam, the limits of the *pond* had been contracted, by deepening its outlet, land subsequently conveyed, bounded on the *pond*, would extend to its new margin.

To, from, or by, are terms of exclusion, unless by necessary implication, they are manifestly used in a different sense. This is clear, where land is conveyed bounded by the land of A. and running from the land of B. to that of C. But it is contended, that although lot number eighty-four runs to, and is bounded by the pond, it is not limited to its margin, but runs by construction of law to its thread or centre. It is true, that where land is bounded on a river or stream, where the tide does not ebb and flow, the owner's title by construction of law, extends to the centre or thread of the stream. But *Flying Pond* is not a river or stream. No case has been cited, nor have we found any, where that rule of construction has been extended to a pond or lake. *Neguasset* pond, which was the subject of discussion in *Hathorn* v. *Stinson et als.* 1 *Fairf.* 238, was a mere expansion of *Neguasset* river or stream. In that case, *Parris J.*, in delivering the opinion of the court, says, "the law of boundary, as applied to rivers, would no doubt be inapplicable to the lakes, and other large natural collections of fresh water, within the territory of this State. At what point its applicability ceases, it is unnecessary now to consider, as the case does not call for it."

The proprietors of the pond and of the contiguous lands, when they sold, to the pond, must have intended to reserve that as a reservoir for the purposes, to which it had been appropriated. They used a term of exclusion. Their intention and meaning is thereby manifested. Had the land been bounded upon a river or stream, or upon an artificial pond created by expanding a stream by means of a dam, the riparian proprietor would go to the thread of the stream. This is law well settled and understood. But it has not been so settled, with regard to ponds and lakes. Nor are we aware, that there can be one construction for small ponds or lakes, and another for large ones. Where shall the line be

drawn? At what point does the one construction end, and the other begin? In the absence of any direct authority, for extending by construction the bounds, which the grantors have prescribed in the deeds under consideration, we do not feel at liberty to do so, from any supposed analogy between streams and ponds. It is, to say the least of it, of very doubtful application. The grantees were carried to the pond; and we are not satisfied that they, or the complainant under them, has any right to go further.

In *Waterman* v. *Johnson*, 13 *Pick.* 261, the court held expressly, that land bounded on a natural pond, went no farther than the margin of the water. The construction, now urged for the complainant, was not there even contended for; although it would have been decisive of the cause.

Judgment on the verdict.

The President Directors & Company of the FREEMAN'S BANK *vs.* FRANCIS M. ROLLINS.

In a several action on a note by the payee against a surety, the principal is a competent witness; and his testimony is admissible to prove facts, happening after its execution, tending to discharge the surety.

Mere delay by the payee, after a note falls due, in enforcing payment against the principal, without binding himself to give further time, does not discharge a surety.

The receipt of interest for a stipulated time in advance from the principal by the payee, after the note has become payable, is not evidence of an agreement to give further credit thereon; and does not discharge the surety.

If the note be paid before the time has expired for which interest was paid in advance, the remaining balance of interest is to be applied towards the payment of the principal.

THIS was an action of assumpsit upon a note, dated *January* 13, 1834, signed by *Thomas Pinkham*, as principal, and by the defendant and one *Taber*, as sureties, whereby they jointly and severally promised to pay the plaintiffs, or order, $500,00 in fifty-seven days and grace. The note was produced, and the signature admitted. The defence was, that the plaintiffs had discharged the sureties by giving credit to the principal. The

defendant called *Pinkham*, the principal in the note, as a witness, and he was received to testify, although objected to by the plaintiffs, as incompetent. He stated, that at the end of eight weeks he proposed to the plaintiffs to pay them $150,00 of the principal of the note and the interest in advance for sixty days longer, with a request that he might have credit upon the note for that term, and that they accepted his proposition by receiving the money; that at the end of another eight weeks, he paid of principal the further sum of $150 with interest in advance for another term of 60 days, with the same request, which was accepted. It appeared, that at the end of another eight weeks, interest was paid in advance and indorsed on the note for another period of 60 days, but the witness had no recollection of paying the last interest, but had left at the Bank $25,00, which he did not know how they had disposed of. He testified, that he stopped payment on the 14th of *August*, 1834; that the defendant inquired of him from time to time what he was doing with the note, and was told, that he was reducing it; that the defendant was his near neighbor, had frequently been his surety at this and other banks, and was, as he supposed, apprised of the mode of doing business there.

The trial was before *Weston C. J.*, who directed a verdict to be returned for the plaintiffs, subject to the opinion of the Court. The jury, upon being inquired of, stated, that the defendant had a knowledge of and consented to the renewal of the note, upon payment of the interest and part of the principal, but that he neither knew of, or consented to a renewal of the note upon payment of the interest only; and they further stated, that the plaintiffs, by their acceptance of the last interest, did thereby intend to bind themselves to give a further credit on the note for the period of 60 days.

If in the opinion of the Court, the defendant proved sufficient matter of defence by competent testimony, the verdict is to be set aside, otherwise judgment rendered thereon.

A. Redington, jr. for the defendant.

The witness was rightly admitted to testify. He had no interest, for he was alike bound to pay the amount to the bank, or to the surety, if he paid the bank. He was not a party to the

suit, and not liable to objection on that account. A party to the note is a competent witness to testify to any facts transpiring after the note was given, tending to defeat it, or to shew payment of it. *Baker* v. *Briggs*, 8 *Pick.* 127; *Gibbs* v. *Bryant*, 1 *Pick.* 121.

The defendant, who was a mere surety on the note, is discharged from all liability by acts of the plaintiffs; and the action cannot be maintained against him.

Wherever the holder of the note delays enforcing payment, without the consent of the surety after it becomes due, and the surety thereby suffers an injury; he is discharged. The most respectable authorities go to this extent. But there are no conflicting decisions, where the holder of the note gives the principal delay, after the note is due, by any proceeding which will take away his right to enforce the payment by action, or which will prevent the surety from taking up the note, and securing himself. The taking of interest in advance for a stipulated time, unless the surety has been conusant of the course of business, and thereby assents to it, has been holden sufficient to discharge the surety. In this case, the sum of $25,00 was paid, as a consideration for waiting 60 days. Whether this contract would be sufficient to defeat a suit before the time expired, or would be the foundation of an action for damages for the breach of it, the result is the same. But in addition to the necessary inference, the jury have found, that the plaintiffs did intend to bind themselves to give a further credit of 60 days on the note. In this case, the principal failed during the time of the extended credit. *Kennebec Bank* v. *Tuckerman*, 5 *Greenl.* 130; *Paine* v. *Packard*, 13 *Johns. R.* 174; *King* v. *Baldwin*, 17 *Johns. R.* 384; *Fulton* v. *Mathews*, 15 *Johns. R.* 433; *Orme* v. *Young*, 1 *Holt's N. P. Cases*, 87; *Peel* v. *Tatlock*, 1 *Bos. & P.* 419; *Hunt* v. *Bridgham*, 2 *Pick.* 585; 2 *Paige's Chan. R.* 497; 3 *Paige's Chan. R.* 629; *Reynolds* v. *Ward*, 5 *Wend.* 503; *U. States* v. *Kirkpatrick*, 9 *Wheat.* 720.

Emmons, for the plaintiffs, argued, that mere delay, without fraud, and without legally binding themselves not to sue, will not discharge sureties on the note. *Strafford Bank* v. *Crosby*, 8 *Greenl.* 191; *Hunt* v. *Bridgham*, 2 *Pick.* 584; *Crane* v.

Newell, ibid. 612; *Frye* v. *Barker*, 4 *Pick.* 382; *Bellows* v. *Lovell*, 5 *Pick.* 307; *Oxford Bank* v. *Lewis*, 8 *Pick.* 458; *Blackstone Bank* v. *Hill*, 10 *Pick.* 129; *Hunt* v. *U. States*, 1 *Gallison*, 35.

The finding of the jury, that the plaintiffs intended to bind themselves to give a further credit on the note amounts to nothing. The finding was in the absence of all proof whatever; it was a question of law to be decided by the Court; and did not come within their province by the instructions of the Judge. The taking of interest in advance did not prevent the plaintiffs from maintaining an action on the note during the time, nor take away the right of the surety to pay the note, or tender payment of it. Even if they had promised in terms not to sue for 60 days, it would have been without consideration and not binding in law. *M'Lemore* v. *Powell*, 12 *Wheat.* 554.

The evidence negatives the pretence, that the $25,00 were paid, as a consideration for waiting another sixty days.

The action was continued, and at a subsequent term the opinion of the Court was drrawn up by

WESTON C. J. — The principal in the note, *Thomas Pinkham*, was offered and received as a witness for the defendant, although objected to by the counsel for the plaintiffs. His interest was exactly balanced, being answerable to the plaintiffs, if the note was not paid by the defendant, and to the defendant, if it was. He was not called to testify to facts, tending to show the note originally void, which would have been inadmissible, as has been decided upon the ground of public policy, but to subsequent transactions, by which the surety was supposed to have been discharged. The cases cited for the defendant, show, that a party to a note may be a witness to facts happening after its execution; and we are satisfied, that there is no legal objection to his competency.

The ground, upon which it is insisted that the defendant is discharged is, that the plaintiffs, the payees and holders of the note, had, without the consent of the surety, given further credit to the principal by an agreement, binding on their part. And by so doing it is urged, the condition of the defendant, the surety, has

been made worse. The case, principally relied upon by the counsel for the defendant, is that of the *Kennebec Bank* v. *Tuckerman*, 5 *Greenl.* 520. There was in that case a delay of nearly eight years; the defendants had requested the plaintiffs to collect the note of the principal, which they might have done, but neglected it; and instead of complying with the wishes of the defendant, the surety, expressly agreed to give the principal further time, until he became insolvent. The court in that case lay down the position, that mere delay on the part of the creditor, does not discharge the surety. But they do, upon the authority of the *New York* cases, cited in the argument, attach some consequence to the fact, that the defendant had requested the plaintiffs to collect the note of the principal. And that this might qualify or change the right of the creditor to remain passive, had received some countenance in the case of *Hunt* v. *Bridgham et al.* 2 *Pick.* 581, then cited, but in the subsequent case of *Crane* v. *Newell et al.* 2 *Pick.* 612, also cited, the doctrine was regarded as unsettled in *New York*. After the decision under consideration, the court in *Massachusetts*, in *Frye* v. *Barker et al.* 4 *Pick.* 382, held that a surety upon a promissory note was not discharged if the holder neglected to sue the principal at his request, and they express their doubts, whether the law in *New York* could be considered as otherwise settled. In *Bellows et al.* v. *Lovell*, 5 *Pick.* 307, the same position was maintained. As there was no such request by the surety, in the case before us, we are not called upon to settle this point.

In the case of the *Bank* v. *Tuckerman*, the plaintiffs were not merely passive, after the request of the defendant, but they expressly agreed in direct opposition to it, to give the principal further time. How much influence that request had upon that decision does not appear, but so far as it had, it differs from the case under consideration. But it differs also upon a point of still more importance. The agreement to wait is not left to be implied from the receipt of interest. The jury found that the plaintiffs did agree affirmatively to allow the principal further time. The evidence is not reported; but as there does not appear to have been any objection to the facts found by the verdict, there must be presumed to have been competent proof upon this point.

It appears in the present case, that at the end of the third eight weeks after the date of the note, interest in advance was indorsed thereon for another sixty days, but no part of the principal. There was no other evidence whatever of any agreement on the part of the bank in regard to that period. The jury upon inquiry as to the knowledge and assent of the defendant, in regard to the course pursued by the bank, found that he consented to a renewal of the note, upon payment of the interest and part of the principal, but that he neither knew of, nor assented to, the renewal of the note, upon payment of the interest only. The case finds, that they further stated, by which we must understand, without inquiry, that the plaintiffs, by their acceptance of the last interest, did thereby intend to bind themselves to give a further credit on the note, for the period of sixty days. The verdict, which was returned for the plaintiffs, by the direction of the presiding Judge, is to be set aside and a nonsuit entered, if in the opinion of the court sufficient matter in defence, was made out by competent testimony.

The holder may be passive. It is the business of the surety to see that the principal pays. If he does not, the surety may pay, and take measures for his indemnity, unless the holder binds himself to give further time; and herein consists the injury to the surety, which entitles him to be discharged. And this is the principle laid down in the *Massachusetts* cases, and most of the others cited for the defendant. And it is distinctly recognized, in *McLemore* v. *Powell et als.* 12 *Wheaton*, 554. Was such the effect of the last interest indorsed, which is the only evidence of any agreement on the part of the bank? Upon consideration, we regard it as manifesting an intention to wait, rather than as evidence of a binding agreement to do so. They were under no necessity thus to tie up their hands; and it is not to be presumed they intended to do any thing, which would have the effect of discharging the sureties. They might still have received the money of them, in which case the sum received in advance as interest, might and should be allowed as so much paid on account of the principal. The bank may have been willing, as a matter of favor and indulgence, to afford additional accommodation, presuming that it was desirable and acceptable to all the parties, who

had signed the note; but they could not have intended to preclude a surety from the exercise of the right he had, by the terms of the note, to pay it after it became due.

The effect of the receipt of interest in advance, upon a note held by a bank, without the knowledge of the sureties, has been directly settled in *Massachusetts*, in the case of *The Oxford Bank* v. *Lewis*, 8 *Pick.* 458. It was held that the bank notwithstanding retained the power of suing and might, if they apprehended a failure, have made an attachment; and that therefore the surety still remained liable. The same principle was again recognised and applied in the *Blackstone Bank* v. *Hill*, 10 *Pick.* 129. It is very desirable, that in relation to bills of exchange and notes of hand, there should be preserved in the commercial world, as near as may be, an uniformity in the law. It should be the same in *Maine* and in *Massachusetts*. There can be no difference, except what arises from judicial construction. In adopting their opinions, in the cases last cited, we do not overrule the case of the *Kennebec Bank v. Tuckerman*. There was a direct affirmative agreement to give further credit, for a period of nearly eight years, and that not only without the assent of the surety, but against his wishes and protestations.

It may deserve notice, that at the end of the first and second eight weeks, there was a distinct proposition of renewal made and accepted. There is no evidence that there was any negotiation whatever for a renewal, at the end of the third period. The only witness in the case, *Pinkham*, testified that he had no recollection of paying the last interest, but that he had left at the bank twenty-five dollars, which he did not know how they had disposed of. They indorsed the interest, but have not accounted for the residue. For any thing which appears, it ought to have been applied in part payment of the principal. And if that was reduced, the case finds, that the defendant assented to the renewals. That justice may be done to him in regard to this payment unless the plaintiffs will release that sum on the verdict, the opinion of the court is, that it should be set aside, and a new trial granted, but if released, it is to stand, and judgment is to be rendered thereon.

BENJAMIN DAVIS *& al. vs.* ISAAC THOMPSON.

A written authority from one to another to give a lease to a third person, on terms previously offered in writing by such third person, is not in itself a lease.

Thus, where C. by letter requested H. to obtain from T. his best terms for the rent of C's store; and T. made a proposition in writing to H. stating the terms on which he would take it for two years, a copy of which was sent by H. to C., who thereupon addressed a letter to H. authorising him "to conclude the business accordingly;" and H. made only a verbal agreement with T. that he should have the store on the terms offered; it was *held*, that this did not amount to a written lease, or agreement with T., that he might hold for the term.

A tenancy at will may be determined at any time at the will of either party; and *notice* to quit the premises, or of surrender thereof, does of itself terminate the tenancy at the time the notice is given.

Where a tenancy at will is determined by the *lessor*, the tenant is entitled to the emblements, and to a *reasonable time only* for the removal of his family and property, with the free ingress, egress and regress for the enjoyment of these rights.

The process to obtain possession under the statute of forcible entry and detainer, may be maintained against a tenant at will, at the expiration of thirty days from the time *notice in writing* to quit the premises is given. Under that statute *notice in writing* to quit, terminates the tenancy at will; and thirty days after such notice is given is the reasonable time allowed to the tenant to remove.

EXCEPTIONS from the Court of Common Pleas.

This was a process under the statute of *forcible entry* and *detainer*, originally commenced before a Justice of the Peace and of the Quorum, in which the complainants alleged seisin of certain land and buildings, in *Augusta*, by virtue of a deed from *Caleb S. Carter* to them, dated *March* 2, 1835. The respondent pleaded title in himself by virtue of a lease from said *Carter*, to him, commencing on the first day of *October*, 1834, to continue two years.

The complainants, to maintain the process on their part, introduced a deed from said *Carter*, dated *March* 2, 1835, and also an admission in writing from the respondent, that the complainants, more than thirty days before the commencement of the process, gave him a written notice to quit and deliver up the premises to them, and that he refused.

The respondent then proved by one *Hamlen*, that in the summer or autumn of 1834, *Carter* requested him by letter, to obtain from the respondent in writing, his best terms upon which he would hire the premises; that he did obtain such written terms, offering to pay a certain sum annually for the term of two years; that he kept the original in his possession, and sent a copy to *Carter* at *Portland;* that *Carter* immediately replied by letter to *Hamlen*, stating that he accepted *Thompson's* terms, and authorized *Hamlen* "to conclude the business accordingly; which letter was exhibited by *Hamlen* to *Thompson*, and *Hamlen* without any other writing authorised *Thompson* to occupy the premises; said *Hamlen* retaining the writing containing the terms of *Thompson*, and the letter of *Carter*, in his own hands."

The respondent, by his counsel, contended, and requested the Judge to instruct the jury, that the two letters, the one from *Thompson*, and the other from *Carter*, in connexion with the facts proved, of themselves constituted a lease, and that no further act was necessary to be done on the part of *Hamlen*, he being the agent of both parties, and holding letters of both, which constituted the lease. But *Smith J.*, before whom the trial was had, declined so instructing the jury; leaving it to the jury to determine from the whole evidence, whether *Carter*, before his deed to the complainants, had by any instrument or agreement in writing, directed to or intended for *Thompson*, authorized him to occupy the premises for the term mentioned in the proposals; and if the jury should find, that said *Carter* had thus authorized the said *Thompson*, they should find a verdict for the respondent; but if the jury should be satisfied, that *Carter* had in writing, only constituted *Hamlen* to be his agent, to close the bargain and lease the premises according to the instructions he had received from *Carter*, and *Hamlen*, by parol and without any instrument or agreement in writing, authorised *Thompson* to occupy accordingly; the authority thus given by *Hamlen* to *Thompson* constituted him a tenant at will only, and after thirty drys' notice, that tenancy was determined, and the jury ought to find for the complainants. The verdict was for the complainants. To the instruction of the court the respondent excepted.

Vose, for the respondent, urged:

1. The respondent, at the time of the institution of this process, was in possession of the premises by virtue of a written lease, or what was equivalent thereto.

Any words, which show the intention of the parties, that one shall divest himself of the possession, and the other come into it for a certain time, whether they run in the form of a license, covenant or agreement, are of themselves sufficient, and will in law amount to a lease. 4 *Cruise's Dig. title Lease;* 4 *Bac. Ab. title Lease, K; Shippey* v. *Denison*, 5 *Esp. R.* 193; *Saunderson* v. *Jackson*, 3 *Esp. R.* 181; *same case*, 2 *B. & Pul.* 238; 1 *Strange*, 426; *Sugden on Vendors*, 65, 67, 68; *Baxter* v. *Brown*, 2 *Wm. Blackstone*, 973.

2. But if the respondent had not a valid lease within the statute of frauds, still the process cannot be maintained. He held then under a parol lease for two years, and this is a tenancy from year to year; and in such case, if the landlord chooses to put an end to this tenancy, he must give at least six months notice to quit and deliver up the premises. The complainants who purchased of *Carter* took no greater rights than he had; for where a tenancy from year to year has once commenced, it continues against any person to whom the lessor afterwards may grant the reversion. 1 *Cruise Dig.* 285; *Birch* v. *Wright*, 1 *T. R.* 378. In *England* and in *New York* the law is settled, that six months notice to quit is necessary. *Clayton* v. *Blakey*, 8 *T. R.* 3; *Riggs* v. *Bell*, 5 *T. R.* 471; *Doe* v. *Porter*, 3 *T. R.* 13; 1 *Cruise*, 284; *Jackson* v. *Bryan*, 1 *Johns. R.* 322. And in *Massachusetts*, it is by no means settled, that six months notice are not necessary. *Coffin* v. *Lunt*, 2 *Pick.* 70, *note.*

3. If the Court should be of opinion, that the respondent is but a tenant at will, and is not entitled to six months notice to quit; still this process cannot be maintained.

He is by all the decisions entitled to a reasonable time to remove after notice, and that must at least be thirty days. During this time he is legally in possession, and the statute notice must have been given after that time. Here there was but one notice, and therefore cannot be considered both a notice to quit, and the statute notice, which can be good only when given after the right

to hold the possession has ceased. *Rising* v. *Stannard*, 17 *Mass. R.* 282; *Keay* v. *Goodwin*, 16 *Mass. R.* 1; *Ellis* v. *Paige*, 1 *Pick.* 43.

Potter, for the complainants.

The respondent never had a greater estate in the premises, than a tenancy at will. On his part, it was a mere proposition to hire for two years, made to *Hamlen*. On the part of *Carter*, there was only a written authority constituting *Hamlen* his agent to lease the premises. If he had kept this authority in his pocket, and had never authorized the respondent by parol to remain on the premises, there would have been no pretence, that it gave him any right whatever. The authority to the agent was to do some act, whereby *Thompson* might obtain the right to remain, as the lessee of *Carter*; but nothing was ever done binding upon either *Carter* or *Thompson*, as it was entirely by parol. Either might put an end to it at his pleasure.

The conveyance from *Carter* to the complainants put an end to all right to occupy under this parol permission. *Rising* v. *Stannard*, 17 *Mass. R.* 282; *Ellis* v. *Paige*, 1 *Pick.* 43; *Keay* v. *Goodwin*, 16 *Mass. R.* 1; 1 *Cruise Dig.* 190.

The correspondence, with the facts in the case, constitute but a parol lease. 4 *Kent's Com.* 130; *Parkhurst* v. *Van Cortlandt*, 1 *Johns. C. R.* 273.

The 4th *sec.* of the *stat.* of forcible entry and detainer does not require any other notice of the determination of the tenant's estate at will, than the notice to quit and deliver up the premises; and the statute expressly provides, that the process shall lie, if the premises are withheld beyond thirty days from the time the notice is given.

Weston C. J.—The propositions made in writing by the defendant to *Hamlen*, who had been requested by *Carter* to procure them, and the letter from the latter to *Hamlen*, accepting the terms proposed, although in reference to an interest in real estate, may be evidence of an agreement in writing required by the statute of frauds, and binding upon both parties. Many of the cases cited for the defendant, sustain this position. But a more important inquiry is, whether it amounts to a lease; or

merely an agreement to demise, between which there is a clear distinction.

In *Baxter* v. *Browne*, 2 *Bl. Rep.* 973, an agreement for a lease, whereby the lessor did let and set, for twenty-one years from a future day, was held, from the use of these terms, to constitute a lease, such being the interest of the parties, apparent from other circumstances. In *Goodtitle ex dem. Estwick* v. *Way*, 1 *T. R.* 735, a paper, containing words of present contract, "and further, the said *Earl* of *Abingdon* doth hereby agree to let, and the said *Richard Way* agrees to rent and take," upon terms and for a period set forth, one of which was, that *Way* should enter into the possession of the premises immediately, was held to be merely an agreement for a lease, there being a further stipulation in the same paper, that leases with the usual covenants should be made and executed, between the parties, within a limited period. And in *Roe ex dem. Jackson* v. *Ashburner et als.* 5 *T. R.* 163, it was held, that an agreement that another should enjoy, did not amount to a lease, if the parties intended that something further should be done. To the same effect, is the case of *Doe ex dem. Broomfield* v. *Smith*, 6 *East*, 530, and *Morgan ex dem. Downing* v. *Bissell*, 3 *Taunton*, 65. There are other cases, where an agreement has been construed as a present lease, where it was manifest the parties so intended; although it provided for future instruments of lease, by way of further security.

In the case before us, *Hamlen* had been requested by *Carter* to obtain from the defendant in writing his best terms for the premises. Accordingly the defendant stated in writing to *Hamlen*, upon what terms he would take them, for a further period of two years. A copy of this letter having been furnished by *Hamlen*, to his principal, *Carter*, the latter replied by letter to *Hamlen*, that the proposals were acceptable to him, and requesting him as his agent to conclude the bargain accordingly. It would be going a great way, to hold that this correspondence amounted to a lease. It might be evidence of an agreement for a lease; although it consisted of a proposal in writing to the agent of one party, the acceptance of which was not communicated in writing to the other party, but to the agent of the same party. *Carter*, in his letter to *Hamlen*, did not regard the business as finished, by

his acceptance of the terms, but authorized and requested *Hamlen*, as his agent, to close the bargain. This was an authority to him to make a lease; and clearly indicated that something was to be done. The defendant had no written evidence of his right to enjoy the property, which he had a good right to expect, and which *Carter* must be understood to have authorized *Hamlen* to furnish. For although he does not prescribe in what form, he was to close the bargain, yet it must be inferred, that authority was given to do it in a manner, which would be binding at law.

In *Allen* v. *Bennett*, 3 *Taunton*, 169, *Mansfield C. J.*, said, that there had been many cases in chancery, some of which he thought had been carried too far, where the court had picked out a contract from letters, in which the parties never certainly contemplated, that a complete contract was contained. And we are of opinion, that if an agreement for a lease may be picked out of the letters under consideration, they do not amount to a lease; and that the parties contemplated a close of the bargain by proper instruments.

As the agent, *Hamlen*, did not discharge the trust confided to him in a manner which was effectual at law, it may admit of some question, whether what he said to the defendant gave him any rights whatever; and if it did not, he remained only tenant at sufferance. But assuming that he was thereby constituted tenant at will, it is insisted that it has the effect of a tenancy from year to year; or of such a character, as to entitle the defendant to six months notice to quit.

In *Ellis* v. *Paige et al.* 1 *Pick.* 43, the *English* cases, in regard to tenancies from year to year, were held to be inapplicable here, where parol leases have the effect of leases at will only; and such we understand to be the law and practice of this State. It results, as incident to a tenancy at will, that it may be determined at the will of either party; and that neither is obliged to give notice of a future day, when the estate shall determine. And this is understood to have been stated by the court in *Ellis* v. *Paige*. It is true, that in *Coffin* v. *Lunt*, 2 *Pick.* 70, *Parker C. J.*, says it is a difficult question, to determine whether a tenant at will is entitled to notice to quit, stating however that the *English* and *New-York* cases do not settle the point here,

where the statute is different. Whatever doubt may be thrown upon the question by this intimation, the opinion of *Wilde J.*, by whom the judgment of the court was delivered in *Ellis* v. *Paige*, has not been overruled; and it is in accordance with the nature and incidents of an estate at will. *Coke Lit.* 55, *a.*; *Bl. Com.* 143. We accede to the doctrine, in which all the court concurred in that case, that where the lessor determines the estate, the lessee is entitled to the emblements, and to a reasonable time for the removal of his family and property, with free ingress, egress and regress for the enjoyment of these rights; and this is no new principle, but in conformity with the ancient law. If the defendant was tenant at will, in our judgment, when the plaintiff notified him to quit and surrender up the premises, his estate was determined. And we are further of opinion, that the defendant was liable to this process, having held more than thirty days after he had notice in writing to quit; and that the statute intended that this remedy should be afforded upon written notice given, after thirty days, if the estate had determined, when the notice was given. We do not assent to the correctness of the position, taken by the counsel for the defendant, that notice to quit under the statute could not be given, or the thirty days begin to run, until the tenant had first had a reasonable time to remove, after the determination of the estate. The thirty days' notice is itself the reasonable time required, and must have been so regarded by the statute.

The Judge below was warranted in deciding, as a matter of law, that the letters did not amount to a lease, without the aid of the jury; but the result is none the less correct for having their sanction.

Exceptions overruled.

SAMUEL CURRIER *vs.* JOSEPH EARL.

Where the testator gave the use of his dwellinghouse to his widow during her life, and directed that she should be supported out of his estate, and in case of failure of performance, to have dower in all his real estate; gave legacies to his daughters to be paid by his executor; and devised his farm to the person named, as executor, on condition, that he discharge the duties required by the will; it was *held*, that these provisions for the widow and daughters, were legacies to them and a personal charge on the executor, but not a charge upon the land, after its conveyance by the devisee.

After such conveyance, between the grantee and grantor, the latter is estopped to deny the title of the former.

If the grantor continue his occupation after the conveyance, he is considered, as tenant at will to the grantee; and if the grantor deny the title of the grantee, and resist his claim, as owner, the latter may elect to consider him a disseisor, and maintain a writ of entry against him, as tenant of the freehold.

Where a tenant at will terminates the tenancy by his own acts, he is only entitled to a reasonable time for removal, before process of law will lie to effect it.

Where the premises consisted of tillage, mowing and pasturage land, a notice of forty-five days was held sufficient.

THIS was a writ of entry, dated *July* 21, 1835, in which the demandant counted on his own seisin and a disseisin by the tenant. The general issue was pleaded, and a brief statement made by the tenant stating, that he was not at the time of the commencement of the action tenant of the freehold.

The land in controversy was once the property of *Daniel Wing*, and the demandant gave in evidence a deed from the tenant to himself, dated *Nov.* 30, 1833, of an undivided half of the farm formerly belonging to *Daniel Wing*, deceased; and shew a division with the owner of the other half, assigning the demanded premises to the demandant, as his sole property.

The tenant gave in evidence a copy of the will of *Wing* of which he was sole executor. By the will the testator gave the widow the use of the dwellinghouse during life, various articles of personal property, "a good and comfortable living out of his estate, to be provided for her by the executor in such manner, as she might reasonably request and desire;" and in case she should be dissatisfied with the support, maintenance, or treatment of said executor, then in lieu thereof, she is at liberty to take one third

part of all my farm in addition to the dwellinghouse and furniture" and also "to have the income of two cows, to be provided by said executor and kept at her own expense," and in such case, "my executor will be released from all obligation for her support." The testator gave to his two unmarried daughters, two hundred dollars each to be paid them by the executor; and made other provision for them, including the right to live in the dwellinghouse, while they remained single. The devise to the tenant was in the following words: "I give and bequeath unto *Joseph Earl* and *Henry Wing* all the rest, residue and remainder of my property, both real and personal, on the following conditions, *viz:* that the said *Joseph Earl* support and maintain my wife, his mother, to her satisfaction, as is heretofore mentioned, and support and maintain my two daughters, and pay to them two hundred dollars each, as therein mentioned, then he is to have one half of all the rest, residue and remainder of my property, as aforesaid."

The dwellinghouse was not upon the demanded premises, nor did the tenant reside thereon. After the deed of *Nov.* 1833, the tenant remained in the occupation of the demanded premises, consisting of mowing, pasturage and tillage land, until the commencement of the action, and by the demandant's consent until the sixth day of *June*, 1835, when he forbid the tenant "from touching, meddling or going on to the premises at his peril." There was evidence, on the part of the defendant, tending to shew, that at different times before the commencement of the suit, the tenant had denied the title of the demandant, refused to give up the possession, and claimed the property, as his own. And also on the part of the tenant, tending to shew, that after the 6th of *June*, the demandant had consented, that the tenant should continue his occupation indefinitely, or so long as he continued to support the widow. There was no evidence, that *Earl* had failed to perform the conditions expressed in the will. In the spring of 1835, the tenant built some fence, and ploughed up and put manure on some of the land, but it did appear that he planted before the sixth of *June*.

Weston C. J., before whom the action was tried, instructed the jury, that the tenant after his deed in *November*, 1833, was only a tenant at will to the demandant, and that if he denied the

demandant's title, and disclaimed his tenure, in such case, that of itself was a determination of the tenancy, and a disseisin at the election of the demandant, and that he was not entitled to any other notice to quit, as his counsel had contended he was, than was proved to have been given him on the sixth of *June;* and that the demandant was entitled to their verdict, unless they were satisfied from the evidence, that subsequent to the giving of such notice, the demandant had revoked it, and consented, that the tenant should continue his occupation, which would be a waiver of his right to treat him as a disseisor, and that if so, the tenant had established the fact set forth in his brief statement, that he was not tenant of the freehold. The verdict was for the demandant. If they were not properly instructed, or if the court should be of opinion, that by the will of *Daniel Wing*, the tenant had a right to occupy the land notwithstanding his conveyance to the demandant, the verdict was to be set aside.

The case was argued in writing, by *Evans*, for the demandant, and by

Wells, for the tenant.

In his argument, the counsel for the tenant contended:

1. That the tenant was not *tenant of the freehold.*

The position of the demandant is, that the refusal of the tenant to remove from the premises is a disseisin done to him, and that thereby the tenant wrongfully acquires the freehold. It involves the inquiry, whether it was wrongful in the tenant to hold the property after his deed to the demandant. This deed conveyed only the right, which the grantor had in the premises, and could not transfer his right to act under the will of *Wing*, or give any rights he had to occupy the land under the will, as executor, to perform the duties incumbent on him, as such. The conveyance by the person, who happened to be both devisee and executor, of his right in the land, could not destroy or diminish the benefits bestowed upon others in the same will. The widow had the right to occupy the dwellinghouse, and have a comfortable living out of the estate, to be provided by his executor. He is not only to furnish fuel for the fires, but to make them, and to do many other acts, which could be performed only by entry on the land. This right and duty under the will is paramount to any individual

interest he took, as devisee. The demandant's claim must be in subjection to the will of *Wing*, and he can support no action against *Earl* for acting under it, and carrying its provisions into execution. The tenant may have done wrong in conveying the demandant more than he owned, and may seek his remedy in damages, but this does not preclude the tenant from saying that he is tenant or servant of another. The demandant cannot succeed in the discharge of the duties and offices prescribed in the will, because this cannot be transferred to another. *Clinton* v. *Fly*, 1 *Fair.* 292.

Should the demandant recover, as there would be no one in possession, who could perform the conditions upon which the farm was devised to the tenant, the heirs of *Wing* would have a right to it, and could recover it, and put the tenant in under them. *Gray* v. *Blanchard*, 8 *Pick.* 284. So that a decision in favor of the tenant would avoid circuity of action.

2. The tenant did not make himself tenant of the freehold in consequence of his refusal to deliver up the possession, when requested by the demandant, because he was entitled to a longer notice to quit.

Between the sixth of *June* and the date of the writ, there are but forty-five days. This was not enough. *Chancellor Kent* says, that the later and more liberal rule seems to be, that tenants at will are entitled to notice to quit before they can be evicted by process of law. *Kent's Com.* 4; 113, 3*d. edition.* And that where no certain term is agreed upon, they are construed to be tenancies from year to year. *Ibid.* 111. The ancient rule of the common law required in such cases six months notice to quit. *Ibid.* 112, 113. Here the tenancy commenced when the deed was given in *November*, 1833, and for no definite term of time. The rule of the common law makes six months notice to quit necessary. That law was brought with us, as a part of our own, and why does it not remain so? True it is said, in *Ellis* v. *Page*, 1 *Pick.* 43, that a tenant at will is not entitled to common law notice to quit, but is to be allowed only time for a removal. By a note, in the case, *Coffin* v. *Lunt*, 2 *Pick.* 71, it appears, that Judges *Jackson* and *Wilde* dissented from this opinion, and *Chancellor Kent* refers with approbation to the opinion of the dissenting

Judges. In *Rising* v. *Stannard*, 17 *Mass. R.* it seems, that a reasonable notice was deemed proper, but in *Coffin* v. *Lunt*, 2 *Pick.* 70, the Court seem to consider the question, as not yet fully settled in *Massachusetts*. Well then may it be considered an unsettled question here.

But by all the authorities a reasonable time should be given. The counsel here brought to the view of the Court the various circumstances tending to shew, that in this case forty-five days was too short notice, cited the opinion of Judge *Putnam*, in *Coffin* v. *Lunt*, and the revised *statute* of *Mass.* in 1835, *part* 2, *tit.* 1, *ch.* 60, *sec.* 26, and contended, that three months was the shortest time which could be deemed reasonable in this case.

Evans, for the demandant, contended:

1. That the tenant was tenant of the freehold. He was in the actual occupation of the premises, and denied the right and ownership of the demandant, and refused to restore to him the possession. From the facts in the case, who was tenant of the freehold? Not the widow, for she did not live upon the land, and no person but the tenant did. As it respects this question, not the question whether he had a right under the will to hold the possession against the demandant, the will, if it shews any thing touching it, shows that *Earl* was tenant of the freehold. The devise is to him of one half of the farm in fee, and in pursuance of it, he entered into possession, was seised, aliened, and even still claims to be in the absolute and undisturbed possession of the freehold. The demandant is kept out of the possession by the tenant, and there is no person against whom the action can be brought, but against him. As it respects this question, it is immaterial wherefore he sets up his claim to retain the possession, if he refuses to yield it up to the owner.

2. There is nothing in the will of *Daniel Wing* to defeat the demandant's title, or his right to the possession.

The tenant is estopped to deny the demandant's title. It emanated from himself, and he is not permitted to question it. He cannot aver, that nothing passed by his deed to the demandant. This is a well established principle. *Jackson* v. *Murray*, 12 *Johns.* 201; *Jackson* v. *Bull*, 1 *Johns. Ca.* 90; *Wilkinson* v.

Scott, 17 *Mass. R.* 249; *Co. Lit.* 45, 47; *Jackson* v. *Morris*, *Cro. Car.* 110.

But even if the tenant is permitted to deny the demandant's title, there is nothing in the will to defeat it. By the will, *Earl* was entitled to one half of all the property, real or personal, not before devised; and if it was clogged with conditions, it was nevertheless alienable, and would pass "*cum onere.*" If the provisions of the will are not performed to her satisfaction, she may have dower, but until she asserts her claim, she has nothing in the demanded premises. It is enough that neither the widow has yet claimed dower, nor the heirs of *Wing* entered for forfeiture, and no facts have yet occured to warrant their doing so. The estate may well pass, and if such claims come, the demandant must meet them. The provisions for the widow were in lieu of dower, which she might have waived, and asserted her claim, but it may now be too late. *Reed* v. *Dickerman*, 12 *Pick.* 146. The direction of the will in regard to the support of the widow is a legacy to her to be paid to her by the executor, and like other legacies, "out of the estate." The articles necessary for her support may be furnished from any other land, as well as from this. *Earl* may be liable personally, and on his bond, but the land is not chargeable on that account, at the extent, further than by asserting her claim to dower. *Earl's* liability is as executor, and not as devisee. The case of *Clinton* v. *Fly*, cited on the other side, was one of personal confidence, growing out of the particular state of the parties. The payment of a legacy like this has not been so regarded. *Crooker* v. *Crooker*, 11 *Pick.* 252; *Farwell* v. *Jacobs*, 4 *Mass. R.* 634; *Wood J.* v. *Barstow*, 10 *Pick.* 368; *Baker* v. *Dodge*, 2 *Pick.* 619.

The condition in the devise to *Earl* is clearly a condition subsequent. It was not to be performed before the estate should vest in the devisee. Nor is it a devise in trust. Possession is not necessary to *Earl* to enable him to perform the conditions expressed in the will.

3. The only remaining inquiry is, what notice, if any, was the tenant entitled to before the demandant could maintain his suit? It has been expressly decided in *Massachusetts*, *Ellis* v. *Page*, 1 *Pick.* 47, that one circumstanced like the tenant is not entitled to

notice. The whole Court did not concur, but the case has not been overruled. The dissenting Judges only contended for reasonable notice. The case of *Rising* v. *Stannard*, relied on upon the other side, is prior to *Ellis* v. *Paige*, and there only reasonable notice is held to be necessary. *Earl* was a mere tenant at will, and not entitled to any notice, for that cause; and also for another reason, that he had himself terminated his estate. The only reason in any case for giving notice is, that the tenant at will may know, that his tenancy is at an end, and when he puts an end to it himself, the reason fails. The denial of the title of the demandant by *Earl* was in itself a disseisin, and put an end to his tenancy. *Campbell* v. *Procter*, 6 *Greenl.* 12; 1 *Inst.* 556; 2 *Bl. Com.* 146. But if any notice to quit was necessary in this case, reasonable notice only was required, and that was given. The tenant did not dwell on the premises, and the only notice, which could be necessary was such, as should prevent a fruitless journey to the land, when he had no right to enter on it. If there were any emblements to which he was entitled, he had no right to retain the possession of the whole premises for that cause, but only the right of egress and regress afterwards to gather his crops without being liable to trespass. 2 *Bl. Com.* 145.

The opinion of the Court was drawn up by

Weston C. J. — There can be no doubt but the tenant, under the will of *Daniel Wing*, was entitled to a vested interest in the premises in controversy, upon a condition subsequent. And although the devise is not in express terms to him and his heirs, yet it was by construction of law, the devise of a fee. First, because it operated upon all his real property, not previously devised; secondly, because it was attended with such a charge upon the devisee, that less than a fee might not prove a beneficial interest. The tenant then had an estate in fee. A right and power of alienation is one of its most valuable incidents. An express condition, that tenant in fee shall not alien, is void in law. *Lit. sec.* 360. *Doe ex dem. Mitchinson* v. *Carter*, 8 *T. R.* 57.

The house, which by the will was subject to the control of the widow of the testator, forms no part of the demanded premises. The support and maintenance of the widow and the two daugh-

ters of the testator, was charged upon the tenant. A provision of this sort has been adjudged to be a personal legacy to the objects of the testator's bounty. *Farwell* v. *Jacobs*, 4 *Mass. R.* 634; *Wood, Judge* v. *Barstow*, 10 *Pick.* 368; *Crocker* v. *Crocker*, 11 *Pick.* 252. If the tenant, as residuary legatee, gave bond to pay the debts and legacies, that affords security to the other legatees. If not, the widow, if dissatisfied, may take to herself, by the express provisions of the will, the use and occupation of a third part of the estate. And the daughters, if their maintenance is withheld, as heirs at law, may enter for condition broken. Their security is ample to enforce performance of the bequest to them.

The tenant may provide for the support of the widow and daughters, without occupying the estate devised. His tenure could not be regarded such, as to confine him to that position, for their lives and the life of the survivor of them, if they remained unmarried; and thus to cut him off from all hope of bettering his condition, by a change of residence, or by seeking other business or employment. No such condition is expressly imposed; nor does it necessarily result from the duties prescribed to him.

This case differs from that of *Clinton* v. *Fly*, cited for the tenant. That was in relation to a personal trust, resting in contract, which from its peculiar circumstances, the Court held not assignable to strangers. Here the trust assumed by the tenant, as executor, is not assigned. It is still his personal duty to furnish the maintenance, provided by the testator for his widow and daughters. He has only conveyed that, which was given him as the consideration for the performance of this duty. And we are of opinion, that the tenant had, as incident to his estate, the privilege of alienation, which he undertook to exercise. It is true the objection to this power is interposed by himself. He now deems it for his interest to contend, that he never had any such privilege. He first sells his land, and receives his pay for it, and then invokes the aid of the Court to permit him to retain it. We cannot but regard the claim as little consistent with morals, as with the principles of law.

It does not appear that any question as to the demandant's title, was raised at the trial; but as it has been presented in argu-

ment, we have examined the right of the tenant to convey. But if he conveyed without right, he would have been estopped by his deed to deny the demandant's title. After that deed, he occupied as tenant at will to the demandant. One point taken is, that the action cannot be maintained, because he was not tenant of the freehold. We cannot however entertain a doubt, that his continuing to hold adversely to the demandant, resisting his claim, and setting him at defiance, was a disseisin at his election. And this is a sufficient answer to that objection.

It is lastly contended, that the demandant could not terminate the tenancy and recover the land, without giving the tenant seasonable notice to quit, and it is denied that such notice was given. To this it may well be replied, that the same acts, which made him a disseisor at election, terminated the tenancy on his part. *Campbell* v. *Procter*, 6 *Greenl.* 12. But we have already decided, in the case of *Davis et als.* v. *Thompson*, *ante p.* 209, that where a tenancy at will is determined by the lessor, the tenant is entitled only to the emblements, and to a reasonable time for the removal of his family and property, with free ingress, egress and regress, for the enjoyment of these rights. In this case, there were no emblements. If the tenancy is to be considered as determined by the demandant, and not by the tenant, it appears that notice to quit was given by the demandant on the sixth of *June*, and the writ, it is agreed, was dated an the twenty-first of *July* following. That notice must be regarded as amply sufficient to enable the tenant to enjoy all his rights, and to justify the action, when it was instituted.

Judgment on the verdict.

Inhabitants of GREENE *vs. Inhabitants of* WINDHAM.

The residence of the wife is evidence of the domicil of the husband; but it is not conclusive; if he has abandoned her, or she has abandoned him, he may establish his domicil elsewhere.

Whoever removes into a town for the purpose of remaining there for an indefinite period, thereby establishes his domicil in that town.

A change of domicil is not effected by an intention to remove, until that intention is carried out, by an actual removal.

The domicil of a man depends upon the place where he does actually reside, and not upon the place where his legal or moral duties call upon him to reside.

The wife has by law derivatively the settlement of her husband; and this rule operates so long, as the marriage tie remains undissolved.

THIS was an action of assumpsit for the support of a pauper named *Alice Wade.* The question in dispute was, where was the legal settlement of the pauper, which was alleged by the plaintiffs to be in *Windham.* The pauper was legally married to *John Wade* on the 4th of *November*, 1816, at the house of her father, *Timothy Wright*, in *Lewiston.* It was proved, that after the marriage, they removed to *Greene*, about three miles distant, and lived together and kept house two or three months, when they disagreed, and she went to her father's in *Lewiston*, complaining of an illicit cohabitation of her husband with another woman; that said *Wade* went to various places and finally to *Freeport*, where the form of a marriage took place between him and one *Sally Miller;* that he lived a few months in *Freeport*, and then went with her and carried a small supply of furniture to *Cumberland*, and from thence, in *December*, 1820, to *Windham*, and there dwelt in a house which he had permission to occupy and cohabited with her there until the spring following after the 21st of *March*, 1821.

The defendants called a witness, who testified, that he knew *Wade's* wife at the time of the marriage, and while they lived together in *Greene;* that *Wade* went off and never returned; and that the wife went to her father's in *Greene.* They also called her father and mother, who testified, that when *Alice* returned, the cause she alleged was the misconduct of her husband; that she claimed a bed and quilt after her return, being the same

she had claimed before her marriage; that she always continued to reside in *Lewiston*, or in *Greene*, adjoining towns, from that time until the commencement of this action; and that *Wade*, her husband, never returned to his wife, nor made any communication to her, nor furnished her with any thing for her support.

The counsel for the defendant requested the Judge to give the following instructions to the jury.

1. That if they should find, that said *John Wade*, on the 21st of *March*, 1821, had a lawful wife in *Greene*, or *Lewiston*, with a portion of his furniture, and that she was living in one of those places at that time; that by law his home would be where his wife and furniture were.

2. That he would not acquire a legal home in *Windham* unless he went there for the purpose of a permanent residence.

3. That if he entertained that intention at one time, still if he abandoned it before *March* 21, 1821, he would not, under the facts assumed in the first request, gain a settlement by force of the statute of that date.

4. That if *Wade* left his wife by reason of his own misconduct, and not that of his wife, it was his legal duty to return to her, but that it was not her duty to follow him, and that his home would so depend upon his legal obligations.

5. That if they should find, that said *Wade* left his wife without any legal cause, and they continued ever after to live separate, that the said *Wade's* wife might have acquired a legal settlement in the town in which she resided on the 21st of *March*, 1821, although her husband was not resident there.

Weston C. J., before whom the trial was had, *upon the first point*, instructed the jury, that the residence of *John Wade's* lawful wife, with such of his furniture as had been left with her, if any, would furnish evidence that his home or domicil remained in the same place; but if he had abandoned her, and they had finally separated, his home might by law be in a different place.

Upon the second; he instructed them, that if he went to reside at *Windham* for an indefinite period, and if when he established himself there, he had no intention of going elsewhere, *Windham* would become his home.

Upon the third; that if he there-afterwards came to a resolution to remove from *Windham* prior to the 21st of *March*, 1821, his domicil would not be changed, until he carried such resolution into effect.

Upon the fourth; that his home, within the meaning of the pauper law, did not depend upon any legal obligation he might be under to return to his lawful wife.

The Chief Justice declined to give *the fifth instruction* requested; but stated to the jury, that the wife would by law have derivatively the settlement of her lawful husband.

The verdict was for the plaintiffs; and was to be set aside and a new trial granted, if the instructions withheld ought to have been given, or those which were given were erroneous.

F. Allen, for the defendants, contended, that the instructions, requested at the trial, ought to have been given, and that those which were given were erroneous and prejudicial to the rights of the defendants; and cited the following authorities in support of his argument.

1st. request. *Richmond* v. *Vassalborough*, 5 *Greenl.* 396.

2d. *Knox* v. *Waldoborough*, 3 *Greenl.* 445.

3d. He referred to both the cases before cited.

4th. To the ruling of the late Chief Justice, in *Raymond* v. *Harrison*, where the parties were said to have submitted to the correctness of the ruling, and settled according to it. This request is founded on that ruling.

Wells, for the plaintiffs, said, that as the jury, under the instructions of the Court, had found a verdict for the plaintiffs, the only question was, whether there was any thing against law in the giving or withholding of instructions. He argued, that in each particular the Court was right; and cited these authorities. 1st instruction right. *Richmond* v. *Vassalborough*, cited on the other side; *Westbrook* v. *Bowdoinham*, 7 *Greenl.* 363; *Greene* v. *Buckfield*, 3 *Greenl.* 136. 3d. instruction. *Hallowell* v. *Saco*, 5 *Greenl.* 143. 4th. Is a man's domicil where he ought to live or where he does live? 5th. *Stat. ch.* 122, § 2; *Dixmont* v. *Biddeford*, 3 *Greenl.* 205; *Hallowell* v. *Gardiner*, 1 *Greenl.* 92.

The opinion of the Court, after a continuance, was drawn up by

WESTON C. J. — The residence of the wife is evidence of the domicil of the husband; but it is not conclusive. If he has abandoned her, or she has abandoned him, he may establish his domicil elsewhere. *Dixmont* v. *Biddeford*, 3 *Greenl.* 205. Whoever removes into a town, for the purpose of remaining there for an indefinite period, thereby establishes his domicil in that town. It is not necessary that he should go, with a fixed resolution to spend his days there. He might have in contemplation many contingencies, which would induce him to go elsewhere. Some persons are more restless in their character, and migratory in their habits than others, but they may and do acquire a domicil, wherever they establish themselves for the time being, with an intention to remain, until inducements may arise to remove.

A change of domicil is not effected, by an intention to remove, until that intention is carried out, by an actual removal. *Hallowell* v. *Saco*, 5 *Greenl.* 143. If it was the moral or legal duty of the husband, to abandon the illicit connexion he had formed, and to return and be reconciled to his lawful wife; he did not think proper to submit to what duty required; for the jury must be understood to have found, under the instruction they received, that he had finally separated from and abandoned his wife. Domicil does not depend upon legal or moral duties of this character. In *Richmond* v. *Vassalborough*, 5 *Greenl.* 396, it is said by the late Chief Justice, that "the Court do not look to the virtues of a pauper or of his wife, in ascertaining the place of his legal settlement."

The wife has by law derivatively the settlement of her husband; and this rule operates, so long as the marriage tie remains undissolved. To decide otherwise, would be a departure from an express provision of the statute, in relation to paupers.

We are satisfied with the correctness of the instructions, given at the trial; and that the Judge was legally warranted in withholding such as were requested.

Judgment on the verdict.

UPHAM T. CRAM *v.* JESSE AIKEN *& als.*

Goods shipped on deck and lost by jettison are not entitled to the benefit of general average.

Where goods are transported by water from place to place, an usage at such places to carry a certain description of goods on deck, after the hold is full, does not render the owner of a vessel liable to contribution for the jettison of such goods, when laden on deck.

And where, by the usage of the place, such goods pay the same freight, when carried on deck as if carried in the hold; they are not entitled to the benefit of general average, when paying full freight, if they are laden on deck and lost by jettison.

THIS was an action of *assumpsit* for contribution upon the principles of general average, against the defendants as owners of the schooner *Herald* arising from a jettison on the high seas of the plaintiff's goods, shipped on freight, on board said vessel. It was admitted, that the defendants were owners of the schooner, and it appeared, that she was employed as a general freighting vessel between *Hallowell* and *Boston*. It was agreed to be the uniform usage for general freighting vessels between *Kennebec River* and *Boston* to carry goods on deck, after the hold was full, but that generally such goods were put in the hold, as would not bear exposure to the weather; and that by the same uniform usage, goods thus carried on deck, paid the same freight, as if carried in the hold. Of this usage it was further agreed that the plaintiff was conusant. It appeared, that for the season when the jettison happened, *Andrew Brown* had taken the vessel on shares, he victualing and manning her, and appointing the master, or acting in that capacity himself. The plaintiff had shipped the goods on board the vessel in *Boston*, to be transported to *Hallowell* for the usual freight, in *Nov.* 1834; and in the course of the voyage, a violent storm having arisen, they were necessarily thrown overboard from the deck, where they were carried, and thus lost, for the safety of the crew, the vessel and the other merchandize laden therein, which were thereby preserved. *Andrew Brown*, the master at the time, called by the plaintiff, testified, that in fixing the rates of freight, a less sum was established for such goods, as might be carried on deck when the hold was full, but that after the rates were fixed, the same sum was requir-

ed for freight of the same goods, whether transported in the hold or on deck. He further testified, that when the plaintiff shipped his goods, standing as he did on the margin of the wharf, and looking into the hold of the schooner, the hatches being open, he must have seen that it was nearly full; that he particularly requested that certain packages, not in controversy, should be put below in the hold; and that he had opportunity to see, that the goods in question were placed on the deck for transportation.

The *Chief Justice*, before whom was the trial, ordered a nonsuit, it being agreed, that if in the opinion of the Court, the plaintiff's claim for contribution could be sustained on the ground of general average, the nonsuit should be set aside.

Wells, for the plaintiff, claimed to support the action on these grounds:

1. The general principle is, that the owners of the vessel in case of a jettison of goods are liable to contribution. *Abbott on Shipping*, 342, 356. The principle on which this liability exists is, that the various owners are mutual insurers for the voyage, when it shall become necessary to abandon a part to save the rest.

2. The reason why goods on deck have not in some instances been placed upon an equal footing with those in the hold, is because they are on long voyages more exposed, and therefore pay less freight; that if a man chooses to have his goods carried in a more exposed place, than those of his neighbors, because he pays a less price, then he hazards the goods for the abatement, and cannot share in the general contribution.

3. Hence it results, that generally the master has no right to put goods on deck, without the consent of the owner. It is a matter of contract. *Abbott on Shipping*, 355.

4. In the present case, it is found to be the uniform usage to carry goods on deck between *Kennebec River* and *Boston*, and that those on deck pay the same freight, as those in the hold. The navigation is not considered dangerous and the voyage is short. The reasons on which the principle is founded do not apply here. Where the usage is to carry goods on deck, contribution may be claimed for those goods which are thrown overboard from the deck. *Philips on Ins.* 322, who cites *Valin's*

Com. tom. 2, 205, and *Emerigon*, 140. Here is both the usage and full freight paid. The reasoning of the Court in *Dodge* v. *Bartol*, 5 *Greenl.* 286, sustains *Philips*.

5. The testimony of captain *Brown* does not contradict the usage; and if it did in words, yet it could not destroy the agreed fact in the case of the existence of the usage. Although called by the plaintiff, and the statements drawn out on examination, still the plaintiff is not concluded by it. *Brown* v. *Bellows*, 4 *Pick.* 194. Nor does the statement, that the plaintiff saw that the goods were probably to be placed on deck, alter the case. He had no right to interfere in the loading, and besides knew the common practice. He paid the same freight for all his goods, and is equitably entitled to contribution. A decision against him will necessarily break up the present practice, and raise the price of freights.

F. Allen, for defendants, contended:

That in case of a jettison of goods carried on the deck of a vessel, the owner has no right to claim contribution. The rule is well established and universal. *Abbott on Shipping*, 393; *Philips on Ins.* 333; *Smith* v. *Wright*, 1 *Caine's Rep.* 44, *note*; *Dodge* v. *Bartol*, 5 *Greenl.* 286; 3 *Kent's Com.* 192. Although goods on deck contribute, when saved, they are not entitled to contribution, when lost. *Strong* v. *F. & M. Ins. Co.* 11 *Johns. R.* 323. It is important, that a rule well known in all maritime countries should be adhered to.

The custom to put this description of goods on deck merely excuses the carrier from paying damage in case of loss, and does not touch the question of contribution. It has been said, that these goods pay the same freight, as the rest. It cannot be so, for the case expressly finds, that this description of goods pays less freight than the cargo generally does, wherever carried.

The plaintiff knew that these goods were to be carried on deck, and did not object, but expressly directed other goods to be put in the hold. He thereby assented to their being carried on deck, and ought not to complain of the law on this subject.

The opinion was delivered at a subsequent term by

WESTON C. J. — By the commercial law, goods shipped on deck, and lost by jettison, are not entitled to the benefit of gene-

ral average. Such is the law of *France*. *Commercial code, b.* 2, *art.* 421, which upon this point follows the ordinance of the marine of *Louis the fourteenth*. Such is the *English* rule, as laid down by *Abbott*, in support of which, he refers to a trial before *Lord Ellenborough*, and another before *Chambre J. Abbott on Shipping*, 344. No opposing decision in the *English* courts, has been adduced. The rule does not appear ever to have been questioned or controverted there.

In *Smith et al.* v. *Wright*, 1 *Caines*, 44, it was held that the owners of cotton in bales, laden on deck and thrown overboard for the preservation of the ship and cargo, could not recover for the jettison, against the owner of the ship. The same view of the law was taken in *Lenox* v. *The Un. Ins. Co.* 3 *Johns. Cases*, 178. And thus it has been regarded as settled in *New York*, in accordance with the general maritime law. 3 *Kent*. 240. The *New York* cases were cited with approbation as evidence of the law, in the opinion of the court in the case of *Wolcott* v. *The Eagle Ins. Co.* 4 *Pick*. 429.

To the same effect is the decision of this court in *Dodge* v. *Bartol et als.* 5 *Greenl.* 206, where the commentary of *Valin* on the ordinance of the marine is cited, in which he notices some exception to the *French* rule in regard to boats and small vessels, which must be peculiar to their navigation, as we find no evidence that it has been adopted elsewhere.

While the general law has been admitted in argument, it is insisted that this should be an excepted case, because the plaintiff paid full freight. Neither the master nor the owner can be chargeable with any fault, in putting his goods on deck. The plaintiff must be understood to have assented to their being placed there, as he knew that they could not be carried in the hold. In *Dodge* v. *Bartol*, the payment of half freight upon the goods there, was noticed as a reason why, upon principle, the owner should have less protection; but it is not the reason generally given for withholding from goods laden upon deck, and lost by jettison, the benefit of general average. The cause assigned is, because goods there laden are peculiarly exposed to peril, and increase the difficulty of the navigation. It is desirable that uniformity should be observed, in deciding upon questions of mari-

time law, in which all commercial nations are interested. Exceptions to be allowed, should be as well established as the rule; and we find no sufficient authority for the exception contended for, in the case under consideration.

Nonsuit confirmed.

WILLIAMS EMMONS *vs.* AURIN Z. LITTLEFIELD.

The grantor is not estopped to prove, that there were other considerations, than that expressed in the deed.

Where L. contracted in writing with E. to pay him the amount of his notes given for certain land, and also to pay him three hundred dollars in addition; and E. agreed to convey the land to L. when all the payments were made; and afterwards E. gave to L. a deed of the land for the consideration expressed therein of three hundred dollars; E. is not precluded by the deed from recovering the balance proved to be due on the contract.

ASSUMPSIT for money had and received. The plaintiff produced in evidence an agreement signed by the defendant and *Thomas W. Smith*, dated *August* 10, 1829, by which the defendant agreed to purchase for about $1400,00 of the plaintiff and said *Smith* two undivided tenth parts of a certain tract of land, which they and others had before contracted to purchase of the agent of the *Bingham* heirs; and to give them each a bonus of one hundred and fifty dollars, and to pay them the amount of their notes for the land as they had agreed to pay the agent. A deed was to be given when all the payments were made.

The plaintiff proved by said *Smith*, who was objected to by the defendant, as interested, but admitted, that sundry payments were made by the defendant to the witness, acting for himself and as agent of the plaintiff, and that receipts were given therefor, the last of which was dated *July* 19, 1832; that the defendant had paid him all that was due for his part, and that there was a balance of $77,06 then due to the plaintiff under the agreement signed by defendant and himself. The defendant produced in evidence a deed from the plaintiff and said *Smith* and two others to him of four undivided tenth parts of the land mentioned in the

contract, the consideration in which deed was $300,00. The defendant contended, that the deed extinguished all claim arising under said contract, and was evidence not to be controlled by parol evidence, that the money agreed to be paid by defendant for the land had been paid. He also contended, that if it were not so, the deed was conclusive evidence, that one half of the consideration, as expressed in the deed, was paid by the defendant to the plaintiff when the deed was given, and if so, nothing was due to the plaintiff.

Weston C. J., ruled both points against the defednant, and directed a verdict for the balance, as testified to by *Smith*. If the ruling was wrong on either point the verdict was to be set aside, and the plaintiff to become nonsuit.

Boutelle, for the defendant, argued in support of the grounds of defence taken at the trial.

It appears by the case, that the plaintiff's claim is for a portion of the consideration money of the land conveyed by the deed to the defendant from the plaintiff and others. The foundation of this claim is an agreement to give a deed, when certain sums were paid. The deed is given, and in it the plaintiff acknowledges, that he has received the consideration for the land. The giving of the deed extinguishes all claim under the previous contract.

This is precisely the case of *Steele* v. *Adams*, 1 *Greenl.* 1. Though much has been said against that case, it has been affirmed in others, and is right in principle. The deed is a release under seal, and cannot be explained, or avoided, by parol testimony. *Pierson* v. *Hooker*, 3 *Johns. R.* 68; 3 *Starkie on Ev.* 1274, and cases there cited; *Sampson* v. *Corke*, 5 *Barn. & A.* 606; *Folsom* v. *Mussey*, 8 *Greenl.* 400; *Schillinger* v. *McCann*, 6 *Greenl.* 364; *Tyler* v. *Carlton*, 7 *Greenl.* 175; *Emery* v. *Chase*, 5 *Greenl.* 232; *Linscott* v. *Fernald*, *ibid.* 503; *Griswold* v. *Messenger*, 6 *Pick.* 517. The same authorities show, that it is certainly good to the amount of one half the consideration money in the deed, as a receipt under seal. That is more than they claimed.

Wells, for the plaintiff, argued:

1. The utmost latitude, that can be given to the deed, as an estoppel, is that $300,00 were paid to four persons, because they

acknowledge the receipt of no more. Estoppels are not to be extended beyond the strict meaning, and must be certain to every intent. *Co. Lit.* 352, *b.* And estoppels must be reciprocal; that is, must bind both parties. *Co. Lit. ibid.* The defendant might shew, that more than $300,00 were paid, and therefore the plaintiff ought to be permitted to prove that more was due. And such is the law. *Tyler* v. *Carlton*, 7 *Greenl.* 175.

2. This deed has no reference to the agreement made by *Mr. Smith* and the defendant, and cannot be considered, as evidence of the payment of the money therein stipulated to be paid. Where a bond for a deed is given conditioned to make the conveyance, when five notes are paid, and the deed is made when but three are paid, this cannot be considered as payment of other notes. The notes given before the deed was in existence, are the consideration, and the deed is no more a bar to their collection, than if they had been given at the same time. The agreement here was the consideration of the deed, and the only payment made. The sums for which receipts were given were but partial payments of the amount stipulated to be paid by that agreement.

3. Parol evidence is admissible to shew, that a part of the consideration money was left back in the hands of the grantor. *Schillinger* v. *McCann*, 6 *Greenl.* 364. Here it was admissible to shew, that the consideration referred to in the deed had relation only to the bonus, and that the sum stated by the witness remained in the hands of the defendant.

The action was continued *nisi*, and the opinion of the Court afterwards drawn up by

WESTON C. J. — According to the case of *Steele* v. *Adams*, cited in the argument, the plaintiff is estopped to deny the receipt of the consideration stated in the deed, upon which the defendant relies. But he is not estopped to prove, that there were other considerations, than that expressed. The authorities, to establish this position, are collected and cited in the case of *Tyler* v. *Carlton*, 7 *Greenl.* 175, to which we refer. It is very clear, that the deed did not express the whole consideration. That deed conveyed four tenths of the *Balize* township, for the consideration therein expressed of three hundred dollars. But by the con-

tract of *August*, 1829, the bonus alone, for two tenths only, amounted to that sum; in addition to which, the defendant was to pay for those two tenths, what the plaintiff and *Smith* were to pay therefor to those who held under *Bingham*. This is under the hand of the defendant, and is not controverted or denied. The deed is evidence of payment as far as it goes; but it evidently states but a part of the consideration. The plaintiff and *Smith* were by the contract to give a deed, when the defendant paid. They did give a deed. This may by implication, not by estoppel, be evidence that the defendant had paid. But it is an implication, which may be rebutted. It is open to inquiry. They agreed to give a deed, when paid; but they might give it before. *Smith*, the witness, whose competency is now conceded, was agent for the plaintiff; and he testified, that at the time of the trial, there was due from the defendant the balance found by the verdict.

In the opinion of the Court, the legal objections made by the defendant cannot be sustained.

Judgment on the verdict.

JOHNSON LUNT *& al. vs.* ROYAL BROWN.

One cannot maintain trespass for taking personal property, unless at the time of the taking, he had the possession, or the right of taking actual possession.

Where one has made a parol lease of personal property to another for a specified time, he cannot maintain *trespass* for taking the property, if taken during that time, as the property of the lessee.

THE action was *trespass* for taking the plaintiffs' mare, and the writ was dated *June* 10, 1834. The defendant pleaded the general issue, with a brief statement, that as a deputy-sheriff, he took the mare, having attached the same on a writ in favor of *J. Herrin & al.* against *Israel Winn*. The plaintiffs proved, that *Winn* applied to *S. Lunt*, one of the plaintiffs, in *Feb.* 1834, and wished him to purchase his mare; that said *S. Lunt* thereupon agreed to purchase the mare for himself and *J. Lunt*, for fifteen dollars,

and that this sum was paid by them to *Winn*, and the mare delivered to the plaintiffs; but at the same time it was agreed, that *Winn* should keep the mare till "grazing time," and that if at any time before then *Winn* should pay the plaintiffs fifteen dollars and interest, they would re-sell the mare to him. The defendant proved, that he attached the mare on the 20th day of *March*, 1834, on a writ in favor of said *Herrin & al.*, and that within three or four days after, the attorney of *Herrin & al.* called on *S. Lunt* to inquire about the title to the mare, and in the course of the conversation *Lunt* said he should be satisfied, if he should receive fifteen dollars. The defendant also proved, that afterwards on the 12th day of *May*, 1834, said *Herrin* tendered to *S. Lunt* fifteen dollars and twenty-five cents, which *Lunt* refused to receive. The trial was in the Court of Common Pleas, before *Smith J.*, who instructed the jury, that upon these facts the action could not be maintained. The jury found a verdict for the defendant. To this instruction the plaintiffs excepted.

The defendant also excepted to certain rulings of the Judge in relation to an amendment, and the exceptions of each party were argued. As the opinion of the Court was against the plaintiff on his exceptions, those of the defendant are not noticed.

Boutelle, for the plaintiffs.

The sale in this case was absolute, and *Winn* had a mere right of purchasing back from them at an agreed price. *Badlam* v. *Tucker*, 1 *Pick.* 284. But if the transaction amounted to a mortgage *Winn* only had the power to redeem, and his right is not an attachable interest. *Holbrook* v. *Baker*, 5 *Greenl.* 309. Nor is the defendant aided by his tender. No one can make a tender legally, unless he has an interest in the subject matter. 5 *Bacon's Ab. A.* 5; 5 *Dane*, 494. Besides the tender should have been made before the attachment.

As the trespass was committed in *March*, perhaps we could not then have supported the action. But as the suit was not commenced until the tenth of *June*, the time had arrived when the special property had ceased, and we were entitled to the possession.

Wells, for the defendant, made these objections.

1. The plaintiffs are but mortgagees, and the defendant represents creditors of *Winn*. The plaintiffs agreed with the agent of

the creditor to take $15,00 in discharge of their claim, and thereby induced him to hold the property. This sum was tendered to them seasonably, and all their right to the property then ceased. They are bound by their own contract.

The plaintiffs are but mortgagees. *Homes* v. *Crane*, 2 *Pick.* 607. They are bound by their contract, for it was a detriment to the creditor. *Train* v. *Gold*, 5 *Pick.* 380. Although the payment would have been in season, if made by "grazing time", it might be made sooner.

2. The property was *Winn's*, when attached, and if the plaintiffs had a lien upon it, they could demand no more than the amount of it, and this was tendered to them. If their action could have been maintained, they could not have recovered but fifteen dollars. The defendant had a right to take the horse, as it respected *Winn*, and to retain it as long as *Winn* could; and therefore had a direct interest in the horse, and was entitled to tender on that ground. *Badlam* v. *Tucker*, cited by plaintiffs; *Holbrook* v. *Baker*, 5 *Greenl.* 309; *Boyden* v. *Moore*, 11 *Pick.* 362.

3. Trespass will not lie in this case. When the attachment was made, *Winn* was rightfully in possession, and the plaintiffs had no right to it. If there had been any wrong done by the defendant, it would have been in not returning the mare, not in taking her. The plaintiffs might as well maintain trespass against *Winn* as against the defendant. *Wyman* v. *Dorr*, 3 *Greenl.* 183; *Seaver* v. *Dingley*, 4 *Greenl.* 316; *Vincent* v. *Cornell*, 13 *Pick.* 294; 1 *Chitty on Pl.* 125; *Gardiner* v. *Campbell*, 15 *Johns. R.* 401; *Nixon* v. *Jenkins*, 2 *H. Black. R.* 135.

After an adjournment, the opinion of the Court was drawn up by

Weston C. J.—Regarding the right of property, in the mare in controversy, to have been in the plaintiffs, with a right of pre-emption only in *Winn*, as whose property she was taken by the defendant, the officer; the case finds, that by the agreement between the plaintiffs and *Winn*, the latter was to keep her until grazing time. She was taken by the officer in *March*, before the time of grazing. And this is the only proof of trespass, upon

which the plaintiffs rely, to maintain their action. Trespass is a remedy afforded by law, for an injury done to the plaintiffs' possession. They must show possession actual or constructive, or an immediate right of possession.

In *Ward* v. *Macauley et al.* 4 *T. R.* 480, the plaintiff had let to *Lord Montfort* a ready furnished house, and the lease contained a schedule of the furniture. Pending the lease, the defendants, sheriffs of *Middlesex*, seized part of the furniture on execution against *Lord Montfort*. Trespass was held not to lie against the defendants, because the plaintiff had neither possession, nor a right of possession at the time. The same doctrine was recognized in *Putnam* v. *Wyley*, 8 *Johns. R.* 432, and in *Clark* v. *Carlton*, 1 *N. H.* 110.

As the plaintiffs had neither possession, nor the right of possession, at the time of the alleged trespass, we are satisfied on this ground, that the Judge below was warranted in instructing the jury, that the action was not maintained. We accordingly overrule the exceptions taken by the counsel for the plaintiffs. It has become unnecessary therefore to consider those taken for the defendant, as, if they are overruled, the plaintiff cannot prevail.

Judgment for the defendant.

JAMES BLACK *vs.* JONATHAN BALLARD *& als.*

In an action on a jail bond, the certificate of the justices of the quorum, that the execution creditor was notified according to law, is to be received as conclusive evidence of that fact.

IN an action of *debt* on a jail bond, conditioned that *Ballard* should not depart beyond the prison limits, unless discharged by law, the defendants proved by the proper evidence, that *Ballard* was discharged by two Justices of the Peace and of the quorum, who made a regular certificate thereof, stating therein, that the plaintiff was legally notified of the time and place of taking the oath. The plaintiff then offered to prove by parol evidence and by a paper, that the plaintiff did not have legal notice of the time

and place for taking the oath. The trial was in the Court of Common Pleas before *Smith J.*, who instructed the jury, that such evidence was inadmissible for that purpose. A verdict was returned for the defendant, and the plaintiff excepted to the ruling of the Judge.

Vose, argued for the plaintiff, and *J. W. Bradbury*, for the defendants.

The opinion of the Court was afterwards delivered by

WESTON C. J. — We are of opinion, that the certificate of the justices of the quorum, that the execution creditor was notified according to law, must be received as conclusive evidence of that fact. So it was decided by this Court in *Agry* v. *Betts*, 3 *Fairf.* 415. We refer to that case for the reasons, upon which the judgment of the Court is founded.

Exceptions overruled.

Propr's of TICONIC BRIDGE *vs.* DANIEL MOOR.

Where the Court of Sessions licensed certain persons, then directors of a Bridge corporation, as ferrymen to keep a ferry near where the corporation bridge had been carried away by a freshet, the income of which ferry was to be appropriated towards rebuilding the bridge; and afterwards the directors of the corporation, being a new and different board from those licensed, made a parol lease of the ferry and ferry-boat to the defendant, who used them for the term; it was *held*, that the corporation could maintain an action, and in their own name.

ASSUMPSIT, for the use of a ferry and ferry-boats from *April* 13, 1833, to *May* 17, in the same year. The directors of the corporation made application to the Court of Sessions for this County, at the *April* term, 1826, to be licensed as ferrymen, to keep a ferry across the river from *Waterville* to *Winslow*, and requested that the profits of the ferry should be appropriated towards repairing the *Ticonic* bridge, which had before then been partially carried away and rendered impassable. At the same term the Court granted the prayer of the petition, and appointed

the individuals composing the board of directors ferrymen. The bridge was repaired in 1826 and 1827, but again destroyed in 1832, and the then directors employed a ferryman to take charge of the ferry for the corporation, who did so for that season, and also by their direction built a ferry-boat for them, the same mentioned in the writ, and received his pay out of the proceeds of the tolls of the ferry by the consent of the plaintiffs, and paid them the balance. On the trial in the C. C. P. before *Smith J.* it was proved, that an auctioneer, acting for the plaintiffs, sold at auction the right to use the ferry and boat for the season or year, 1833, to the defendant. There was evidence on the part of the plaintiffs tending to shew, that it was agreed upon at the auction, that if the license aforesaid should be taken away before the expiration of the season, the defendant was to pay in proportion to the time he used the ferry and boat; and there was evidence on the part of the defendant tending to show, that the hiring was for the whole season and that he was not to pay in proportion to the time he had the use of the ferry. It was further proved, that in *April*, 1833, the Court of County Commissioners revoked said license, and appointed another person ferryman. It was not proved, that the auctioneer ever made any memorandum of the sale, nor was it shewn, that the plaintiffs ever passed any vote in relation to said ferry or ferry-boat, or in any way by vote sanctioned the doings of the auctioneer or of the directors in regard to the ferry or ferry-boat, nor was any vote shown authorizing the bringing of this suit. It was however proved, that the acts of the auctioneer were authorized by three of the then directors of the bridge, but who were not the persons, who were directors, when the license was granted, of whom one owned no stock in the corporation; and that they were a majority of the board, if one without owning stock could be legally a director, but not otherwise. One of the directors, who had been appointed ferryman, objected to the sale at auction. The instructions of *Smith J.* to to the jury are recited in the opinion of the Court in this case.

The jury found a verdict for the plaintiffs, and the defendant excepted to the instructions of the Judge.

Wells, for the defendant, contended, that the instructions were erroneous, and that the action could not be maintained.

1. Because the ferry, if it belonged to any persons, belonged to those who were licensed as ferrymen, and not to the plaintiffs. The legal interest being in them, they should bring the action. 1 *Chitty on Pl.* 5, 6, 46. If the petition is to be taken, as part of the adjudication, then it was only to repair the first bridge, and the license had expired.

2. A corporation cannot be licensed to keep a ferry, nor can any person hold a ferry in trust for others by the appointment of the Court of Sessions. *Revised stat. ch.* 176; *Day* v. *Stetson*, 8 *Greenl.* 365.

3. There was no proof, that those who were licensed as ferrymen consented to the sale, but it was shown, that one of them objected. As it was a sale of what did not belong to the plaintiffs, if there was any promise to pay it was to those who had the right, and not to the plaintiffs.

4. The right to keep the ferry was a personal trust, and not assignable. *Stat.* before cited; *Clinton* v. *Fly*, 1 *Fairf.* 292.

5. There was no competent evidence, that the plaintiffs, a bridge corporation, ever consented to take charge of the ferry or ferry-boat, or to sell the right to use them, or that they authorized the bringing the suit. 7 *Mass. R.* 102; 8 *Mass. R.* 292; 10 *Mass. R.* 397; 17 *Mass. R.* 29.

6. The plaintiffs have no right by their act of incorporation to accept a license of a ferry, or take the profits of it. *Special Laws of* 1821, *ch.* 69; *Head* v. *Prov. Ins. Co.* 2 *Cranch*, 127; *First Par. in Sutton* v. *Cole*, 3 *Pick.* 232; *Kent's Com.* 2*d. Ed.* 298.

7. The boat belongs to the persons to whom the ferry belongs, because it was paid for out of the proceeds of the ferry.

8. But if the plaintiffs owned the boat, they could not recover for the use of it, unless they owned the ferry, the contract for ferry and boat being one entire contract. *Stark* v. *Parker*, 2 *Pick.* 267.

Boutelle, for the plaintiffs.

As the commissioners did not license the corporation, it becomes unimportant to inquire, whether it was, or was not within their power to do it. The directors, as individuals, were licensed for the benefit of the corporation, and were bound to pay the

profits to the plaintiffs. The plaintiffs then had the beneficial interest in the ferry, though they were not the ferrymen. The defendant had the ferry during the time, and made an express promise to the plaintiffs, who were entitled to receive the profits, to pay them. Here was an actual benefit to the defendant, and an express promise to the plaintiffs. Those beneficially interested may support an action on an express promise. *Trustees of M. & S. fund in Levant* v. *Parks*, 1 *Fairf.* 441; *Fisher* v. *Ellis*, 3 *Pick.* 322; *Mowry* v. *Todd*, 12 *Mass. R.* 281. The defendant hired of the plaintiffs, and is estopped to deny their right. *Merrill* v. *Merrill*, 3 *Greenl.* 463. This was not an assignment of the ferry to the plaintiffs, but merely an appointment of them to receive the profits, in discharge of their duty as ferrymen. Even if the law would not have permitted the plaintiffs to have enforced their claim against the ferrymen, the defendant cannot object. Rights of this description cannot be tried in actions between third persons. Whatever some old books may say, the law is now settled, that corporations are bound by corporate acts without vote. *Wor. Turnp. Cor.* v. *Willard*, 5 *Mass. R.* 80; *Salem Bank* v. *Gloucester Bank*, 17 *Mass. R.* 29; *U. S. Bank* v. *Dandridge*, 12 *Wheat.* 64; *Peters* v. *Ballistier*, 3 *Pick.* 495; *Copeland* v. *Mercantile Ins. Co.* 6 *Pick.* 198; *Proprs. Canal Bridge* v. *Gordon*, 1 *Pick.* 297.

The action was continued for advisement, and the opinion of the Court was afterwards drawn up by

EMERY J. — The exceptions are to the instructions of the Judge, that the said *Asa Redington* and others, the directors of said corporation, having been appointed ferrymen, for the purpose of receiving the proceeds of the tolls in trust for and to the use of the plaintiffs, to aid in building said bridge; the plaintiffs could maintain this action, there being an express contract on the part of the defendant, and the proceeds of the ferry, previous to the removal of said *Redington* and others as ferrymen, having been received by the defendant. And also that the plaintiffs were entitled to receive for the use of the boat during the time, that the defendant used the same as stipulated in said contract, provided the jury were satisfied that the contract was, that the defendant

should pay for said ferry and boat, for the proportions of the time, that he used the same, but not otherwise; that no memorandum signed by the defendant or the auctioneer was necessary, in as much as the defendant had the use of the ferry and boat; and that the bringing of the action was a ratification of the plaintiffs of the acts of the directors in causing the use of the ferry and boat to be sold.

In consequence of the destruction of a very considerable part of *Ticonic Bridge* by a freshet in 1826, application was made to the Court of Sessions to establish a ferry across the river between *Waterville* and *Winslow*. The application was made by the directors of the corporation, and it was said it would not seem unreasonable to ask that the profits of the ferry should be appropriated to the use of the proprietors of the bridge toward making the repairs of the bridge, and they prayed the court to license them to keep the ferry, it being understood, that they shall account with said proprietors for the net profits of the same, they giving bonds as the law directs.

At the *April Term*, 1826, after mature deliberation, the court granted the prayer of the petition, and these directors were by name appointed ferrymen and were authorised to receive the same rates of ferriage as were there last established.

The license to those gentlemen who were directors, was taken away by the Court of County Commissioners in 1833, and another person was appointed ferryman.

In 1832, the bridge was carried away and the directors of the bridge employed a ferryman to take charge of the ferry for said corporation who did so for that season, and who by direction of the plaintiffs built for them the boat about which this suit is instituted. It was paid for out of the tolls received from the ferry by the plaintiffs' consent to whom the balance was paid. The right to use the ferry and boat was sold at public auction by an auctioneer acting for the plaintiffs.

The suit is brought for the use of the ferry and boat from the 13th of *April*, 1833, to the 17th of *May*, 1833.

The license having been granted to the persons named, with the evident design of benefit to the corporation, every incidental power necessary to the enjoyment of the right must be intended

to follow. The right to take toll would be unavailing if they could not procure a boat.

We do not consider, that any minute inquiry as to the act of incorporation is requisite to determine the rights of the parties in the present controversy. The defendant has realized all the benefits he expected.

The direction of the Judge limited the jury to be satisfied, that the contract was to pay for the ferry and boat for the proportions of the time that he used the same, but not otherwise.

They have found that it was so.

And we do not perceive error in the instructions of the Judge upon the facts reported.

The exceptions are overruled. There must be judgment on the verdict.

ABEL KENDALL *& al. vs.* DAVID WHITE *& al. Ex'rs.*

In an action against an officer for neglect of duty in not delivering over property by him attached on the writ, to be seised by another officer on an execution issued on the judgment, the Court of Common Pleas have the power, after verdict, to permit an amendment of the declaration by correcting an erroneous description of the term of the court at which the judgment was rendered.

In such action, the return of the officer holding the execution, that he made a demand of the property of the attaching officer, is competent evidence of the facts stated in the return.

EXCEPTIONS from the Court of Common Pleas.

This is an action of the case against the executors of the late *Benjamin White*, formerly Sheriff of the County of Kennebec. In the first count the plaintiffs alleged, that *John Wilson* and others were indebted to them in the sum of $1347,67, and that on the seventh of *May*, 1833, they sued out in due form of law a writ of attachment against the said *Wilson* and others, returnable at the Court of Common Pleas to be holden at *Augusta*, on the second Tuesday of *August* then next, directed to the Sheriff of the County of Kennebec or his deputy, and delivered said writ to

one *Samuel Thing*, then and for a long time afterwards a deputy-sheriff under said *White*, who by virtue thereof attached a quantity of goods, wares and chattels of the value of $2000, the property of the debtors, and served and returned said writ accordingly. At the *April Term* of the Court of Common Pleas, 1834, the plaintiffs recovered judgment against said *Wilson* and others for the sum of $1347,67 debt, and $38,79, costs of suit; averring that neither the said *Thing* nor the said *White* did keep said goods for the space of thirty days after the rendition of said judgment, that the same might be taken in execution to satisfy said judgment.

The second count set forth the same facts and further alleged, that on the 19th day of *April*, 1834, the plaintiffs sued out an execution upon said judgment directed to the several coroners of the County of Kennebec, and that on the same day, they delivered the same to one *James R. Bachelder*, a coroner within and for said County, to be by him served, executed and returned according to the command therein contained, who on the sixteenth day of *May*, 1834, demanded of said *Thing*, at his dwellinghouse, the goods, wares and merchandize by him attached on the original writ against said *Wilson* and others, that the same might be appropriated to pay said execution, and averring that said *Thing* refused to deliver said goods.

The general issue was pleaded and joined.

To maintain the action, the plaintiffs offered in evidence, in support of the 1st count, the original writ sued out by them against said *Wilson* and others, on which said *Thing* returned the attachment of the property mentioned in said count, subject to a prior attachment in favor of *Thomas P. Cushing*. In support of the 2d count the plaintiff offered in evidence the execution which issued upon said judgment with the return thereon, the same having been seasonably returned to the attorney of the plaintiffs. The officer set forth in his return on said execution, that on the sixteenth day of *May*, 1834, having the execution in his hands, he demanded of *Thing*, the deputy of the defendant's testator, who had attached the goods on the writ, the property by him attached, that the same might be taken on the execution, and that *Thing* refused to deliver the property. They also introduced

James R. Bachelder, a coroner and the officer to whom said execution was delivered, though objected to by the defendants, and proved by him a demand upon said *Thing* and upon the defendants on the 16th of *May*, as mentioned in his return on said execution; and also a personal demand upon said *Thing*, on the 17th of *May*, 1834, of the property attached by him. It was also admitted, that the Court of Common Pleas, *April Term*, 1834, adjourned on the 17th day of said *April*. On which day, judgments are entered up, unless specially entered before. The defendants by their counsel, objected that the return upon said execution was not evidence of a demand upon *Thing*, or the defendants. And of this opinion was *Smith J.*, who presided on the trial of said action, and the same was rejected. To the admission of the officer, as a witness, the defendant objected on the ground, that he was interested, and therefore incompetent. Of this opinion was the presiding Judge. The counsel for the plaintiffs thereupon made and executed as attorney for the plaintiffs, and delivered to the witness a release not under seal; and contended that his interest was now removed and his competency restored. To this the defendants objected on two grounds. First, that the attorney of the plaintiffs had no authority to execute said release; and secondly, that not being under seal, it was not effectual in law to release the liability of the witness to the plaintiffs for any default, by him committed in relation to said execution. It being intended to reserve this point by exceptions, the witness was admitted. The defendants also contended, that the demand, as testified to by the officer, was not within thirty days after the rendition of the judgment against the original debtors, and therefore they were not liable. The Judge presiding in the trial of said action overruled these objections.

At the trial it was proved or admitted, that the judgment in favor of plaintiffs v. *Wilson* and others, was recovered at the Court of Common Pleas, *April Term*, 1834, and no suggestion in the course of the trial was made to the contrary, or that the demand made on said *Thing*, on the 17th of *May*, 1834, as proved by *Bachelder*, was too late, after it was proved, that the said judgment was rendered on the 17th of *April*, 1834. The jury returned a verdict for the plaintiffs. After verdict, it was

discovered by inspecting the writ, that the term at which said judgment was recovered, by mistake, was not clearly alleged and it might be considered, that it was alleged to have been recovered *April Term*, 1833. The counsel for the plaintiffs thereupon moved for leave to amend the declaration, according to the fact, as it appeared in the evidence, and insert *April Term*, 1834, which was permitted by the Court. To which permission to amend and to all the other rulings and instructions of the Judge, the defendants' counsel excepted.

D. Williams, for the defendants, argued on the first point, that as the Court of Common Pleas ruled, that the coroner's return was inadmissible to shew a demand on the attaching officer, and the plaintiff did not except to this ruling, that this was not now open, and the decision of the Common Pleas must stand good in this case. But the decision was right. The coroner makes a return on an execution, which exculpates himself from blame, and throws it on another person. It would be a strange doctrine that an interested person should be permitted to make a return to discharge himself, and that a Court should give it their sanction.

To shew, that *Batchelder* was not a competent witness, he cited *Bradbury* v. *Taylor*, 8 *Greenl.* 130.

The attorney has no power by virtue of his employment to discharge any one from his liability. But if he had the power, it was not exercised in this case. There was no consideration paid, and without it, a paper not under seal is no discharge. 8 *Greenl.* 286; 4 *Greenl.* 421; 5 *Barn. & Ald.* 606.

The Court of Common Pleas have power only to grant legal amendments, and if they go beyond this extent, the error may be corrected in this Court. *Clap* v. *Balch*, 3 *Greenl.* 316. The Court have no power to give a cause of action not before existing by way of amendment. The foundation of the action, as the declaration stood, was a judgment rendered in 1833. The amendment introduced an entirely new cause of action. Nor could the Court legally permit any amendment to be made after verdict, while the verdict remains in force. It is only when it is set aside, and a new trial granted, that an amendment is permitted after verdict. *Williams* v. *H. & Q. B. & T. Corporation*, 4 *Pick.* 341.

Wells, for the plaintiffs.

1. The return on the execution by the coroner was conclusive evidence of the facts therein stated. *Russell* v. *Hook*, 4 *Greenl.* 372; *Gyfford* v. *Woodgate*, 11 *East*, 297; 3 *Starkie on Ev.* 1357; *Bamford* v. *Melvin*, 7 *Greenl.* 14.

2. If it was not, the coroner was a competent witness. He was the agent of the plaintiffs. 2 *Starkie on Ev.* 767; *Fisher* v. *Willard*, 13 *Mass. R.* 379.

3. The release, though unnecessary, was properly made. The authority arises from the relation subsisting between attorney and client. *Adams* v. *Robinson*, 1 *Pick.* 461.

4. The amendment, being of a fact not clearly alleged, was proper. It was consistent with the original cause of action, and might be made after verdict and before judgment. *McLellan* v. *Crofton*, 6 *Greenl.* 307. This exercise of discretionary power is not a case for exception. *Wyman* v. *Dorr*, 3 *Greenl.* 183.

After a continuance, the opinion of the Court was drawn up by

Weston C. J. — We are of opinion, that the Court of Common Pleas had the power after verdict, to allow an amendment of the declaration, as to the term when the judgment in question was rendered. We think it was justified, under the authority of the case of *McLellan* v. *Crofton*, 6 *Greenl.* 307.

The execution, which issued on the judgment, and the return thereon of *Bachelder*, the officer to whom it was delivered, is made part of this case. He sets forth in his return, that on the sixteenth day of *May*, 1834, which was within thirty days after the rendition of judgment, having the execution then in his hands, he made a demand upon *Thing*, the deputy of the defendants' testator, who had attached the goods upon the original writ. This was a return made by the officer, in the regular discharge of his official duty.

In *Gyfford* v. *Woodgate et al.* 11 *East*, 297, a return of the sheriff on a *fieri facias* was read in evidence, which it was insisted ought not to affect the plaintiff, who was no party to the sheriff's return; but the court held, that it was *prima facie* evidence of the facts stated therein, upon the ground, that faith was to be given to the official act of a public officer, like the sheriff,

even where third persons were concerned. Hence if the sheriff return a rescue, it is evidence against the person, charged in the return of being guilty of it. *Rex* v. *Elkins*, 4 *Burrow*, 2129.

Upon exceptions, either in this court or in the Common Pleas, the court are to do therein, what to law and justice may appertain. We are of opinion, that the return of the officer, which is before us, was *prima* evidence of a seasonable demand upon *Thing*, although the Judge below ruled otherwise. We find then in the case competent evidence of a demand upon *Thing*, without the testimony of the officer in support of his return, which was unnecessary. We are relieved then from the necessity of deciding the questions raised, whether the officer was interested or not, or whether if he was, his interest was removed, before his testimony was received. Rejecting that testimony altogether, the plaintiffs have supported their action; and the verdict in their favor is justified.

Exceptions overruled.

JOHN COOL, JR. *& al. vs.* ORRIN L. CROMMET *& al.*

It is not necessary to the legality of a town way, that the return of the selectmen of their doings in locating the way should be recorded before it is offered to the town for acceptance.

Notice of the intended location of a town way by the selectmen, given either to the mortgagor or mortgagee in the actual possession of the land, is sufficient.

A surveyor of highways may lawfully remove a fence across the highway without first requiring the owner of such fence to remove it.

Trespass cannot be maintained by the proprietor of unfenced land against one employed in making a road, whose cattle, used in the work, strayed upon the land against the will of their owner.

When persons employed in constructing a new highway necessarily enter upon the adjoining land, doing as little damage as may be; they do not thereby render themselves liable to an action of trespass.

TRESPASS *quare clausum* for breaking and entering the close of the plaintiffs in *Waterville*, between the 1st and 16th of *September*, 1833, ploughing up their soil, and with cattle treading down their grass, and destroying their produce. The defendant, *Orrin*

L. Crommet, justified as a surveyor of highways for that year in entering upon the land in question, as a public highway, and making a town road, and the other defendant justified, as acting by his direction. It was admitted, that *O. L. Crommet* was a surveyor of highways, and that the *locus in quo* was within the limits of the district assigned to him by the selectmen. The principal question was, whether the road was legally laid out by the selectmen of *Waterville*. The selectmen went upon the land, and laid out the road, and made a return of their doings in writing to the town clerk, before the warrant was made to call the meeting of the inhabitants of the town at which the road was accepted; but their return was not recorded by the town clerk prior to the town meeting. The article in the warrant calling the meeting recited the whole return of the selectmen, in which they particularly describe the road laid out, and states the names of the persons over whose land the road passed, and that they were all severally duly notified. Among these was *John Cool*, but the plaintiffs were not named. The road was duly accepted by the town. The plaintiffs objected, that the road was not laid out according to law, because that they owned the land at the time, and were not notified. It was proved, that prior to the laying out of the road, *April* 8, 1829, *John Cool*, father of the plaintiffs, conveyed the land to them, and took a mortgage back for the consideration money, but neither of these deeds have ever been recorded. *John Cool* remained in possession, as before, and it was proved, that the conveyance was made to enable *John Cool* to obtain a pension by an apparent reduction of his property. It was also proved, that *John Cool* paid taxes for the land for several years after the deeds were made, and that one of the plaintiffs in making a return of his valuation gave in no land of his own, but stated this to belong to his father; and that it was not known to persons living near to the land, that the plaintiffs claimed or owned it, until after the commencement of making the road. It was also proved, that *John Cool* summoned a witness and paid him his fees for attending the trial of this action. It was proved likewise, that *John Cool* was on this land and other land of his adjoining with the selectmen, when they laid out the road. It appeared, that the defendants removed about three

lengths of fence extending across the road, and that while making the road, and when it was necessary to use more than one yoke of oxen, the forward cattle would frequently pass upon the land adjoining the road; and that several times the oxen employed in making the road strayed off some rods from the road on the adjoining land which was not fenced upon the road, but that no intention or disposition was manifested by the defendants, or by others in their employment, to do any injury to the land adjoining the road, which could be avoided.

After a partial trial, a commissioner was agreed on to repair to the land and report the facts proved to his satisfaction; and from that report the preceding statement was taken. The case was submitted to the determination of the Court on the commissioner's report, and the papers in the case.

D. Williams, for the plaintiffs, contended:

1. The proceedings are void, because the doings of the selectmen were not recorded prior to the town-meeting at which the road was accepted. The case of *Commonwealth* v. *Merrick*, 2 *Mass. R.* 529, is conclusive on this point.

2. The case finds, that the plaintiffs were not notified. The record of the laying out is not evidence of notice to any one. It must be shewn in evidence from other sources. *Harlow* v. *Pike*, 3 *Greenl.* 438.

3. But if *John Cool* had been the owner of the land, instead of the plaintiffs, he was not notified. The record being no evidence of that fact, the only proof is, that he was casually on the land among others when the selectmen were there. The road was over land of his separate from this. The owner should have due notice, and time to prepare. *Howard* v. *Hutchinson*, 1 *Fairf.* 335. Being casually on the land was no proof of notice even to *John Cool*. *Keen* v. *Stetson*, 5 *Pick.* 494.

4. If the road was legally laid out, still the action is supported, and the defendants are trespassers. The defendants had no right to remove the fence without first giving notice to the plaintiffs. They had no right to go upon the plaintiffs' land for their convenience in making the road, nor to let their cattle commit a trespass. It is not necessary to prove an actual disposition to do mischief. It is enough, that a trespass has been committed on the

plaintiffs' land through their means. Even in case of an involuntary trespass there is no defence without tender of amends.

Boutelle, for the defendants.

There is no reason why the laying out of the selectmen should be recorded on the town records before the acceptance of the road. The *statute, ch.* 118, does not require it, and the practice has always been otherwise. The remark of the Judge in the case referred to has never been considered law. It is enough, that when it becomes valid by the acceptance of the town, it should be recorded.

The courts have holden, that parties interested should be notified of the intention to lay out the road. But the courts will also allow of constructive notice. But notice in this case was given to the right person. It was given to the real owner of the land; to the mortgagee in possession. He was proved to be present at the time with the selectmen, and knew the object of their being there. But even this is a too favorable view for the plaintiffs, for the deeds never were recorded, nor were their existence known among the neighbors. The courts in making the rule, that the owner of the land is entitled to notice, will see, that it is not made the means of fraudulently preventing the selectmen from performing their duty in laying out roads. On the facts the Court might properly consider, that there had been a foreclosure, or that as the deed was given to defraud the public, that it was void from the beginning.

The removal of the fence across the road was but the abatement of a nuisance. As there was no fence upon the road, the plaintiffs cannot complain that cattle strayed upon the land. There was no more injury done to the land adjoining the road, than was absolutely necessary in order to make the road, and this is allowable. *Stackpole* v. *Healey*, 16 *Mass. R.* 33. But even if an action could be maintained for this cause, yet as it would be an injury to the possession which was in others, the plaintiffs could not maintain it.

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

Weston C. J. — The *statute* does not require that the doings of the selectmen in laying out a road should be recorded, previous

to its being offered to the town for acceptance. And although according to the marginal note, in the *Commonwealth* v. *Merrick*, 2 *Mass. R.* 529, that was held to be necessary, yet it does not appear, upon examining the case, that the court adjudged it necessary that the doings of the selectmen should be recorded, before the subject is brought before the town for their consideration.

In the case of *Harlow* v. *Pike*, and in that of *Howard* v. *Hutchinson*, cited in the argument, it was held that notice should be given, upon the principles of common justice, to the owners of the lands, over which a town road is intended to be located, previous to its being laid out; although a requirement to this effect is not to be found in the statute. But the notice thus judicially held necessary, must have a reasonable construction. While it was intended to afford an opportunity to the owners of the land to be heard, it may be very questionable, whether it was designed that public officers, in the discharge of their duties, are to be considered bound to take notice at their peril of a latent interest, which they had no means of ascertaining; and which the parties concerned had studiously concealed. But without placing this part of the cause upon the peculiar circumstances, attending the title of the plaintiffs as reported, we are of opinion, that notice given either to the mortgagor, or to the mortgagee, being the tenant actually in possession, is sufficient. He has charge of the estate; and is to be regarded the owner, for the purpose of receiving a notice of this sort. And we are of opinion, that if it appear in the record of the proceedings, that such previous notice was given by the selectmen, that it is at least *prima facie* evidence of the fact.

With regard to the removal of the three lengths of fence, which crossed the road, it is expressly authorised by the fourteenth section of the act in relation to highways, *statute* of 1821, *ch.* 118; and he may exercise this authority, without first requiring the owner of the fence to remove it.

The surveyor with his assistants, and such teams as were necessary, were rightfully in the road, in the regular discharge of their duty, and if the cattle strayed on to the plaintiffs' land, being lawfully in the highway, against the will of the defendants, they are not trespassers. *Dovaston v. Payne*, 2 *Hen. Black.* 527.

Stackpole et al. v. *Healey*, 16 *Mass. R.* 33. The report of the commissioner states, that when it was necessary to use two yoke of oxen in scraping, while making the road, the forward cattle in turning, would frequently pass on to the plaintiffs' land. If this was caused by the voluntary act of the defendants, it may be understood to have been necessary; for the report finds, as well in reference to this part of the case, as to the fact that the cattle strayed on to the plaintiffs' land, that no intention or disposition was manifested, either by the defendants, or any other persons in their employment, to do any injury to the land adjoining the road, which could be avoided. If the road could not be made, without turning the forward cattle sometimes on to the land adjoining, the defendants cannot be adjudged trespassers for so doing. They were not only engaged in a lawful act, but in the discharge of a duty, which they were bound to perform. The law which justifies the act, and imposes the duty, will protect them in the use of all necessary means.

Upon a view of the whole case, we are all of opinion, that the defendants are entitled to judgment.

EBENEZER FREEMAN, *Ex'r of* JOHN GILMAN'S *Estate*, *vs.* UPHAM T. CRAM.

The equitable assignee of a chose in action, who took the assignment during the pendency of a suit thereon, and who afterwards, without any knowledge that the suit was groundless, prosecuted it for his own benefit, but failed to recover, is not liable to the defendant for taxable costs or other expenses incurred in the defence.

EXCEPTIONS from the Court of Common Pleas.

This was an action of the case commenced by *John Gilman* in his life-time against the said *Cram*, for the *December Term* of the Court of Common Pleas, 1833, wherein the said *Gilman* in his declaration set forth, that whereas at said *Augusta*, before the eighth day of *April*, 1833, one *John Wells* had instituted a suit in the Court of Common Pleas for said county, in the name of

one *John Reed*, as nominal plaintiff against the said *Gilman*, upon a false and groundless claim which he the said *Wells* pretended to have and own in virtue of a sale and assignment thereof from the said *Reed* to himself. And said *Wells* had instituted said suit, as aforesaid, and upon the day aforesaid was prosecuting the same in said Court for the purpose of recovering to his own use the amount of said pretended claim, and the suit pending thereon as his own, and ever afterwards took to himself the control and management of said suit, and for the purpose of recovering the amount of said pretended claim to his own use, and greatly to the injury of the said *Gilman*, prosecuted said suit in said Court until judgment was therein rendered by the consideration of the Justices of said Court, at the term thereof holden on the second *Tuesday* of *August*, 1834, that the said *Gilman* should recover his costs therein against the said *Reed*, which costs were taxed by said Court at the sum of thirty-four dollars and forty-six cents, as by the record thereof appears. And the said *Gilman* avers, that said claim at the time of the commencement of said suit thereon, and at the time of the said pretended assignment thereof from said *Wells* to said *Cram*, was and always had been wholly false and groundless.

And the said *Gilman*, on the twenty-sixth day of said *August*, sued out his execution against said *Reed*, in due form of law, and on the same day delivered the same to one *Geo. W. Stanley*, then and ever since a deputy-sheriff of said county, for service, who afterwards, on the twenty-fifth day of *Nov.* 1833, returned the same satisfied in part, *viz:* for the sum of five dollars and no more, of which the said *Cram* there afterwards on the same day had notice, whereby he became liable to the plaintiff to pay him the unsatisfied balance of said execution, together with the further sum of twenty-five dollars for his care and trouble and for counsel fees and other expenses in carrying on the defence of said suit, and not made up nor included in the amount of said judgment. Whereby the said *Gilman* has been greatly injured. And after the aforesaid action was continued to *April Term* of said Court, 1834, the plaintiff, *John Gilman*, deceased. At the said *April Term*, a motion was made that said *Freeman*, the executor of the said *Gilman*, should be allowed to come in and prosecute this

action and which motion was sustained by the Court, and the said *Freeman* accordingly came into Court and took upon himself the prosecution of this action. At the trial of this action the facts alleged in the plaintiff's declaration were proved; whereupon the defendant's counsel requested the Court to instruct the jury;

1st. That this action did not survive to the executor.

2d. That the facts aforesaid were not sufficient in law to entitle the plaintiff to maintain this action.

The trial was before *Perham J.*, who refused to give these instructions; but directed the jury, that the action did survive to the executor; that the facts aforesaid were in law sufficient to entitle the plaintiff to maintain this action.

The jury returned a verdict for the plaintiff.

To these instructions the defendant's counsel filed exceptions.

The case was argued in writing by *A. Redington, Jr.*, for the plaintiff, and by *Lombard*, for the defendant.

As the exceptions were sustained solely, because the second instruction requested was not given, the arguments relative to the first are not inserted.

In the argument for the *defendant*, it was said, that this was an action of the first impression, furnishing in itself no slight argument against it. Neither party by the common law is entitled to costs. The plaintiff therefore has no case, unless the statutes of the State afford him a remedy. By our laws the prevailing party is allowed costs, and they are taxed only against the opposing party on the record, and in the action of *Reed* against *Gilman*, they were actually taxed against *Reed*, and a portion of them collected on execution of him. This is not an action for malicious prosecution. The form of action is not adapted to it, nor will the facts support it. It is not alleged or proved, that the defendant had any agency in the institution of the suit, or that the prosecution of it was continued further, than it would have been, if no assignment had been made to him; or that the defendant had any knowledge, that *Reed's* action against *Gilman* was not both just and well founded.

Redington. The facts in the case shew a sufficient ground of action. The *statute, ch.* 59, *sec.* 17, provides that "the prevailing party shall be entitled to his legal costs," but is wholly silent

as to the mode of obtaining them. It does not even state against whom, or what party, he shall recover them. But the intention is, that he shall recover them against the party, who unjustly compelled him to incur them. Another statute, it is true, *ch.* 60, *sec.* 3, provides that the party obtaining judgment in any civil action shall be entitled to execution, &c. But this is not the exclusive remedy. Debt would lie, as well as *scire facias*. The Court will allow a process by the injured party suited in its form, and effectual in its operation, to the object in view. Within the equity of the statute allowing costs, a defendant, prevailing in a suit prosecuted by an assignee for his own benefit, is entitled to a remedy against the real party. The assignee, in practice, is deemed the real party, and after notice payment to the assignor is no discharge. The assignee is bound by former verdicts and judgments, as truly as the nominal party. *Rogers* v. *Haynes*, 3 *Greenl.* 362. It is by the extension of the principles of equity that his privileges are secured to him by the courts. Shall he then prosecute in court, as his own, demands which he has purchased in the name of some person, real or fictitious, under an indulgence solicited in equity, without a particle of liability on his part? Shall he be, at the same moment, a party, and not a party, claiming the benefits, but discarding the liabilities which the law has made incident to parties? Shall he ask equity and not do equity?

Independent of any statute, this action well lies. An individual without any reality of justice assails his neighbour in the forms of litigation, and inflicts anxiety, trouble and expense upon him by an unjustifiable interference with the concerns of others. For this invasion of right, what law precludes a remedy? It is said, that the common law allows no costs. But does that prove, that an interference like the one in controversy can be practised with impunity? An action of tort was always available for redress to a person, who has been assailed by one in the disguise of another, whether in acts of personal violence, deceptive practices, or an injurious intermeddling under the forms of law. Good policy requires, that the action should be maintained. If such suits are to be multiplied with the same rapidity they have been recently there should be some remedy for the defendants, who are thus put to expense. He commented on the case of *Rogers* v. *Haynes*,

3 *Greenl.* 362, and contended, that it was not against him, and cited the following authorities. *Calhoun* v. *Dunning*, 4 *Dallas*, 120; *Schoolcraft* v. *Chapman*, 5 *Cowen*, 18; *Norton* v. *Rich*, 20 *Johns.* 475; *Ketcham* v. *Clark*, 4 *Johns.* 484; *Cauley* v. *Ridgway*, 1 *Binney*, 496; *Waring* v. *Barrett*, 2 *Cowen*, 460; *Webb* v. *Ward*, 7 *T. R.* 296.

After a continuance, the opinion of the Court was delivered by

WESTON C. J. — Whoever sues another in the name of a fictitious plaintiff, either one not in being, or one who is ignorant of the suit, is liable to be indicted, if he is not answerable to the party injured in a civil suit. An action lies also for a malicious prosecution, which may generally be supported, when the prosecution was instituted without probable cause. But a man may prosecute any action, for which he has probable cause; at the peril only of being adjudged to pay costs. Many claims are set up and pretended, which turn out to be unwarranted. They are found to be false, because there is a failure of proof, and it may be of truth also, in the averments, by which they are attempted to be supported. Hence such claims may well be denominated false and pretended. But there might have existed such circumstances, or such color for them, as to amount to a probable cause.

If in this case there was probable cause, which might have existed, and which is not disproved, *Reed* might lawfully prosecute the claim, of which the plaintiff complains; or he might assign it to another, which if the demand be not negotiable, carries with it an authority to the assignee, to prosecute thereon a suit in his name. It does not appear, if *Reed* had been as plaintiff the only party in interest, that he had not a lawful right to prosecute the suit. Nor does it appear, but what *Wells*, the assignee, had reason to believe that the action was well founded. Certainly there is nothing in the case showing, that he knew it to be groundless. If there was, he might be charged for a malicious prosecution, upon proper averments, which would afford to the plaintiff an apt remedy.

Still less does it appear that the defendant, to whom the demand was assigned after the action, had the least knowledge or suspicion, that it was not a fair claim. He had a lawful right to

purchase a chose in action, and to prosecute a suit, by which its recovery was attempted to be enforced. It is not pretended, that the defendant made any promise, express or implied, to the plaintiff's testator, to pay him the costs, or indemnify him for the expenses of an action. And he was guilty of no tort or wrong, which would render him liable to the plaintiff's testator. The only ground upon which he can be charged, is, that being substituted for the original plaintiff, he was liable for costs. These are not allowed at common law ; and therefore can be claimed only under the statute.

By the act, regulating judicial process and proceedings, *statute* of 1821, *ch.* 59, *sec.* 17, it is provided, that in all actions the party prevailing shall be entitled to his legal costs. They are to be ascertained by the order or judgment of the court, before whom the action is pending. Payment is not enforced in our practice by attachment, but by execution. An action of debt may be brought upon the judgment ; but neither assumpsit or case can be maintained, for the recovery of legal costs. It is insisted, that the statute allows costs to the prevailing party, but does not prescribe against whom they shall be adjudged ; but the necessary implication is, that they must be awarded against the party, who does not prevail ; and this, by the uniform practice of our courts, is the adverse party upon the record.

The real party in interest, if disclosed to the Court, is protected from any fraudulent attempts of the nominal party to defeat his rights ; but no judgment is ever rendered against him. If he claims the equitable interposition of the Court in his favor, they may in their discretion grant it, upon condition that he shall give security to the adverse party for his costs ; but this would be matter of stipulation ; and could form no part of the final judgment of the Court. Upon the facts in this case, we are of opinion, that costs neither have nor could be legally awarded against the defendant.

In *Rogers* v. *Haines*, 3 *Greenl.* 362, the first count was for a malicious prosecution ; the second was for bringing without authority a suit in the name of another, which he knew to be paid, but without the imputation of malice. The court held, that the scienter, alleged in the second count, was an important and sub-

stantive part of the charge, and must therefore be proved, and this not having been done, they found it unnecessary to decide, whether the averments in that count went far enough to sustain the action. In *Calhoun* v. *Dunning*, 4 *Dal.* 120, the court decided, that the party beneficially interested, who prosecuted in the name of a trustee, should be bound by the result.

Webb v. *Ward et al.* 7 *T. R.* 292, was brought by an uncertificated bankrupt, for the benefit of the assignees, but the court directed a stay of the proceedings, until security was given for the costs. But in *Snow* v. *Townsend*, 6 *Taunton*, 123, where the plaintiff had been discharged from prison, under the insolvent act, and had been sued for a debt due to him before his assignment, which the assignee had refused to sue, the court would not stay proceedings, until security was given for costs, saying that the case of *Webb* v. *Ward* had been much questioned.

The authorities, cited from the fourth of *Johnson* and the fifth of *Cowen*, were cases of insolvency. In *Warring* v. *Barrett*, 2 *Cowen*, 460, the plaintiff was out of the State; and the Court refer to a rule of their practice. But as costs in our State depend on statute, the law and usage of other States cannot be safely resorted to for our guide.

The opinion of the Court is, that the Judge below should have instructed the jury, that the action was not supported by the evidence in the case; and the exceptions are accordingly sustained.

Samuel S. Arnold *vs.* William Elwell *& al. and* George W. Bachelder, *Trustee.*

One to whom a vessel had been assigned in trust for the benefit of creditors, which was absent at sea at the time the assignment was executed and which did not return until after the service of the trustee process, was held chargeable, as trustee, for the balance of the proceeds of the sale of the vessel, after paying such creditors as had executed the assignment previously to the service.

From the disclosure of the trustee, it appeared, that the defendants, on the fourth of *March*, 1835, assigned to the trustee, for the benefit of their creditors, certain property, including the

schooner *Adventure*. Without this schooner, the property was not sufficient to pay those creditors, who had executed the assignment before the service on the trustee; but including her, there was a balance in the hands of the assignee after satisfying those claims. The statement of the trustee relative to this schooner follows. "In this assignment is the schooner *Adventure*, together with the net proceeds of her voyage. I did not get possession of said schooner until long after the service of the plaintiffs' writ on me, asshe was, at the time the assignment was executed, at sea. I have since her arrival sold her at auction. I have not received the proceeds of the sale, but have given credit to the assignment for her. I took possession of her immediately on her arrival at *New York*, where I ordered her."

Wells, for the trustee, contended, that the trustee ought to be discharged, because when the service was made, he had not the possession of the *Adventure*, and it was wholly uncertain, whether he ever would obtain it. This is precisely the case of *Andrews* v. *Ludlow & Tr's*, 5 *Pick.* 28. The decision is to be made on the state of facts existing at the time of the service, and he cannot now be holden, as trustee, unless the Court are prepared to have charged him, if the vessel had been lost at sea before he could have obtained the possession of her. He must have the property, so that he can turn it out to the officer, if he chooses. *Grant* v. *Shaw*, 16 *Mass. R.* 341; *Lanfear* v. *Sumner*, 17 *Mass. R.* 110. So long as it depends upon a contingency, whether the property will ever come into his hands, a man cannot be charged as trustee. Whether the property was lost at sea, or afterwards came to the possession of the trustee, can make no difference, as the uncertainty remained when the process was served. *Rundlet* v. *Jordan*, 3 *Greenl.* 47; *Sayward* v. *Drew*, 6 *Greenl.* 263; *Sanford* v. *Bliss*, 12 *Pick.* 117; *Faulkner* v. *Waters*, 11 *Pick.* 473; *Wood* v. *Partridge*, 11 *Mass. R.* 488. The property in this case might have been lost, and nothing obtained from it.

F. Allen, for the plaintiff, said, that here the property was actually vested in the trustee by the assignment, and could only be divested by his neglect to take possession within a reasonable

time after her coming into port. The possession of absent property follows the title. The bill of sale while the vessel was at sea transferred the property to the trustee, and if the schooner had been attached on her arrival at the wharf, before any possession had been taken by him, still if he had done his duty and seasonably claimed the property under the assignment, he would have held it. Before the return of the *Adventure*, he might sell and convey a good title, and had an insurable interest in her, and in fact might exercise all the rights of an owner, which *Elwell*, the principal, could have done, if no conveyance had been made. It is said, that this vessel might have been lost, and so nothing realized from her. The same might be said with equal truth, if she had been at the wharf, under the control of the trustee, or of goods in a store. No interference by others by attachment, or otherwise, before he could take the actual possession, would divest the property, if he took it within a reasonable time. *Putnam* v. *Dutch*, 8 *Mass. R.* 287; *Badlam* v. *Tucker*, 1 *Pick.* 284; *Brinley* v. *Spring*, 7 *Greenl.* 241.

The opinion of the Court, after a continuance, was drawn up by

Weston C. J. — Whether the trustee shall be charged or not, depends upon the question, whether the schooner *Adventure* is or is not to be considered as goods or effects of the principal in his hands, at the time of the service upon him of the process of foreign attachment. The vessel, then at sea, had been previous to that time regularly assigned to the trustee. In virtue of the instrument of assignment, the property was transferred and passed to him, subject to be defeated, if he did not take possession of the vessel on her arrival from sea. *Abbot on Shipping*, 10; *Atkinson* v. *Maling et als.*, 2 *T. R.* 462; *Putnam* v. *Dutch*, 8 *Mass. R.* 287; *Badlam* v. *Tucker et al.*, 1 *Pick.* 389. From the time of the assignment, she was subject to the control of the trustee, who was clothed with all the attributes of ownership. He could have insured the property, or assigned it to another. The vessel was in his hands, as effectually, although not with the same security, as if she had been in port.

It is insisted, that it was contingent, whether she would ever arrive, and whether the trustee would realize any thing from her. But he might have sold her while at sea, for a valuable consideration, or he might have made an insurance, which would have given him an equivalent, if she had been lost. Goods in a warehouse, after the service of this kind of process, may be destroyed by fire, before the rendition of judgment, or the issuing of an execution. The continued possession of whatever is liable to be consumed or destroyed, is attended with a certain degree of peril or hazard. If they are lost, before they are turned out on execution, without any fault or negligence on the part of the trustee, and he has not been indemnified by insurance, the trustee might avail himself of this matter, by way of defence to a *scire facias*, which might be brought against him. But when he has, on the day of the service of this process upon him, the entire control, disposition and management of goods and effects, made over to him by his principal, but to which he has no title against an attaching creditor, he is trustee; and has no claim to be discharged, because the property may be exposed to subsequent hazards and contingencies.

In *Grant et al.* v. *Shaw*, 16 *Mass. R.* 341, the principal debtors had consigned goods to the defendant, who while these goods were at sea in their transit, was served with a process of foreign attachment; and he was discharged, upon the ground, that he had neither accepted the consignment, nor received the goods.

In *Andrews* v. *Ludlow and trustees*, the trustees disclosed an assignment to them of certain property by the principal, a part of which was a portion of two vessels with their cargoes, then at sea; but they had been previously assigned and pledged to a third person to secure a sum of money, which pledge was in full force, when the trustee process was served. While thus pledged, the vessels were not liable to attachment, as the property of the principal. He had only an equitable interest, which could not be reached by attachment in his hands, or when transferred to his assignees. *Badlam* v. *Tucker*, 1 *Pick.* 389.

At the time of the service of this process, the trustee had all the possession, of which property so circumstanced was susceptible. No owner could have over it a more perfect control. If

goods have been deposited with a trustee, it has never been held necessary that they should, when process is served, be within the State; although they cannot otherwise be turned out on execution. Suppose the property in question had been goods, under the control of the trustee, in a warehouse in *Boston*. There would be no contingency in regard to his possession; but if he chose to deliver the goods upon the execution, rather than pay their value, they might be lost in the transit.

The vessel in controversy was available property, under the control of the trustee, at the time of the service of the writ. He could on that day, if the foreign attachment had not interposed, have sold and transferred her for a valuable consideration. And the opinion of the court is, that *Bachelder* must be adjudged trustee, according to his disclosure.

JABEZ LEADBETTER *vs.* *The* ETNA INS. COMPANY.

In an action on a policy of insurance, referring to certain conditions, wherein it was stipulated, that the assured "shall procure a certificate under the hand of a magistrate, notary public, or clergyman, most contiguous to the place of the fire, and not concerned in the loss, or related to the insured or sufferers, that he is acquainted with the character and circumstances of the person or persons insured; and knows or verily believes, that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned; and until such certificate is produced, the loss shall not be deemed payable;" after the destruction of the property insured by fire, the assured applied to the two nearest magistrates, who refused to give the required certificate, and then applied to the next nearest magistrate, who gave one, which was produced to the defendants; *it was held*, that the certificate of the *nearest* magistrate was a condition precedent to the right of the plaintiff to recover.

THE action was on a policy of insurance whereby the plaintiff caused $2000,00 to be insured on his house, furniture, barn, shed and hay, for the term of one year from the 12th of *December*, 1832, and the plaintiff averred a total loss of the property insured within the year by fire. Certain conditions were annexed to the policy in reference to which it was made. By one of these con-

ditions the assured was to furnish a certificate under oath, that the property was not insured elsewhere. This the plaintiff had not done. The tenth condition follows. "All persons insured by this company, and sustaining loss or damage by fire, are forthwith to give notice thereof to the company; and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; and also, if required, shall produce their books of account and other proper vouchers; they shall also declare on oath, whether any and what other insurance has been made on the same property, and procure a certificate under the hand of a magistrate, notary public, or clergyman most contiguous to the place of the fire, and not concerned in the loss, or related to the insured or sufferers, that he is acquainted with the character and circumstances of the person or persons insured; and knows or verily believes, that he, she, or they, really and by misfortune, and without fraud or evil practice, hath or have sustained by such fire loss and damage to the amount therein mentioned; and until such proofs, declarations and certificates are produced, the loss shall not be deemed payable. Also if there appear any fraud or false swearing, the insured shall forfeit all claim under this policy." With a view to comply with this condition, the plaintiff had seasonably furnished the defendants the certificate of *Lemuel Bryant*, a Justice of the Peace, in form required in the condition. *Mr. Bryant* testified, that eight or ten days after the fire, the plaintiff brought to him that certificate in his own hand-writing, and he signed it. It appeared, that the *Rev. Mr. Robinson*, a clergyman, and *M. Wing* and *G. Smith*, magistrates at the time, lived nearer to the place of the fire, than *Mr. Bryant* did; and it was admitted, that neither of these gentlemen was concerned in the property insured, nor related to either party. It was further admitted, that the plaintiff had applied to *Wing* and to *Smith* to give the certificate required by the tenth condition, and that each had declined so to do. The trial was before *Weston C. J.*, who, being of opinion that the plaintiff had failed in the necessary preliminary proof, directed a nonsuit, which was to be taken off, if the whole Court should be of a different opinion.

Otis, for the plaintiff, submitted the case without argument.

S. W. Robinson, for the defendants submitted on his brief, citing the following authorities. 1 *Rolle's Abr.* 415, 452; *Doughty* v. *Neal*, 1 *Saund.* 216; *Hesketh* v. *Gray*, *Sayer*, 185; *Gruit* v. *Purnel*, 5 *Viner's Abr.* 207; *Davis* v. *Mure*, *and Pole* v. *Harrobin*, *cited in* 1 *T. R.* 642, 644; *Campbell* v. *French*, 1 *T. R.* 200; *Appleton* v. *Crowninshield*, 3 *Mass. R.* 443; *Bagley* v. *Francis*, 14 *Mass. R.* 453; *and Worsley* v. *Wood*, 6 *T. R.* 710, relied upon, as precisely similar to the present case.

After a continuance, *nisi*, the opinion of the Court was drawn up by

Weston C. J. — We are clearly of opinion, that the plaintiff at the trial failed to exhibit the preliminary proof, made a condition precedent to his right to recover. It was a condition fairly and rightfully imposed, fully accepted, and made a part of the policy. It was of a character not to be misunderstood; and was interposed to protect the defendants against fraud. As insurance companies, who enter into extensive contracts of this kind, are liable to great impositions, they are justified in taking every precaution, which common prudence may suggest.

In *Worsley* v. *Wood et als.* 6 *T. R.* 710, which was upon a policy against fire, it was one of the printed conditions accompanying the policy, that in case of loss, the assured should procure from the ministers and churchwardens, and from some respectable householders of the parish, not concerned in interest, a certificate like that required in the policy under consideration. The assured procured and delivered a certificate in the requisite form, from four reputable householders of the parish, and alleged in their declaration, that the minister and churchwardens of the parish, wrongfully and unjustly, and without probable cause, refused to join in such certificate. Upon an issue being made up upon this point, the jury found in favor of the assured. The case was twice argued, and received great consideration from the court. It was finally decided, that the certificate of the minister and churchwardens was a condition precedent, to the right of the assured to recover. That if unreasonably refused, it was their misfortune; but that without it, they could not prevail. That the company

had a right to impose their own conditions, for which they were not bound to receive any substitute whatever.

Dawes v. *The North River Insurance Company*, 7 *Cowen*, 462, which was assumpsit on a policy against fire, *Savage C. J.*, who delivered the opinion of the Court, says, "in cases of this kind, great strictness is required; and the plaintiff cannot recover, without a literal compliance with the conditions." And in the *Columbian Insurance Company* v. *Lawrence*, 2 *Peters*, 25, the certificate of a magistrate or sworn notary, required by the conditions, was held indispensable preliminary proof.

In the case before us, the defendants were not to be held to pay, unless the assured procured the specified certificate, from the nearest magistrate, notary or clergyman. This was withheld, for what reason does not appear; but without it, the plaintiff cannot prevail in this action.

Nonsuit confirmed.

Richard H. Vose *vs.* James C. Howard.

In an action of debt, brought by a Division Advocate against a Captain in the Militia, to recover the amount of a fine and costs awarded against him by the sentence of a Court Martial, where the only evidence offered in support of the action was a copy of the judgment of the Court Martial at which the sentence was rendered, certified by the Adjutant General; also the pay roll of the court certified in the same manner; also the order of the Commander-in-Chief directing the plaintiff to commence the action; and his own commission, as Division Advocate; it was *held*, that a nonsuit was rightly ordered.

Exceptions from the Court of Common Pleas.

The action was *debt*, brought *Oct.* 31, 1835, by the plaintiff, as Division Advocate of the second division of the militia, to recover the amount of a fine and one half of the costs awarded against the defendant by the sentence of a court martial, under the provisions of the "act to organize, govern and discipline the militia of this State," passed *March* 8, 1834. The plaintiff, to maintain the issue on his part, produced a copy of the judgment of the court martial at which the sentence was rendered,

certified by the Adjutant General; also, the amount of the pay-roll of said court, certified in the same manner; also the order of the Commander-in-Chief, directing the plaintiff to commence this action; and also his own commission, as Division Advocate, which papers were referred to in the bill of exceptions, as part of the case. Upon this evidence the plaintiff rested his case.

The counsel for the defendant required proof, that the court martial referred to had jurisdiction of the subject matter, were duly organized, and had conformed in all respects to the requirements of the law in such cases made and provided. The paper referred to, as a copy of the judgment of the court martial certified by the Adjutant General, was the copy of a paper purporting to be signed by *Rufus C. Vose*, as president of a court martial for the second division, and recited that pursuant to a general order from the Commander-in-Chief for the trial of the defendant, as captain of a company of infantry, on certain charges preferred against him by the Division Advocate, on the complaint of the commanding officer of the regiment, the court martial, naming the persons composing it, met, and having heard the parties, found the defendant guilty of the first charge and of the first and second specifications of the charge, and sentenced the defendant to be removed from office, and to pay a fine of $25,00, and half the costs of prosecution. This paper does not state what the charges were. The paper referred to, as the order directing the plaintiff to commence the action, recited the proceedings of the court martial, and concluded thus. "Major *Richard H. Vose*, Division Advocate of said second Division, will enforce the payment of the fine and costs which said *Howard* is sentenced by said court to pay. Captain *Howard* is hereby discharged from the service. Major General *White* will cause this order to be carried into effect." This last paper, and this only, states the offence of which the defendant was found guilty.

Smith J. before whom the action was tried, ruled, that the plaintiff had not gone far enough to make out his case, and directed a nonsuit; to which the plaintiff excepted.

Vose, pro se, argued, that the evidence introduced on the trial was sufficient to enable him to recover under the provisions of the *stat. of* 1834, *ch.* 643. By the statute and the practice under

it, a copy of the general order convening the court martial is sent to the Judge Advocate, who notifies all parties, and when the court have finished the business before them, they make a written statement of their doings, and all the papers are returned into the office of the Adjutant General, and there recorded. The court martial do not, and cannot, keep a record of the proceedings, and after the adjournment there would be no one to certify it, if they could. This judgment of the Court was properly certified by the only person competent to do it. By the *Mass. statute* the Judge Advocate is to keep a record of all the proceedings, and certify it to the Adjutant General. But here both the law and the practice are otherwise. The record produced was a record of the judgment, which is sufficient to support an action of debt for the amount. This record need not recite all the particulars of the proceedings before them, any more than the record of a judgment in a court of law. Nor is it any more necessary to produce a copy of the order convening the court, than to shew the commissions of the judges in an action on a judgment of a court of law.

May, for the defendant, took many objections to the sufficiency of the evidence offered at the trial, among which are these.

1. A court martial is a tribunal constituted entirely by the order of the Commander-in-chief, and has no persons designated and commissioned, as its members, and there are no stated times fixed by law for holding the courts. The statute provides expressly, that the members of these courts are to be detailed by the Commander-in-chief, and convened by a general order. No evidence of this was offered. The very foundation of the Court, and the power to act is wanting.

2. A court martial proceeds in a summary way, and is not a court of record. The only record kept is by the division advocate, whose duty it is made by statute, and he is to return it to the Commander-in-chief. The paper called a judgment was but a copy of a copy of a paper purporting to be signed by a man calling himself president of a court martial. The paper is not signed by the proper person to certify the doings, and a certified copy of a copy is no evidence.

3. The paper called a judgment does not state what the charges against the defendant, of which they found him guilty, were, and of course do not shew, that they had any jurisdiction of the subject matter. It does not even state that there were any charges in writing.

4. The paper does not shew, that the court was organized according to the provisions of the statute. The mode is there particularly pointed out, and the Court required to appoint a Marshal and may appoint other officers. They ought to return what they have done, that the Court here may see, that the proceedings are legal. But here it is not said, that they were organized according to law, nor is a single fact stated tending to shew it.

5. Those sections of the *statute*, from 36 to 43 inclusive, on which the action is founded, apply only to the militia when called out into actual service. If they do not, then they are unconstitutional and void, because they take away the right of trial by jury secured by the constitution.

He cited the following authorities. *Stat.* 1834, *ch.* 643, § 36 to 43; 1 *Black. Com.* 413; *Phil. on Ev.* 298; *Peake on Ev.* 74; *Rex* v. *Croke*, 1 *Cowper*, 26; 1 *Saund. Wm's Ed.* 74, *note* 1; *ibid.* 313, *note* 1, 2; *Commonwealth* v. *Coombs*, 2 *Mass. R.* 489; *Bridge* v. *Ford*, 4 *Mass. R.* 641; *Coffin* v. *Wilbour*, 7 *Pick.* 149; *Brooks* v. *Adams*, 11 *Pick.* 441; *Betts* v. *Bragley*, 12 *Pick.* 572; *Wise* v. *Withers*, 3 *Cranch*, 331; *Pownal, ex parte*, 8 *Greenl.* 271; *State* v. *Pownal*, 1 *Fairf.* 24; *Mills* v. *Martin*, 19 *Johns.* 7; *Constitution of Maine*, *Art.* 1, § 20.

After a continuance for advisement, the opinion of the Court was drawn up by

Emery J. — In this action a nonsuit was directed in the Court of Common Pleas, and the matter comes before us on the exceptions taken against that direction. It is certainly desirable that efficiency should be given to the sentences of courts martial, and that for trivial causes, delays should not be interposed to defeat their judgment. Celerity of punishment is necessary to maintain discipline. But it is the design of law to open the way for investigation as to the regularity of the organization of this species of

tribunal of limited jurisdiction, when a civil suit is instituted to recover the fines imposed. We cannot deprive the citizen, who is sued, of any of the protection, which our law extends to his case. We are to take nothing by implication.

The objections urged by the defendant's counsel are, that the record is deficient in not shewing the members composing the court martial to be detailed by the Commander-in-chief from the Division to which the officer belongs; does not shew that any marshall was appointed; that the commander did not designate who should act as president; nor that any order was issued by the Commander-in-chief, nor that the charges were in writing, and that the record sets forth no offence against military law, and that the order is not to be used to shew what the charges were.

We do not profess to ground our opinion solely on the want of evidence as to the appointment of a marshal, though it seems by law to be a peremptory provision, that he should be appointed by the president, and the president with advice of his associates *may* appoint a warrant officer to attend upon them, because it is not brought home to our conviction, that this officer would very materially *enlighten the judgment of the Court* on the subject committed to their consideration. Yet we can readily imagine that such an officer might aid in the preservation of order. But on examining the cases cited by the counsel for the defendant, we are constrained to say, that "*the plaintiff had not gone far enough to make out his case.*" The exceptions therefore are overruled, and the nonsuit is confirmed.

JAMES SMITH *vs.* BENJAMIN FOLLANSBEE, JR. *& al.*

The English statute of *Gloucester*, if ever adopted in *Massachusetts*, was repealed, as to tenants in dower, by the statute of 1783, *c.* 40; and was wholly inoperative at the time of the separation of *Maine* from that State.

Nor did the repeal of the statute of 1783, by the Legislature of *Maine*, nor the legislation upon the subject of dower, without re-enacting the provisions charging the tenant with forfeiture for waste, restore the validity of the statute of *Gloucester*.

An action of waste cannot be maintained in this State, against a tenant in dower.

Semble, that an action on the case in the nature of waste, to recover the damages sustained, may be maintained by the reversioner against a tenant in dower for actual waste.

Dubitatur, whether such action can be maintained for permissive waste.

EXCEPTIONS from the Court of Common Pleas.

This was an action of *waste*. The plaintiff alleged, that the defendants were assignees of a tenant in dower, and that he was the owner of the reversion; and that the defendants had made waste and destruction of the premises by suffering the dwelling-house to go to ruin and decay, the windows to be broken, the shingles on the roof to become rotten, &c.; and that the defendants had thereby forfeited the place wasted, together with three-fold damages for the amount of the waste. The action was referred to referees by rule of Court, who at the request of the parties found the facts in form of a special verdict, and submitted the questions of law arising thereon to the decision of the Court. One *Sarah Smith* had the premises assigned to her, as her dower in the estate of her late husband, in *January*, 1821; that in *April*, 1823, *Mrs. Smith*, conveyed the premises so assigned to her to the defendants; that during his life, in 1819, the husband of *Mrs. Smith*, through whom she was entitled to dower, conveyed the same premises to the plaintiff; that the outside of the shed and roof of the house were not kept in repair for some time before, nor at any time after the conveyance to the defendants, but were suffered to go to decay, which decay was solely occasioned by the operation of time and weather; that to repair the same and put them in as good condition, as when conveyed to the defendants, would cost $43,75; and that if the plaintiff be entitled to recover, the single damages would be said sum of $43,

75. The defendants, by their counsel, on the return of the report of the referees into Court, contended that the plaintiff should be ordered to become nonsuit.

1. Because, by law, an action of waste does not lie against tenants in dower, and is not the appropriate remedy for the injuries supposed to have been sustained.

2. Because treble damages are not recoverable of tenants in dower for waste.

3. Because tenants in dower are not liable in any form for permissive waste.

4. Because, by law, the estate supposed to be wasted is not forfeited.

But *Smith J.* who then held the Court, accepted the report of the referees, and adjudged, that the plaintiff recover against the defendants threefold damages, and the land set off as dower on which were the buildings thus wasted, with costs.

To this opinion and adjudication the defendants excepted.

The case was argued in writing by *Evans*, for the defendants, and by *F. Allen*, for the plaintiff.

Evans, in his argument, enforced these positions.

The first question to be considered is; whether an action of waste can be maintained in this State against a tenant in dower? In this State it is unknown in practice; not given by statute; nor required for the full administration of justice. The remedy by special action on the case is sufficient for all injuries, that may be sustained, and accords much better with the growing liberality of the law, which seeks rather to avoid, than to enforce a rigid exaction of penalties and forfeitures. If further remedy be wanting, a writ of injunction against doing waste would furnish it. The reasons, which, six centuries ago, justified the severity of the English laws against tenants impeached of waste, never existed here, and the doctrine was "enlarged and better accommodated to the circumstances of a new and growing country." 4 *Kent's Com. 3d Ed. 76 to 82, and notes.* Jurists of the first eminence are not agreed in the cases in which the action can be maintained. *Mr. Dane* is of opinion, that it lies against tenants in dower only; and that not by the statute of *Gloucester*, but by the *Massachusetts* statute of 1783, *ch.* 40, respecting dower. *Judge Jackson* is of opinion, that it may be maintained in all

cases, and that the statute of *Gloucester* became by adoption the common law of *Massachusetts*, and the Supreme Court seem to coincide in the opinion of *Judge Jackson*, in *Sackett* v. *Sackett*, 8 *Pick.* 309, but in the language of doubt and hesitation. It is yet to be settled what is the law in this State. The Court admit, that it was competent for the colonial legislature to repeal that statute, if adopted. Whether they did so or not, it is now contended, that the *Massachusetts* act of 1783, *ch.* 40, did abrogate and repeal the statute of *Gloucester*, so far as it regards tenants in dower. It was legislation on the subject, and defined the rights, liabilities and remedies of parties. The Court so considered it in *Padelford* v. *Padelford*, 7 *Pick.* 152. By virtue of this act, the statute of *Gloucester*, so far as it respected tenants in dower, became inoperative in *Massachusetts*, and of consequence was so in this State at the separation. By the 10th article, § 3, of the Constitution of this State, the laws of *Massachusetts* were the laws of this State, until altered or repealed. By the general repealing act of *March* 21, 1821, this act was repealed, being specially named in the act. This did not revive and again put in force the *statute* of *Gloucester*. The legislature of *Maine* early revised the statute respecting dower. *Statute*, *ch.* 40. It re-enacted so much of that of *Massachusetts*, as was deemed proper, but differs entirely from it. It makes no prohibition of waste; gives no writ of waste; and no forfeiture. It is insisted for the defendants, that the action of waste does not lie in this State against tenants in dower.

If the action of waste cannot be sustained, forfeiture of the place cannot follow, nor treble damages. The first, second and fourth objections made at the trial are thus disposed of.

As to the third objection, it is contended, that *no action* can be maintained against tenant in dower for such waste, as the report finds this to have been, "occurring wholly by time and weather." Such tenant is never liable for permissive waste unless it occur through carelessness or negligence. 4 *Kent's Com.* 81.

But a dowress, to use a good word of *Chancellor Kent*, though not found in the dictionaries, is not bound to repair the ravages of time and weather and natural decay. The statute of *Maine*, dif-

fering in that respect from that of *Massachusetts*, imposes no such obligation. If the widow were bound to make good all natural decay, and to leave the premises, as valuable, as they were when she went into possession; to make old buildings equal in value to new ones; the benefit of dower would be very materially diminished.

F. Allen, for the plaintiff.

Nothing urged by the counsel for the defendants is sufficient to authorize this Court to overrule the opinion of the Court below. It has been said, that the action of waste will not lie in this State. A list of the authorities relied on for the plaintiff was furnished to the counsel opposed; but no authority is cited in support of this position; and as numerous authorities are found in favor of maintaining the action in *Massachusetts* both before and since the separation; the position on the ground of authority is untenable. In favor of supporting the action are these authorities. *Carver* v. *Miller*, 4 *Mass. R.* 559; *Sullivan on Land Titles*, 180, 333; *Sackett* v. *Sackett*, 5 *Pick.* 191; *Sackett* v. *Sackett*, 8 *Pick.* 309. I am not aware, that any one has questioned, that the action of waste would lie against tenant in *dower;* but wherein any one has expressed doubts, as to other tenants for life or years, it seems to have been taken, as conceded, that there was no uncertainty, as to the right to such remedy against this class of tenants. The difference of opinion referred to as entertained by jurists, was whether the statute of *Gloucester* had been adopted in *Massachusetts?* Upon this point the authorities are thus balanced. In the negative, *Mr. Dane.* In the affirmative, *Parsons C. J.*, in delivering the opinion of the Court, in *Carver* v. *Miller*, before cited; *Jackson on Real Actions*, 20, 331, 340; The Court in *Sackett* v. *Sackett*, 8 *Pick.* also cited; 4 *Kent's Com.* 76 to 82, cited for defendant, where the decisions are commented upon, and the weight of his opinion added in the affirmative. *Mr. Dane* supposed, that the *statute* of *Massachusetts* of 1783, giving the place wasted and damages, was a substitute for the *statute* of *Gloucester*, and that the latter had not been adopted there. But he stands alone in the opinion; and the authority against him is overwhelming. The case of *Padelford* v. *Padelford* was but a *per curiam* opinion, entitled to but little

weight in itself, not opposed, merely placing the decision on a different ground, and not considered by the Court, in *Sackett* v. *Sackett*, 8 *Pick.* as conflicting with our position. And such is the opinion of Judge *Kent*. 4 *Com.* 81, note. As the *statute* of *Gloucester* then was adopted in *Massachusetts*, and remained in force, as the common law of the State, after the act of 1783, it became the common law of this State on the separation. The repeal of the *statute* of 1783, did not alter the case in the least. The common law remained unaffected by it, and in full force here. No *remedy whatever* was provided or even alluded to in the *stat.* of this State, *ch.* 40, as to waste committed. The fair and only legitimate inference to be drawn from that is, that the legislature, well knowing the law laid down in *Carver* v. *Miller*, and considering the *statute* of *Gloucester* to be the common law here, intended the provisions of it to be the law and the remedy here. If such be not the case, then we have no law on the subject. There is the same difficulty in maintaining an action on the case in the nature of waste. And besides, if resort might be had to that, or to an injunction to stay waste, they would but subject the reversioner to expense, and would in most cases be wholly fruitless, because in most cases such tenants are wholly unable to pay.

Tenants in dower and their assigns are liable for permissive waste. *Carver* v. *Miller*, before cited; *Sullivan*, 180, 333; 4 *Kent's Com.* 76, 79, 81.

At a subsequent term, the opinion of the Court, having been drawn up by him, was delivered by

Weston C. J. — The plaintiff claims judgment for the place wasted, and also for treble damages; and he founds his claim upon the statute of 6 *Edward* 1, *ch.* 5, called the statute of *Gloucester*. Whether therefore he is entitled to the judgment, for which he contends, will depend upon the decision of the question, whether as against tenant in dower, that statute at the time when the waste complained of was suffered, was in force in this State as part of our common law.

By the third section of the tenth article of the constitution, it is provided, that " all laws now in force in this State, and not repugnant to the constitution, shall remain or be in force, until

altered or repealed by the legislature." The laws of *Massachusetts* were then the laws of this State. Was a tenant in dower at that time liable to be charged in an action of waste, under the statute of *Gloucester?* Chief Justice *Parsons*, in *Carver* v. *Miller*, 4 *Mass.* 559, intimates an opinion, that tenant in dower is liable to forfeit for waste, the place wasted and treble damages. No question however upon this point, had been raised before the court in that case.

In *Padelford* v. *Padelford*, 7 *Pick.* 152, which was an action of waste, the plaintiff claimed treble damages, which are given by the statute of *Gloucester;* and the question was directly presented to the court whether he was entitled to them. The Court decided, that it was not necessary to resort to the statute of *Gloucester;* and that single damages only should be awarded, according to the statute of *Massachusetts*. *Stat.* of 1783, *ch.* 40, § 3. But it is urged, that the same court decided differently in the case of *Sacket et al.* v. *Sacket*, 8 *Pick.* 309. The marginal note to that case is, that the statute of *Gloucester* has been adopted, as a part of the law of the Commonwealth, though in respect to tenant in dower, modified there by statute. In that case, the court go into an elaborate consideration of the question, whether the statute of *Gloucester* had been adopted, as a part of the common law of *Massachusetts;* and they come to an affirmative result, notwithstanding the opposing opinion of *Mr. Dane*. As it was a part of the existing law of *England*, at the time of the emigration of our ancestors, necessary for the protection of real property, it was held that they brought it with them. But the court say further, that they also brought with them "power to make such new laws, as their exigencies might require. They could live under the old law, or make new ones. Whenever they legislated upon any subject, their own law regulated them; when they did not legislate, the law they brought with them was the rule of conduct."

The colonial legislature did legislate upon the subject of dower, in 1641, and the provincial, in 1701 subjecting the widow to an action, for any strip or waste, by her done, committed or suffered. They were silent, as to what she should forfeit, or what should be the nature of the action, to which she was made liable. And

upon the question, whether the law before existing was thereby repealed, and an action on the case for damages substituted, or whether the action intended was one under the statute of *Gloucester*, the court in the case last cited manifestly incline to the latter opinion. They however make no comment whatever upon the *statute* of 1783; but the result of their reasoning clearly is, that the former law was thereby changed and modified, as the reporter understood it.

That statute not only legislated upon the subject of dower, but it prescribed what tenant in dower should forfeit for waste, and to whom. Had either the colonial or provincial statute gone as far, the course of reasoning adopted by the court, would have led them at once to regard it, as a substitute for the *English* law. It would have been held as a clear manifestation of the legislative will, that the new forfeitures, and not the old, should be visited upon the delinquent. So the same court thought in *Padelford* v. *Padelford*. We find no discrepancy between the two cases. *Sacket* v. *Sacket* was not brought against tenant in dower. In the former case, the statute of *Gloucester* was held not to apply, because that of the Commonwealth had substituted a new remedy. In the latter, it was held that it did, because no other remedy had been provided. If they had intended to overrule the former case, which was decided only the preceding year, they would have so intimated. But there is no inconsistency between the cases. The same reasoning supports both.

Without giving any opinion upon the question, whether the statute of *Gloucester* was adopted in *Massachusetts*, before our separation, we are satisfied that if it was, a tenant in dower was relieved from its operation, in virtue of the statute of 1783. At the time therefore of the adoption of our constitution, such tenant was not liable to be charged, under the former statute. The legislature of *Maine* did in 1821 repeal the *statute* of 1783, within this State; and in the revision of the laws, they legislated upon the subject of dower, without re-enacting the provisions, charging the tenant with a forfeiture for waste. What was the effect of this repeal? Did it subject the tenant to the severe forfeiture of the statute of *Gloucester*? Without determining that such would have been its effect, if that statute had constituted our

common law before, it is sufficient to say, that such could not have been the operation of the repeal, the statute of *Gloucester*, as it respects tenant in dower, never having been the law of *Maine* at any former period, at or after the adoption of the constitution.

It is insisted, that this action ought to be maintained, because otherwise tenant in dower may commit waste with impunity. If it were so, this view of the case addresses itself to the legislative, rather than to the judicial power. It is, doubtless however, still an unauthorized act, to the injury of the reversion; and we do not at present perceive any objection to the maintenance of an action on the case, in the nature of waste, against tenant in dower; but whether or not for permissive waste, may require investigation. 4 *Kent*, 79.

The exceptions are sustained. And the opinion of the Court is, that the action of waste cannot be maintained against the defendants upon the facts.

Judgment for the defendants.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1836.

WATERMAN LAWRY *vs.* SIMEON WILLIAMS.

Where a deed appeared to have been executed more than thirty years before the trial; and where the only subscribing witness testified, that at the time of the date he subscribed his name as a witness to the deed in the presence of both parties, but could remember no other circumstance taking place at the time; and where subsequently the deed was in the possession of the grantee; it was held, that there was sufficient evidence of its execution and delivery.

A deed, although not acknowledged or recorded, is good against the grantor and his heirs.

Where one conveys to another, by deed of general warranty, land to which he had not then a perfect title; any title subsequently acquired by the grantor will enure by estoppel to the grantee.

THIS was a writ of entry on the plaintiff's own seisin within twenty years, the writ being dated *June* 12, 1832, to recover a strip of land fronting on seven mile brook in *Anson*, of the width of eighteen rods and running back half a mile. The demandant claimed title to an undivided share of the premises, as one of the heirs of *Samuel Lawry*, deceased; and he gave in evidence a deed from *Samuel Titcomb* to said *Samuel Lawry*, dated *October* 19, 1814, and recorded in the same month, of this and other land. The tenant then offered in evidence a deed of warranty from the same *Samuel Lawry*, deceased, to *Lemuel Williams*, deceased, whose son and heir the defendant is, dated *November* 29, 1790, of this same land. This deed was objected to by the plaintiff's counsel, it not being acknowledged or recorded, and it being wit-

nessed by *Samuel Lawry*, as one of the two subscribing witnesses, and there not appearing to be any one of that name, excepting the grantor in the deed. He also called for proof of the execution of the last named deed. The tenant then gave in evidence the deposition of the other subscribing witness. He testified, that he witnessed a deed from *S. Lawry* to *L. Williams* of the same date of the one produced at the trial, and the same shewn to him, when he gave his deposition, the deed not being annexed to the deposition. The deponent stated, that when he signed his name, as a witness, the parties were both present, but he saw no one write but himself, and did not see the deed delivered, or know which took it, and saw no consideration paid. He also stated, that when the deed was given, *Lawry* was in possession of the land, and continued in possession for about a year afterwards. And the tenant proved the genuineness of the signature of said *Samuel Lawry* by other evidence. There was evidence that a deed, having a resemblance to the one offered, and believed by the witness to be the same, was seen in possession of said *Lemuel Williams*, many years prior to the time of the trial. The tenant also offered evidence to show, that *Lemuel Williams* was in possession of the land in dispute, and the demandant offered evidence to prove that *Samuel Lawry* claimed title after the deed to *Williams*. A nonsuit was ordered by consent of the demandant; and if the deed from *Samuel Lawry* to *Lemuel Williams* was properly admitted, and would have the effect of transferring the land, so that it could not be defeated by said deed from *Titcomb* to *Lawry*, the nonsuit was to stand; otherwise to be set aside and the action stand for trial.

Tenney, for the demandant, said that the deed of warranty to the father of the demandant, acknowledged and recorded, was sufficient evidence of title, unless defeated by the paper introduced by the tenant, on the ground that the title of the demandant's ancestor enured to the tenant's benefit in consequence of what appeared in the case; and contended, that such result did not follow. There was no legal proof of its execution. One subscribing witness says, in his deposition, that both parties were present when he wrote his name, but that he saw nothing writ-

ten but his own signature, and nothing was said about what was or had been written. The rule is, that if one witness can be found, he must be called, and his evidence is conclusive. 1 *Stark. Ev.* 330, 333, 336. Nor does proof of the handwriting of *Samuel Lawry*, as a witness, aid the tenant, for being the supposed grantor he is incompetent. 1 *Stark. Ev.* 342. Unless possession follows the deed, it must be proved however ancient. *Stockbridge* v. *West-Stockbridge*, 14 *Mass. R.* 261; 1 *Stark. Ev.* 345, 349.

There was no legal delivery. There was no absolute evidence, that the paper was ever in the hands of the elder *Mr. Williams*. A delivery should not be presumed, especially, when the tenant shows, that there was no delivery at the time it is said to have been executed, and where there are circumstances to raise a presumption to the contrary. 1 *Stark. Ev.* 333; 9 *Mass. R.* 310; 12 *Mass. R.* 461; 10 *Mass. R.* 458; 7 *Greenl.* 181; 4 *Kent's Com.* 448.

The deed should have been acknowledged and recorded. *Lawry* is proved to have been in possession at least one year after the date of the deed, and it is not proved that *Williams* ever had the exclusive possession at any time.

F. Allen, for the tenant, argued in support of the following positions.

1. The deed, *Lawry* to *Williams*, was properly admitted in evidence. This deed was executed more than thirty years before the trial, and such deeds have always been admitted without proof of execution. *Phil. Ev.* 404; *Bul. N. P.* 255; 3 *Johns. R.* 292; 14 *Mass. R.* 237.

2. Recording the deed was unnecessary, as between the parties to it and their heirs, both by the statutes of *Massachusetts* and of *Maine*.

3. The deed from *Lawry* to *Williams*, being a deed of warranty, estops *Lawry*, and his heirs, from ever claiming. 9 *Cranch*, 43; 9 *Wheaton*, 454; 11 *Johns. R.* 97; 14 *Johns. R.* 194; 2 *Serg. & R.* 515; 3 *Pick.* 61; 5 *Greenl.* 227.

4. The deed from *Titcomb* to *Lawry, senior*, had no tendency to defeat the deed to *Williams*, for there is nothing in the case to shew, that *Titcomb* had any title; much less that he had a para-

mount one. If his deed conveyed any title, it enured to the benefit of *Lawry's* grantor, and not to *Lawry*.

The opinion of the Court was subsequently delivered by

WESTON C. J. — There was proof of the execution of the deed of *November*, 1790, *Samuel Lawry* to *Lemuel Williams*, which with the subsequent possession of the deed by the grantee, was of a character to afford satisfaction upon this point. Although not acknowledged or recorded, it was good against the grantor and his heirs. Being a deed of general warranty, any title subsequently acquired by *Lawry*, would enure by estoppel, with regard to the land conveyed, to *Williams*, his grantee. When therefore, the proprietor, *Titcomb*, did in 1814, convey the whole lot to *Lawry*, the title to the twenty acres, parcel thereof, enured to *Williams*, and *Lawry* and his heirs are by law estopped to demand the same against *Williams*, his heirs or assigns.

Nonsuit confirmed.

MARY SMITH *vs.* HANNIBAL INGALLS.

In an action of dower, the tenant, who holds under a deed from the demandant as executrix of her husband's will, conveying the testator's interest in the premises subject to her right of dower, and who discloses no other title, is estopped to deny the seisin of the husband during the coverture.

THE demandant claimed *dower* in certain real estate in *Mercer*, of which the late husband of the demandant, now deceased, was alleged in her writ to have been seised during the coverture. The plea was, that the husband was not seised during the coverture of such an estate, as would entitle the demandant to dower therein. In support of the action the demandant introduced an agreement for the sale and purchase of the land, signed by the demandant and tenant, dated *August* 4, 1832, in which are found these words: "the reversion of the widow's dower therein, subject to and expressly reserving her, the said *Mary's* right of dower in the premises." Also, a deed from the demandant to the

tenant, dated *August* 6, 1832, as executrix of the will of her late husband, and conveying all the testator's "right, title and interest in the premises, if any," "reserving and excepting her right of dower in said real estate." The demandant also gave in evidence the copy of a license from the Judge of Probate, to sell said estate. It was admitted that the demandant made a seasonable demand of her dower of the tenant. The tenant proved, that on the 10th of *May*, 1804, the husband conveyed the premises wherein dower is now demanded to one *Curtis*, taking back a mortgage to secure the consideration. It appeared that *Curtis* took possession of the land, being then wild and uncultivated, and while thus in possession, paid to the husband the sum for which the land was mortgaged. Subsequently to this the coverture took place. It was contended by the demandant, that upon this evidence the tenant was estopped to deny the seisin of the husband of an estate whereof the demandant was entitled to be endowed. A verdict was taken for the demandant, subject to the opinion of the Court. If in their opinion the tenant is thus estopped, judgment is to be rendered thereon; otherwise the verdict is to be set aside, and the demandant become nonsuit.

Tenney, for the tenant.

One point only is presented. Is the tenant estopped to deny the seisin of the demandant's husband.

The case shows, that the husband of the demandant had not the slightest pretence of title during the coverture. Long before the marriage, the estate had been conveyed, and a mortgage taken back; but the mortgage money had all been paid, and the mortgagee never entered under his mortgage; nor was he in any way in possession. If she had been married before the conveyance to *Curtis*, still she would not have been entitled to dower, because it was then wild and uncultivated land.

The doctrine of estoppel is not to be favoured, but carefully to be restricted. *Leicester* v. *Rehoboth*, 4 *Mass. R.* 180; *Bridgewater* v. *Dartmouth*, *ibid.* 273; 5 *Dane*, 380.

Shall the demandant by her own act, as executrix, and because the tenant has received her writing and deed, have dower in land, wherein her husband never had the least interest during the coverture?

Nothing passed by that deed to the tenant, because the testator had before sold to *Curtis;* nor did he, or could he, take possession under it. There were no covenants of warranty in the deed giving him any remedy for the incumbrance of dower or for any defect of title. The deed was a mere naked release, and the description of the property was such, that if there had been covenants, they would have been useless, because, nothing but the testator's right, *if any*, was conveyed. By such deed no relations would arise between the parties, by which one is placed in subordination to the other. 4 *Greenl.* 214; 7 *Wheat.* 547. The principle on which estoppels are allowed is to avoid circuity of action; and where there is no circuity, there is no estoppel. 4 *Dane*, 494; 1 *Church's Dig.* 385. By allowing the estoppel in this case it will promote suits, for the demandant cannot hold against *Curtis'* claim. *Allen* v. *Sayward*, 5 *Greenl.* 227. One in possession has a right to purchase claims to secure his title without subjecting himself to any liabilities, 4 *Greenl.* 219.

In *Allen* v. *Sayward*, 5 *Greenl.* 227, it was held, that one giving a release, with covenants of seisin, might set up an after acquired paramount title in himself. In this case she sells, as executrix, and reserves to the widow. If she had any right to dower, the executrix could not sell it. Anything reserved in a deed must be from what would otherwise have passed by the deed. For that reason it cannot operate as an estoppel. Nothing but his interest would pass, *if any*, by the deed, for nothing more was described, as conveyed. But *dower* is not reserved, but the mere *right to dower*, which in this case was nothing.

Wells, for the demandant.

The tenant discloses no title, but under the husband of the demandant, and the case is to be considered, as it would have stood, if the husband had conveyed before his death, instead of his executrix afterwards. If the tenant had shewn a paramount title from another source, perhaps the case might have been different.

The tenant is estopped by the agreement to purchase, in which dower is reserved. It is said, that the words, *if any*, shew doubt of title in the demandant's husband. But when he takes a title under it by which he holds the land, for he shews no other, he

cannot dispute the title of the testator. The reservation in the agreement shows, that the tenant so understood the title. *Johns* v. *Church*, 12 *Pick.* 557; *Willard* v. *Nason*, 5 *Mass. R.* 240.

But the tenant is conclusively estopped by the deed. 2 *Greenl.* 226; 6 *Greenl.* 243; 1 *Fairf.* 383; 6 *Johns. R.* 290; 10 *Johns. R.* 292; 17 *Mass. R.* 162. As it respects estoppel, there is no distinction between deeds of warranty and of quitclaim. The tenant is estopped to deny the seisin of the husband by accepting the deed equally, whether the deed be warranty, or quitclaim. *Hains* v. *Gardner*, 1 *Fairf.* 383; *Fairbanks* v. *Williamson*, 7 *Greenl.* 96.

After a continuance for advisement, the opinion of the Court was drawn up by

Weston C. J. — The tenant holds under the title of the husband, in virtue of the deed of his executrix, conveying the same, under license from competent authority. He does not plead nontenure, or disclaim any interest in the land, of which dower is demanded; but he controverts the seisin of him, from whom alone he has any pretence of title. He denies the source and origin of his own claim. We cannot distinguish this case in principle, from that of *Kimball* v. *Kimball*, 2 *Greenl.* 226, or of *Nason* v. *Allen*, 6 *Greenl.* 243, and the authorities cited in those cases, and by which they are sustained. In *Nason* v. *Allen*, the husband was not in fact seised of an estate, which would have entitled his widow to dower; but as the tenant held under the husband, it was decided, that he was estopped to deny his seisin.

Had the tenant been seised of the land, in which dower is demanded, by a distinct title, before his purchase from the executrix, the case might have borne some resemblance to that of *Fox et al.* v. *Widgery*, 4 *Greenl.* 214, cited for the tenant. But all the title he has comes from the husband. No other appears, with which he connects himself.

The tenant sought the title, of which he became the purchaser. He was apprized by the deed, under which he holds, that he would take, subject to the widow's dower. And that she should have her dower, was one of the stipulations, to which he expressly assented in the agreement, which preceded the sale, and formed

the basis, upon which it afterwards took place. He has little reason therefore to complain of the application to his case of the rule of law, by which he is estopped to deny the validity of the title, under which he holds.

Judgment on the verdict.

Copp *vs.* Lamb.

The demandant, in a real action, is entitled to set off his costs against the value of the improvements, found for the tenant under the provisions of the *stat.* of 1821, *ch.* 47, *sec.* 1.

In this action, which was a writ of entry, the jury found a verdict for the demandant, but also found, that the tenant was entitled to a sum of money for his improvements, under the provisions of the *statute*, *ch.* 47, *sec.* 1, commonly called the *betterment* act. Judgment was rendered on the verdict, whereupon *Boutelle*, for the demandant, moved to set off the demandant's judgment for costs against the defendant's claim for improvements.

Hutchinson, for the tenant, stated that he appeared for an assignee of this claim from the tenant, and objected to the set-off; and argued, that this came within the general principle, that where a claim has been fairly assigned, no after claim on the assignor can be set off against it.

Boutelle remarked, that the demandant became entitled to costs at the same instant, that the tenant became entitled to payment for betterments.

The Court, on the next day, directed the set-off to be made.

Asa Vickerie *vs.* Asa Buswell.

Three persons, as tenants in common, owned land on which was a mill, carried by placing a dam across a brook, with all the land covered by the water of the pond thus flowed. After the mill and mill-dam had stood many years, they made partition of this and other adjoining lands by mutual releases, assigning the mill to the respondent in a process for flowing, and certain land including a portion of that covered by the mill-pond to the complainant. In the release to the complainant were these words; "Brook to remain for the use of the mills, as heretofore, forever." *It was held*, that the respondent was entitled to flow the land of the complainant, without payment of damages, to the extent *that it had been usually flowed* by the previous dams.

This case was a complaint under the statute, for flowing the complainant's land in *Solon*, by means of a dam erected by the respondent for the purpose of working his mill. The respondent claimed the right to flow the land without payment of damages. He proved, that the land flowed, with other land adjoining, was once owned in common and undivided by the parties and one *Chase*, that, on *March* 11th 1824, partition was made by mutual releases; and that in the release from the respondent and *Chase* to the complainant, under which he holds in severalty, is the following reservation. "Brook to remain for the use of the mills, as heretofore, forever." It was proved by the respondent, that between the years 1779 and 1793 a dam was erected about fifteen rods above the one now existing, which occasions the flowing complained of; that this first dam was removed in about 12 years, and in 1805 another was built on or near the site of the present dam; that in 1831 the second dam was carried away, and the present one erected soon after; that the first was higher, than the two subsequent dams, and flowed more land; that the dam of 1805 was higher and flowed more land, when first erected, than it did immediately previous to its removal; and that for sometime it was depressed in the centre, but that the wings were as high as the dam now existing. It did not appear at what time the depression took place. The complainant offered evidence tending to prove, that the dam of 1805, for several years before its removal, flowed less than the present, and that a portion of the land cultivated, and which was good tillage land in 1828, was overflowed by the present dam, and that the water was, in the opinion

of witnesses, about a foot higher in the mill-pond after the erection of the present dam, than during the latter part of the existence of the dam of 1805; and that this higher elevation caused the damages complained of; that for eighteen years past, the comparative elevation of the water, as raised by the present dam, was higher than as raised by the dam of 1805; and that within that time, the water was at no time raised so high by the dam of 1805, as by the present one.

The counsel for the complainant contended:

1. That the reservation in the release gave no right to flow the lands of the complainant without compensation, but only the right to use the water for the mill.

2. That the reservation gave no right to flow more of the complainant's land, than was flowed at the time of the execution of the release.

3. That the right, which the complainant had in the land before the partition, remained, as regarded the brook and the flowing, unimpaired, and that the reservation extended no farther, than to preserve to the respondent and *Chase* the rights therein, which they previously had.

Weston C. J. instructed the jury, that the reservation did embrace the right to flow without remuneration, as well as the right to use the water; that if the water was not raised higher by the present dam, than it was by the first, during its continuance, and by the second at the time of its erection, they would find a verdict for the respondent; that the complainant's receiving the release with the reservation, and giving his own, was relinquishing all the right to object which he anciently might have had before the partition.

The jury returned a verdict for the respondent, which was to be set aside, if the instructions of the Judge were wrong.

Tenney, for the complainant, argued in support of the three points made at the jury trial. Under the first he cited *Angel on Watercourses*, 65, 70, 15; *Howard* v. *Wadsworth*, 3 *Greenl.* 471.

Under the second. *Angel on Watercourses*, 48; 17 *Mass. R.* 289.

Wells, for the respondent.

The operation of the reservation was to continue to the respondent the same right to flow the water, without payment of damages, which had been appropriated to the mill before that time. And the course taken was proper to carry such intention into effect. *Emery* v. *Chase*, 5 *Greenl.* 232.

By the partition the mill was set off to one party, with the right to keep up the pond of water to carry it without payment of damages. The damages were paid then by the other property assigned to them. The obvious intention was, that the respondent should have the same privilege of water, which the whole three had appropriated to it, when they erected their dams, and not in the lowest state of water, when the dam was decayed and partially broken down.

The action was continued, and the opinion of the Court afterwards drawn up by

WESTON C. J. — By construction of law, the owner of land bounded upon a brook or stream of water, goes to the thread of the stream. But he may accept a deed, in which there is reserved or secured to his grantor an easement or privilege, in the premises granted. The brook in question had been appropriated, to raise a head of water for the use of the mills, for more than thirty years, prior to the release, under which the complainant holds. In that release are these words, "brook to remain for the use of the mills, as heretofore, forever."

If these words had not been in, the complainant would have had no right to divert the brook from the respondent's mills. These words must have had some meaning. Some beneficial interest was intended to be secured to the respondent, as the owner of the mills. When we apply the language to the subject matter, we think the meaning cannot be mistaken. The respondent was to have the same use of the brook for his mills, as had "heretofore" been enjoyed. It was to remain as before. Its volume had been for many years artificially increased, for the use of the mills; and so it was to remain forever. The enjoyment of the property released to the complainant, is to that extent qualified. If there had been reserved for the use of one or

both the releasors, the privilege of cutting timber, upon a definite portion of the premises released, or a right of way, such reservation would have been good. In the present case, the soil passed to the complainant, the respondent reserving the right to cover a portion of it with water, as had been before done, for the benefit of his mills.

If there is any technical difficulty in giving effect to the manifest intention of the parties, in the clause under consideration, as a reservation, the complainant may be regarded as estopped, by his acceptance of the deed, under which he claims, to demand damages for keeping the head of water in the brook as before, or as evidence of a license to permit the respondent to flow, without payment of damages. The brook was not to remain as it then was, at the time the release was executed, when the centre of the dam had become depressed by decay, or from other causes. It was to remain for the use of the mills, "as heretofore," plainly embracing a former period when the dam was in a finished state. When that was carried away, and it became necessary to rebuild, we are of opinion, that upon a just construction of the clause, the respondent had a right to elevate the new dam, as high as the former one was, before its centre was depressed. He would thus use the water, and keep the brook in the state it formerly had been, for the use of the mills. And this is allowing him elevation enough, to justify the flowing complained of, without resorting to the state of things, in the time of the first dam, when a still greater head of water was raised.

The opinion of the Court is, that the presiding Judge was justified, in withholding the instructions requested, and that those given, were substantially correct.

Judgment on the verdict.

JOHN MOOR *vs. The Inhabitants of* CORNVILLE.

A surveyor of highways cannot maintain an action against the town for services in building a bridge across the highway within his district, without the consent or knowledge of the selectmen; although the inhabitants of such town had passed over the bridge in travelling the road.

THE case came before the Court on an agreed statement of facts.

The action was assumpsit, upon an account annexed to the writ, for materials found and labor furnished in the building of a bridge across cold stream in the town of *Cornville*, to the amount of $26,05. The plaintiff was duly chosen and sworn, as surveyor of highways for that town, on the first *Monday* of *March*, 1832, and on the 19th of the same month, the selectmen duly assigned to him his limits, including the bridge in question. On the 22d of *May* following the bridge was carried away and destroyed by a sudden freshet. At this time the tax bills were not committed to the plaintiff, who, without consulting or applying to the selectmen, or giving them any notice, proceeded to repair the bridge by the labor of himself and others employed by him. For that labor and the materials used upon the bridge this action is brought. The plaintiff demanded of said inhabitants payment for his services within thirty days of the time they were performed; and the inhabitants have constantly used said bridge by passing and re-passing it from the time of its erection until the commencement of this suit. The bills of the highway taxes in his district had afterwards been committed to the plaintiff, and he had not returned them, when the action was commenced. The question submitted to the court was, whether the plaintiff, upon these facts, could maintain the action.

D. Kidder, for the plaintiff.

It was the duty of the plaintiff, as surveyor of highways, to repair the road within his district, and this ought to entitle him to payment. But here the case shews, that the inhabitants of the town have used the bridge constantly since the time it was built by the plaintiff. This brings him precisely within the cases of *Hayden* v. *Madison*, 7 *Greenl.* 76; and *Abbott* v. *Hermon*, *ibid*, 118.

Hutchinson, for the defendants.

The plaintiff did not pursue the course pointed out by the statute, and therefore is not aided by his being a surveyor of highways. *Haskell* v. *Knox*, 3 *Greenl.* 445. Here was a road and bridge, and they were no more used by individuals in *Cornville*, than those belonging to other towns. They were not to be prevented from travelling the road by the acts of the plaintiff. The cases cited were, where the plaintiffs had made special contracts, and had not fulfilled them to the letter of the contract. The use of the property was held to be an acceptance of the work. The plaintiff had enough in his hands to do this work, and had he returned his bills, that fact would have appeared.

The action was continued for advisement, and the opinion drawn up by

Weston C. J. — The law has made ample provision for such an exigency, as happened in the case before us. If the ordinary means, subject to the control of the surveyor, proved insufficient, he had a right, with the consent of the selectmen, or the major part of them, to employ the inhabitants of the town, who would be entitled to be reimbursed from the town treasury. Failing to pursue this mode, he acted without any authority whatever. *Haskell* v. *Knox*, 3 *Greenl.* 445.

The counsel for the plaintiff relies upon two cases cited from our own reports. In *Hayden* v. *Madison*, 7 *Greenl*, 76, the plaintiff had performed services upon a special contract, with which he had not strictly complied. One half the stipulated price was to be paid, upon the completion of the road. As the town paid this, they were deemed to have accepted what was done, and to have waived their right to require a strict performance.

In *Abbot* v. *The third school district in Hermon*, the plaintiff had built a school house under the direction of certain persons, acting as a committee of the district, who had not been regularly chosen. It had been occupied by a school for three successive winters, the last under the authority of the school agent for the district. This was regarded as sanctioning what had been previously done ; and as an acceptance of the house, by an agent duly

authorized. It was a ratification of what had been procured by agents, whose legal authority was liable to objection.

The plaintiff here stepped aside from the path of official duty, which had been plainly and clearly pointed out, and seeks to impose an obligation upon the town, based upon this irregular and unauthorized course of proceeding. The law required him to act under the advice of the selectmen, the prudential agents of the town. This, he entirely disregarded. The bridge having been placed across a stream in the highway, must necessarily be used by all persons, having occasion to travel in that direction. We cannot regard this use as raising an obligation to pay for the bridge on the part of the town, under the circumstances. It would have the effect to encourage a departure from the law, which has regulated and prescribed the duties and liabilities of towns, in relation to highways.

Judgment for the defendants.

Franklin Fling *v.* Joseph Trafton.

A party is responsible for the acts of the attorney of record regularly employed by him in the case.

Where the name of one of two defendants was stricken out by permission of the Court, on motion of the plaintiff's attorney, and with the assent of the only defendant appearing in defence; the action then stands, as it would have done, if it had been originally brought against the only remaining defendant.

A writ of review of such action is rightly brought in the name of the remaining defendant alone.

And a motion, made by the original plaintiff, at the trial of the review, to restore the name stricken out will not be allowed.

This case was on a writ of review. The original action was brought by *Trafton* against *Fling* and *James Conner*, on a contract dated *September* 30, 1826, in which *Trafton* had agreed to build a mill for *Fling & Conner*, and they agreed to pay him $110,00 in the following *June*, and $50,00 in stock in one year from the next *October*. There was an account annexed to the

writ of $62,76. The action was commenced in *July*, 1827, and continued until the *June Term*, 1828, when *Fling* was defaulted, and *Trafton* and *Conner* agreed to refer the action, as far as related to said *Conner*. The referees awarded, that *Conner* should pay *Trafton* $104,00, damage, and no costs, and *Conner* paid this amount to *Trafton*. At the next term of the Court, the rule of reference was discharged, and the name of *Conner* by his consent was stricken out of the writ, that judgment might be rendered against *Fling*. This was done without the knowledge of *Trafton*, but by the assent and upon the motion of the *then* attorney of *Trafton* of record, but who at that time acted for the benefit of *Conner*, intending that *Conner* should have the benefit of the judgment, which, according to the attorney's impression, he stated to the court. Judgment was made up in the handwriting of the same attorney against *Fling* for $175,51, damage, and $15,80, costs. Afterwards *Conner* took out an execution in *Trafton's* name, without his knowledge, and gave it to an officer who collected thereupon $100,00 in cash, and took the note of a third person to *Conner* for the residue. On the opening of the action of review for trial, before *Weston C. J.*, *Trafton* moved, that the writ in the original action should be amended by restoring the name of *Conner*, so that the action might be tried in the manner in which it originally stood; but the motion was overruled by the Court. *Trafton* also objected to the maintenance of the action of review in the name of *Fling* alone, and contended, that *Conner* should have been joined with him. This objection was overruled. The verdict was for the plaintiff. If in the opinion of the Court, the action cannot be maintained in the name of *Fling* alone, or if the name of *Conner* should have been restored to the original writ; the verdict was to be set aside, and a new trial granted.

Wells, for the defendant.

Fling became defaulted, and was subject to have an execution taken out against him for the whole amount of the demand, if *Conner's* name had been stricken out. This was a larger amount than that for which execution issued. If then *Conner* had paid nothing, and his name had been stricken out, the plaintiff could not complain of any of the proceedings. *Trafton* might have

taken out the execution and have enforced it. But the other defendant would not be defaulted, and after submitting the case to referees, he paid *Trafton* the amount they found due without costs. *Trafton* received this sum, and there the case ended, as it respected him. The attorney knew this fact, and all his authority to act for *Trafton* ceased from that time. In his after course of conduct, the relation in which he stood gave him no authority, and he did not pretend to act for *Trafton's* benefit, but for another man. Unless then, because a man has once employed an attorney, he must be bound by all his acts after he has ceased to be such, this furnishes sufficient ground of defence. But the injury to the plaintiff did not arise from the acts of the attorney. The case shews, that it was not the attorney, but *Conner*, who took out the execution and enforced it. The whole was done without authority from the then plaintiff, or even from the man who had once been his attorney.

The *statute* of 1821, *ch.* 57, giving the right for review, provides that the review must be prosecuted by all the original parties. Where a part of the writ has been stricken out, it is competent for the Court to restore it on a writ of review. *Parker* v. *Parker*, 17 *Mass. R.* 376. The declaration discloses a cause of action against two, and on trial against one the plaintiff must become nonsuit. 1 *Chitty on Pl.* 29. The trial of the action of review should be had, as the action stood originally.

The injury done to *Fling*, if any, was done by *Conner*, and the proper remedy is by an action against him. If *Conner's* name can be restored, then justice may be done between all the parties: as it stands this cannot be done.

Tenney, for the plaintiff in review.

When *Conner* paid the amount found due to *Trafton*, the whole contract was entirely cancelled, the suit ended, and *neither party* should have been entered. After the debt, $104,00, was paid, and after the action should have been dismissed, judgment was made up for the whole amount claimed and costs, and collected of the defendant. But it is said, that this was done without the knowledge of the defendant in review, and that he is not liable. It was done by the attorney of record of the plaintiff,

and without whose action, it could not have been done. The defendant in review is responsible for his acts.

After the amendment was made, the action stood, as if *Conner's* name had never been in the writ. This amendment is to be treated like any other, and a trial on a review does not set aside all amendments. The record and judgment stand, *Trafton* v. *Fling*, and the review is to be tried, as the action stood at the time of the former trial or judgment. *Sawyer* v. *Merrill*, 10 *Pick.* 16. By permitting the amendment, it would be in effect granting a new trial between other parties, which is beyond the power of one Judge. *Parker* v. *Parker*, 17 *Mass. R.* 376.

But if the name of *Conner* was inserted, and the trial was to be had with his name in, it could make no difference. The demand was fully satisfied by the payment of the award; and a joint promissor can make no use of a judgment which has been satisfied by himself. *Hammatt* v. *Wyman*, 9 *Mass. R.* 138.

After a continuance, the opinion of the Court was drawn up by

Weston C. J. — The original action was prosecuted to final judgment and execution by the attorney of record of *Trafton*. It is not pretended, but what he was regularly employed by him. *Trafton* then must be held responsible for any injury done to the adverse party in his name. We can take no notice of any other person, for whose benefit these proceedings, of which the present plaintiff complains, may have been had. *Conner's* name had been stricken from the original writ by his consent, on the motion of *Trafton's* attorney. The action then stood, as if brought against *Fling* alone. A review had been granted of the action, in the shape in which the original plaintiff, *Trafton*, chose to present it, upon which judgment was rendered in his favor.

In *Parker, executor*, v. *Parker*, 17 *Mass. R.* 376, the question was, not whether the amendment must be, but whether it could be allowed. It was so far from being deemed essential to the prosecution of the review, that it was allowed in that case only, because it was regarded, under the circumstances, as forming an exception to the general rule relating to amendments. If it forms a precedent, which would justify the allowance of the

amendment moved for, in the case before us, by the defendant in review, we think it was properly refused by the Judge, who presided at the trial. The case was left in the posture, in which it was placed by the original plaintiff, and we perceive no equitable circumstances, which justify its restoration to its original condition. As *Conner* was no longer a party to that action, and as the judgment neither was, nor could have been rendered against him, he could not have joined in prosecuting the review, which was rightfully brought by *Fling* alone.

Judgment on the verdict.

Inhabt's of NEW PORTLAND *vs. Inabt's of* RUMFORD.

The separation of territory from an existing town and the annexation of it to another town will not, under the *stat.* 1821, *ch.* 122, give a settlement in the latter town to any persons, other than those who resided thereon at the time of such annexation, and who then had a settlement in the former town.

THE only question made in this case, which came before the Court on a statement of facts, was, where was the settlement of the pauper?

James McAllister, and his family, for whose support the action was brought, had his settlement in *Rumford* in *March*, 1831, and in *March*, 1833, removed into *New Vineyard*, living on that part of the town which was annexed to *New Portland* by an act of the legislature, passed *March* 4, 1834; and continued to reside on that part until after that act was passed. All the supplies sued for were advanced after the passage of the act. A nonsuit or default was to be entered according to the opinion of the Court.

Leavitt, for the plaintiffs.

The settlement of the pauper was in *Rumford*, in 1831, and *there* must remain until a new one is gained. There is but one provision in the settlement act, statute of 1821, *ch.* 122, which applies to this case, the latter part of the sixth mode. The annexation of part of one town to an adjoining town has the same

effect as the incorporation of a new town, so far as it regards the settlement of persons resident on the territory annexed. *Hallowell* v. *Bowdoinham*, 1 *Greenl.* 129. By the terms of the statute, only such persons as have a legal settlement in the old towns gain a settlement by the incorporation of a new town out of one or more old towns. The annexation of the land on which the pauper resided to *New Portland*, placed that town in the same situation in which *New Vineyard* would have been, if the land had remained there. *Rumford* neither gains nor loses by the setting off. The pauper, being settled in *Rumford*, and not in *New Vineyard*, retains his settlement. This part of the statute is but a transcript of the *Mass.* statute, and the decisions there apply here. *West Springfield* v. *Granville*, 4 *Mass. R.* 486; *Walpole* v. *Hopkinton*, 4 *Pick.* 357. There is a difference in the language in the fifth and sixth modes. One gives a settlement to all persons *living* there; the other to all persons settled there.

Boutelle, for the defendants.

The effect of setting off this tract of territory with the people upon it from *New Vineyard*, and annexing it to *New Portland*, is to give a settlement in the latter town to all who lived upon it at the time. This case does not come within the sixth mode, nor is it provided for in the statute. *Groton* v. *Shirley*, 7 *Mass. R.* 156. The annexation of the land where the pauper lived, to *New Portland*, in itself, gives him a settlement in that town. *Fitchburg* v. *Westminster*, 1 *Pick.* 144, and cases there cited. The cases cited for the plaintiffs apply to division of towns, and not the annexation of a portion of one to another town.

After the case had been continued for advisement, the opinion of the Court was prepared by

Weston C. J. — The settlement of the paupers, for whose support this action is brought, it is agreed was in *Rumford*, in *March*, 1831. In 1833, they removed into that part of *New Vineyard*, which in 1834, was annexed to *New Portland*, and there remained, at the time of such annexation. Their residence in *New Vineyard* gave them no settlement in that town.

The sixth mode of gaining a settlement, under our statute for the relief of the poor, statute of 1821, *ch.* 122, is precisely like the tenth mode of the act of *Massachusetts*, statute of 1793, *ch.* 34, which was in force at the time of our separation. That mode has received a judicial construction, both in *Massachusetts* and in this State. In *Groton* v. *Shirley*, 7 *Mass. R.* 156, it was held, that where a part of one existing town is annexed to another, it is to have the same effect, as if a new town had been created out of the two towns. And the correctness of this construction was recognized in *Great Barrington* v. *Lancaster*, 14 *Mass. R.* 253, and in *Fitchburg* v. *Westminster*, 1 *Pick.* 144. In *Hallowell* v. *Bowdoinham*, 1 *Greenl.* 129, the same construction obtained, upon the authority of the two cases first cited.

But in order to give a person, residing in a part of an existing town, a settlement in another existing town, to which such part is annexed, besides having an actual residence in such part at the time, he must have had his settlement in the town, to which such part before belonged. *West Springfield* v. *Granville*, 4 *Mass. R.* 486. Now the pauper and his family, having no settlement in *New Vineyard* could, upon this construction, acquire none in *New Portland*, upon the annexation to the latter town of that part of the former, in which they resided. It results, that their former settlement in *Rumford* continued.

Defendants defaulted.

William Butler *vs.* William Tufts.

The established rule is, that if a witness be discovered to be interested during any part of the trial, his testimony is to be disregarded, although there has been a previous unsuccessful attempt to exclude him by the party against whom he was called.

Where a party has attempted to exclude a witness, produced against him, by evidence of his interest from others, and has failed, the Judge may in his discretion permit him to examine such witness on the *voir dire;* but it is doubtful whether this may be claimed, as matter of right.

If a person sell goods to one, as his own, and afterwards sell the same goods to another, as his own, he is liable to both on the warranty implied; and in a conflict between them, both claiming under him, he may be a witness for either.

Where personal property was mortgaged to ensure the delivery of articles on a given day; and the articles were not delivered at the stipulated time, but were afterwards delivered and accepted; the lien created by the mortgage is thereby discharged.

Exceptions from the Court of Common Pleas.

The action was trover for a yoke of oxen, alleged to have been converted in *August* 1834. The plaintiff proved, that he was in possession of the cattle, and that they were taken by the defendant of whom they were demanded. The defendant then called *Robert Banks*, as a witness to prove the property of the oxen to be in him. The plaintiff insisted, that *Banks* was incompetent through interest, and offered to prove that fact by the declarations made by said *Bangs*. *Smith J.*, before whom the trial was had, ruled that the declarations of *Bangs* were inadmissible for that purpose. The plaintiff then inquired of witnesses, whether the defendant had ever said, that *Bangs* was interested, but the witnesses had heard nothing from him on the subject. The plaintiff then offered to examine *Bangs* on the *voire dire*, but the judge ruled, that as the plaintiff had called witnesses to prove said *Bangs'* interest, it was not competent to examine him on the *voir dire*. *Bangs* was examined in chief, and it appeared from his testimony, that he once owned the oxen and sold and and delivered them to the defendant in *February*, 1834; that the cattle were left by the defendant in the possession of *Bangs*, and that he, *Bangs*, was to deliver them to the defendant in *July* following. The amount paid for the oxen, by the defendant, was

$50,00. The delivery of the cattle by *Bangs* to the defendant was proved by other witnesses. It further appeared from the testimony of *Bangs*, that in *September*, 1833, he mortgaged and delivered the cattle to one *Chandler*, as security for the sum of $35,00, to be paid in two months; that when that time was expired, *Chandler* agreed to wait two or three weeks longer for his pay. About that time the plaintiff applied to *Bangs* to purchase of him a potash frame, kettles, &c., and *Bangs* agreed that he should have them, if he would advance the sum of thirty-five dollars, to be paid to *Chandler* in discharge of his lien upon the oxen. The frame, &c., were to be appraised and the balance above $35,00 to be credited by the plaintiff to *Bangs* to be paid in goods out of his store. The bargain was made, and it was also verbally agreed, that *Bangs* should mortgage the oxen to the plaintiff to secure the delivery of the frame, &c. in the ensuing week. After the time for payment to *Chandler* had expired, the plaintiff sent the $35,00 to *Chandler*, who, having been previously informed by *Bangs*, that the plaintiff was to pay him, received the money and delivered the oxen to the plaintiff; understanding that they were to be held by the plaintiff as security for the delivery of the potash frames, &c. *Bangs*, and also his son, testified, that the potash frame, &c., were delivered according to agreement. A witness called by the plaintiff testified, that they were not delivered according to agreement, but were sent to the plaintiff's afterwards, and finally appraised in *May* following at $67,00, and that sum appropriated with *Bangs'* consent to the payment of other claims, and that the sum paid to *Chandler* was still due. There was much other evidence in the case tending to discredit, or to corroborate *Bangs*, as well as to shew in whom the property of the oxen was at the time of the commencement of the action. The character of it sufficiently appears in the instructions requested and given in the Court of Common Pleas, and in the opinion of the court.

The plaintiff contended, at the trial in the Court of Common Pleas:

1. "That *Bangs* was interested, and ought not to be received as a witness. The Judge permitted said *Bangs'* testimony to be

considered by the jury, and instructed them to give it such credit, as they thought it deserved."

2. "That if the potash frames and kettles were not delivered within the next week, as stated by *Bangs;* and as it appeared that *Bangs* had received his pay in goods for the same, and settled his account without any reference to said oxen, he thereby waived the substitution of said frame and kettles, as security for the $35,00, for which said oxen were mortgaged. But the Judge instructed the jury, that it was immaterial at what time the potash frame and kettles were delivered, provided they were satisfied from the evidence, that they were received from the plaintiff without objection, in discharge of his mortgage and lien upon said oxen, and the potash frames, &c., were delivered by said *Bangs* for that purpose; and he further instructed the jury, that the plaintiff's mortgage and lien upon said oxen being thus discharged, the right to them reverted to the said *Bangs*, and his sale to the defendant, in *February*, 1834, became valid, and was not defeated by *Bang's* settlement in *May* following with the plaintiff, and that the plaintiff could not legally appropriate said oxen to the payment of his debt against *Bangs*, without the consent of the owner."

3. "It was contended, that the plaintiff derived a title from *Joel Chandler*, as appeared by his deposition. But the Judge instructed the jury, that it did not appear by that deposition, that the plaintiff derived an absolute title to the oxen from *Chandler* but from all the evidence taken together, it appeared that the title or lien which he obtained, was derived from said *Bangs.*"

4. "It was contended by the plaintiff, that the testimony of said *Bangs*, in relation to the substituting the frame and kettles for the oxen, was incorrect and not entitled to credit, but that so much of his testimony as was in favor of the plaintiff's right of action, or claim upon said oxen, might be credited by the jury. But the Judge instructed the jury, substantially, that if they believed the testimony of *Bangs*, the defendant was entitled to their verdict, that the case principally turned on the credit they should give to his testimony; that it was difficult to separate one part of his testimony from the other, and to say that this part should be believed, and the other rejected; that the title of the

defendant was proved by other testimony, than that of *Bangs*; and that if they rejected the testimony of *Bangs* altogether, they would then inquire, if they were satisfied from other evidence in the case, that the plaintiff had made out his title to the oxen, previous to the sale and delivery of them to the defendant, by said *Bangs*, and the evidence to that point was referred to; and upon the whole, the Judge instructed the jury to form their own opinion of the evidence and of the facts, and having satisfied themselves in that respect, to decide the case according to the principles of law, as above stated."

The jury returned a verdict for the defendant, and the plaintiff filed exceptions to the rulings and instructions of the Judge.

Wells, for the plaintiff, in support of the request made at the trial to examine the witness on the *voir dire*, said that it was a settled principle of law, that if during the trial a witness turns out to be interested, his testimony will be rejected, even after an unsuccessful attempt to prove the interest. *Schillinger* v. *McCann*, 6 *Greenl.* 364; *Stark. Ev. part* 2, 120, 154, *part* 4, 756; 8 *Serg. & R.* 444. If then the the testimony is to be thrown out of the case, if given, it would be much better to prevent the waste of time by an examination on the *voir dire*.

He also argued in support of the other positions taken for the plaintiff at the trial.

F. Allen, for the defendant, argued in support of the rulings and instructions of the Judge; and cited, *Commonwealth* v. *Waite*, 5 *Mass. R.* 261; *Vining* v. *Wooton*, *Coxe's R.* 127; *Stark. Ev.* 756, *note*; *Pierce* v. *Chase*, 8 *Mass. R.* 487; *Ware* v. *Ware*, 8 *Greenl.* 43, 59.

After a continuance, *nisi*, the opinion of the Court was drawn up by

WESTON C. J. — The rule now established is, that if a witness be discovered to be interested, during any part of the trial, his testimony is to be disregarded. 1 *Phillips*, 101. And in *Schillinger* v. *McCann*, 6 *Greenl.* 368, this rule was applied, notwithstanding there had been a previous attempt unsuccessfully made to exclude him, by the party against whom he was produced. The defendant, to whom *Bangs* had sold the yoke of oxen in

controversy, called him as a witness, not only to prove the title of his vendee, the defendant, but further to support it, by disproving the title of the plaintiff, which conflicted with his.

It was decided in the case of *Hale* v. *Smith*, 6 *Greenl.* 416, that the vendor of goods, who sells them as his own, being bound to warrant the title, is inadmissible as a witness for the vendee. But the interest of a witness may be extinguished by a release, or it may be balanced by an equal interest on the other side. The plaintiff also claims to be the vendee of *Bangs*, by the transfer, by *Bangs'* consent, of the instrument of sale previously made by him to *Chandler*. This being the ground, upon which the plaintiff founds his claim, it must, as against him, be taken to be true; for if it is not, he fails altogether. If a party sells goods to A. as his own, and afterwards sells the same goods to B. as his own, he is liable to both upon the warranty implied, and in a conflict between them, both claiming under him, he may be a witness for either, his interest being exactly balanced.

The plaintiff insists, that he was the owner of the oxen by a prior sale; originally by way of pledge or mortgage, but long since forfeited. The witness has since sold them to another. If they are thereby lost to the plaintiff, the witness is liable to him for their value. And if the plaintiff had prevailed, he would have been liable to the defendant for no greater amount. We regard it therefore as a case where the interest is balanced, and the witness admissible. As every inquiry was finally made, and as it appears that the plaintiff would have derived no advantage from an examination under the *voir dire*, it is unnecessary to decide, whether that ought to have been allowed or not. We think the Judge might in his discretion have permitted it. It may be more doubtful, whether it could be claimed as a matter of right.

It seems to us very clear, that if the oxen mortgaged or pledged to the plaintiff, only for the delivery to him of the potash frame and kettles, when these were delivered to his acceptance, his lien on the oxen was gone. If the kettles and frame were not furnished at the precise time agreed, the plaintiff might waive that condition, and the jury have found, that they were received by him without objection, in discharge of his mortgage or lien upon the oxen.

With regard to the instructions requested, that the jury might believe what the witness had testified in favor of the plaintiff, and disbelieve what he testified making for the defendant, no doubt they might, if they were satisfied that he was capable of perjury, or of swearing falsely for the sake of the plaintiff; but we perceive nothing in the case, which would justify such an imputation as the request implies. Nor did the jury; for they gave credit to his testimony, upon which they were instructed the cause principally turned. The credit of the witness, and every other part of the case was very fairly left to the jury.

Exceptions overruled.

Ichabod Foster *vs.* Peter Haines.

A licensed innholder is not liable, under *statute* of 1834, *ch.* 141, to the penalty of ten dollars for selling spirituous liquor in a particular instance.

But if such licensed innholder presume to be a common retailer, without being licensed as such, he is liable under that statute to the penalty of fifty dollars.

The granting, or refusing to grant amendments, is within the discretion of a Judge of the Court of Common Pleas, and therefore does not furnish matter for exceptions.

The action was debt, there being but one count in the declaration, founded on the *statute* of *March* 13, 1834, *ch.* 141, to recover two penalties alleged to have been incurred by the defendant for selling by retail, without license therefor, a pint of gin to one individual, and a quart of brandy to another. The action was originally commenced before a Justice of the Peace, and came into the Common Pleas by appeal, and into this Court by exceptions to the direction and ruling of the Judge of that Court.

The defendant moved, in the Court of Common Pleas, to quash the writ on the ground, that two offences were included in one count, which motion, *Smith J.* overruled. The plaintiff, under general leave to amend, offered an amendment, setting out each of the two offences in separate counts, which the Judge re-

fused to allow. It appeared, that the defendant had sold the gin and brandy, as stated in the declaration; that the gin was carried away from the house of the defendant; and that at the time he was regularly licensed, as an innholder, but not as a retailer. The Judge was of opinion, that the action could not be maintained, and directed a nonsuit.

R. Goodenow, for the plaintiff, contended that the amendment ought to have been allowed; that the *statute* of 1821, *ch.* 59 *sec.* 16, was general, and applied to actions for penalties, as well as to other actions. And one penalty might have been recovered without amendment, unless specially demurred to.

The action is brought upon the latter part of the first section of the *stat.* of 1834, and which is copied without alteration from the *statute* of 1821. The offence is complete on selling any quantity to be carried away without a license, as a retailer. The only question is, whether a license, as an innholder, will authorize him to do this. The first section of the statute gives no right to sell except under license, and license too for that employment. The license of a retailer does not authorize him to keep tavern, nor that of an innholder give him any liberty to sell as a retailer. If it had not been for the license, as an innholder, there could be no defence set up. These have always been considered as distinct employments, and distinct licenses have been required. The defendant cannot defend himself, as an innholder, and stands like a person without license of any kind.

Tenney, for the defendant.

It is very clear, that the declaration for two distinct penalties, alleged to have been incurred by the commission of two distinct offences, is bad. *Chitty on Pl.* 390 to 397. The rejection of the proposed amendment in a penal action was proper in itself; but were it otherwise, it is but an exercise of discretion for which no exception can be taken. 3 *Greenl.* 183; *ibid.* 216.

But the license to the defendant, as an innholder, authorizes whatever is shewn to have been done by him in this case. Not only does the definition of the term authorize an innholder to sell spirituous liquor in small quantities, but the statute itself, in several instances, implies it. It is said, that this is a selling to carry away. In one instance it was carried away, but not sold for that

purpose. It is however out of the power of the innholder to prevent its being carried away when once sold. This must have been the view taken of the statute in *State* v. *Burr*, 1 *Fairf.* 438. That covers the whole of this case.

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

WESTON C. J.—In the case of *Wyman* v. *Dorr*, 3 *Greenl.* 183, and in *Clapp* v. *Balch*, 3 *Greenl.* 216, it was held that the granting or refusing to grant amendments, was within the discretion of the Common Pleas, and therefore did not furnish matter for exceptions. But if the original declaration had contained the counts, offered under leave to amend, we are of opinion, that after the plaintiff had introduced his testimony, a nonsuit was properly ordered, by the Judge who presided at the trial. It appeared by the plaintiff's own showing, that the defendant was a licensed innholder. He was then authorized to sell spirituous liquors, having a license therefor. It is lawful for innholders to sell such liquors, except to certain persons, for selling to whom a special forfeiture is provided. They are to take care not to suffer within their premises any revelling, riotous or disorderly conduct, under pain of forfeiting the bond, they are required to give.

The plaintiff relies, to support his action, upon the latter part of the first section of the *statute* of 1834, *ch.* 141, for the regulation of innholders, retailers and common victuallers. It provides that if any person shall at any time sell any spirituous liquors, or any mixed liquors, part of which is spirituous, without license therefor, duly had and obtained, he shall forfeit for each offence the sum of ten dollars. This is an offence, which cannot be committed by a regular innholder, for he has a license, which authorizes such sale. If the defendant was licensed, which is in proof, the acts charged, even in the amended count, constitute no offence. He had a right to sell to travellers and others, as may be deduced by fair implication, especially if we take into consideration the statute passed in *pari materie*, at former periods. And this right has been extended also to a common victualler. *State* v. *Burr*, 1 *Fairf.* 438. And it is admitted in argument,

by the counsel for the plaintiff, that an innholder might thus sell, to be drank in his house, but not to be carried from it. If this distinction is well founded, the gist of the offence consisted in its being sold to be carried away, which should have been averred in the declaration. As it was not averred, it failed in an essential point, according to his own construction. The offence charged was not proved. The nonsuit then was proper; although there may have been proof of an offence not charged. And if an innholder has no right to sell spirituous liquor to be carried away from his house, it would be difficult to show, that by so doing, he forfeits the penalty demanded in this action; or that he is liable under the section, upon which it is based, which is silent upon this point.

It is further insisted, that if an innholder sell spirituous liquor to be carried away, and may do it with impunity, he has all the privileges of a common retailer. But if he presumes to be a common retailer, without being licensed as such, he is liable under the statute to a forfeiture of fifty dollars. It is not pretended, that the defendant is charged as a common retailer.

And we are all of opinion, for the reasons before stated, that the nonsuit was properly ordered.

Exceptions overruled.

Samuel Libby *vs.* Philander Soule.

The person by whose direction an officer takes the property of one man, on an execution in his favor against another, is liable to the owner in trover.

Trover for the conversion of a yoke of oxen. At the trial in the Court of Common Pleas, before *Smith J.*, the evidence of a conversion was, that one *William Knowles* testified, that he took the plaintiff's oxen to carry to *Quebec*, by an agreement with the plaintiff, while they were in possession of the witness. The defendant saw them, and said that he intended to attach them for a debt he had against one *Abraham Knowles*, and being informed that they were the property of the plaintiff, by the wit-

ness, the defendant said, he should send an officer and take them. And one *Evans*, an officer, afterwards came and took them away from the witness. Another witness testified, that he saw these oxen afterwards in possession of the defendant, who informed the witness that he had them taken on an execution in favor of himself against said *Abraham Knowles*, and that he had bid them off himself at the officer's sale. Upon this evidence the counsel for the defendant contended, that there was no proof of conversion, and moved the Court to order a nonsuit; but the Judge being of a different opinion, declined to do so, and observed to the counsel that he might file his exceptions, if he thought proper. The case proceeded, and after much other testimony as to the property in the oxen, the jury found a verdict for the plaintiff. The defendant filed exceptions to the ruling of the Judge.

Tenney, for the defendant.

There is no evidence of a conversion by the *defendant* in this case. Trover cannot be maintained against a creditor for directing an officer to take property on an execution. The purchase of property sold on execution is like a purchase in market overt, and vests the property in the purchaser. *Titcomb* v. *U. F. & M. Ins. Co.*, 8 *Mass. R.* 326; *Davis* v. *Maynard*, 9 *Mass. R.* 242; *Howe* v. *Starkweather*, 17 *Mass. R.* 240.

C. Greene, for the plaintiff.

The defendant directed the taking of the plaintiff's property, and is liable for the consequences. That the officer took the oxen on an execution against another person, furnishes no justification to him, and of course none to the defendant by whose orders they were taken. He would have been liable in trespass for the damage, and is in trover for the value. A tort may be extenuated, but not increased. If we have any sales in market overt, this is not one; for the defendant here is the person taking, converting, purchasing, and using. 1 *Chitty on Pl.* 153, 169; 3 *Dane's Abr. ch.* 77, *art.* 11, § 5.

After a continuance, the opinion of the Court was drawn up by

WESTON C. J. — *Evans*, the officer, having an execution in favor of the defendant against *Abraham Knowles*, had no right to

seise thereon the oxen of the plaintiff. By so doing he became a trespasser, or he might be charged in trover, at the plaintiff's election. The unjustifiable seisure of the oxen, would be sufficient evidence of conversion. As this was done by the direction and procurement of the defendant, the act of the officer was his act; and he was equally liable in trespass or trover. The tortious taking was itself a conversion. *Chapman* v. *Lamb*, 2 *Strange*, 943. *Woodbury et al.* v. *Long*, 8 *Pick.* 543.

Exceptions overruled.

John Ellis *vs. Inhabitants of* Madison.

The clerk's entry in the docket, "20 dollars brought into Court under the common rule," implies that leave therefor was first obtained; and no other evidence of payment of money into the Court is necessary.

The thirty-second rule of this Court, relating to the payment of money into Court, applies to all actions whatsoever.

Parol evidence to change the effect of an entry in the docket is inadmissible.

Exceptions from the Court of Common Pleas, *March Term*, 1836, *Smith J.* presiding.

The action was assumpsit for the support of a pauper, which the defendants were bound to relieve, and was entered at the then last *June Term* of said Court, when the following entry was made under the action in the docket. "20 dollars brought into Court under the common rule." The action was continued, and at the next term, the following entry was made. "25 dollars brought into Court under the common rule." But no motion was made in writing, and there was no evidence of the offer of the money, other than as appears by said entries. The cause went to the jury, and a verdict was returned for the plaintiff for thirty-four dollars. The Judge directed the jury to assess the whole damages, without regarding the sum paid into Court, and that the verdict might be put into form afterwards. The parties consented, that the verdict of the jury might be amended and put into form. The plaintiff moved the Court to allow him his full costs to the time of the verdict, and to refuse the defendant all costs; and he

offered to prove, that the defendants said to the plaintiff, *at the time when the action was tried*, that the money so brought into Court was intended in full satisfaction for damages and all costs. This evidence was rejected by the Judge, and costs allowed the plaintiff only to the time of bringing the money into court; and costs were allowed the defendants after that time. The plaintiff filed exceptions.

Tenney, for the plaintiff, cited the rule of the Court of Common Pleas on the subject, precisely like *Rule* 32 of this Court, 9 *Greenl.* 302; *Boyden* v. *Moore*, 5 *Mass. R.* 365; *Howe's Practice*, 401, 402.

Wells, for the defendants, said that the plaintiff had received costs to the time of the payment into Court, to which he was not entitled, but which could not be remedied, because no exception was taken by the defendants; and relied on the same rule of Court. He also cited *Boyden* v. *Moore*, 5 *Mass. R.* 365, cited for the plaintiff; *Howe's Practice*, 408; *Williams* v. *Ingersoll*, 12 *Pick.* 345.

The opinion of the Court, after a continuance *nisi*, was drawn up by

WESTON C. J. — The common rule of the Common Pleas, in regard to the payment of money into court, is precisely like the thirty-second rule of this court, which is to be found in 1 *Greenl.* 421.

It is contended by the counsel for the plaintiff, that the money brought into court in this action, was not upon leave granted; but the entry in the docket implies that leave was first obtained; otherwise it could not have been paid under the common rule. The entry sufficiently apprizes the counsel for the plaintiff of what was done, if he had not notice, at the time when leave, thus to pay in the money, was granted to the defendants. And in our practice, no other evidence of this proceeding is required, or is necessary, either for the court or the parties. It does sufficiently appear upon the docket, that two sums, and not one only, were paid into court under the common rule.

It is further insisted, that this is not a case, to which the common rule applies. But whatever may be the *English* rule, or the

rule of other courts, our rule and that of the Common Pleas, applies to all actions. And it is equally useful in all cases, either by arresting litigation by a fair adjustment, or by justly throwing costs subsequently incurred upon him, who is ultimately found to prosecute or defend, what may remain in controversy, without right.

And we are of opinion, that the Judge below properly rejected parol testimony, to change the effect of the entry on the docket. It was clearly inadmissible to affect the regular evidence of proceedings in court.

The common rule does, it is true, provide, that the sum thus paid shall be stricken out of the declaration, as if paid before the commencement of the action, which proceeds only for the residue. But by consent of parties this was waived, it being agreed that the verdict when returned, should be amended and put into form by the court. As the jury found less for the plaintiff, than the money paid into court, it was in effect, under the rule and the consent of the parties, a verdict for the defendants. The motion on the part of the plaintiff for full costs, was properly overruled by the Judge, and costs to the defendant, from the time the money was brought in, were rightfully allowed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT, JUNE TERM, 1836.

MARK TRAFTON *& al. vs.* ZEBEDIAH ROGERS.

It is competent to prove by parol evidence, that a writ, appearing by its date to have been issued on the Lord's day, was in fact made on a different day.

When an objection can be taken either by plea in abatement, or by motion to quash the writ, the motion must be made, generally, within the time limited for filing a plea in abatement.

The assignment of a judgment and execution, made by the attorneys of the creditor who does not interfere, is a sufficient consideration for a note of hand given therefor to him, who has the equitable interest in the judgment.

THIS was an action of *assumpsit*. The writ bore date *Jan.* 5, 1834, and the action was entered at the *June Term* of the S. J. Court, and was then continued until the *October Term* following, when the trial was had before *Emery J.* At this last term the defendant moved, that the writ should be quashed, because it was issued on the Lord's day. No proof was then given on either side, whether the writ was, or was not, made on the Lod's day, other than what appeared from an inspection of the writ, and reference to the calendar. "But for the purpose of ascertaining the merits of the case, the trial was directed to proceed, leaving the defendant such benefit, as he ought to have by law in consideration of all the proceedings in the case if he should establish the fact, that it issued on *Sunday.*"

The action was brought to recover the amount of a note of hand given by the defendant to the plaintiffs, promising to pay them by the first of *June*, then next, $88,67 or to procure and

deliver to them the note of one *Michaels* for the same sum. On the same paper was a memorandum, below the note, that "this is given for execution, *Leggett & Hance* v. *Moses Ingals.*" The defendant then produced a paper, in the handwriting of *Mr. Hatch*, of the following tenor. "Amount of execution, *Leggett & al.* v. *Moses Ingalls*. *Capt. M. Fisher*, Deputy-sheriff, please deliver above execution to *Col. Z. Rogers*, as he is the owner of said execution.

"*March* 1, 1828. *McGaw & Hatch.*"

McGaw & Hatch were then attorneys of *Leggett & Hance*. The defendant proved, that before the first of *June* he called on *Fisher* for the execution, and he looked for it, but could not find it, and that he also called on *Hatch* for it. After the first of *June*, it was found in the office of the attorneys and returned into Court. The plaintiffs then proved, that the judgment referred to was founded on a note given to them, and by them assigned to *Leggett & al.* as collateral security, and that they had paid the amount due, and that the judgment was their property. They also proved, that the defendant, after the first of *June*, controlled the execution and claimed it as his property.

The defendant's counsel objected, that *McGaw & Hatch* had no authority to assign the demand of *Leggett & Hance* against *Ingalls* or sell it for the defendant's note; and that the defendant was not obliged to pay the money or deliver *Michael's* note until he received the execution.

The Judge instructed the jury, that if they were satisfied, that *Rogers* was willing to take the order on the Deputy-sheriff for the execution from *McGaw & Hatch*, the attorneys, and give his note as stated, without insisting on a more formal assignment, and that no imposition was practised upon him, and that he had availed himself of the right to control the execution by undertaking to assign it, and by preventing an action from proceeding on the judgment, relying upon and enforcing his claim under the order, which he retained; it was a sufficient assignment by the attorneys of *Leggett & Hance* so far as to constitute a good consideration for the note, though there might seem to be some contradictory remarks made by the plaintiffs, as to the *Ingalls* demand; that no persons could rightfully find fault with the doings of *McGaw*

& Hatch, but *Leggett & Hance*, as to the giving of the order, and they were paid; it having been in proof, that *Trafton & Bright* yielded to the claim of *Rogers* of property in the execution against *Ingalls*. That the defendant, not having performed his contract was answerable for the sum mentioned in the note and interest. The jury found a verdict for the plaintiffs. The report of the case concluded, that if the Court, on proof that the writ issued on *Sunday*, yet to be exhibited, should on consideration of all the circumstances and proceedings in the case, decide that the writ shall be abated or quashed, the verdict is to be set aside, and the defendant recover his costs; should the process be sustained, and if the direction to the jury was erroneous, the verdict is to be set aside.

This case stood for argument at the *June Term*, 1835, but was not reached in its order during the term. It was therefore continued, the parties being at liberty to furnish written arguments. The arguments were prepared in writing, and not having been handed to the Court, were read at the *June Term*, 1836. At this term, *Mr. Poor*, one of the plaintiffs' counsel, *Messrs. McGaw, Allen & Poor*, at the instance of the senior partner, was sworn, and testified, that the writ was not made on the Sabbath day, but made in the Court house immediately on the termination of another suit, and that in dating the writ, he must have made a mistake in the day of the month. As the arguments were previously written, the testimony of *Mr. Poor* is not referred to in them.

Kent, for the defendant, contended:

On the motion to quash the writ; the report states, that it was dated, *January* 5, 1834, and that no proof was given, that this was the Lord's day. This evidence uncontradicted and unexplained is sufficient to establish the fact, that it issued on that day. *Johnson* v. *Farwell*, 7 *Greenl.* 370. The Court are presumed to know when *Sunday* comes. It is not necessary to prove or deny the computation of time, for the Court will take notice of it. *Canal Co.* v. *Railroad Co.* 4 *Gill & Johns.* 63; *Pugh* v. *Robinson*, 1 *T. R.* 116; 1 *Strange*, 387; *Starkie on Ev. part* 3, *sec.* 20; *Cro. Eliz.* 227.

A writ thus issued is void and a nullity, both at common law, and by our statute.

It is void at common law without reference to any statute, English or American. In the earliest records of the proceedings of Courts of law, the issuing of judicial process was held not to be legal on *Sunday*, and that such process might be avoided, if issued. The service of the process was held to be legal, as a work of necessity, until prohibited by the statute of *Car.* 2, *ch.* 7. The same prohibition is found in our statute, probably a transcript of that of *Car.* 2, leaving the issuing of process, as formerly, prohibited by the common law. 2 *Coke's Inst.* 254, 354, *note* 3; *Swan* v. *Broome*, 3 *Burrow.* 1595; *Dyer*, 168; *Mackalley's case*, 9 *Coke's R.* 66; *Pearce* v. *Atwood*, 13 *Mass. R.* 347; 5 *Dane's Ab. ch.* 146, *art.* 7, § 3.

The process is also void, as being in contravention of the spirit and letter of the statute of 1821, *ch.* 9, "providing for the due observation of the Lord's day."

It will not be assumed by the opposing counsel, that the making of a writ on the Sabbath is a *work of necessity*, and surely the defendant can never look upon it as a *work of charity*.

There is one general principle of law to be gathered from all the authorities, English and American; that no party can claim any right, or enforce any contract, founded upon any act which is in contravention of the express provisions of a statute. *Bensley* v. *Bignold*, 5 *Barn. & Ald.* 335; *Preston* v. *Bacon*, 4 *Conn. Rep.* 480; *Russell* v. *Degrand*, 15 *Mass. R.* 39; *Wheeler* v. *Russell*, 17 *Mass. R.* 258, and cases there cited; *Smith* v. *Sparrow*, 2 *Carr. & P.* 544; *Fennell* v. *Ridler*, 5 *Barn & Cres.* 406; *Fox* v. *Abel*, 2 *Conn. R.* 541; *Wight* v. *Geer*, 1 *Root*, 474; *American Jurist*, *No.* 26, *for April*, 1835, *art.* 8, where the only opposing case, *Geer* v. *Putnam*, 10 *Mass. R.* 312, is commented upon.

A motion to quash the writ is the proper course for the purpose. 5 *Dane's Ab. ch.* 146, *art.* 7, *sec.* 3.

The instructions of the Judge were erroneous.

1. The consideration of the note was the execution. This the defendant could not obtain, and the consideration therefore failed.

2. But if it be said the consideration was the assignment of the judgment, then there was no consideration. Although the attorneys might take security, they had no right to sell the demand. *Lewis* v. *Gamage*, 1 *Pick.* 348; *Langdon* v. *Potter*, 13 *Mass. R.* 320; *Kinden* v. *Shaw*, 2 *Mass. R.* 398.

F. H. Allen, for the plaintiffs.

1. The motion to dismiss the action was not seasonably made. Under the 18th rule of this Court, it should have been made on the second day of the first term, or at least on some day in the term. The Court will not hear a motion to dismiss an action after the first term, unless strong reasons are shown. *Howe's Pract.* 213; *Rathbone* v. *Rathbone*, 4 *Pick.* 89. A plea in abatement cannot be filed after a general imparlance. *Coffin* v. *Jones*, 5 *Pick.* 61.

2. It should have been taken advantage of by plea in abatement. It was settled in *Johnson* v. *Farwell*, 7 *Greenl.* 373, that the presumption, that the date of the writ is the time when the action was commenced may be rebutted by proof of the true time. The allegation is traversable, and therefore should have been pleaded. *Mitchell* v. *Starbuck*, 10 *Mass. R.* 5; *Cook* v. *Gibbs*, 3 *Mass. R.* 195; *Prescott* v. *Tufts*, 7 *Mass. R.* 209; *Rathbone* v. *Rathbone*, before cited. A party making an objection merely technical, must bring himself within strict rule. *Ripley* v. *Warren*, 2 *Pick.* 594; *Gordon* v. *Valentine*, 16 *Johns. R.* 145; *Gilliland* v. *Morrell*, 1 *Caine's R.* 154.

3. The Court are not to take judicial notice, that the fifth of *January*, 1834, was *Sunday*. *Ripley* v. *Warren*, before cited.

4. A writ dated on *Sunday* is good at common law. Original writs may bear teste upon the Sabbath, for the *Chancellor* may seal writs on any day. *Cro. Jac.* 496. The reason why a *scire facias* issued on *Sunday* is void, is because it is in *England* supposed to issue only when the Court is sitting.

5. The statute only prohibits the *service* of civil process on *Sunday*. This implies, that all other acts may be done, subject only to the penalty, if the act is not necessary. But the act is not void. It has been decided, that a bill or note made on *Sunday* is good. *Geer* v. *Putnam*, 10 *Mass. R.* 312; *Drury* v.

Defontaine, 1 *Taunt.* 131; 14 *Petersdorff's Abr.* 760; 4 *Petersdorff*, 266, and cases there cited.

The action was continued *nisi* for advisement, and the opinion of the Court was drawn up and delivered at a subsequent term by

EMERY J. — In this case the writ bears date the 5th of *January*, 1834, and was served the 7th day of *May*, 1834, returnable before the Supreme Judicial Court on the 3d *Tuesday* of *June*, then next. The defendant appeared and the action was continued. At the *October Term*, 1834, the defendant moved that the writ be quashed because, he says, it was issued on the Lord's day. The trial proceeded, leaving the defendant such benefit as he ought to have by law, in consideration of all the proceedings in the case, if he should establish the fact, that it issued on *Sunday*. No such proof has been given other than such as arises from the date. The discussion has been elaborate and ingenious, upon the assumption that it was issued on the Sabbath. But it is insisted by the plaintiff's counsel, that it is too late for the defendant to make the objection, inasmuch as it was not taken by plea in abatement at the first term, agreeably to the rule of this Court.

And we are inclined to the opinion, that although the objection may be taken by motion to quash the writ, as well as by plea in abatement, for errors and defects apparent on the face of the record; we are also satisfied, that generally, when the objection is taken by motion, it is entitled to no more favor in point of time, within which it should be made, than a plea in abatement. *Howe's Practice*, 213; 4 *Pick.* 89, *Rathbone* v. *Rathbone*; 5 *Pick.* 61, *Coffin* v. *Jones*.

A void writ however cannot be amended according to *N. Y.* practice. We take it for granted, that this writ bears date of a *Sunday*. But the whole argument, derived from this circumstance, seems to be overthrown in the proof made before us, on the argument, by *Mr. Poor*, who on oath declared that he commenced making the writ in the Court house in the session of the Court of Common Pleas, after *Mr. Gilman* exhibited the evidence; and that it was not made on *Sunday*.

This evidence we think was rightly received agreeably to the spirit of the decision in 7 *Greenl.* 370, *Johnson* v. *Farwell.* And here this part of the case might be ended. And indeed we see no valid objection against the verdict or direction of the Court, as to the merits.

For the alleged failure of consideration is not established, the defendant having availed himself of the judgment and his enjoyment of the benefit of the assignment has not been withdrawn from him by *Leggett & Hance.*

We must consider it as having vested a right in him till he has been compelled to restore the amount. An opinion has been drawn more at length on the case, but it is not deemed requisite to communicate it.

Judgment on the verdict.

Inhabt's of CORINNA *vs. Inhabt's of* EXETER.

In a question respecting the settlement of a pauper, the statements of an overseer of the poor of the town, he being a competent witness, made at the time of leaving a notice but having no relation to the notice, cannot be given in evidence.

Where it was contended, that the supplies were not furnished to a pauper in good faith, but to prevent his gaining a settlement; it is competent for the overseer, furnishing the supplies, to testify that they were furnished in good faith, and upon his judgment of what duty required.

It is not necessary, under the statute of 1821, *ch.* 122, that a person in distress should apply for relief as a pauper; it is sufficient to prevent his gaining a settlement by five years residence, if the person was in distress and in need of immediate relief, and the supplies were furnished and finally received.

To bring the case within the exception and avoid the settlement, it is not necessary that *notice* of having furnished supplies to the pauper should be given to the town where the settlement is.

THE action was on the statute for supplies furnished *Lewis Williams* and family, alleged to have been paupers and to have had their legal settlement in *Exeter.*

The settlement of *Williams* was admitted to have been in *Exeter,* on and before *June,* 1826, at which time he removed into

Corinna, and continued to reside in that town until the commencement of the suit. To show that *Williams* gained no settlement by his residence in *Corinna* for a term of time exceeding five years, under the statute, they introduced evidence to shew, that at two different times, within the five years, *Williams* and his family had received from the town supplies as a pauper. One instance was where a physician who had attended on the family for two years previous to that time, had charged $48,28 for his services, and had been paid all but about two dollars, was called on by one of *Williams'* minor sons to attend another sick son, and refused to go on the credit of *Williams*, and did not go until after he had given notice to one of the selectmen, and had been authorized by him to go on the credit of the town. He went and visited the child for which he charged seventy-five cents, and was paid by the town. The other instance of the furnishing of supplies was in *Feb.* 1830. A *Mr. Emery* testified, that he was on that day at *Williams'* house; that *Mrs. Williams* was in bed; that there was no wood, but what was on the fire, where there was only one brand and a few coals; that *Mrs. Williams* said she had no food but a few frozen potatoes; that her husband was gone, and that it was uncertain when he would return; that they got some wood for her, made a fire, and at her request went to *Mr. Winchester's*, one of the overseers of the poor, to solicit aid. *Mr. Winchester* testified, that on the day referred to, he went, as requested, to *Williams'* house; that *Mrs. W.* was by the fire, told him that her husband had returned with meal, and had just left to go for some fish, molasses, and tea, and would soon return, and wished him to remain until then; that having been informed of their destitute condition, he went there, and took with him four pounds of pork, some flour and some bread; but finding they had received some meal, he carried home the flour and left the pork, for which he charged the town of *Corinna* fifty cents, and had received his pay. He further testified, that *Mrs. W.* informed him, that her husband had directed her not to receive any assistance; that he did not inform her that he left the pork, as supplies; that he thought she might possibly have received the impression from the conversation between them, that the pork was a present, as she remarked, that she hoped she should be

able to reward him for it; that he did not communicate to *Williams* or his family, that this pork was furnished as supplies; and that during the six or seven years, that he had been selectman he had not known that *Williams*, though very poor, had applied to the selectmen, personally, for assistance. No notice was given to the town of *Exeter*, that the plaintiffs had furnished the pork to *Williams*, or had paid the bill of the physician.

The plaintiffs proposed to prove by *Winchester*, what his intentions were in leaving the pork; to which the counsel of the defendants objected, on the ground that the jury should be left to gather his intention from his acts. This objection was overruled by *Weston C. J.*, who presided at the trial, it having been insisted on the part of *Exeter*, that this supply was not furnished in good faith, and he was permitted to testify, and did testify, that his intentions in leaving the pork were to relieve the distress of the family, and not to prevent his gaining a settlement. There was much other testimony bearing upon the question, whether the supplies were or were not furnished in good faith. *Williams* testified, that he did not know, that this pork was furnished as supplies, until *April*, 1833, and that when he was informed by his wife of her sending to *Winchester*, that he directed her to receive nothing, as a pauper.

The defendants then offered to prove, that *Cushman Bassett*, one of the overseers of *Corinna*, at the time he left the notice with the overseers of *Exeter*, in 1833, stated that *Williams* had not a settlement in *Corinna*, for that they had supplied him to prevent his gaining a residence in that town, and that they meant to help the family, so that they should not gain a settlement; which proof was rejected by the Chief Justice. The counsel of the defendants insisted, that the supplies furnished in 1830, did not prevent *Williams* from gaining a settlement, because no notice was given to *Exeter*, of those supplies being so furnished; because furnished without his request, knowledge or consent, and against his will; that though supplies might be requested and offered, yet if not received as supplies by the pauper, they did not prevent his gaining a settlement, and that the jury might be permitted to pass upon the fact; and that the facts proved by the

plaintiffs did not show, that *Williams* had not gained a settlement in *Corinna* by lapse of time.

The Chief Justice instructed the jury, that if the pork furnished by the overseer, *Winchester*, was given as a present, or not in good faith, or with a view merely to prevent *Williams* and his family from gaining a settlement in *Corinna*, it could not be regarded as a supply furnished him as a pauper, within the meaning of the statute. But that if the family were in distress, standing in need of relief from the town, and the overseer of the poor in good faith, and in the honest discharge of his official duty, furnished relief, and it was received and consumed by the family, the case was brought within the exception in the statute relied upon by the counsel for the plaintiffs. And that if a family, in a distressed and starving condition, did even decline to receive relief as paupers, it was nevertheless the duty of overseers to furnish it, and if actually received and consumed, the continuity of residence necessary to gain a settlement was broken; and that to produce this effect, it was not necessary to give notice to the town liable. The verdict was for the plaintiffs, and was to be set aside, if the testimony rejected was admissible, or if that objected to, ought to have been received, or if the jury were improperly instructed.

J. Appleton, for the defendants.

The rejection of the testimony offered to prove the declarations of *Bassett*, one of the overseers of *Corinna*, when he left the notice with *Exeter*, was erroneous.

Every inhabitant of the town is a party to the suit, and his admissions are evidence. *Adams* v. *Wiscassett Bank*, 1 *Greenl.* 361; 11 *East*, 578; 1 *Maule & S.* 636. He was an officer of the town, doing the business of the town, and the statements were made in relation to this business, and therefore may be given in evidence.

The instruction requested by the counsel for the defendants, at the trial, ought to have been given.

The *statute*, *ch.* 122, provides, that if the pauper shall reside in any one town for the space of five years together, "and shall not during that term receive directly or indirectly any support or supplies from some town, as a pauper, shall be deemed to have a

settlement in the town, where he then dwells and has his home." It is the *reception by the pauper*, and not the *furnishing by the town* of support, which interrupts the settlement. The word *received* implies knowledge and assent on the part of the person receiving. 11 *Pick.* 540, *opinion to the Senate; Green* v. *Buckfield*, 3 *Greenl.* 136; *Bloomfield* v. *Canaan, ibid*, 172; *East Sudbury* v. *Sudbury*, 12 *Pick.* 1.

The supplies, in order to constitute a man a pauper, must be furnished, and must be *received as a pauper.* This is a case where the supplies were given with one intent, and received, if received they were, with another. *Williams* never asked support, as a pauper, but expressly refused so to do, and did not receive the article as a pauper, or under the expectation, that he should thereby become one. Such is the language of the statute. If not, then it makes no difference, whether the supplies were received, as a pauper, or *not* as a pauper. A gift has been classed, as one description of contracts, and certainly it requires the assent of both parties to make a contract. Becoming a pauper takes away the most important rights, such as voting and having the control of his own family. *Dixmont* v. *Biddeford*, 3 *Greenl.* 205; *Pothier on Con.* 11; *Hazard* v. *N. E. M. Ins. Co.* 1 *Sumner*, 218; *Allen* v. *McKean*, 1 *Sumner*, 307; 4 *Day's R.* 395; 7 *Conn. Rep.* 503; 11 *Pick.* 542; 4 *Gill & Johns.* 1.

This is not a case contemplated by the statute; not a case of *falling into distress, and standing in need of immediate relief.* When the four pounds of pork were left, the family denied that they were in distress, and not only notified the overseer, that the head of the family had directed them not to receive anything from the town, but did actually refuse to receive it, while so offered. If they were in such distress, as to stand in need of immediate relief, leaving four pounds of pork, but carrying home the bread and meal, would not have relieved it.

Rogers, for the plaintiffs.

This is a mere question of liability; on which town devolves the duty of supporting these paupers. The case shews, that the pauper once had his settlement in *Exeter*, and there it must remain until a new one is acquired. If a person falls into distress,

and stands in need of relief, and this is known to the overseers of the poor of the town, it is their imperious duty to furnish it. Neither law, nor humanity, requires them to wait until the sufferers come and acknowledge themselves to be paupers. *Paris* v. *Hiram*, 12 *Mass. R.* 267. If the case is found, and the relief is furnished, it necessarily makes the man a pauper; if it be not, his acknowledging that he is a pauper, does not make him one. The same state of things and the same acts, which will make a man a pauper with his assent, will make him so without it.

It has been said, that there was error on the part of the Judge in not giving the instructions requested. The instructions sought may be divided into three propositions.

1. Because furnished against his will. This has already been disposed of.

2. Because no notice was given to *Exeter* of the furnishing of the supplies. This is only necessary, when there is an action to be brought. If this be law, then the pauper may be supported by the town during the whole five years, and yet gain a settlement there, because the town where he happened to reside could not find the town where the settlement was.

3. Because not received by the pauper, as such; acknowledging himself to be a pauper. If the request or consent of the pauper was necessary, the statute ought to have said so. The pauper might be insane, or unable to speak, or wilfully perverse and willing to see his family starve; but will this excuse the overseers in seeing them perish without assistance?

The instructions given were correct. The finding of the paupers in distress; the furnishing them the supplies in good faith; and the receiving and consuming the articles left as supplies; were held to constitute the man a pauper. This is the only fair construction, that can be given to the statute.

The declarations of *Bassett* were clearly inadmissible. By the *stat.* of 1821, *ch.* 87, he was made a witness for either party, and therefore must be called himself. *Angel & A. on Cor.* 389, *sec.* 8.

The action was continued for advisement, and the opinion of the Court drawn up, and delivered at a subsequent term, by

WESTON C. J. — *Lewis Williams*, for the support of whom and family this action is brought, it is agreed had his settlement in the town of *Exeter*. That town attempts to escape the charge, by showing that he gained a new settlement in *Corinna*. He resided and had his home in that town for more than five years together, from and after *June*, 1826. And the question is, whether within the five years he received directly or indirectly any supplies or support as a pauper from the town of *Corinna*. With a view to shew that the support, upon which they relied, was furnished collusively, and in fraud of the law, the defendants offered to prove certain declarations, having this tendency, made by *Cushman Basset*, an overseer of the poor of *Corinna*, when he left a notice with the overseers of *Exeter*. Proof of these declarations was rejected.

It is insisted however, that this proof was admissible, either because *Bassett* is a party to the suit, or as a part of the *res gesta*. He was a citizen of *Corinna*, who sue in their corporate capacity, and cases have been cited to show, that as such he may be regarded as a party. His property is liable to be taken by any creditor of the town; but a citizen or inhabitant of a town has never been, in our practice, so far regarded as a party to their suits, as to admit his declarations as such in evidence. The interests of a town might be jeopardized, if they were liable to be affected by mere declarations of any one of their citizens. The purposes of justice do not require it; for they are by statute expressly made competent witnesses.

In *The King* v. *The Inhabitants of Hardwick*, 11 *East*, 578, proof of the declarations of an inhabitant, as a party, was received, becuase he could not be compelled to be a witness. All the Judges place the admission upon that ground. *LeBlanc J.* expresses his regret, that so important a point of evidence should come up in a settlement case, where their decision could not be revised. In our courts, an inhabitant of a town is compelled to be a witness; and although he is a party so far, as that his property may be seised on execution against the town, we are of opinion that his declarations cannot be received in evidence. *Basset* was the bearer of a written notice to the overseers of *Exeter*. When leaving it, he made certain statements of what *Corinna* had done

in reference to *Williams*, of its effect and of their motives. The business done, the *res gesta*, was the delivery of the notice. The declarations were in no proper sense a part of it. They formed no part of any business, he was negotiating in behalf of the town. If he knew any facts, favorable to the interest of *Exeter*, they might have called him as a witness.

Winchester, another overseer was called, and he was competent to testify to all facts, bearing upon the issue. A question had been raised, of importance in the cause, whether the supplies were furnished in good faith. He best knew, for he was the overseer applied to, and the supply was furnished upon his judgment of what duty required, and by his hand. It was then proper for him to testify, whether he acted in good faith, and in the discharge of what he believed to be his official duty.

The jury have passed upon the testimony, upon which the defendants relied, They have negatived the assumption, that the supply was left as a present, or not in good faith, or with a view to prevent *Williams* from gaining a settlement in *Corinna*. And they have found that his family was in distress, standing in need of relief from the town, and that the supply was furnished in good faith, and actually received and consumed in the family. The statute no where makes it necessary, that the suffering party should apply for relief. The duty of the overseers arises, when distress exists and relief is necessary. If the husband and father, through false pride, or a reckless disregard to the wants of his family, or from any other motive, should protest against the proffered supply, and refuse to receive it as a pauper, it is still the duty of the overseers to relieve his and their distress, and if the supply is finally received, we doubt not it comes within the exception of the statute. This was the view of the law taken by the presiding Judge in his instructions to the jury; and in our judgment it was correct.

No motion is filed to set aside the verdict, as against the weight of evidence. It was the province of the jury to determine the facts. If *Corinna* did not give notice to *Exeter*, they could not claim a reimbursement. The supply was too trifling, to require such a course of proceeding. But their omission to do so would not affect the fact, which brings the case within the exception of

the statute, and which is not made to depend upon the giving of such notice. Nor is it of any importance, what may have been the amount or value of the supply. A settlement is not gained by a residence of five years, if the party, within that time, "receive directly or indirectly any supplies or support as a pauper."

Judgment on the verdict.

JAMES THOMAS *& al. vs.* MOSES PATTEN *& als.*

Where the number of the lot on a plan referred to in the deed is the only description of the land conveyed; the courses, distances and other particulars in that plan are to have the same effect, as if recited in the deed.

It is a well settled rule, that where an actual survey was made, and monuments were marked or erected, and *a plan was afterwards made*, intended to delineate such survey; and there proves to be a variance between the survey and the plan, that the survey must govern.

But no such rule of construction has obtained, where the survey was subsequent to the plan.

Where a survey and plan were made in 1801; and the same surveyor went upon the land in 1802, made another survey and put down stakes as monuments, not intending to conform to the plan, and designedly varying from it, but made no new plan, or alteration in the former one; and a conveyance was made in 1803, in which the only description in the deed was a certain lot on that plan; *it was held*, that the extent of the grant was to be ascertained by the plan, and not by the monuments thus erected.

THIS was a writ of *entry*, brought to recover a certain piece of land, described in the declaration, in the city of *Bangor*, in which the demandants counted upon their own seisin, and upon a disseisin by the tenants. The general issue was pleaded and joined. It was admitted that *James Dunning* the elder, was an original settler in *Bangor*, and was possessed as such of the land in controversy, and of contiguous land. That he died prior to *January*, 1790, intestate, leaving as heirs, *James Dunning*, his oldest son, and six other children. *James*, the son, was entitled by descent to two shares, and by deed, dated *October* 14, 1793, he purchased three other shares or eighths of *Robert*, *William & Anne*, his brothers and sister. Being thus the owner of five eighths, *James Dunning*, the son, did by deed of warranty, dated

October 1, 1798, duly acknowledged and recorded *October* 8, 1798, convey to *Thomas Rice*, one acre of the common land described, in severalty, by metes and bounds. *Thomas Rice*, by deed of warranty, dated the 11th, acknowledged the 12th of *November*, and recorded *December*, 30th, 1801, conveyed the same acre by metes and bounds and in severalty to *Jonathan Hyde;* and that land was afterwards known by the name of the *Hyde* acre. The demandants adduced in evidence, a deed dated *June* 1, acknowledged *December* 3, and recorded *December* 29, 1800, from *James Dunning* and wife to the demandants, conveying to them his five eighths of all the land described, reserving and excepting out of said five eighths, the *Hyde* acre and two other pieces previously conveyed by him by metes and bounds. It appeared that *Andrew Dunning*, one of the children and heirs of *James*, the father, did by deed dated 5th of *August*, acknowledged *August* 16, and recorded *August* 25, 1800, convey his share or eighth, to the tenants. With a view to a partition of the common lands among the several tenants, they caused *Moses Hodsdon* to make a survey and plan of their lands in 1801. Thereafterwards there was assigned and conveyed to the tenants, by deed dated *April* 3, 1803, by their co-tenants, lot number 39 and other lots, and to the demandants, by deed dated *April* 2, 1803, there was assigned and conveyed by the other co-tenants, lot number 73 and other lots, and the deeds of release executed and received by the several co-tenants described the lots by number, according to a plan made by *Moses Hodsdon, May* 14, 1801. That plan was produced by the demandants at the trial. *Moses Hodsdon*, the surveyor, being called as a witness by the tenants, testified that he made and delivered the plan to *Dudley*, one of the demandants, in 1801. That at that time the south line of the lot marked as 73 on that plan, was not then drawn by him, nor were these figures made by him on that plan, that he did not again see the plan until *October*, 1834, when it had upon it delineated the figures 73, and the south line of that lot, but how or by whom made, he did not know; that the lot marked 73, was intended to delineate the *Hyde* acre, but was left incomplete by reason of a mistake discovered in regard to what was supposed to be the south line of that acre, and that the other lots he did at

the time plat and lay down. By a survey and plan made by *Jedediah Herrick*, by order of Court, verified by his testimony, it appeared that there was between the lots thus platted and the true south line of the *Hyde* acre, a gore of land, and that part of the gore, which lay between lot No. 39, as laid down on that plan, and the *Hyde* acre was demanded in this action. *Moses Hodsdon*, further testified that the existence of this gore was discovered in 1802, whereupon a majority of the co-tenants, and he had no doubt that among them both the demandants, called upon him to make a new survey, and to average the gore among the lots between the *Hyde* acre and water street. This he stated he proceeded to do, and put down stakes at the corners of the lots thus enlarged; and that so far as he knew, the owners occupied according to the new survey. There was testimony tending to shew, that *Dudley* owned and occupied lot No. 40, south of 39, and also lot No. 34 and half of No. 35, being part of the five lots in the rear, according to the new survey. It appeared that the tenants claimed to extend lot No. 39, up to the *Hyde* acre, and that they had occupied the land now demanded, or a portion of it, by piling thereon lumber from time to time; a considerable proportion however of the land demanded lay below high water mark. The trial was before *Weston C. J.*, who instructed the jury, that if the demandants were not entitled to recover the gore demanded, as a part of lot No. 73, they were entitled to recover five-eighths of it, as common and undivided; and that the division made by *Hodsdon* in 1802, and what followed by the parol direction of the co-tenants, did not create a several tenancy in that gore, unless where the tenants had held accordingly by an exclusive, notorious, and continued possession, for a period of more than twenty years, prior to the commencement of the action. The jury returned a general verdict for the tenants. If *they were properly instructed*, the verdict was to be set aside, and a new trial granted.

The case was argued by *Mellen* and *Rogers* for the demandants, and by *F. Allen* and *J. Appleton* for the tenants.

For the demandants it was said, that the only question before the Court was, whether the instructions of the Judge were, or were not correct.

Five eighths of the land in controversy were conveyed to the demandants, and three eighths to the tenants. It is here unnecessary to inquire, whether we are entitled to the whole, or to the five eighths, as in either case we are to have a new trial. The division deeds only conveyed such lots as were then marked and numbered on the plan made in 1801. The land now demanded was not then thus marked or numbered on the plan, and of course not conveyed by the deeds. As the deeds refer to the plan by numbers, the lines and distances marked on the plan have the same effect, as if they had been inserted in the deeds. If there was a parol partition made afterwards, that was void, and there is no evidence in the report of any title in the defendants acquired by disseising the owners. There was only a little lumber occasionally placed on a small part of the land; and as to most of it, it is not even pretended, that there was occupation of any kind. The putting down of the stakes was not done to locate the land according to the plan or deeds, but for a purpose wholly different. The cases on that subject therefore have no application here. They cited *Porter* v. *Perkins*, 5 *Mass. R.* 233; *Whitney* v. *Holmes*, 15 *Mass. R.* 152.

For the tenants it was insisted, that the plan made by *Hodsdon*, and as made by him, was to govern. The report only shews, that the plan went into the hands of *Thomas*, but does not show by whom the alterations were made; especially, it does not shew, that the tenants assented. The location of the land was afterwards made and monuments erected with the intent to conform to the plan, and to complete any deficiencies therein. The actual survey and location upon the earth, and the erection of monuments according to the survey control the plan, although it is referred to in the deed. This was done before the division and partition by deed, and must be decisive of their rights. But if the deeds had been made first and the survey and location made afterwards, the same result must have followed. There was no gore of land at that time, but the whole of the land held in common was conveyed to be held by them respectively in severalty. The instruction, therefore, that the demandants were entitled to recover five eighths of the tract, as common and undivided, was erroneous, as in the division no part of the demanded premises

fell to their share. It was also wrong because the tenants would have acquired a title to it, if they had not obtained it otherwise, by the parol division made in 1802, and the possession under it since. It was occupied, as part of the lot on which the buildings stood, and actually used, as much as land of that description can be. After a lapse of twenty years, and occupation during the time, a deed is to be presumed. The demandants cannot prevail, because they stood by and saw the tenants making improvements, without asserting their right, for more than twenty years. The verdict ought not to be set aside, because the Court cannot avoid seeing, that in this case substantial justice has been done. They cited, 12 *Mass. R.* 469; 17 *Mass. R.* 207; 13 *Pick.* 267; 5 *Greenl.* 24; 7 *Greenl.* 61; 2 *N. H. Rep.* 197; 7 *Johns. R.* 238; 6 *Wend.* 467; 7 *Cowen,* 761; 1 *Caines,* 362; *Mathews on Presumptions,* 196; 3 *Greenl.* 316; *Cowper,* 217; 13 *Pick.* 251; 1 *Phillip's Ev.* 121; 3 *Paige's C. R.* 545; 1 *Johns. C. R.* 354; 4 *Wheaton,* 513; 1 *Greenl.* 219; 2 *Greenl.* 213.

The action was continued for advisement, and the opinion of the Court afterwards drawn up by

Weston C. J. — The tenants are the owners of lot number thirty-nine, according to a plan made by *Moses Hodsdon, May* 14, 1801. There being no other description of that lot, its location must depend altogether upon the plan. And the courses, distances and other particulars in that plan are to have the same effect, as if recited and set forth in the deed. *Davis et al.* v. *Rainsford,* 17 *Mass.* 207; *Ripley* v. *Berry et al.* 5 *Greenl.* 24. This is a rule of law well settled in our practice, in reference to deeds, containing no other description of the land conveyed, than the number of the lot and the number of the range, according to the plan of a township. The plan referred to in the deed, under which the tenants hold, has been produced; and there does not appear to be any difficulty in locating the lot, according to the plan. For although the surveyor has testified, that one of the side lines of lot number seventy-three, which on the plan produced, is also one of the side lines of thirty-nine, was not drawn upon the plan, when it went from his hands; yet the other side line and the two end lines of thirty-nine being delineated, and

the exact distance between the side lines marked on the plan, the true boundaries of that lot may be ascertained with entire precision. The location of the whole range or tier of lots, of which this is one, is found by an exact admeasurement, according to the plan, from water-street, which is a fixed point.

But it is insisted that this location is to be controlled by the monuments put down by the surveyor, subsequent to the plan, and prior to the deed. Had he established monuments at the angles, and had afterwards made a plan, which was intended to be a delineation of his survey, the plan must have yielded to the monuments, if there had been any discrepancy between them. But no such construction has obtained, where the survey was subsequent to the plan. In *Esmond* v. *Tarbox*, 7 *Greenl.* 61, cited in the argument, although the survey was made by one surveyor, and the plan referred to by another, yet the survey preceded the plan, and the monuments held decisive in that case, were set up at the time of the survey. In *Makepeace* v. *Bancroft*, and in *Davis et al.* v. *Rainsford*, monuments were referred to in the deeds, which were afterwards located, and it being justly inferred that they were intended to conform to the deeds, they were regarded as conclusive upon the parties. Here the monuments put up by the surveyor, were neither referred to in the deed, nor marked on the plan.

The surveyor testifies that the error in the plan was discovered in 1802, and thereupon by a new survey, the gore, a part of which is sought to be recovered in this action, was averaged between the lots, and stakes put down accordingly at the new corners thus established. As his plan was made only the year before, and deeds had not then been given, to carry into effect the contemplated partition, it is somewhat remarkable, that a new plan was not made, or that the former one was not corrected, or at least some explanatory certificate entered upon it. And it is still more remarkable, that in the following year, when deeds of release were given, reference was made to a plan, then recently discovered to have been erroneous, without the slightest intimation, that measures had been taken for its correction. This accords so little with the conduct of men of ordinary prudence, as to throw distrust upon the accuracy of the surveyor, as to the time

of the new survey ; and it illustrates the danger of suffering written memorials to be explained or modified by parol testimony, resting in memory ; especially after the lapse of many years. But assuming, as it is proper to do, for the purposes of this inquiry, that the surveyor's testimony is correct, both as to what was done and the time when, the new survey, and the monuments thereupon established, were not intended or designed to conform to the plan referred to in the deed under consideration ; so that this case bears no resemblance to those before cited. And we are very clearly of opinion, that by law, lot number thirty-nine must depend for its location upon the plan of 1801, to which, and to which alone, it refers for a description of the land, upon which it was to operate.

There is great reason to believe, that the proprietors of these lands, when apprized of the existence of the gore, then of trifling value, divided it among themselves, by widening their respective lots, and that the demandants assented to this arrangement, and participated in the division. And if, without violating the principles of law, the partition thus made could be held effectual, it would seem best to accord with the equity of the case. But lands can neither be conveyed, nor divided by parol. The law requires that this should be done by deed. If parties will be so improvident as to pursue a different mode, and their confidence in each other turns out to have been misplaced, we are not at liberty to bend the law to meet the apparent justice of such a case. More injustice would be done than remedied, by thus unsettling the rules of law.

There is no doubt, that one tenant in common may oust his co-tenants, and acquire by lapse of time, and by force of the statute of limitations, an estate in severalty. This effect could not arise from exclusive possession alone, because he would be presumed to hold for himself and his co-tenants. But if long continued, without any claim on their part, and especially if their right had been denied or resisted, it would be evidence of ouster. In *Rickard* v. *Rickard*, 13 *Pick.* 251, several descents had been cast, and the estate in controversy had been settled in the probate office, in a manner inconsistent with the continuance of an estate in common. The other co-tenants, whose interest had not been

asserted for over seventy years, were there held barred by the statute of limitations. A tenant in common, who ousts his companion, is a wrongdoer, and we are aware of no reason, which presents his claim more favorably, than that of a disseisor. If his possession be continued and exclusive, and under circumstances from which an ouster may be inferred, the right of his cotenant may be lost by lapse of time. The report states, that the tenants had used part of the land from time to time, as a place for the deposit of lumber. This seems to imply, that their occupancy of the land in this manner, was not constant, but remitted. At any rate, as it applied to only part of the land, and was consistent with a tenancy in common, it does not justify the verdict, which excludes the demandants from the whole. On a further trial, the tenants will have it in their power to make as much of this point, as by law they may. Upon the whole, we are of opinion, that the jury were properly instructed at the trial; and as their verdict does not conform to their instruction in point of law, it is set aside, and a new trial granted.

JAMES THOMAS *& al. vs.* GEORGE W. PICKERING *& als.*

D., being the owner of five-eighths of an original settler's right in a two hundred and twenty-five acre lot in *Bangor*, in 1798, by deed of warranty conveyed to R. one acre thereof, describing it particularly by metes and bounds. In 1801 R. conveyed the same acre by the same description to H.; and H. in 1822, conveyed the same, in a large number of lots, to the respondents, or to others under whom they claim. All these deeds were recorded immediately after they were given. In 1800 D. made a deed to the petitioner, T., describing the whole 225 acre lot, and then saying, "of which only five-eighths are the property of said D, and are hereby conveyed, with the exceptions of" three pieces described, containing in the whole about twelve acres, one of which pieces was the *acre* conveyed to R., and then adding, "*which exceptions are made out of the five-eighths conveyed, as aforesaid.*" In 1803, T. and the owners of the three-eighths of the whole lot, made a partition of all the land, but the *acre* and the other two excepted pieces, in which partition the owners of the three-eighths had assigned to them *their full share in the whole of the* 225 *acre lot.* T. released to the owners of the three-eighths, his interest in the land assigned to them, and they released to him their three-eighths in all the residue. In 1802, a committee authorized by a resolve of the legislature of the Commonwealth of *Massachusetts*, conveyed the lot to the heirs of the first settler. Soon after H. received and recorded his deed, he entered into the occupation of a part of the acre, and he and his grantees continued the occupation to the present time, covering the principal part of it within the last twelve years with buildings. During a portion of this time T. acted as the agent of H. in leasing the land. In 1834, T. entered upon the land, and instituted this process of partition. *It was held:*

That by the deed from D. to T. *the whole* of the excepted pieces was reserved out of the five-eighth parts, and was to be considered, as so much received of the interest to be assigned to those shares, when partition should be made:

That the effect of the deeds of release was but to make partition of the 225 acre lot:

That T., having taken a deed from D. conveying him only so much as remained of the five-eighths after deducting therefrom the whole of the excepted pieces, acquired by the deed of release, made on the partition, no title in himself in the three-eighths of those pieces:

And that the deed from the State did not vary the rights of those claiming under the first settler, further than relinquishing the right of the State.

One tenant in common *may oust* his co-tenant by resisting or denying his right or by excluding him from the enjoyment of it; and an interest thus acquired may become indefeasible by an uninterrupted continuance for a sufficient time.

A deed of warranty given by one tenant in common in possession to a stranger who records his deed and enters and occupies a part thereof, the residue remaining vacant, ousts the co-tenants of the grantor, and puts the grantee in the seisin of the whole; and he becomes entitled to the protection of the statute of limitations against all conflicting rights.

Thomas *v.* Pickering.

THIS was a petition for partition in which the petitioners alleged, that they were seised in common, with persons unknown, of three undivided eighth parts of an acre of land in the city of *Bangor*, described in their petition. Certain persons appeared as respondents, and severally pleaded sole seisin in certain portions of the acre, described in their pleas, and traversed the seisin of the petitioners alleged in their petition, and upon these pleas issues were joined. The petitioners adduced in evidence a deed dated *April* 2, 1803, acknowledged *April* 4, and recorded *May* 4, of the same year, from *Isaac Hatch*, *Moses* and *Amos Patten* & *Nathaniel Harlow*, guardian of *Vinson Dunning*, a *non compos*, to the petitioners of their interest in 42 lots of land, and among others of lot No. 73, according to a plan made by *Moses Hodsdon*, *May* 14, 1801; also the said plan, it appearing that lot No. 73, embraced within itself most of the acre, of which partition was prayed; also a deed dated *August* 5, 1800, from *Andrew Dunning* to *Moses* and *Amos Patten*, of his interest in the estate of his father, *James Dunning*, deceased, being one eighth part, also a deed, dated *April* 4, 1804, from *John Dunning*, another of the heirs of *James Dunning*, of his eighth, to *Isaac Hatch*. It appeared that *Vinson Dunning*, was another heir, and entitled to one eighth. It was agreed that *James Dunning*, the father, was an original settler in *Bangor*, that the acre in question was a part of his possession, and that he was entitled to the favor of the government, under a resolve of the Commonwealth of *Massachusetts*. The petitioners produced a deed, dated *November* 11, 1802, from a committee of the Commonwealth, conveying to the heirs of *James Dunning*, deceased, certain lands, of which he died possessed, of which the acre formed part. It was admitted that *James Dunning*, the father, died intestate, prior to *January*, 1790, leaving *James Dunning*, his oldest son, and six other children, his heirs at law. *James*, the son, by the law as it then stood, was entitled to two shares, and it appeared from a deed in the case, that on the 14th of *October*, 1793, he acquired by purchase from *Elijah Smith* and *Anne* his wife, a daughter of the deceased, in her right, and from *Robert Dunning* & *William Dunning*, his brothers, their three-eighths, by which he became the owner of five-eighths of the estate. The respondents pro-

duced a deed dated *June* 1, 1800, from *James Dunning*, the son, and wife, to the petitioners of his five-eighths. This deed describes a tract of land containing two hundred and twenty-five acres, and then says, "of which only five-eighth parts common and undivided is the property of the above named *James Dunning* and is hereby conveyed; with the exceptions of about ten acres conveyed to *William Hammond*," describing the ten acres; "and also one acre conveyed by deed to *Rice*," describing it in the language of the deed to *Rice;* also another tract described, and proceeds, "which exceptions are reserved out of the five eighths conveyed, as aforesaid," "to have and to hold the aforegranted premises, *viz.* five-eighth parts thereof with the exceptions as above described," that I am lawfully seised, &c., "of the five-eighths with the exceptions aforesaid," and continuing the same expressions in all the covenants.

Also a deed of warranty, dated *October* 1, 1798, acknowledged the 2d, and recorded the 8th of the same *October*, from *James Dunning*, the son, conveying the acre by metes and bounds to *Thomas Rice*, also a deed of release, dated 11th of *November*, acknowledged *November* 12, and recorded *December* 30, 1801, of the same acre, by the same bounds to *Jonathan Hyde*. And it was admitted, that the title of *Hyde* had passed to the respondents, in the proportions by them claimed. *Daniel Ladd* testified, that in 1798, *James Dunning*, the son, improved and occupied a field which included the acre, which he that year sold to *Thomas Rice*, who paid him a horse therefor. The deposition of *Jonathan Hyde*, the grantee of *Rice*, was read: which stated in substance, that he purchased the land in *Bangor* known as the *Rice* or *Hyde* acre in 1801; laid it out in lots in 1822; and soon after sold out to various individuals; that he resided at *Bath*, and was in *Bangor* in 1807, in 1813, and in 1822; that he paid the taxes or caused them to be paid; that although he had no recollection of appointing *James Thomas* his agent, as early as 1810, yet he finds a lease in his possession dated in that year from said *Thomas*, as his agent, to one *Reynolds*, and that he approved of the transaction, and received rents under the lease from time to time; that the acre was unoccupied, except where there were buildings: that he thinks he appointed *Mr. William*

Emerson, about 1815, his agent to take care of the land and pay taxes, but has not a distinct recollection about it; that during the time, he never knew *Thomas*, who is his brother-in-law, or any one else, claim the land, or any of it, included within the description in the deed, but that after his survey in 1822, *Thomas* said he should for himself, or others, claim all that the deed did not give the deponent; that *Thomas* never claimed any interest in the lot covered by the deed, while the deponent owned the land; and that he had always claimed the entire ownership of the whole acre.

Abner Taylor testified, that he became acquainted with the land in question, in 1802 or 1803, and that it was then known by the name of the *Hyde* acre; that *Thomas*, one of the petitioners, stated to him that he purchased the acre for *Hyde*, who was his brother-in-law, that he went to the county of *Worcester*, and had a jaunt to find *Rice*, the owner. That in 1810, he and *Moses* and *Amos Patten* built a vessel, on the shore of the acre; that while she was on the stocks, *Thomas* said he had called upon *Patten* for pay for the use of the land, who was unwilling to give any thing; that *Thomas* said he was an agent, and had the care of the land for *Hyde;* that it made no difference to him, but he thought *Hyde* ought to have something. The witness added, that nothing was paid for the land, so far as he knew, and that *Thomas* never claimed the land, as his, to his knowledge. *John Reynolds* testified, that on the third of *October*, 1810, he took a lease of a part of the acre, to set a shop upon. The lease was under the hand of *Thomas*, was written by him, professing to act as the agent of *Hyde*, and had a seal affixed thereto. An account between him and *Hyde* for rent was introduced and verified by the witness. The witness testified, that the following year, he built a shop on the land he hired; that he sold the shop to one *Pray*, who paid ground rent therefor; *Pray* sold to *Simon Harriman*, who paid ground rent; that *Harriman* sold to *Thomas A. Hill*, under whom the witness hired and occupied the shop from 1818 to 1827, when he repurchased the shop; that it remained on the land, where it was first placed, until 1827, when *John Sargent* and another, who had purchased the land of *Hyde*, began to dig their cellar, at whose request he removed the

shop off, and they thereupon put on the same spot a wooden store, which remained thereon until it was burnt in *July*, 1834; that there were, before the fire, wooden buildings from where his shop was, to the end of the acre, and upon the opposite side except an avenue; that *Fisk & Billing's* wooden store, built in 1824, and *Thomas F. Hatch's*, both on the acre, were not burnt, but are still standing. And that his shop was the first building on the acre, except *Simon Harriman's* blacksmith's shop, which stood west of main-street, on or near the scite of the old *Bangor Bank*. *David Hill* testified, that in 1813, he got permission of *William Emerson* to put up hayscales, of the fashion of that day, on a part of the acre; that *Emerson*, when he gave liberty told him he must settle with *Hyde*, and was referred to him to determine what ground rent he should pay. What *Emerson* said was objected to, but admitted. That he soon after saw *Hyde*, to whom he paid rent from time to time, so long as they remained, $3,00 a year at first, and afterwards he believed $5,00 a year; that in 1827, at the request of *George W. Pickering*, who had bought the land of *Hyde*, he removed the hayscales off, and *Pickering* put up a building on the same place. *Thomas Bartlet*, who had sold the hayscales to *Hill*, testified that he was positive they were put up in 1813. *Benjamin Weed* testified, that in 1820 or 1821, *William Emerson* gave him and one *Davis* permission to put up a shop, on a part of the acre, *Emerson* saying at the time, that *Hyde* would soon be here, and settle the price; that they built their shop, and *Hyde* came soon, and gave them a lease; and that their shop remained until *Pickering*, who had bought the land, required him to remove it, who thereupon built on the same place. The witnesses before mentioned were adduced in behalf of the respondents.

For the petitioners,

Jacob Chick testified, that in 1802 he hired of *Thomas* a portion of the *Hyde* acre, paying him therefor, three or four dollars a year, in building for him a chimney in his store; that he put upon and inclosed the upper part of the acre with a fence of stakes, boards and withes, and cut grass there two or three years; that he thought he understood at the time, that *Hyde* owned the acre,

probably from *Thomas*, but upon further examination stated, that he could not say he heard him say any thing about it.

Simon Harriman testified, that prior to 1807, he had a blacksmith shop standing upon land belonging to *James Thomas*, not part of the acre, that in 1807 it was carried off by a freshet. That afterwards *Thomas* asked him, if he was going to rebuild, and that he replied he would not put his shop again, where it would go adrift, whereupon *Thomas* told him that he had a piece of land, where it would be safe, and accordingly gave him permission to set his shop, which he did, west of main-street, on the acre, on or near the scite of the *Bangor Bank;* that he was to give *Thomas* $2,00 a year, and he supposed he paid him for the time his shop stood there; that it remained until about the year 1818, when he removed it across the street to make way for the bank; that prior to 1807, he had heard about the *Hyde* acre; thought *Thomas* might have spoken of it, but could not recollect with certainty; that twenty-two or twenty-three years ago, but was not certain, whether during the late war, or before or after, he tried to purchase of *Hyde* the land upon which his shop stood, but thinking his price too high, he did not buy it. He further testified, that he did not see *Thomas*, after he left here in 1812, until he went to *Houlton* in 1828. *Simon B. Harriman* testified, that he is now 40 years of age, and that he came to *Bangor* thirty-three years ago; that the shop of his father, the last witness, stood on or near the scite of the old bank, and was removed to make way for the bank, which was built in 1818; that it afterwards stood upon the opposite side of the street, upon another part of the acre, for which he thought he once paid *Hyde* rent at *Bath;* that he had known the *Hyde* acre ever since he came to *Bangor*, and that he had understood it was purchased for a horse. *Alvin Haines* testified, that on the 24th of *February*, 1834, he went with *Thomas*, who there in his presence made a formal entry into every part of the acre, which was in a several occupation.

On making the partition, the lots assigned to each party were marked on the plan, number 73 not being drawn or marked; and three-eighths of the whole 225 acre lot were assigned to the three shares.

The counsel for the petitioners requested *Weston C. J.*, before whom the trial was had, to instruct the jury: 1. That if the petitioners took a deed of the three-eighths, and put it upon record, and thereby became seised, and *Hyde* afterwards entered and occupied a part of the acre, it would not be a disseisin of the petitioners of the whole acre. 2. That the entry and occupation of *Reynolds*, under the lease given by *Thomas*, as attorney, being by the agency or consent of *Thomas*, was not a disseisin of *Thomas* of any part. 3. If of any part, it was not of the whole. 4. If *Hyde* intended to claim no more than he had title to, and entered and occupied, supposing, by mistake of his legal rights, that he owned the whole, this would not be a disseisin of the petitioners. 5. That to constitute a disseisin, the occupancy must be adverse to the owner. 6. That if *Hyde's* occupying was by *Thomas'* consent, it was no disseisin. 7. That if *Chick* went on under *Thomas'* agency, and there is no evidence of the revocation of such agency, it may be presumed to have continued as long as *Chick* continued. 8. If *Chick's* whole occupancy was by *Thomas'* agency, then *Thomas* might take a deed, while it continued. 9. That if *Thomas* told *Taylor* that he acted as the agent of *Hyde*, in purchasing the land, it was not evidence that he acted as agent, when he put *Harriman* in possession, in 1807. 10. That the petitioners' title commenced, when they caused a plan to be made, with a view to a partition.

The Chief Justice instructed the jury, that the deed made by *Dunning*, the son, to *Rice*, being a deed of warranty and recorded, as was also the deed of *Rice* to *Hyde*, conveying the *Hyde* acre in severalty, by metes and bounds, if the grantees or either of them thereupon entered into any part of the acre and occupied it, it would be a disseisin of the other co-tenants; that the petitioners' interest, if any they had, in the three-eighths claimed by them did not commence prior to *April* 2, 1803, when they took their deed of release; that if *Thomas*, when he put *Chick* into possession of the acre or part of it, acted as the agent of *Hyde*, his brother-in-law, of which they would judge from all the tistimony in the case, bearing upon that point, and *Chick* thereupon entered under *Hyde*, and was thus holding under him on the 2d of *April*, 1803, the other co-tenants were disseised,

and that therefore nothing passed by their deed of release of that date to the demandants; that if not satisfied upon that point, that by the entry of *Reynolds* under *Hyde* in 1810, and the continued occupancy of a part or parts of the acre under *Hyde*, for more than twenty years prior to the entry of the demandants, on the 24th of *February*, 1834, they were disseised, and their title thereby defeated, unless they or either of them had a concurrent possession, by the occupancy of *Simon Harriman;* that it hence became important for the jury to determine, whether *Thomas*, when he put *Harriman* on and suffered him to remain there, did, or did not act as the agent of *Hyde;* that of this they would judge from the whole evidence having relation to this point; that what *Thomas* told *Taylor*, that he purchased of *Rice* for *Hyde*, in 1801, and his representation to him that he was his agent in 1810, was evidence upon this point to be considered by them, with the other testimony; that it appearing from *Hyde's* deposition, and from other evidence, that he claimed the whole acre, and having a warranty of the whole, through *Rice*, there did not appear any such mistake of his rights, as would impair his title to the acre, and that if *Harriman* entered and held under him, *Hyde*, the demandants had no right of entry in 1834. Upon the points requested, the Chief Justice gave no other instructions than the foregoing. The jury returned their verdict for the respondents. If the instructions given were erroneous, or those requested and withheld ought to have been given, or the testimony of *Hill*, objected to, ought not to have been received, the verdict was to be set aside, and a new trial granted; otherwise judgment is to be rendered thereon, unless the same should be set aside, as a verdict against evidence.

There was a motion to set aside the verdict, as against evidence.

The case was elaborately argued by *Mellen* and *Rogers*, for the petitioners, and by *J. Appleton* and *Starrett* for the respondents.

In the arguments for the petitioners it was said:

1. That when the petitioners purchased the rights of three of the heirs of *James Dunning, senior*, they became tenants in common in the whole of the land, and had their election either to

seek partition in the whole, as one lot, regardless of any division by another tenant in common, or might call for a partition in each lot. The other co-tenants could do nothing to impair these rights, but the petitioners were under no necessity of enforcing them. They went on and made partition of all but this acre, but the other shares in this being sold out to a different person, at a distance, no partition was made of it. They had the power of defeating the title under *Rice* entirely, unless on the partition it fell to the share of those who had sold to him, when it might enure to his benefit. The petitioners were willing to accommodate, but they gave up no rights in this portion of the common property by making partition of the residue. *Gordon* v. *Pearson*, 1 *Mass. R.* 324; *Porter* v. *Hill*, 9 *Mass. R.* 34; *Bartlett* v. *Harlow*, 12 *Mass. R.* 348; *Baldwin* v. *Whiting*, 13 *Mass. R.* 57; *Rising* v. *Stannard*, 17 *Mass. R.* 282.

2. As the respondents have no paper title to but five-eighths of the land, they seek to take it from us, who have it, in some mode or other; and insist, that because the *Hyde* acre was excepted in *Dunning's* deed to us of the five-eighths, that it transfers the title to them. But it must be remembered, that neither the grantor, nor the grantees had at that time any title to this acre. The one had sold out, and the others had not purchased in. It is not easy therefore to imagine how such consequence can follow. Having made a conveyance of his interest in these lots, he made an exception of them in this deed, the only effect of which was to render the deed what it would have been, if these lots had been excluded, instead of being included, and excepted out. An exception can only be out of what otherwise would have been conveyed, 4 *Com. Dig.* 283; *Hornbeck* v. *Westbrook*, 9 *Johns. R.* 73; 10 *Coke's R.* 106.

3. If the petitioners could be considered, as trustees of the land for the respondents, it would afford them no defence in this process. The legal estate would be in us, and they would be put to their bill in equity. 4 *Kent's Com.* 289. But that there is a trust of any description is wholly denied. The petitioners never derived any title in the acre by their deed from *James Dunning;* they then had no title in it from any source, and they now claim under a distinct title. 4 *Kent's Com.* 289; *Fisher* v.

Fields, 10 *Johns. R.* 495; *Steeve* v. *Steeve*, 5 *Johns. Ch. R.* 1; *Philips* v. *Brydges*, 3 *Vesey*, 127; 4 *Kent's Com.* 305; *Morvan* v. *Hays*, 1 *Johns. Ch. R.* 339; *Goodwin* v. *Hubbard*, 15 *Mass. R.* 210.

4. There is no foundation for saying, that here is a resulting trust, implied by law. Payment at the time is indispensable to the creation of such trust; and it exists only, where the consideration of the purchase is paid by one man, and the conveyance made to another; or where the trust is declared in writing in part, and there is a resulting trust of the residue to the heir at law. *Lloyd* v. *Spillett*, 2 *Atkins.* 150; *Willis* v. *Willis*, *ibid.* 71; *Bartlett* v. *Pickersgill*, 1 *Eden's R.* 515; *Botsford* v. *Burr*, 2 *Johns. Ch. R.* 405; *Sterrett* v. *Sleeve*, 5 *Johns. Ch. R.* 1; *Howell* v. *Monson & B. Man'g Co.* 3 *Mason*, 362; *Radley* v. *Shaver*, 4 *Johns. Ch. R.* 300; 4 *Kent's Com.* 306.

5. There is no reason for saying, that a title was gained by disseisin, or that there was such an adverse possession, when we took our deed, as would prevent the title from passing. The doctrine of disseisin is spread over a broad surface; but one principle seems to be clearly established, which is, that there can be no disseisin, unless the commencement of it was a trespass. Mere sole occupancy is not sufficient. In the language of *Chancellor Kent*, "Every disseisin is a trespass, but every trespass is not a disseisin. A manifest intention to oust the real owner must clearly appear, in order to raise an act which may be only trespass to the bad eminence of disseisin." 4 *Kent's Com.* 2*d Ed.* 482 *to* 489; *Harrison* v. *Philips' Academy*, 12 *Mass. R.* 456; *Little* v. *Libby*, 2 *Greenl.* 242; *Pro. Ken. Pur.* v. *Laboree*, *ibid.* 275; *Robison* v. *Swett*, 3 *Greenl.* 316; *Stearns on Real Actions*, 39; *Shumway* v. *Holbrook*, 1 *Pick.* 114; *Ricard* v. *Williams*, 7 *Wheat.* 59; *McClung* v. *Ross*, 5 *Wheat.* 116; *Barnitz* v. *Casey*, 7 *Cranch.* 456; *Carruthers* v. *Dunning*, 3 *Serg. & R.* 373; *Peaceable* v. *Read*, 1 *East*, 568; *Bigelow* v. *Jones*, 10 *Pick.* 161; *Prescott* v. *Nevers*, 4 *Mason*, 326; *Ross* v. *Gould*, 5 *Greenl.* 204; *Tinkham* v. *Arnold*, 3 *Greenl.* 120; *Fox* v. *Widgery*, 4 *Greenl.* 214; *Dennett* v. *Crocker*, 8 *Greenl.* 239; *Schwartz* v. *Kuhn*, 1 *Fairf.* 274.

6. But none of the parties had any title to the land, before the deed from the Commonwealth to the heirs of *Dunning*, in 1802, which made them all tenants in common according to their respective rights. *Little* v. *Megquier*, 2 *Greenl.* 176; *Polk* v. *Wendell*, 5 *Wheat.* 308; *Sampeyreac* v. *U. States*, 7 *Peters*, 222; *Knox* v. *Pickering*, 7 *Greenl.* 106; *Ricard* v. *Williams*, 7 *Wheat.* 59.

7. The occupancy of the persons put in by *Thomas* could be no disseisin of him; but if it could, it would extend only to the small parcels occupied, and not to the rest. *Oakes* v. *Marcy*, 10 *Pick.* 195; *Pro. Ken. Pur.* v. *Laboree*, 2 *Greenl.* 275.

In the arguments for the respondents, it was said; that they held under a warranty deed of the whole of the tract, in which there were definite and well known boundaries, and that the deed was recorded more than thirty years before the entry of the petitioners; and that actual possession had accompanied the deed. A portion of the land was covered with buildings soon after the deed was given, and long since nearly the whole was covered with buildings and streets. An agent for the respondents attended to paying the taxes and taking care of the land. All the title the petitioners set up accrued more than thirty years before their entry, and during the whole time the present claimants had full knowledge of all these facts, and were in a situation to enforce any rights they had for the whole period; and yet stood by and saw the respondents making very valuable improvements, without giving the slightest intimation, that they had any title.

1. They have not exhibited sufficient evidence to put us on our defence. Their own testimony shews, that we were in possession when they took their deeds, which were mere deeds of release; given by persons not in possession to persons in the same condition. Nothing passed by these deeds. *Pro. Ken. Pur.* v. *Call*, 1 *Mass. R.* 483; *Porter* v. *Perkins*, 5 *Mass. R.* 233; *Warren* v. *Childs*, 11 *Mass. R.* 22; *Mayo* v. *Libby*, 12 *Mass. R.* 339; *Hathorne* v. *Haines*, 1 *Greenl.* 238; *Quarles* v. *Quarles*, 4 *Mass. R.* 680; *King* v. *Barnes*, 13 *Pick.* 24.

2. If the petitioners have any strict rights, an attempt to enforce them against the respondents, under the circumstances of this case, is a legal fraud, which the courts will not countenance

or suffer to be enforced. *Lapish* v. *Wells*, 6 *Greenl.* 175; *Dunlap* v. *Stetson*, 4 *Mason*, 349.

3. By the deed from *James Dunning* to the petitioners, if they took any thing, it was only his five shares in the land not before conveyed, less by the amount of the value of the three-eighths by him previously conveyed, which by the terms of the deed was to be taken out of the remaining five-eighths. And on the partition the owners of the three-eighths actually received an equivalent for any right they might have had in the lands previously sold. The effect of this was a resulting trust for the benefit of those to whom *Dunning* had previously conveyed in fee. This trust is not within the statute of frauds; nor can the trustee set up the title to oust the equitable owner. *Scoby* v. *Blanchard*, 3 *N. H. Rep.* 170; *Pritchard* v. *Brown*, 4 *N. H. Rep.* 397; *Hempstead* v. *North Hempstead*, 2 *Wend.* 109; *Comstock* v. *Smith*, 13 *Pick.* 116. It has been said, that an exception can be only made out of the estate, which would otherwise have been conveyed. This is precisely our ground, that the exception was made out of the five-eighths of the remaining lands, which otherwise would have passed.

4. The entry into the land under a recorded deed of warranty, and the possession of it for more than twenty years, exercising all the acts of ownership over it, incurring liabilities by paying taxes and keeping an agent in the neighbourhood to take care of it, the petitioners making no entry or claim during the time, in themselves give an indefeasible title against all persons, and especially against the petitioners, who were conusant of the whole facts. *Farrar* v. *Eastman*, 1 *Fairf.* 191; *Pro. Ken. Pur.* v. *Laboree*, 2 *Greenl.* 275; *Robison* v. *Swett*, 3 *Greenl.* 316; *Town* v. *Needham*, 3 *Paige*, 545; *The King* v. *Butterton*, 6 *T. R.* 556; *Prescott* v. *Nevers*, 4 *Mason*, 326; *Bradstreet* v. *Huntington*, 5 *Peters*, 402; 13 *Serg. & R.* 356; *Jackson* v. *Smith*, 13 *Johns. R.* 426; *Clap* v. *Brompton*, 9 *Cowen*, 530; *Rickard* v. *Rickard*, 13 *Pick.* 251; *Doe* v. *Prosser*, *Cowper*, 217; *Cummings* v. *Wyman*, 10 *Mass. R.* 464; *Bogardus* v. *Trinity Church*, 4 *Paige*, 200; *Jackson* v. *Tibbetts*, 9 *Cowen*, 251.

5. The fact, that the Commonwealth had not conveyed until after the deed to *Rice* cannot aid the petitioners. Before that conveyance, a title by disseisin, by deed, or by any other mode of acquiring title, would be good against all but the Commonwealth. In this case the resolve of the Commonwealth is but saying to the settlers, depend on your own rights, independently of us, and we will not interfere. *La Frombois* v. *Jackson*, 8 *Cowen*, 603; *Prop. No.* 6 v. *Jones*, 12 *Mass. R.* 334; *Hill* v. *Dyer*, 3 *Greenl.* 441; *Jackson* v. *Vermilyea*, 6 *Cowen*, 667.

The action was continued for advisement, and the opinion of the Court was prepared and delivered at a subsequent term in *Cumberland* by

WESTON C. J. — *James Dunning*, the younger, being the owner of five-eighths of a tract of land, containing two hundred and twenty-five acres, sold to different persons ten acres, one acre and an eighth of an acre, part of the same tract, by metes and bounds. These sales did not conclude his co-tenants; and were liable to be defeated by them. But as the quantity sold was far short of the proportion to which he was entitled, he might well entertain a just expectation, that these parcels would be assigned to his right, when partition was made, and thus his sales become confirmed. He ventured to rely upon a spirit of accommodation, on the part of his co-tenants.

He subsequently sold his five-eighths in the whole tract, describing it, to the petitioners, excepting therefrom the parcels before sold. Had the terms of the exception stopped there, there might have been some color for the position, that the exception was only of five-eighths of those parcels. But that his meaning, in his deed to the petitioners, might not be misunderstood, he adds, "which exceptions are reserved out of the five-eighths, conveyed as aforesaid." This language is plain and intelligible. It cannot easily be misunderstood. The parcels sold being reserved out of the five-eighths, the residue was conveyed to the petitioners. He had given deeds of warranty to his prior grantees; and in selling the residue, he meant to make provision, that they should not be disturbed. In order to carry into effect the plain intent of the parties, it must have been contemplated,

that in any partition which might be made, the parcels excepted would be assigned as part of the five-eighths; and that the petitioners, or whoever might claim under them, would be entitled to the residue of that proportion of interest, to be set off to them in severalty.

The petitioners did not purchase five-eighths, but they purchased such fractional part of the whole, as would remain, after deducting from five-eighths the parcels before sold. The previous grantees and the petitioners together were the assignees of the exact and entire interest of *Dunning*, the younger. After the first grants were satisfied, the petitioners came in for the residue. They claiming to represent five-eighths, and the proprietors of the other three-eighths, made partition among themselves. After determining what should be assigned to each, mutual releases were passed, to enable the petitioners and the other co-tenants to enjoy their respective shares in severalty.

In the arrangement, certain of the small lots, into which the whole tract was divided, were assigned to the other co-tenants, as an equivalent for their releasing to the petitioners their interest in the excepted pieces. The effect of this was, that these pieces were assigned as part of the five-eighths; the owners of the three-eighths taking their share elsewhere. Thus the five-eighths became detached and severed from the three-eighths; but it was the same interest in another form. The right to make partition was incident to the estate, of which the co-tenants availed themselves in a mode, with which they were satisfied. The proportion of the petitioners was not increased, or intended to be, by the partition. The five eighths had succeeded to the whole of the excepted parcels; but it was in consideration of a release and relinquishment of that interest in other parts of the tract.

If the petitioners, having paid no new consideration, their right being derived altogether from the conveyance from *Dunning*, hold three-eighths of the excepted parcels, they would have more by so much than they purchased; and that at the expense of the prior grantees, or of *Dunning* their warrantor. If that is to be the result, at variance as it manifestly is with the source and origin of their title, the interests of some of the parties will be sacrificed, in consequence of the course pursued by the petitioners.

And if in this, they are to be aided by the technical principles of law, those principles will be perverted to a purpose, which is neither consistent with justice, nor with the fair construction of the deed, under which they claim. Technically an exception must be of part of what was previously granted, or would have been granted, but for the exception; and it is insisted, that as the three-eighths, claimed by the petitioners, never belonged to *Dunning*, the younger, they could not have been granted by him, and therefore could have formed no part of the exception. If a moiety of a tract of land in common and undivided, is granted by the owner of that proportion, which upon partition is afterwards set off in severalty, is it not the same interest? And if the grantor had taken a mortgage to secure the purchase money, would it not attach to that interest, when severed? So if the grantor had excepted from the same moiety an acre by metes and bounds, which upon partition is assigned to that interest, shall the exception be defeated? We perceive no sufficient reason why it should be. It is a distinct and determinate part of what would have been granted, but for the exception, in its new and derivative form, flowing from the right of partition, which is one of the legal incidents of the estate granted.

A conveyance of land not located, but which points out the manner in which it is to be located, is operative, and passes the land when located. *Fairbanks* v. *Williamson*, 7 *Greenl.* 96. There must be reasonable certainty as to the subject matter of a conveyance; and no more can be required as to the subject matter of an exception. We think the exception in the deed under consideration, should be understood to mean, that out of the five-eighths were reserved the excepted parcels, they being first assigned as a part of that interest. It would hence result, that the petitioners could not claim any part of the acre against the exception. Had the partition between the parties been made by process and judgment of law, the consequences which we have deduced, we doubt not would have been justified and required. The same result ought to flow from the mode of partition adopted. That *Thomas* and *Dudley* so understood it, may well be presumed from their long acquiescence in the claim and enjoyment in severalty of the excepted pieces by the grantees of the

younger *Dunning* and their assigns. But if the mutual releases executed by the parties, may have left the legal title of the proportion, claimed by the petitioners in them, it may be important to view the cause in other aspects, in which it may be presented. If the meaning of the exception cannot be directly carried into effect, that its plain purport might not be defeated, the five-eighths may be understood to be conveyed to the petitioners, charged with the trust, in favor of the grantees of the excepted parcels, their heirs and assigns, that so much of the land, as might be necessary to effect the object, should be appropriated to procure the extinguishment of the interest of the other co-tenants in these parcels; and that would still leave to the petitioners all they purchased. It is not necessary, that such a trust should be declared by them. It is sufficient, if it is declared by their grantor in his deed of conveyance, in which case, they would take the land charged with the trust.

No particular form of words is necessary for the creation of a trust. It is sufficient, if the intention is clear. 4 *Kent*, 304. The excepted pieces were to be taken from the five-eighths; and if this could not be done, but by the procurement and agency of the petitioners, it does not appear to be too much to say, that when they accepted their deed, they took the land charged with that trust. Their title to so much as five-eighths cannot otherwise be sustained; for they purchased that proportion, reserving therefrom the excepted pieces. Upon this construction, the petitioners are the trustees; and the grantees of those pieces, their heirs or assigns, the *cestuis que* trust. In *Armstrong* v. *Pierce*, 3 *Burrow*, 1898, the court held it as a settled point, that the formal title of a trustee shall not, in an ejectment, be set up against the *cestui que* trust; because from the nature of the two rights he is to have the possession. *Lord Ellenborough*, however, in *Shewen* v. *Wroot*, 5 *East*, 138, thought otherwise; and in a note to that case it appears, that the Judges were divided in opinion upon the same question, in the exchequer chamber. But if the trustee would at law be entitled to judgment, this court, sitting as a court of chancery, would upon a proper process enjoin the execution of it against the *cestui que* trust. *Dunlap et al.* v. *Stetson*, 4 *Mason*, 349.

If the case required it, it might deserve great consideration, whether the claim of the petitioners could be enforced, without giving effect to the consummation of a legal fraud against *Dunning* and his heirs, who are bound by his covenant of warranty, and against those claiming the excepted pieces under him.

It is very manifest that the petitioners well understood, that they had no interest in those pieces. They took no measures to assert any claim thereto until 1834, more than thirty years after the execution of the release, upon which it is now founded; notwithstanding, during all that time, they knew that sole seisin in the acre in question, was claimed and asserted by the grantee of *Dunning* or his assigns.

We proceed to the consideration of other points raised at the trial.

In 1798, *Thomas Rice* took a deed of warranty of *Dunning*, the son, of the disputed acre, who was then in the actual possession. On the part of *Dunning*, this conveyance was an unequivocal ouster of his co-tenants, from that part of the land, and a claim of sole seisin in himself. For notwithstanding the case of *Porter* v. *Hill*, 9 *Mass. R.* 34, which has reference to a case of jointenancy, it has been well settled that one tenant in common may oust his co-tenant, by resisting or denying his right, or excluding him from the enjoyment of it. *Doe* v. *Prosser*, *Cowper* 217; *Coke Lit.* 199 *b*. *Bracket* v. *Norcross*, 1 *Greenl.* 89; *Rickard* v. *Rickard*, 13 *Pick.* 251. And an interest thus acquired may become indefeasible, under the operation of the statute of limitations. And if the party doing the wrong may avail himself of the protection of that statute, there is much greater reason for extending it to his grantee, to whom no wrong can be imputed.

A sale by metes and bounds to a stranger is an ouster of the other co-tenants, within the principle of the authorities before cited. But *Rice* having bought of the apparent owner in possession, was no disseisor. His estate might be defeasible; but he was not a wrongdoer in making his purchase. Nor is the title he acquired subject to the strict construction, which obtains against a disseisor. *Pro. Ken. Pur.* v. *Springer*, 4 *Mass. R.* 416; *same* v. *Laboree et al.* 2 *Greenl.* 275. *Rice* having taken a

deed of warranty, and caused it to be recorded, his grantor being in possession, acquired a seisin, which he had a lawful right to transfer, in 1801, to *Hyde*, no adverse right or claim having in the mean time been interposed. If *Chick*, the witness, then entered and occupied part under *Hyde*, the latter was thereby seised of the whole land covered by his deed, which he had lawfully purchased, if indeed such an occupancy were at all necessary for this purpose, under the circumstances, there being no adverse possession. The jury have found that *Chick* did enter under *Hyde*, through the agency of *Thomas*. It is however insisted, that there was no evidence to be left to the jury of the agency of *Thomas* at the time. We think otherwise. He acknowledged himself to have been the agent of *Hyde* in making the purchase of *Rice*, to *Taylor* in 1802 or 1803, while *Chick* was in possession. In 1807, he put on *Harriman*, as the jury have found, in behalf of *Hyde*, and in 1810, he made a lease in writing, as his agent and attorney, of part of the land to *Reynolds*. And although *Hyde* did not recollect, that he employed *Thomas* as his agent at so early a period, there was evidence to prove that fact properly left to the jury. If the seisin was in *Hyde*, it could not be in the petitioners' releasors; and could not therefore be acquired by their release. Whatever right, if any, that release gave them, commenced at its date; and cannot be referred to the previous steps taken, preliminary to a partition among the co-tenants. And we are of opinion that *Thomas*, being the agent of *Hyde*, had no more right to take from a third person, a deed of land of which *Hyde* was seised, than a stranger. He only can lawfully convey, who is seised. Upon the facts therefore as found by the jury, the evidence of which was properly left to them, they were rightfully instructed, that the petitioners acquired no seisin by the release, under which they claim.

The point last under consideration, arises from a technical objection, which although available by our law, is aside from the merits of the case. There is however in the report, coupled with the finding of the jury, plenary evidence of a continued and uninterrupted seisin in *Hyde* and his assigns, for more than twenty years before the entry of the petitioners, and by which their right of entry was taken away. *Reynolds* became the tenant of *Hyde*

of part of the acre in 1810; and that tenancy continued in him and his assigns, until *Sargeant* and another purchased the same land of *Hyde*, and built a store upon it, which remained, until it was burnt in *July*, 1834, covering in the whole an uninterrupted period of nearly twenty-four years. It has been already stated, that the deed of warranty given to *Rice*, from a grantor in possession, which was duly recorded, and which enured to the benefit of *Hyde*, by a deed to him which was also recorded, followed by an entry and continued occupancy of part, if that was necessary, put the grantee and his assigns in the seisin of the whole. And being so seised, they became entitled to the protection of the statute of limitations against all conflicting rights.

It does not appear to us, that it could be any objection to the seisin of *Hyde*, that the occupancy of *Reynolds* was through the agency or by the consent of *Thomas*, or that his claim is more favorably presented, in consequence of his forbearance to assert it. The seisin of *Hyde* was necessarily adverse to any claim of seisin in *Thomas;* and not the less so, because he recognized the title of *Hyde*, and acted as his agent. The title of *Hyde* was openly asserted; and continued and preserved by the possession and occupancy of his tenants, and others claiming under him. That of *Thomas*, long abandoned, if it ever existed, has been set up, after a slumber of thirty years. Under these circumstances, and against a claim so long dormant, the respondents, in our judgment, are well entitled to the benefit of the statute of limitations. The co-tenancy of others in the *Hyde* acre has never been recognized since 1798. The conveyances, and all the facts since that period, are evidence of sole seisin in *Rice* and those claiming under him, and consequently of an ouster of the other co-tenants, up to the entry of the petitioners. The continuity of seisin under the *Rice* deed would have been broken, if the jury had found that *Thomas* put on *Harriman* in his own right, but this they have negatived. In addition to the facts adverted to in relation to *Chick*, to show the agency of *Thomas* in behalf of *Hyde*, there is in this part of the case, the evidence, that the land was known to *Harriman* as the *Hyde* acre; and that while in possession he negotiated with *Hyde* for the purchase of the part he occupied. We think therefore it was properly left to

the jury to determine, whether *Thomas* did not put on *Harriman*, as the agent of *Hyde*.

It does not appear to us to make any difference, in the deduction of title on either side, that the deed from the Commonwealth of *Massachusetts* of the *Dunning* land, was not made until 1802. The effect of that deed was, to confirm the titles, emanating from *Dunning's* heirs.

Upon the whole, we are of opinion that the petitioners have not sustained their title, in any point of view, in which their case may be legally presented.

Judgment on the verdict.

Mem. During the week allotted by law to this County, but six cases, of nearly fifty standing for argument, were heard. Two of the opinions in the six cases then argued have not yet been received by the Reporter. The Court adjourned to the second Tuesday of *August* following, and then heard every case prepared for argument; and the Reporter has received opinions in most of them. These cases will follow those argued before that time in other Counties.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WASHINGTON, JUNE TERM, 1836.

JOSEPH CHAMBERLAIN *vs.* GEORGE REED.

In an action between the owner of goods shipped on board a vessel on freight, and the master of the vessel, an adjustment and general average of a loss, made on the protest and representation of the master, does not preclude the owner from showing, that they are not liable to contribution because the loss was occasioned by the culpable negligence or want of skill of the master.

The master has a lien on goods shipped on freight, *liable to contribution*, on an adjustment of general average.

Where money has been paid by the shipper of goods on freight to liberate his goods, detained by the master to enforce the payment of a groundless claim, it may be recovered back.

If the goods be released on the written promise of an agent of the owner to pay the amount; and if the agent, instead of resisting payment, pay according to such promise; this does not prevent the recovery of the money back.

THIS was an action of *assumpsit* for money had and received to recover $115,00, paid by the plaintiff to defendant on the 8th *Dec.* 1832, for the balance of an adjustment made at *Boston*, by *Z. Cook*, a ship-broker, of general average and for specific charges on plaintiff's property on board the schooner *Jane*, of *Boston*, of which defendant was master, and which had sustained damage and incurred expenses in unloading and reloading the cargo in *Gouldsborough* harbor. The money was paid at *New-Haven*, the port of discharge, under circumstances, which sufficiently appear in the opinion of the Court. It was admitted by the counsel for the plaintiff that the adjustment, though it was

made wholly on the defendant's representation, and without plaintiff's knowledge, was correctly made, and the sum apportioned upon plaintiff's property was right in principle, provided that this was a proper case for average, and provided the cargo was liable for any sum whatever; but he contended that it was not; and he proposed to prove that the damage, which took place on the 23d day of *Sept.* was occasioned by the culpable negligence or want of skill of the defendant. This was objected to by the counsel for defendant on the ground, that the adjustment was conclusive on the plaintiff. With a view to settle the facts in the case, and for the purposes of the trial, *Weston C. J.* presiding at the trial, overruled the objection, and the evidence was admitted. It was proved, that a protest was duly entered at the place of plaintiff's residence by defendant soon after the injury; that plaintiff was at *Gouldsborough* several times before the vessel was refitted; and defendant offered evidence tending to prove, that plaintiff knew all the circumstances under which the injury arose; and the defendant's counsel requested the Court to instruct the jury, that if they should find that plaintiff knew all the circumstances attending the accident, and he or his agent paid the claim of *Reed* with such knowledge, he could not reclaim it in this action.

2. That what plaintiff knew he must be presumed to have made known to his agent, and if he would object to his paying the claim, he ought to have notified him, and to have informed defendant of the nature of his objection.

But the Chief Justice declined giving these instructions.

If the ruling was correct, and the instructions requested were properly withheld, the verdict, which was found for the plaintiff, was to stand, unless set aside on the defendant's motion for a new trial, as a verdict against evidence.

F. Allen, for the defendant.

1. The adjustment was conclusive, and the evidence objected to was improperly admitted. It was made by a ship-broker, and assented to by the plaintiff's agent, the master of the vessel. This adjustment, having been made in a different State, is to be considered as made in a foreign port. *Lewis* v. *Williams*, 1 *Hall's Rep.* 430; *Strong* v. *U. Ins. Co.* 11 *Johns. R.* 323.

2. The instructions requested by the defendant should have been given.

Where money is paid without compulsion or duress, it cannot be recovered back. This was a voluntary payment at the time it was made. He had already received his cargo, giving only an obligation to pay the amount of the average. If the plaintiff was not compellable by law to pay the average, the obligation was without consideration and could not be enforced. The plaintiff then had an opportunity to defend against the claim made; he knew of its existence, and paid it with a knowledge of all the circumstances. There was no mistake of the facts, and money paid cannot be recovered back for a mistake in law. *Shaw* v. *Woodcock*, 7 *Barn. & C.* 73; *Mowatt* v. *Reed*, 1 *Wend.* 355; *Chitty on Bills.* 173.

Mellen, for the plaintiff.

In this case, the defendant had the property of the plaintiff in his hands and wrongfully and illegally detained the same, and refused to give it up, until the amount claimed in this action was paid. It is a case of coercion, where money paid may be recovered back. It is not necessary, that the plaintiff should have resorted to an action of replevin to obtain his property, but is at liberty to pay an unjust demand set up, in order to release his property, and may recover it back. *Dwinal* v. *Chase*, 7 *Greenl.* 134; 4 *T. R.* 485; *Douglas' R.* 696; 2 *Strange*, 915; 1 *Dane*, 180; *Cowper*, 200; 2 *Esp. R.* 723; *ibid.* 546, *and note.*

The giving of his own obligation to pay the sum demanded, to release the plaintiff's property by the agent, was a payment to the defendant. It gave the agent a claim on the plaintiff as so much paid to obtain the property, and between the parties to this suit it is immaterial, whether the payment was in gold, or silver coin, bank bills, or notes, or obligations of individuals.

After a continuance, the opinion of the Court was drawn up by

WESTON C. J. — We are satisfied with the adjustment made by the broker of the general average, and of the specific charges upon the deck-load; and that if no charge of negligence or want of skill was justly imputable to the master, the adjustment was warranted by the facts, upon which it was made. And upon the

same assumption only can it be conclusive upon the plaintiff, and upon all concerned. If it were otherwise, as the adjustment was procured by the master, without the assent or privity of the other parties, upon the protest and other evidence furnished by him, he would escape all responsibility, however gross might have been his negligence, or palpable his want of requisite skill. The papers submitted to the broker, disclose no failure of duty in the master. It was a point not submitted to his consideration; and most extraordinary would it be, if the result to which he came, upon facts which he received from the master, should close the door to all liability on his part to those, who had confided their property to his care.

The jury have found that the loss, a part of which was visited upon the plaintiff, was occasioned by negligence or want of skill in the defendant. It is very manifest, this being ascertained, that he had no just cause to receive the money, sought to be reclaimed in this action. It is however insisted, that this action ought not to prevail, the plaintiff having a full knowledge of all the circumstances, and the money being voluntarily paid by his agent. A question then arises, was this a voluntary payment?

In *Chase* v. *Dwinal*, 7 *Greenl.* 134, it was decided, upon an examination of the authorities, that a payment made under a moral compulsion, to obtain property improperly detained, was not voluntary. The same principle is distinctly laid down in the case of *Shaw* v. *Woodcock*, 7 *Barn. & Cress.* 73, cited for the defendant. The master has a lien upon goods liable for contribution, on an adjustment of general average. Accordingly the defendant in this case refused to deliver the plaintiff's lumber to his agent, until his claim was satisfied. In this he would have been justified, but for the facts now settled by the jury. The agent, protesting that the demand was unjust, and notifying the defendant that the money would be reclaimed, finding that he could not otherwise liberate the lumber, agreed to pay the sum required, and having given a writing to this effect, paid the money after the lumber was delivered. Payment made under these circumstances, we cannot regard as voluntary. It is contended, that the agent having got the lumber, should have withheld the money. We cannot admit that such a breach of faith became

a legal duty, necessary for the protection of the rights of his principal. The moral compulsion was still upon him; and the subsequent payment can, in no fair and just sense, be pronounced voluntary. We are of opinion therefore, that the instructions requested were properly withheld.

The testimony in the case is somewhat conflicting; but the jury have passed upon it. It is their province; and we perceive no sufficient reason for the interference of the Court.

Judgment on the verdict.

ALEXANDER BARING *& al. vs.* PETER HARMON *& al.*

By the statute 1821, *ch.* 59, § 33, the copies of private acts of the legislature, printed under the authority of the State, are to be received as evidence thereof in all Courts of law.

Devisees in trust, under a will, are permitted, by rule 34 of this Court, to give in evidence an office copy of the deed to the testator under which they claim.

THIS was an action of *trespass, quare clausum,* for breaking and entering the plaintiffs' close, in Plantation No. 26.

To prove the title to the *locus in quo,* the plaintiffs offered in evidence an office copy of a deed, verified by the register, from the Commonwealth of *Massachusetts* to *William Bingham,* deceased, dated *January* 28, 1793, duly acknowledged and recorded, under whom the plaintiffs claimed, with an authenticated copy of the will of said *Bingham,* devising his real estate in *Maine* to trustees with the power of appointing other trustees.

They also read in evidence an act passed *January* 31, 1828, special laws, *ch.* 190, for the relief of the heirs of said *Bingham;* the plaintiffs' counsel claiming for them the character of trustees, by appointment by the original trustees under said will, and made in pursuance of said will, and also by the authority of said act.

The counsel for the defendants objected to the reading of the office copy of said deed and said act, but the Chief Justice, then

holding the Court, overruled the objection, reserving the question of their admissibility for the opinion of the whole Court. A verdict was returned for the plaintiffs. If the foregoing testimony was inadmissible, the verdict is to be set aside.

Hobbs, for the defendants, remarked, that he could say nothing in relation to the admissibility of the statute, as he could not find it, although it was referred to in the report.

The admission of an office copy of a deed, when the original should have been produced, is a sufficient cause for granting a new trial. *Woodman* v. *Coolbroth*, 7 *Greenl.* 181. The admission of the copy was a violation of the spirit and intention of the rule of this Court on the subject. *Rule* 34, 1 *Greenl.* 422. The plaintiffs do not stand in the relation of purchasers, but are mere trustees for the heirs of *Bingham*, and ought not to be exempted from the operation of any rules applicable to heirs. The rule has no relation to the age of the deed, but to the persons, who should have the custody of it; who in this case are the plaintiffs.

F. Allen, for the plaintiffs.

The plaintiffs are neither grantees, nor heirs, nor servants of grantees, and therefore come within the rule. The deed is forty years old, and it might be used without proof, and therefore the defendants could derive no advantage by having the original instead of a copy. The statute, *ch.* 59, § 33, provides, that the printed copies of private acts shall be admitted as evidence of them. As the objections are merely technical, the Court will not extend the meaning of the rule beyond its literal import. *Scanlan* v. *Wright*, 13 *Pick.* 523.

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

Weston C. J. — By the act regulating judicial process, statute of 1821, *ch.* 59, § 33, it is provided that the copies of private acts of the legislature, printed under the authority of the State, shall be received as good evidence thereof in all Courts of law. The act objected to at the trial, being thus authenticated, was properly received in evidence.

The plaintiffs in this action are neither grantees in the deed, an office copy of which was received in evidence, nor do they claim as heirs, or set up any title or justification, as servants of the grantee or his heirs, they were therefore entitled to adduce in evidence the office copy read at the trial, under the thirty-fourth rule of this Court.

Judgment on the verdict.

PETER CARLE *vs.* WILLIAM DELESDERNIER.

An action of *trespass* does not lie against an officer for arresting a person, in obedience to his precept, who happens to be then privileged from arrest, as a witness attending Court.

THIS was an action of *trespass*, for assault, battery and false imprisonment at *Calais*, on the 19th of *June*, 1834. It appeared that on that day the plaintiff, who lived at *Princeton* about fifteen miles from *Milltown* in *Calais*, having been previously duly summoned, attended at that place as a witness, of which the defendant had notice, in a criminal prosecution before *Luther Brackett, Esq.*; that the investigation before the justice terminated about six o'clock in the afternoon, when the plaintiff was going to the residence of his son-in-law for his horse, which he had left there, with a view to return home, when he was arrested by the defendant. The plaintiff's son-in-law lived in the village of *Milltown*, a few rods from the house of the justice before whom the plaintiff attended, but in a direction opposite to that which led to the plaintiff's home.

The defendant, being Sheriff of the County of *Washington*, justified under an execution then in full force which had been put into his hands for service, which issued upon a judgment rendered against the plaintiff at the Court of Common Pleas for this County, at *March Term*, 1834, in favor of one *Paschal Gilbert*, which run against the body of the plaintiff and in which he had not the privilege of bail. Under that execution the defendant arrested the plaintiff and committed him to the jail in *Machias*, in the County of *Washington*, but without the least harshness or

severity, or the exercise of any more coercion or authority than his duty required, if he was then in its lawful exercise. The counsel for the defendant contended; first, that he was fully justified in making the arrest and commitment complained of in virtue of the precept in his hands; secondly, if he was not thus justified, that he was not liable to the plaintiff in this form of action. *Weston C. J.*, presiding at the trial, ruled against him upon these points, intending to reserve them for the consideration of the whole Court, and with a view to settle other facts in the case. The jury returned their verdict for the plaintiff. If in the opinion of the Court the defendant was justified under the execution aforesaid, or if liable at all, not in this form of action, the verdict was to be set aside and the plaintiff was to become nonsuit, otherwise judgment is to be rendered thereon.

F. Allen and *Bridges*, for the defendant, contended:

That the defendant, acting under a precept in full force against the plaintiff, was bound to arrest him, and of course was justified in so doing. The officer is not the judge whether the plaintiff is or is not a witness. The Court is to judge of that, and if he be arrested while attending on the Court, he will be set free by the Court. The officer is not to hear and judge whether the debtor is, or has been, attending Court, at the peril of paying damages, if he arrests, when he should not, and of paying the debt, if he does not arrest, when he should. But were it certain, that the plaintiff was privileged from arrest, it would not alter the case. An action of trespass cannot be maintained for thus obeying the mandate of the law. The privilege is the privilege of the Court, and not of the witness. *Cameron* v. *Lightfoot*, 2 *Wm. Bl. Rep.* 1190; *Cameron* v. *Bowles*, *ibid.* 1195; *Tarleton* v. *Fisher*, *Doug. R.* 646; *Vail* v. *Lewis*, 4 *Johns. R.* 450; *Ray* v. *Hodgdon*, 11 *Johns. R.* 433; *Swift* v. *Chamberlain*, 3 *Conn. R.* 537; 5 *Dane*, 186.

But if any action can be maintained, trespass will not lie. *Plummer* v. *Dennett*, 6 *Greenl.* 421.

Mellen and *Chandler*, for the plaintiff, urged:

That this was an arrest of the plaintiff, when he was not liable to be arrested, and that the report shew, that the defendant knew this fact. This is not a mere contempt of Court, but a violation

of the rights and the liberty of the defendant. It was an illegal arrest, for which the plaintiff has a remedy by an action of trespass, on the principles of the decision in *Illsley* v. *Nichols*, 12 *Pick.* 276. It is like the case of an attachment of goods by breaking into a dwellinghouse, and arresting a person; where the party making the arrest is liable for the injury in an action. The injury is direct and not consequential, and trespass is the proper remedy. The case cited on the other side, *Swift* v. *Chamberlain*, 3 *Conn. R.* 537, is an authority in our favor. The writ of execution was no protection to the defendant, and he is liable to the plaintiff in the same manner, as he would have been, if he had thus acted without any precept.

The action was continued *nisi*, and the opinion of the Court was afterwards drawn up by

WESTON C. J. — The authorities cited for the defendant, to show that an action of trespass does not lie against a sheriff, for arresting a person, in obedience to his precept, who happens to be privileged from arrest, are numerous and direct. Among the most prominent are *Tarleton* v. *Fisher et al.* 2 *Douglas*, 671, and *Cameron* v. *Lightfoot*, 2 *Wm. Bl.* 1190, and *Cameron* v. *Bowles et al.* for the same cause, 2 *Wm. Bl.* 1195. The first was brought by a party privileged from arrest, under an insolvent act, which prescribed that he should not be liable to be arrested, by virtue of any civil process out of any court; and if arrested that he should be discharged. In violation of this exemption, he had been arrested under a writ of attachment from the court of exchequer. The general doctrine laid down by the court was, that trespass and false imprisonment will not lie against a sheriff or his officer, for arresting in virtue of a precept, a person privileged from arrests. *Buller J.* says in that case, "the general law as to sheriffs is, that if a sheriff has acted in obedience to the mandate of the court, he is excused. If he arrest a peer, the writ is erroneous, yet he is not a trespasser for executing it." And yet a peer of the realm, having high duties to perform, holds his privilege principally for the sake of the public.

In the cases from *William Blackstone*, both of which were for the same cause, a witness had been arrested under a precept,

while on his return from court. He brought trespass and false imprisonment against the officer, and a verdict was taken in his favor, subject to the opinion of the Court, whether the action would lie. The Court held that it would not, and *DeGrey C. J.* by whom their opinion was delivered, goes into a consideration of the authorities, and adverts to many cases, where a privilege from arrest exists, yet he adds, that " though in many cases the process is declared void, yet in none has any instance been produced, of an action of false imprisonment being brought, much less will it lie in the present case, where the writ is not void, nor the arrest illegal, but only improperly timed."

In *Brent* v. *Broadstreet et ux.* 3 *T. R.* 183, *Lord Kenyon* regarded it as incomprehensible to say, that a person shall be considered as a trespasser, who acts under the process of the court. *Plummer* v. *Dennett*, 6 *Greenl.* 421, did not turn upon any personal privilege, but the court advert with approbation to cases and principles, which bear against the maintenance of the action under consideration.

Although there must have been numerous arrests, upon precepts, of privileged persons, who have been discharged upon motion or upon *habeas corpus*, not one case has been cited or referred to, where trespass has been brought against the officer, and been adjudged to lie. This of itself is evidence, not to be disregarded, that the law has been understood to be against it.

If for the protection of persons, entitled to an immunity from arrest, in certain cases, or for certain periods, it is necessary that they should be allowed to maintain an action of trespass against an officer, in cases like the one under consideration, in addition to the remedy afforded by *habeas corpus*, it must be granted by the legislative power. We do not feel at liberty to sustain it, against the current of authorities, which are of too uniform and decided a character, to be affected by any inference to be drawn by analogy, from the case of *Illsley* v. *Nichols et al.* 12 *Pick.* 270.

The opinion of the Court is, that if the defendant is liable at all, it is not in this form of action. The verdict is accordingly set aside.

Plaintiff nonsuit.

GEORGE I. GALVIN *vs.* JAMES THOMPSON *& al.*

In an action upon an award, parol evidence to show how far each party had performed, or had fallen short of performance of the contract submitted to the determination of the arbitrators, and what claims thence resulted by one upon the other, depending on facts subsequent to the agreement, and which could only be verified by such proof, is admissible.

And if by the aid of such evidence, the condition of the bond to perform the award, and the award of the arbitrators, otherwise obscure and uncertain, may be rendered intelligible, an action may be maintained.

When evidence has been offered on the trial and rejected, in determining the question submitted to the Court, the truth of the facts offered to be proved is to be considered as established.

If arbitrators award in favor of one party in a particular unauthorized by the submission, it affords no ground of objection on his part.

THIS was an action of *debt* on bond, conditioned to abide an award and to deliver certain timber. The general issue was pleaded and joined, accompanied with a brief statement. The plaintiff adduced in evidence the bond declared on with the condition, the contract first made between the parties, the award referring thereto, and testimony shewing that the parties were notified of the award on its being made. The substance of the submission and award sufficiently appear in the opinion of the Court.

The counsel for the defendants objected that the award was void for uncertainty; that it did not follow the agreement of the parties; that it did not follow the submission; and that it did not put an end to the differences between the parties.

The plaintiff offered to introduce testimony to prove by parol, first, that the quantity of timber cut under the contract was 122 tons and three feet; that the timber was driven down to tide or salt water in *Calais;* that notice was given by *Galvin* to *Thompson,* of the place in *Calais,* viz: in *Shaw's* boom, where he wished the timber delivered; that *Thompson,* prior to the execution of the bond, had taken 37 tons of the timber cut under the contract, and appropriated it to his own use, without the consent of said *Galvin,* leaving the balance of said timber, 84 tons and 11 feet; and that said *Thompson,* being insolvent, and objecting to the delivery of any of the timber to *Galvin,* on the ground that he had interfered with his logging birth, and thereby injured his winters' work. *Galvin* agreed to refer the difficulties under the con-

tract, provided said *Thompson* would procure a responsible person to become surety for the faithful performance of the award; and *Thompson* accordingly procured the other defendant as his surety; that after the award, *Galvin*, relying upon the same, and the security he had obtained, as he supposed, permitted *Thompson* to take and use said timber as he pleased, and thus lost the benefit of the lien on the timber secured to him under the contract.

Weston C. J., before whom the trial was had, sustained the objections made to the award and directed a nonsuit, with leave to the plaintiff to move to set aside the same, if the whole Court should be of opinion that the award is good or that it may be made good by the parol testimony offered, so far as the same may be legally admissible; otherwise the nonsuit is to stand.

Downes, for the plaintiff, argued, that the evidence offered was admissible, shewing the situation of the property which was the subject matter of the contract, and how much had been done when the agreement to refer was entered into, as well as the state of things existing at the time of the making of the award; and that the award was, as certain, as from the nature of the subject of it could be reasonably expected, and that this was sufficient. *Hawkins* v. *Colclough*, 1 *Burr.* 274; *Barry* v. *Rush*, 1 *T. R.* 691; *Rosse* v. *Hodges*, 1 *L'd Raym.* 233; *Caldwell on Awards*, 109. If the award can be made certain by proof of facts bearing on the subject, it is all the law requires. 3 *Lev.* 18; *Barnes*, 166; *Cro. Car.* 383; 2 *Wils.* 267; *Caldwell on Awards*, 110.

The award follows the agreement of the parties and the submission. It sufficiently appears, that the arbitrators adjudicated on all matters of difference submitted to them, and this is sufficient. *Dolbier* v. *Wing*, 3 *Greenl.* 421.

Bridges, for the defendants, contended, that the nonsuit was properly ordered.

1. The award must be tried by what appears on its face. *Doe* v. *Rosser*, 3 *East*, 15.

2. The award is not examinable, unless there is fraud in the arbitrators, which is not pretended; and if there was, it would set the award aside and shew, that there was no cause of action. *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21.

3. An award must be certain, and shew in itself what the arbitrators intend. 13 *Johns. R.* 96; 5 *Wheat.* 394; *Caldwell on Awards*, 107.

4. The bad part of the award is manifestly the consideration of the good part, and therefore the whole is void. *Gordon* v. *Tucker*, 6 *Greenl.* 447; *Watson on Awards, Phil. Ed.* 71.

5. The parol proof offered to make the award certain was not admissible for that purpose, and would not make it certain, if admitted. *Woodbury* v. *Northey*, 3 *Greenl.* 85; *Thompson* v. *C. C. Soc. in Rehoboth*, 7 *Pick.* 160; *North Yarmouth* v. *Cumberland*, before cited; *Newland* v. *Douglas*, 2 *Johns. R.* 62; *Barlow* v. *Todd*, 3 *Johns. R.* 367; *Perkins* v. *Wing*, 10 *Johns. R.* 143; *Bean* v. *Farnam*, 6 *Pick.* 269; *Gray* v. *Wells*, 7 *Pick.* 217; *Ward* v. *Gould*, 5 *Pick.* 291.

After a continuance, the opinion of the Court was drawn up by

Weston C. J.—By the agreement between the plaintiff and *Thompson*, each entered into stipulations in regard to the timber to be cut, hewn and transported to tide waters by *Thompson*. How far each had performed or fallen short of performance, and what claims thence resulted by the one upon the other, depending on facts subsequent to the agreement, could be verified only by parol proof. We are of opinion then that the parol proof offered at the trial by the plaintiff was legally admissible. And with the aid of that, the condition of the bond in suit, and the award of the arbitrators, otherwise so obscure and uncertain, may be rendered intelligible. Assuming, as should be done, in determining the question submitted to our consideration, the truth of the facts offered to be proved, it would have been made to appear that *Thompson* had cut, hewn and driven to tide waters, one hundred and twenty-two tons and three feet of timber; that the plaintiff required it to be placed in *Shaw's* boom at *Calais;* that *Thompson* had appropriated to his own use, thirty-seven tons of the timber; and that he declined to deliver to the plaintiff any part of it, alleging as a reason that he had done him an injury, by interfering in that part of the plaintiff's township from which by their agreement, the timber was to be taken. That the plain-

tiff consented to a reference of their differences, upon the execution of the bond in question. By the condition, *Thompson* was to abide the award, was to deliver the balance of the timber, being eighty-four tons and eleven feet, also thirty-seven tons of pine timber, or such part thereof as the referees might award.

They gave the parties a hearing, and awarded that *Thompson* should forthwith deliver to the plaintiff at *Calais*, according to the contract, every ton of timber by him cut and made on the plaintiff's township the preceding winter. As this was to be forthwith delivered, they must be understood to mean such only as he had been able to get down. This was one hundred and twenty-two tons; and as he was to deliver every ton, their award embraced both the thirty-seven tons, and the eighty-four tons and eleven feet, mentioned in the condition. This then is covered by the condition, and it is all that was awarded. The plaintiff was thereupon to pay *Thompson* for the cutting, hewing and driving the timber, according to the contract.

And they required the plaintiff to pay *Thompson* an additional sum beyond the contract of fifty cents, for each ton of timber delivered to him. They designed this probably as an equivalent, for any injury the plaintiff might have done him, by his alleged interference. And if so, it is an award, upon one of the points in difference between the parties. But if unauthorized, being in the defendants' favor, it affords no ground of objection on their part. Having decided upon what was in difference between the parties, they leave the timber, not got down that season, to the provisions of the contract. Thus explained and understood, in connection with the parol proof, the award is certain to a common intent, it follows the agreement and the submission, or if it departs from either, it does so for the benefit of the defendants; and when carried into effect, it will put an end to the difference between the parties. We do not sustain therefore the objections taken by the defendants' counsel; the nonsuit is accordingly set aside, and the action is to stand for trial. If the parties do not adjust it, for every ton of timber, proved to have been cut and got down by *Thompson* from the plaintiff's township, and not delivered, not exceeding the two quantities stated in the condition of the bond, the plaintiff is entitled to be allowed the fair value, de-

ducting from the whole what may be due to *Thompson* for his services, according to the award of the referees.

JOHN GOOCH *vs.* JESSE STEPHENSON.

If a statute give merely a new remedy, where one before existed at common law, it is cumulative; and the party injured is at liberty to pursue either.

If a statute give the same remedy, which the common law does, it is merely affirmative, and the party has his election which to pursue.

But if a statute deny or withhold the remedy, which before existed at common law, tho common law right ceases to exist.

Since the *stat.* of 1834, *ch.* 137, concerning pounds, &c., where parties are owners of adjoining improved lands, and the fence between them is defective and insufficient; and there has been no division of fence, or assignment of distinct portions thereof to each, by the fence-viewers, or by agreement of the parties, or by prescription; no action of trespass can be maintained by either of such owners against any owner of cattle lawfully on the opposite side of such fence, and breaking into the inclosure through such insufficient fence.

THIS was an action of *trespass, quare clausum,* on the trial of which, before *Weston C. J.*, it appeared, that the plaintiff and defendant were owners of two adjoining fields, and that the separating fence between the fields was defective and ruinous; and that there had been no assignment of the portion to be made by each by prescription, by agreement of the parties, or by the fence-viewers. The defendant's cattle, by reason of the insufficiency of the fence, escaped from his close into that of the plaintiff, and were there doing damage. The plaintiff became nonsuit, and it was agreed, that if upon the facts, the Court should be of opinion, that the action could be maintained, the nonsuit was to be set aside, and the defendant was to be defaulted.

Chase, for the plaintiff.

The plaintiff claims to maintain his action by virtue of the principles of the common law. The rights and liabilities of the parties are not affected by any of the provisions of the statute. The plaintiff supports his claim upon the principles of the cases, *Rust* v. *Low*, 6 *Mass. R.* 90; *Stackpole* v. *Healey*, 16 *Mass.*

R. 33; *Heath* v. *Ricker*, 2 *Greenl.* 72 and 408; and *Little* v. *Lothrop*, 5 *Greenl.* 356.

In *Little* v. *Lothrop*, decided in 1828, this principle is laid down. "Every person may maintain trespass against the owner of cattle, unless such owner can protect himself by the provisions of a statute, or by a written agreement, or by prescription." And again, "When there is no prescription, agreement or statute assignment, no tenant is bound to fence against an adjoining close, but in such case, there being no fence, each owner is bound at his peril to keep his cattle on his own close." These decisions settle beyond question, that the common law was not affected by any provisions of our statutes.

The only question then in this case is, whether the *stat.* of 1834, *ch.* 137, repeals the common law, which requires every man to keep his cattle on his own close, where the adjoining owner or occupant is not by law obliged to keep division fences. When the statute was made, the common law on this subject was well settled and understood. The object of the law of 1834 was not to affect those principles in relation to the rights and liabilities of adjoining proprietors of improved lands, but to simplify and improve the remedy by impounding. It refers only to cases where there is a legal division fence between the parties, and not to those cases, where there is no fence in fact, or none established by force of law, between the closes. To show that his proposition was tenable, the counsel compared and commented upon the several statutes in relation to impounding and fences, and particularly examined the several provisions of the act of 1834. He also commented on the decisions upon the subject. He said, that if the construction contended for by him was not the true one, it was a little remarkable, that the act does not mention the case, where there is no division fence between adjoining proprietors. The act gives an action of trespass only, *where there is a "legal and sufficient fence,"* but withholds it where the cattle break through where the fence on the legal line is not according to law. The legislature could not have intended, that a party should be liable to have his crops destroyed without remedy, and that too before he could possibly get on the fence-viewers, and have the line divided, and have a time fixed for one party to make the

fence, and in case of his declining, time to have the other party actually make it. But there are very many cases in the newly settled part of the State, where there are no fence-viewers, and where there is no mode of enforcing a division of fence; and where if there was, it would be ruinous to the occupant to be compelled to fence in all his land, where his cattle ranged, but comparatively easy to fence in his improved land.

The statute gives to either party the right to change the relations established between them by the common law, by taking the steps pointed out by it; and until that is done they must abide by the common law. The will of the legislature should be expressed in extremely clear terms, before the Court should believe they intended to invade the favourite rule of law and justice, "*sic utere tuo ut alienum non laedas*"; or the not less important one, "that there is a remedy for every wrong." And if the Court should be constrained to come to the conclusion, that the legislature did so intend, they should carefully enquire, whether their constitutional limits were not passed.

In construing statutes the whole subject matter should be considered. General terms and expressions of a statute should be restricted and limited in construction, so as to make them conformable to other well settled principles of law, and other constructions of like statutes. 3 *Mass. R.* 296; 4 *Mass. R.* 462; 1 *Pick.* 254; 7 *Mass. R.* 306; 5 *Mass. R.* 380; 8 *Mass. R.* 472; 2 *Cranch*, 358. It is always to be presumed, that the legislature intend the most beneficial construction of their acts, when the design is not apparent. 4 *Mass R.* 537. In some cases the letter of a statue may be restrained by an equitable construction, and in others enlarged. 12 *Mass. R.* 383. An act which is to take away or clog a remedy which a party has by the common law, shall not be taken away by equity. 19 *Viner*, 514. A statute should be so construed, that whatever the words, it shall conform to reason and justice. 7 *Johns. R.* 477. If made in derogation of the common, it should be construed strictly. 15 *Mass. R.* 205. Where rights are infringed, the legislative intention must be expressed with irresistible clearness to induce the court to yield to it. 1 *Condensed R.* 425; 2 *Cond. R.* 380; 2 *Cranch*, 400. In giving a construction to a statute every part of it should

be taken into consideration. 2 *Cranch*, 33; *ibid.* 10; 1 *Wheat.* 115. When the law antecedent to the revision of a statute is settled, the mere change of phraseology shall not be deemed to change the law. 2 *Caine's Cases in Error*, 143; 4 *Johns. R.* 359; 9 *Johns. R.* 507. A thing which is within the intention of the makers of the statute is as much within the statute, as if it were within the letter; and a thing which is within the letter is not within the statute, unless it be within the intention of the makers. 15 *Johns. R.* 358; 3 *Cowen*, 89; 9 *Cowen*, 506.

Downes, for the plaintiff, remarked, that *Rust* v. *Low*, and the other cases of similar tendency were very good law as the statutes stood, when those decisions were made. So too the very numerous cases cited upon the construction to be given to statutes, and the rules stated as the results of them, may be good law; and still the plaintiff have no cause of action. But the legislature have the power to alter the common law on this subject whenever they please, and in such manner as they choose. It is proposed only to give a statement of what has been done. It was decided in *Rust* v. *Low*, that by the common law every man must keep his cattle on his own land, and is liable to damage if they stray upon that of his neighbor; and that the act of 1788 did not alter that law, where the cattle were lawfully on the adjoining close, and no fence according to law. This was in 1809.

In 1819, in *Stackpole* v. *Healey*, the Court decided, that closes adjoining highways are left as at common law, and therefore that the owner of land thus situated is not obliged to fence against cattle running at large. And in 1821, after this decision, our legislature re-enacted the statute of 1788, but with an additional provision, that no action should be maintained, where cattle break into a close from the commons or highways in a part where the fence is not made according to law. In *Heath* v. *Ricker*, it was decided, that the right to impound and sell beasts, under the statute, was given only in cases where the injury was done to lands enclosed with a legal and sufficient fence. The next case, *Little* v. *Lothrop*, was decided in 1828, and it was there held, that where the lands of adjoining occupants are not separated by a

lawful fence, each is bound to keep his cattle on his own land at his peril, according to the principles laid down in *Rust* v. *Low*.

In this state of the law the statute of 1834 was enacted. This statute repeals the statute of 1821, and all acts and parts of acts inconsistent with its own provisions. This statute re-enacts the provisions of those of 1788 and of 1821, so far as it respects lands inclosed with a legal fence. But it has a provision, which was contained in no previous statute, that no action shall be maintained, nor beasts be impounded, for a breach over or through an insufficient part of the fence. This extends the provisions of the statute of 1821, to all cases whatsoever of adjoining lands. Therefore the action cannot be maintained.

The action was continued for advisement, and the opinion of the Court was afterwards drawn up by

WESTON C. J. — As the law stood, prior to the separation, this action was maintainable. The cases of *Low* v. *Rust*, and of *Stackpole* v. *Healey*, cited for the plaintiff, are decisive upon this point. But the law as it then stood, has been changed. The *statute* of 1821, *revised laws, ch.* 128, § 6 provided, that no action of trespass, *quare clausum fregit*, should be maintained against the owner of neat cattle, breaking into a close from the high way or commons, where the fence of such close was not good and sufficient, provided such neat cattle were, at the time lawfully going at large on such commons or highways. The law however was left unchanged, with regard to cattle escaping from adjoining fields; and this action might still have been maintained at common law, notwithstanding the statute of 1821. *Little* v. *Lothrop*, 5 *Greenl.* 356. Then came the statute of 1834, *ch.* 137. The third section provides, that no action of trespass shall be maintained against the owner of cattle, breaking into the inclosure of another, through an insufficient fence; such cattle being lawfully on the opposite side thereof. In this predicament stands the case before us. The defendant's cattle, being lawfully upon the opposite side of the fence, through the insufficiency thereof, broke into the plaintiff's inclosure.

We have been referred to many cases, illustrating the principles upon which statutes should be construed, to which there is

very little occasion to resort. The statute in question is too plain, direct and positive, to leave room to escape the force of its terms, by any technical rules of construction. If a statute gives merely a new remedy, where one before existed at common law, it is cumulative; and the party injured is at liberty to pursue either. And where a statute gives the same remedy, which the common law does, it is merely affirmative; as in that part of this section, which allows the party injured to impound or maintain trespass. But this does not affect or qualify the prohibitory part, which denies and withholds the remedy, under certain circumstances, where it existed before at common law. It has been insisted that justice and the security of rights, is best promoted by maintaining the remedy, as it before existed; but that is an argument, which addresses itself to the legislative power, and not to the judicial, whose duty it is to ascertain and give effect to what the legislature, within the limits of the constitution, have declared. If a party will surround his inclosure with a sufficient fence, and the cattle of others break in upon it, the law affords him adequate remedies. The inhabitants of unincorporated places, may not have the full benefit of the laws, in relation to partition fences. They may have to rely upon such equitable arrangements as may be dictated by the mutual interests of adjoining owners. The plain provisions of a general law are not to be defeated, or explained away, because they may operate less favorably upon a small portion of the community.

It is urged, that if the statute, upon which the defendant relies, forbids the remedy sought in this case, that part of it is unconstitutional. If it had authorized one man to interfere with the lands of another, it might be liable to this objection. But a party is liable to an action, who enters himself upon another's grounds, or who turns on his cattle. And if cattle, lawfully on adjoining lands, stray where they have no right to go, they may be driven off. Or the owner of land may exclude the cattle of others, by sufficient fences, and if these are violated, he may seize and impound cattle doing damage, or maintain trespass against their owners. It was for the legislature to determine what protection should be thrown around this species of property; What vigilance and what safeguards should be required at the hands of the

owner; and where he might invoke the aid of courts of justice. They have no power to take away vested rights; but they may regulate their enjoyment. Lands in this country cannot be profitably cultivated, if at all, without good and sufficient fences. To encourage their erection, it is undoubtedly competent for the legislature to give to the owners of lands thus secured, additional remedies and immunities.

We perceive nothing in the law, which violates or impairs the constitution; and, in our judgment, the plaintiff's action cannot be maintained.

Nonsuit confirmed.

ALVAN CUTLER *vs.* WILLIAM POPE.

Grass already grown, and in a condition to be cut, may be sold by parol; and there is no objection to such sale, arising from the statute of frauds.

Where grass is sold on credit, and a license is given to cut it, but no lien reserved; the property in the grass passes to the vendee, and the vendor cannot hold it for the payment of the purchase money.

TRESPASS, for taking a quantity of hay on township No. 18.

The plaintiff proved that he cut seven and a half tons of hay on said township, and that it was taken by defendant. The defendant by his brief statement justified the taking, as the agent of *John Lemist*, who it was agreed was the owner of *Scott's* meadow, on which the hay was cut, at the time of the cutting.

J. C. Talbot, testified, that he was the agent of said *Lemist* at that time, and gave one *Levi Scott* a written permit, which was lost, to cut the grass on said meadow, he paying the usual price, but there was no provision in said permit that he should hold the hay till the license was paid for. His agency terminated in *November* after the cutting, and *Pope* was appointed *Lemist's* agent. The defendant's counsel contended, that *Scott* would have no right under said permit to remove said hay from the meadow, before paying for the license. But *Weston C. J.* presiding at the trial, ruled otherwise.

It did not appear whether the hay was cut by plaintiff before or after the date of *Scott's* permit; but *Mr. Talbot* thought he gave it the day before the plaintiff went on to the meadow.

John Bagley, testified, that when *Scott* went on to the meadow, he found part of it had been cut and in stack, upon the date of the license. *Scott* commenced cutting, when plaintiff came and forbid him. It was finally agreed between *Scott* and plaintiff, that plaintiff might have what he had cut and the remainder of the grass on condition, that he should account to *Lemist*, or to *Miles*, under whom he claimed, whoever should prove to be the owner of *Scott's* meadow; that *Scott* requested plaintiff to put up what hay they had, and plaintiff said he would, and witness thought he did, but such request and promise was no part of the bargain for the grass. At the time the defendant took the hay he was the agent of *Lemist*, and claimed a right to do so under him. The plaintiff had not paid *Lemist*, or either of his agents for the grass.

The counsel for defendant contended, that under said license, *Scott* had no right to sell the grass to plaintiff; but the Chief Justice ruled otherwise, and that this was a sale of the grass to the plaintiff. The counsel for the defendant further contended, that the plaintiff had no right to remove the hay, until he had paid to *Lemist* or his agent, the value of the grass. But the Chief Justice ruled otherwise. Upon this evidence and ruling the defendant was defaulted, it being agreed, that if in the opinion of the Court, the action is not maintained, the default is to be taken off and the plaintiff to become nonsuit; otherwise the default is to stand and judgment is to be rendered thereon.

F. Allen, for the defendant.

The property in the hay remained with the owner until it was paid for, no credit being given. *Hussey* v. *Thornton*, 4 *Mass. R.* 405; *Marston* v. *Baldwin*, 17 *Mass. R.* 606.

Scott had no right to transfer his permit to the plaintiff, it being a personal trust. *Pease* v. *Gibson*, 6 *Greenl.* 81.

But if *Scott* had authority to transfer his permit, it was not done, as it was merely by parol. The grass was standing, and any contract not in writing was void by the statute of frauds. *Crosby* v. *Wadsworth*, 6 *East*, 602.

Hobbs, for the plaintiff.

The case finds, that the grass was cut, and the license fully executed, long before the defendant was appointed agent. When a license is once executed, it cannot be revoked. *Fitzh. Trespass*, 149; 3 *Bur.* 1826; *Co. Lit.* 4 *b.*

Lemist himself could not have revoked the license, when the trespass was committed, but the defendant had nothing to do with it, and he did not even attempt to revoke it. The grass was sold to *Scott*, and he was answerable for the price. It can make no difference whether it was paid for, or not. The case in 6 *East*, cited for the defendant, is an authority, that *Scott* only could be called on. The grass might be sold, or the permit assigned, by *Scott*, like any other property. The grass could be sold by parol, and the statute of frauds does not apply to this case. It has been holden, that it does not apply even in the case of a sale of betterments on land. *Lombard* v. *Ruggles*, 9 *Greenl.* 62. There was no right reserved to hold the grass until payment was made; but had the right to take the grass instead of money existed, no election to do it was made.

The action was continued *nisi*, and the opinion of the Court delivered, afterwards, as drawn up by

Weston C. J. — As part of the grass was standing, when it was sold by *Scott* to the plaintiff, and that sale was by parol, an objection is interposed, that this was an interest in land, and not a mere personal chattel, and could not therefore consistently with the statute of frauds, be sold without an instrument in writing.

The counsel for the defendant relies upon the case of *Crosby* v. *Wadsworth*, 6 *East*, 602, which was upon a sale of grass then growing, which was adjudged to be within the statute of frauds. This did not accord with an anonymous case, reported in 1 *Lord Raymond*, 182, in which *Treby C. J.* and *Powell J.* were of opinion that growing timber might be sold by parol. And in *Whipple* v. *Foot*, 2 *Johns.* 418, it was decided that wheat or corn growing is a chattel, and may be taken in execution and sold. The case of *Crosby* v. *Wadsworth* was questioned in *Frear* v. *Hardenburgh*, 5 *Johns. R.* 272.

But in *Parker* v. *Staniland*, 11 *East*, 362, the true ground, upon which that case turned, is stated and commented upon, namely, that it was for the sale of a crop of growing grass, for the continued growth and maturity of which, a certain interest in the land was necessary; a case however, which *Lord Ellenborough* said he should be unwilling to extend. That which was then under consideration, was the sale of a crop of potatoes, then ripe and to be immediately dug and taken from the ground; and it was held to pass no interest in the land; and that the sale might therefore be made by parol.

And we are of opinion, that grass already grown and in a condition to be cut, as the grass in question was, might be sold by parol, and that there is no objection to such sale, arising from the statute of frauds.

It appears from the testimony of *Mr. Talbot*, the agent of the owner of the land, that he sold the grass to *Scott*, and that without any lien on the hay for the price. Prompt payment was not a condition of the sale; and it is evident from the testimony, that it was neither exacted nor expected. *Scott* then being a purchaser of the grass, from the agent of the owner, although remaining his debtor therefor, had a right to sell it to the plaintiff. It appears, that the consideration for which *Scott* sold was, that the plaintiff should do certain labor for him, equal to what he had done upon the grass sold, and that he should pay to *Lemist* the price for which he purchased. Thereupon the plaintiff proceeded to make the hay, and subsequently removed it. So far as it regarded the sale of the hay, this was a contract executed. The price was the plaintiff's promise to labor for *Scott* and to pay *Lemist*. *Scott* reserved no lien, and the property in the hay was transferred to the plaintiff. This took place before the agency of the defendant commenced. The hay was the plaintiff's property; and the defendant has shown no justification for taking it away.

Judgment for the plaintiff.

JAMES BOIES *vs.* BILLINGS BLAKE.

By the *stat.* of 1824, *ch.* 271, a sale to a foreigner of trees, timber or grass standing or growing on the *Passamaquoddy Indian Township*, whether made by the agent, or by a citizen of this State who had purchased of the agent, is void, and transfers no title to such foreigner.

Where the *Indian* agent, F., gave to D. a written license to cut all the grass on such township, with a provision in the license, that it was understood, that D. was to permit B. to cut a certain specified portion thereof for a reasonable compensation; and B. offered to D. such reasonable compensation, who refused to receive it, and afterwards transferred his right and interest under the license to a foreigner; B. cut the grass, made it into hay, and stacked it: *it was held*, that B. had such interest in the hay, as would enable him to maintain trespass against a foreigner acting under such transfer.

THIS was an action of *trespass* for a certain quantity of hay cut on the *Huntly brook meadow* in the *Indian* township in this County, and was tried before *Weston C. J.*

It appeared, that the plaintiff had cut and stacked the hay on that meadow in the season of 1832, and that the defendant, who was a resident in the Province of *New-Brunswick*, and in the employment of one *Marks*, a British subject, took and carried away the hay the winter following. It did not certainly appear, when the hay was cut, but it was not proved to have been cut in the month of *August*. The plaintiff claimed a right to cut and take the hay by virtue of a reservation in the permit, license, or sale, dated *July* 14, 1834, given by *James Farnsworth*, the Indian agent, to one *Dudley*. By this the agent gave *Dudley* "permission to go on to the Indian township and cut and commit to his own use all the grass usually denominated meadow hay." The writing contained these provisions. "It is further understood, that the said *Dudley* is to permit *James Boies* to cut two small meadows on the *Huntly brook* for a reasonable consideration," and "the said *Dudley* is not to allow any foreigner to have any control directly or indirectly of the management of said premises under the penalty of being considered a trespasser from the beginning." On the 29th of *August*, 1832, *Dudley* sold to the defendant "all his right and interest" by the permit or license of the Indian agent of *July* 14, 1832. It appeared, that the plaintiff, prior to the 29th of *August*, 1832, had offered to pay

to *Dudley* a reasonable compensation for the hay reserved for him, which *Dudley* declined to receive. The defendant relied on the transfer of *Dudley* to him, of *August* 29, 1832. The jury returned their verdict for the plaintiff, which was to be set aside, if the Court should be of opinion, that the action could not be maintained.

Bridges, for the defendant.

The plaintiff brings an action of trespass, and to sustain it, he must have a right to the immediate possession of the property, and must show a direct and immediate tortious taking. 5 *Dane*, 533; *Graham* v. *Peat*, 1 *East*, 244. The most favorable case for the plaintiff is, that *Farnsworth*, the Indian agent, sells the grass on the Indian township to *Dudley*, with this provision, that *Dudley* should permit *Boies* to have this grass for a reasonable compensation to be paid by him to *Dudley*. The grass then is *Dudley's*, and he did not sell it to *Boies*, but to *Marks*, under whom the defendant acted. The tender by the plaintiff to *Dudley* did not vest the grass in him. The assent of *Dudley* was necessary, and that assent was never given. No person can maintain an action of trespass in consequence of a contract between two other persons. *Hornbeck* v. *Westbrook*, 9 *Johns. R.* 73. A reservation in a deed to a stranger is void. A price was to be agreed on, and a sale to be made, before the plaintiff could acquire a property in the grass. 4 *Dane*, 109; *Co. Lit.* 47; *Hunter* v. *Rice*, 15 *East*, 99. The case finds, that the plaintiff offered to pay *Dudley* for the grass, but this was not a tender, or equivalent to it. If a tender would have transferred the property, it was not made. *Brown* v. *Gilmore*, 8 *Greenl.* 107.

The statute says, that no grass growing on the Indian township shall be sold to a citizen or subject of a foreign country. *Blake* was but a mere resident in *New-Brunswick*, but if he was a British subject, and the contract void, it left the property in *Dudley*, and did not pass it to the plaintiff, and he cannot maintain the action.

Chase, for the plaintiff.

By the contract between the agent and *Dudley*, the latter was not entitled to this grass, except on the contingency, of the failure

of the plaintiff, to whom it was reserved, to comply with the condition. The plaintiff did comply with the condition by offering to pay, as required in the contract. The reservation was binding before upon *Dudley*, and he could not avoid it without the consent of the other party, the agent. The offer to pay was an assent to the terms, and a compliance with them, on the part of the plaintiff. *Dudley* could derive no title to this grass, by violating the contract and disregarding his duty. If the defendant stood in the place of *Dudley*, he would have no defence. He must make out a title to take this hay first. He fails to do this, both because the acts of the parties gave the title to it to the plaintiff, and because *Dudley* had forfeited all right, if he ever had any, by the violation of the terms and spirit of his contract.

The possession of the hay gives the plaintiff the right to maintain trespass against any, but the true owner. The defendant and *Marks*, under whom he acted, are British subjects, and could derive no title to this grass even from the strongest writing the agent himself could have given. The *stat.* of 1824, *ch.* 271, positively forbids such sale. But the contract and the law here both forbid it, for the agent inserted the provision of the statute on this subject, as a part of the contract. A contract made in violation of a statute is void. *Armstrong* v. *Toler*, 11 *Wheat.* 298; *Wheeler* v. *Russell*, 17 *Mass. R.* 258.

After a continuance, the opinion of the Court was drawn up by

Weston C. J. — *James Farnsworth*, the agent of the *Passamaquoddy Indians*, had authority to dispose of the hay in controversy. The instrument in writing, between him and *John Dudley*, which is a part of this case, is evidence that when the plaintiff went in and cut the hay, he had, for so doing, the license and consent of *Farnsworth*. And it is also evidence, that *Dudley* consented thereto. This may well be understood to have been so expressed, in consequence of a previous understanding between *Farnsworth* and the plaintiff. By the written agreement referred to, a specific portion of the grass, by a description well understood, is set apart for his benefit. It is equivalent to a declaration of trust to that extent in his favor. The plaintiff, however, was

to pay a reasonable compensation to *Dudley*. This was offered by the plaintiff, but *Dudley* refused to receive it.

It has been insisted, that the actual receipt of the money by *Dudley*, was necessary to entitle the plaintiff to the hay, to sustain which position, the counsel for the defendant has cited the case of *Hunter* v. *Rice*, 15 *East*, 99. The plaintiff there, and one *Sharpe*, had entered into bonds to submit to the award of arbitrators. They awarded among other things, that the plaintiff should have certain hay belonging to *Sharpe*, upon being paid or allowed a certain sum of money. The money was tendered by the plaintiff, but refused by *Sharpe*, who declined to execute the award. The question was, whether the property in the hay passed by the award. The court held, that it did not and that the only remedy for the plaintiff was upon the award, but added that if *Sharpe* had received the money, it would have been such an assent on his part to the award, as would have amounted to a transfer of the property. Here the receipt of the money was not necessary to prove that either *Farnsworth* or *Dudley* had consented, that the plaintiff should have the hay. That had been before distinctly expressed in the written agreement. The tender made by the plaintiff, so far as it affected the transfer of the hay, was equivalent to payment. From the evidence in the case, it may be fairly inferred, that *Farnsworth* and *Dudley* had agreed to sell the hay to the plaintiff, for a reasonable compensation, to be paid to *Dudley*, which was tendered by the plaintiff, who thereupon took the hay.

It is further urged, that the plaintiff is a stranger to the agreement, made between *Farnsworth* and *Dudley*, and cannot take advantage of any thing there stipulated for his benefit. In *Martyn* v. *Hinde*, *Cowper*, 437, the plaintiff sustained an action against the defendant, rector of *St. Anne's*, *Westminster*, upon a certificate addressed by the defendant to the *Bishop*, wherein he nominated the plaintiff his curate, and promised to allow him £50, per annum, until otherwise provided for. And in *Marchington* v. *Vernon*, 1 *Bos. & Pul.* 101, *note b*. *Buller J.* says, "if one person makes a promise to another, for the benefit of a third, the third may maintain an action upon it."

But if there were difficulties attending the plaintiff's title to the hay, he had cut it, and had it in actual possession. He might therefore maintain trespass against a wrongdoer for taking it away.

By the *statute* of 1824, *ch.* 271, no citizen or subject of any foreign government, can be permitted to purchase, cut or carry away any trees, timber, or grass standing or growing on the township, reserved for the *Passamaquoddy Indians;* and the agent, who presumes to permit it, is subject to a forfeiture. And accordingly in the agreement between *Farnsworth* and *Dudley*, it is provided, that *Dudley* is not to allow any foreigner to have any control or management, directly or indirectly, either in the hay or the timber, which *Dudley* was thereby permitted to cut, under the penalty of being considered a trespasser from the beginning. And yet it appears, that *Dudley* assigned all his right, title and interest in that instrument, and the permit it contained, to the defendant, who was then a resident in the *British province* of *New-Brunswick*, and in the employment of one *Marks*, a *British subject.* This was not only in violation of law, but in direct violation of the express terms of the contract, under an asssignment of which the defendant justifies. We are very clear, that under these facts, the defendant has made out no title whatever to the hay in controversy; and that as against him, the possession of the plaintiff is sufficient evidence of title, to enable him to maintain the action.

Judgment on the verdict.

SAMUEL GOOCH *vs.* OTIS BRYANT.

The Court of Common Pleas have power to grant leave to amend a writ by striking out after the name of the plaintiff, the words, H. in the County of W. Esquire, and inserting B. in the County of S. and State of M., trader.

The admissions of a third person cannot be given in evidence against the plaintiff on the record, merely because a memorandum that the note sued was the property of such third person, had been made on the writ by the plaintiff's attorney, and afterward erased by him.

The declarations of an agent cannot be given in evidence against his principal, unless made in the actual discharge of the duties of his agency.

The alteration of a figure in the date of a note, proved only by inspection of the note, is not of itself evidence, that the alteration was made after the signature and delivery.

EXCEPTIONS from the Court of Common Pleas;

This was an action of *assumpsit* on a note of hand dated *March* 19, 1824, for $31,78, payable on the 19th of the following *September*, given by the defendant to *Samuel Gooch* or order and witnessed by one *Shorey;* and not endorsed by the payee. The plaintiff was described in the writ as of *Houlton* in the County of *Washington*, Esquire. At the term at which the action was entered the plaintiff's counsel, by leave of Court, amending his writ by striking out the words, "*Houlton* in the County of *Washington*, Esquire," and inserting "*Boston* in the County of *Suffolk* and Commonwealth of *Massachusetts*, trader." At the next term, the defendant's counsel objected to the amendment, and moved to have the writ restored to its original state, but the Court overruled the motion. The general issue was pleaded, with a brief statement of the statute of limitations.

The note had been left with the attorney, who commenced the suit, by one *Whitney*, without stating whose property the note was. The attorney wrote upon the back of the writ the words, "the property of *Ephraim Whitney*," but erased them before the trial. The defendant's counsel contended, that this furnished sufficient evidence of property in *Whitney* to enable him to give *Whitney's* admissions in evidence to the jury; but the Court rejected the testimony offered for that purpose.

The *defendant* then called *Whitney*, as a witness, who testified, that he had no interest in the note, and had been agent of

the plaintiff only for the purpose of calling on the maker for payment, and if it was not paid, leaving it with an attorney for collection; and that he had seen the plaintiff, and informed him of his leaving the note with the attorney, and that he had then nothing to do with the business. The defendant then offered to prove, that *Whitney* had said, that while the note was in his hands, it had been paid by the maker; but the evidence was not admitted by the Court.

One of the figures in the date of the note had been altered, but no evidence was introduced in relation to the alteration, and the fact appeared only from an inspection of the note. The counsel for the defendant contended, that the alteration appearing on the note, was sufficient to avoid it, unless the plaintiff shew, that it was made before the signing and delivery of the note; and also, that the exception in the statute of limitations in relation to witnessed notes did not apply in this case.

Perham J., who presided at the trial, instructed the jury, that a material alteration of a note by the party holding it, after it was made and delivered, would be a good defence; that such alteration would be a fraud, but as fraud was not to be presumed, but must be proved, it was for the jury to determine from their evidence whether such alteration was made at the time of the delivery of the note, or afterwards, and that the alteration would not vitiate the note, unless they were satisfied from the evidence, that it was made after the signing and delivery. The jury were also instructed, that this action, being brought in the name of the promisee, and the note in question being for money, and tested by a subscribing witness, was not within the statute of limitations.

The jury found a verdict for the plaintiff.

R. K. Porter, for the defendant, contended:

1. That the Court of Common Pleas had no right to permit the amendment.

2. That the indorsement on the writ was equivalent to proof, that the plaintiff had once said, that the note was the property of *Whitney;* that its erasure amounted to nothing more, than would a statement of the plaintiff that the note was not *Whitney's* property made afterwards, and at a different time; which would not do away the effect of his previous admission.

3. After *Whitney* was called as a witness, his declarations were improperly rejected. They were competent evidence as the admissions of the plaintiff's agent, and also to prove, that the witness, *Whitney*, was mistaken in a matter of fact. 2 *Starkie's Ev.* 147; 1 *Esp. N. P.* 267; 12 *Wendell*, 105.

4. A material alteration by the holder, whether done fraudulently or not, will vitiate the note. *Chitty on Bills*, 121.

5. In determining whether this note did, or did not, come within the exception in the statute of limitations, as to witnessed notes, the real party in interest, and not the party to the record, should be taken into consideration. It should therefore have been submitted to the jury to determine, whether *Gooch* or *Whitney* was the true party in interest.

Lowell, for the plaintiff.

1. The amendment was properly granted. There was no change of parties, but the mere alteration of the place of abode and title. It was allowed without objection, and therefore to be considered the same, as if made by the consent of the defendant. It was a matter of mere discretion in the Judge, and therefore exceptions will not lie. 3 *Greenl.* 183; *ibid.* 216; 3 *Mass. R.* 208.

2. The memorandum on the writ, having been erased, was in itself no evidence. If it had remained without erasure, it ought not to have affected the interest of the plaintiff without shewing that it was put there with his assent. The plaintiff could not call the person making it, because he had indorsed the writ, but the defendant could have shown the truth, and therefore is entitled to no presumptions in his favor.

3. The witness called by the defendant shew, that he had no interest in the note. The declarations offered to be proved were made by the plaintiff's own witness, and at a time, when he was not transacting any business in relation to the note. On either ground, their rejection was right. The declarations of an agent can be given in evidence only, when a part of the *res gesta*. 2 *Phil. Ev.* 78 and 79 and *notes*. 2 *Starkie's Ev.* 43 to 45 and *notes*.

4. The instruction of the Judge to the jury was, in substance, that they were not to presume, that an alteration in the note was

made after it was signed and delivered without any proof whatever; and he left it to the jury to say, when the alteration was made. The instruction of the Judge was right; and even if it was not strictly so, the verdict was clearly right on the evidence.

5. It is enough, that the case shews, that the property of the note was in the plaintiff, that the action was in his name, and that the note was witnessed. The instruction of the Judge however in relation to the statute of limitations was right. There was no question, as to the facts, and the construction of the statute belongs to the Court.

The action was continued *nisi*, and the opinion of the Court afterwards drawn up by

WESTON C. J. — It was not competent by way of amendment to change the party plaintiff and substitute another; but if there was a mistake in his addition or place of residence, we have no doubt that either may be set right by amendment.

The note having been handed to the attorney for collection by *Ephraim Whitney*, he erroneously supposed it to have been his property, and made a memorandum to that effect on the writ. As soon as the mistake was discovered, it was erased. It was no part of the writ, or of any indorsement required to be made thereon by law. The rights of the plaintiff are certainly not to be concluded by a memorandum, which he never authorised, and which was put on by mistake. The whole evidence, upon the question whether the note had been transferred to *Whitney*, was fairly left to the jury.

Whitney was called as a witness by the defendant. He could not therefore impeach his credit, by showing that he had made contradictory statements elsewhere. Had the note been his property, his declarations would have been admissible, but *that* he disproves by his testimony. It appeared that he was the agent to call for the money; and if not paid to leave it with an attorney for collection. And it is contended, that as the agent of the plaintiff, *Whitney's* admissions were binding upon him. Any acts or declarations of the agent, while in the actual discharge of his agency, would be binding upon his principal. But what he said at other times is not evidence. It is merely hearsay. He

was a competent witness, and having been called by the defendant as such, the truth of the case, so far as it could be ascertained from him, has been elicited under the sanction of an oath, and the scrutiny of a cross-examination. 1 *Philips' Ev.* 74; *Leeds* v. *The Marine Ins. Co.* 2 *Wheaton*, 380. There was no other evidence of the alteration of the note, than what arose from inspection, from which it appeared, that one of the figures in the date had been altered. Of the fact there could be no doubt; but the more important inquiry was, when it was done. If altered after the signing and delivery, it would vitiate the note; if before, it would not. As to the time, no evidence was offered by either party. The alteration was not in itself proof that it was done after the signature; it might have been made before. If the alteration was *prima facie* evidence that it was done after, it must be upon the ground that such is the presumption of law. But we do not so understand it. It would be a harsh construction; exposing the holder of a note, the date of which had been so altered, as to accelerate payment, or to increase the amount of interest, to a conviction of forgery, unless he could prove that it was done before the signature. It would be to establish guilt by a rule of law, when there would be at least an equal probability of innocence. But such cannot be the law; it is a question of evidence, to be submitted to the jury, as was done in the case before us. And they were properly instructed, that it was a case not within the statute of limitations.

Exceptions overruled.

The MIDDLE BRIDGE *Propr's vs.* WARREN BROOKS.

Whether a duty imposed upon a corporation by law is merely directory, or is essential to the enjoyment of some of their rights, must be determined by its nature and object, by the public convenience, and by what may be understood to have been the intention of the legislature.

If the act granting the right to erect a toll bridge require, that the rates of toll shall constantly be kept exposed to the view of passengers at the place where the tolls are collected; no action can be maintained for the recovery of the penalty given for forcibly passing the bridge without paying toll, unless the corporation have complied with this requirement.

Where there has once been a compliance with this provision on the part of the corporation, and the board on which the rates of toll were established was afterwards unlawfully destroyed, such action cannot be maintained, unless the rates of toll are again exposed to view, as soon as may be.

It was held, that an action could not be maintained after the corporation had delayed for six days to exhibit the rates of toll.

THIS was a writ of error brought to reverse a judgment of the Court of Common Pleas.

The original action was trespass brought before a justice of the peace, and carried by appeal to the Court of Common Pleas. By the action the *Middle Bridge* proprietors, by their treasurer, sought to recover of *Brooks* a penalty of not less than five nor exceeding fifty dollars, under the special *stat.* of 1827, *ch.* 357, for forcibly passing their *Bridge* without paying the legal toll.

The testimony given at the trial, before *Perham J.* was spread on the record, as were several requested instructions, the refusal of the Judge to give them, and the instructions actually given. Thirteen distinct causes of error were assigned, part of which were for alleged material defects in the declaration, and part originating from imputed errors of the Judge in refusing to give the instructions requested by the counsel of the original defendant, and in giving such as were given. As the opinion of the Court was confined to but two particulars, both embraced by the same state of facts, so much only of the case will be given, as is pertinent to this inquiry. The statute granting the right to build the bridge and to take toll, has in it these words: "and the toll shall commence on the day of the first opening of said bridge for passengers, and may be collected, as shall be prescribed by said corporation; and at the place where said tolls are collected, the rates

of toll aforesaid, and all others which may be granted, shall be fairly and legibly painted in large or capital letters, and kept constantly exposed to the view of passengers." There was no averment in the declaration, that any part of this provision of the statute had been complied with, unless from the statement, that the corporation, on the fifteenth of *May*, 1834, when it was alleged that *Brooks* passed the bridge without paying toll, though demanded of him, that the corporation were lawfully entitled to require toll of him. It appeared in evidence, that the defendant, on that day passed over the bridge, the gates being open, without paying toll, although the toll gatherer requested payment thereof. It also appeared, that a board with the rates of toll painted thereon had been erected, but that on the ninth day of the same *May*, and the witness did not know how long before that time, the board had been broken, and the rates of toll torn off, and as he supposed from hearsay, which testimony was objected to by the defendant, by some evil minded person; and that the board continued in that condition for some months afterwards, when it was replaced by a proper one.

It appeared from the record, that the counsel of the original defendant, *Brooks*, contended at the trial, that the action could not be supported, unless it was proved, that the rates of toll were fairly and legibly painted in large or capital letters, and kept constantly exposed to the view of passengers at the place where the toll was collected, and that this had not been done; and he requested the Judge to instruct the jury, that, as there was no evidence that the rates of toll were fairly and legibly painted and exposed to the view of passengers, as required by the statute granting the charter, at the time of the alleged passing of the bridge by *Brooks*, and as there was evidence that the rates were down more than a reasonable time, that the facts proved by the plaintiffs did not constitute such a forcible passing, as was contemplated by the statute. The Judge refused to give this instruction, and instructed them, that it was necessary for the plaintiffs to show, that they had a board with the rates of toll written legibly exposed to the view of passengers, as required by the statute; but that if they were satisfied, that the plaintiffs had erected such board, and it was broken down by violence, or any

other cause, contrary to the wishes of the corporation, and it was not permitted to be down for an unreasonable extent of time, that they had complied with the law in this respect. The jury found a verdict for the plaintiffs; and the defendant filed exceptions.

Among other errors assigned was this: Because it is not alleged in said declaration, that the rates of toll are, or ever were, fairly and legibly painted in large or capital letters, and kept constantly exposed to the view of passengers at the place where the tolls are or were collected.

Another of the errors assigned was founded on the refusal of the Judge to give the instruction requested, and giving instead thereof the one by him given on this subject.

All the questions raised by the assignment of errors were fully argued by *J. Granger*, for the plaintiff in error, and by *T. J. D. Fuller*, for the original plaintiffs.

With respect to these errors, it was argued for *Brooks*, that the omission to aver in the declaration, that the corporation had observed the requisition in their charter in relation to keeping the rates of toll exposed to view was a fatal defect, and that it was not cured by the verdict. The action cannot be maintained, unless enough appears from the declaration to show, that a cause of action existed. In a declaration upon a penal statute, or a penal provision in a statute, every material fact should be accurately averred, or distinctly alleged, in the declaration, or it will be error. *Barter* v. *Martin*, 5 *Greenl.* 76.

It was certainly necessary to prove the fact on the trial, that this provision of the law had been complied with. Both the erection and continuance of the notice to passengers of the rates of toll, they were required to pay, were conditions precedent to the right to recover toll. *Nichols* v. *Bertram*, 3 *Pick.* 342. If the corporation had put up a notice of this kind, and it was destroyed, by accident or design, it was their duty to replace it, as soon as one could be made. This they did not do. This question of what was, or was not, a reasonable time, should have been decided by the Court, and not left to the jury for them to decide for the Court. *Atwood* v. *Clark*, 2 *Greenl.* 249. But the jury were erroneous in their law, as well as the Court.

For the corporation, it was argued, that this provision was of the same character of the other requirements of the statute, such as the dimensions and location of the bridge, the time when the same should be completed, and others of that description; and that it was no more necessary to allege in the declaration, that the rates of toll were put up, than to aver that the bridge was made at least twenty-two feet wide, as required by the statute. It is enough to allege, that the corporation were entitled to receive toll of those who pass the bridge. *Angell & A. on Corporations*, 377; 2 *Cowen's R.* 770; 4 *Randolph's R.* 578. Whether the corporators have complied in every particular with the requirements of the charter or not, the issue cannot be made in this collateral way. If the proprietors are holding a franchise by wrong, until a seisure of it into the hands of the government of the State, no individual can complain or object. The only condition, the failure to perform which destroys the rights of the corporators under it, is that the bridge should be completed within two years. This was done. 7 *Mass. R.* 185.

Must the corporation, at the peril of suffering any one to use the bridge without payment of the stipulated compensation, keep their bridge in every particular in constant repair, especially when broken down by some malicious individual. The terms of the statute no more makes the keeping up the rates of toll a condition precedent to the right to take it, than it does the keeping of the bridge constantly railed. If the corporation cannot collect the toll by law, then they cannot recover the penalty; they are concurrent remedies, and if a man forcibly passes the bridge without paying toll, if the corporation are entitled to toll, they may recover the penalty. There is a very material difference between this act and the general turnpike act. In *that* it is expressly enacted, that no toll shall be collected, unless the rates are kept up. There is no such provision in *this*. The only provision on the subject in the charter of this corporation is merely directory, like the other regulations about the mode of building the bridge, and keeping it in repair. For any omission or accident in this respect the corporation are only answerable to the government. But unless the rates of toll under all circumstances are to be kept up; and if they are broken down by force,

that any person may pass forcibly with impunity until another is made and put up, the requirement of the law was fully complied with. It was but six days after the breaking of the board that the defendant forcibly passed the bridge. Whether it was the special duty of the Judge or jury to decide, as to what was a reasonable time to repair a mischief of this description, it is enough, if the decision was right. To make a sign-board of this character requires a skilful artist, who could only be found at particular places. Six days time is too short to find the artist and to have the board made, painted, lettered, varnished, and in order to be put up.

The action was continued for advisement, and the opinion of the Court afterwards drawn up by

WESTON C. J. — The assignment of errors in this case has been extended to a great number of specifications, most of which have been satisfactorily answered. By the third section of the act, under which the plaintiffs were incorporated, it is provided that they shall, at the place where the tolls are collected, cause the rates of toll to be fairly and legibly painted in large or capital letters, and kept constantly exposed to the view of passengers. It is true, that many provisions in a charter, or in the by-laws authorised under it, may be regarded as directory merely. Others are such, as are to be inquired of only between the government and the corporation; or such as relate to the internal management of their affairs with their officers, or with the individual corporators, which are not to be called in question by a stranger.

Whether a duty imposed upon a corporation by law is directory, or essential to the enjoyment of some of their rights, must be determined by its nature and object, by the public convenience, and by what may be understood to have been the intention of the legislature. *Bank of the United States* v. *Dandridge*, 12 *Wheat.* 64. The duty referred to is one which, from its nature and object, ought by no means to be remitted. It answered a double purpose; as an admonition to passengers, of what was required from them, and to protect them from the imposition of being called upon to pay a higher rate of toll, than was authorised by law. And that the intention of the legislature might not be

misunderstood, they have directed, that what they required to be done, should be constantly exhibited to public view.

It is a regulation, in the fulfilment of which, a party charged with having incurred a penalty, for passing without the payment of toll, when thereto required, is interested. And we are of opinion, that the corporation is not authorised to enforce the penalty, while there is a failure, from whatever cause, to exhibit the rates of toll in the manner required by law. It does not appear to us, that they have a claim to exact a penalty from a passenger, who passes without payment of toll, although demanded of him, which was all that was proved against the original defendant, while they omitted to exhibit to his eye, one of the evidences of their right, which it is their duty constantly to expose to view.

The defendant used no other force, than what is merely constructive. It may have been enough to bring his case within the operation of the statute, provided the plaintiffs had done their duty in regard to the subject matter, but we think not otherwise. Nor does it in our judgment make any difference, that their toll-board may have been wantonly and mischievously destroyed. For an injury of this sort, they have a remedy by action; and their property is protected by penalties. If their board is destroyed, or the letters become obliterated by time, accident or design, they should cause it forthwith, as soon as may be, to be restored and the letters renewed. It cannot otherwise be constantly exposed to the view of passengers.

Nichols v. *Bertram et al.* 3 *Pick.* 342, was an action for forcibly passing a turnpike gate, without paying toll. After the corporation was established, in whose behalf the plaintiff, their treasurer, sued, it was provided by a general law, that turnpike corporations should not be entitled to demand or receive toll, unless they erected a sign-board, with the rates of toll written or printed in a certain manner. In the act by which they were created, the duty was imposed in somewhat different language; and it was not in terms made a condition, upon which their right to receive toll depended. The Court held, that their rights and duties were to be determined by their act of incorporation, and not by the subsequent general law. They further held, that the corporation had complied with the act. And the implication evidently is,

that had it been otherwise, the penalty sought could not have been recovered.

In this case the evidence is, that the toll-board of the corporation was destroyed, at least as early as the ninth of *May*. On the fifteenth, when the alleged trespass was committed by the defendant, it had not been restored. There was at that time no such board exhibited to the view of passengers. And in our opinion the Judge below should have charged the jury, as requested, that this omission was fatal to the action.

Judgment reversed.

Edward Butler *& ux. vs.* Pearl Howe.

If several disabilities exist together, at the time when the right of action accrues, the statute of limitations does not begin to run until the party has survived them all.

But under the statute, a party cannot avail himself of a succession of disabilities, but only of such as existed, when the right of action first accrued.

These principles apply to the ninth section of the statute of 1821, *ch.* 62.

Where a feme sole infant, entitled to the possession of personal property, made a demand thereof, and afterwards, during the infancy, became covert, and so continued until the suit was brought: *it was held*, that the cause of action accrued at the time when the demand was made; and that the action, having been commenced more than six years after she became twenty-one years of age, was barred by the statute of limitations.

Exceptions from the Court of Common Pleas.

This action is *trover* for a bed, bedstead and bedding of the value of $50,00 which are alleged to have come into the possession of the defendant on the 21st day of *January*, 1806, and afterwards, on the 17th day of *February*, 1835, to have been wrongfully converted by him to his own use. Plea the general issue and a brief statement, that the cause of action, if any, did not accrue within six years next before the commencement of this suit. To prove the issue on his part, the plaintiff called one *M. Foster*, who stated, that as nearly as she could recollect, that in the year 1806, her late husband, father of plaintiff's wife, while on his

dying bed, directed that the articles named in the writ should be given to his daughter *Polly*, then about six years old, now wife of the plaintiff, to go with *Polly* to the defendant's, whose wife was sister of *Polly*, with whom she lived about two years; the articles to be delivered *Polly* when she came to the age of 21, or when she needed them; that soon after the death of her husband, she delivered the articles to defendant. There was no agreement that dedefendant should deliver the articles to *Polly*, but the defendant knew the conditions on which they were delivered to him; she further stated that *Polly* had been married 14 or 15 years, and thought she might have been 19 or 20 years old when married, but of that she could not be certain. On cross-examination she stated, that she had frequently heard *Polly* complain, that she had asked defendant for the articles, but he refused to deliver them up. This she had heard as well before as after her marriage. It was admitted that on the 17th day of *February*, 1835, before the service of the writ, the articles were demanded of the defendant and he refused to deliver them to the plaintiffs. *Perham J.* who presided at the trial, instructed the jury, that the statute of limitations attached when the cause of action accrued; that if they found the articles to have been the property of *Polly*, and that she had demanded them of defendant after she had a right to have them, and they were not delivered, but subsequently detained by defendant, it would be evidence of a conversion and the cause of action would then accrue; that if the cause of action should have thus accrued previous to her marriage, her husband's right to bring this action then commenced. He further instructed the jury, that if they found there had been no conversion by defendant previous to the marriage, the right of action would not have accrued. And he left the jury to inquire from the evidence whether the cause of action had or had not accrued more than six years before the commencement of the action. The plaintiff's counsel requested the Judge to instruct the jury, that if they found that the plaintiff and wife intermarried while she was an infant, that the statute of limitations did not attach until a demand by the husband was made on the defendant; that the statute did not attach as to the wife, until she became of the age of twenty-one years; that if the jury found that *Butler* and wife intermar-

ried before she was twenty-one years old, the statute would not commence running against plaintiffs until a demand by the husband; that if the wife made a demand before marriage and before twenty-one years old, that the statute had not commenced running against her, and that the act of marriage constituted no conversion of the articles by the defendant. But the Judge did not so instruct the jury, and left the cause to them on the instructions he had previously given them. The jury returned a verdict for the defendant. To all which the plaintiff excepted.

Chase, for the plaintiffs.

The only question in this case is, whether the cause of action is barred by the statute of limitations. By the terms of the donation, which the defendant accepted by receiving the property, he was to keep the bed and deliver it to the daughter of the donor, when she became twenty-one, or needed it. The defendant then was to this extent the guardian and trustee of *Polly's* property to be delivered at a time certain. It is not then for him to say, that she needed the bed before she was twenty-one, even if while a minor she asked for it. She had no power to enforce any claim against the defendant, while she was a minor and unmarried, and of course no action accrued to her before the marriage. Since that time, no act she could do, independent of her husband, could give any cause of action. As the husband never made any demand until about the time of bringing the action, the statute cannot bar the action from any act of his. If the infant did make a demand, it was certainly voidable, and while it was so, no cause of action could accrue in consequence of it, and the husband did avoid it, by making the demand in 1835, and bringing this suit. The cause of action therefore did not accrue before the demand by the husband.

But if the cause of action did accrue during the minority, or coverture, it comes within the exception in the statute, and is not barred by it. The statute says, "that this act shall not be construed to bar any infant, *feme covert*, &c., from bringing either of the actions, &c., within the term before set for bringing said action, *reckoning from the time such impediment shall be removed.*" Although when the statute begins to run it will not stop, here there was no time for it to begin to run, as one impediment suc-

ceeded the other without any interval. There is a striking difference in the exceptions in relation to real and personal estate in our statute. In *New-York* and in *England*, where the statutes with relation to real and personal estate are alike and similar to ours respecting real estate, the Courts have decided, it is true, that successive, or cumulative disabilities are not within the exception. *Demarest* v. *Wynkoop*, 3 *Johns. Ch. R.* 129. In *Massachusetts*, in relation to real estate, where the exception is the same, a like construction has been adopted, but with regard to personal estate, where the exception is like ours, the Court say, that a different rule should be adopted. In *Eager* v. *Commonwealth*, 4 *Mass. R.* 189, *Parsons C. J.* says, "In the limitation of personal actions, the plaintiff, a female infant, may marry after her right has accrued; or an infant just before he is of age, and after the cause of action accrued, may go abroad; and however long he may be absent, he would prevent the effect of the statute until his return."

Lowell, for the defendant.

The points raised by the exceptions depend on the general principles of law on the subjects of infancy, husband and wife, and limitations. It is by the application of those principles, that the case is to be determined; and it is believed, that they were faithfully applied by the Judge in the Court of Common Pleas; and that his ruling was substantially correct. The instructions to the jury were, that if they found the articles to have been the property of *Polly*, and that she had demanded them of the defendant after she had a right to have them, and they were not delivered, but subsequently detained, it would be evidence of a conversion, and the cause of action would then accrue; and that if the cause of action should have thus accrued previous to the marriage, her husband's right to commence this action then commenced. And it is submitted to the Court, whether this be not the law of the books. By marriage the personal property and rights of action of the wife vest in the husband. *Shuttlesworth* v. *Noyes*, 8 *Mass. R.* 229; *Legg* v. *Legg*, *ibid.* 99. The exception in the statute, excepting infants and *feme coverts* from its operation, applies to one disability, and not to cumulative disabilities. Its language is, "reckoning from the time such disabil-

ity is removed," clearly indicating, that the same disability was intended, and not a series of disabilities. This construction is sustained by *Eager* v. *Commonwealth*, cited for the plaintiff. She demanded the property after she had a right to have it, and her right of action was perfect; and a suit might have been commenced by her immediately after the demand. On the marriage the husband's right to commence this action existed, the moment she become his wife. This demand having been made fourteen or fifteen years before the action was commenced, the action is barred by the statute of limitations.

The action was continued for advisement, and the opinion of the Court was afterwards drawn up by

WESTON C. J. — The defendant became the depositary of a bed, bedstead and bedding belonging to *Polly*, then a child of six years old, now the wife of *Edward Butler*, upon the condition, that he should deliver them to her, when she became twenty-one, or when she needed them. If he withheld them after he was bound to deliver them, he became liable to an action of assumpsit upon his promise, or of trover for the wrongful detention. It is apparent, from the condition, that it was contemplated she might want them, before she arrived at twenty-one. They were the bequest of her dying father; and constituted probably the only provision, he was able to make for her.

It may well be presumed, that when she was making preparations for her marriage, she wanted these articles, as an humble outfit on that occasion. Under these circumstances, she was entitled to demand them before marriage; and if withheld, an action would accrue against the defendant. She married at the age of nineteen or twenty. The evidence, that she demanded them before, depended on her declarations, which were received without objection. No question is submitted to us, under these exceptions, as to its admissibility, or as to its sufficiency to prove the demand.

The Judge instructed the jury, and we think rightfully, that the cause of action accrued before marriage. She was then under the disability of infancy; and we are called upon to decide, whether the statute of limitations began to run, when the first

impediment, infancy, ceased. If several disabilities exist together, at the time the right of action accrues, the statute does not begin to run, until the party has survived them all. 1 *Plowden*, 375. But in *Demarest et ux.* v. *Wynkoop*, 3 *Johns. Ch. R.* 129, *Chancellor Kent* examined the authorities, and went into a consideration of the question, the result of which was very clearly in his judgment, that a party cannot avail himself of a succession of disabilities, but only of such as existed, when the right of action first accrued. And the reason is, that if disability could be added to disability, claims might be protracted to an indefinite period. The same doctrine was laid down in *Eager et ux.* v. *Commonwealth et al.* 4 *Mass.* 182.

Our attention has been called to a peculiarity in the fourth section of our statute of limitations, where the right to bring writs of formedon, in favor of persons under disabilities, is extended ten years, not from the removal of the disability, but from the end of the twenty years, allowed to persons not under disability. The English statute however allows ten years, after the removal of the disability. 21 *Jac.* 1, *c.* 16. And from the case cited from *Johns. Ch. Reports*, it may be understood that such is the *New York* statute. By the statute of *Massachusetts*, commented upon in *Eager et ux.* v. *Commonwealth, statute of* 1805, *ch.* 35, five additional years were allowed to persons under disabilities, to bring a writ of error, after the removal of the disability.

The authority of the cases cited, and the principle upon which they turned, applies with equal force to the ninth section of our statute, now under consideration, which after specifying the disabilities, provides that any persons laboring under either of them, may bring the action within the period set and limited, after the removal of *such* impediment. And by this must be understood the impediment existing, when the cause of action accrued. It results, that more than six years having elapsed after the infancy of her, who is now the wife of *Edward Butler*, had ceased, which was the impediment existing, when the cause of action accrued, it has become barred by the statute of limitations. If the plaintiffs had any rights, they should have asserted them sooner. There was nothing to prevent the bringing of the action immediately after the marriage.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK, JUNE TERM, 1836.

BLUEHILL ACADEMY *vs.* ANDREW WITHAM.*

Where the defendant and others subscribed a fund towards the support of an academy, with an understanding among themselves, that they should be repaid, when there were sufficient funds for that purpose; and this fund was appropriated by them to the erection of a building for an academy; and afterwards an academy was incorporated and the building was conveyed to the corporation without any stipulation, that they should pay for the building; the corporation made use of the building for many years, and during the time divided a sum among the original subscribers; the corporation afterwards sold the building and appropriated the proceeds of the sale to the erection of a new building. *It was held*, that the defendant could not recover of the corporation any sum for rent of the building, or for the proceeds of such sale.

THE case came before the Court on a statement of facts. The action was *assumpsit* on a note of hand for money lent, which was part of the proceeds of the sale of half a township of land granted to the plaintiffs by the Commonwealth of *Massachusetts*, to which the defendant claims to have an offset by reason of certain claims by him made for certain sums of money advanced by him, as one of the original subscribers for fourteen shares of one hundred shares taken in the getting up of said academy; and for rent of the original building of the academy; and for his proportion of the amount for which said original building sold in 1832, at the time a new academy was erected. And it was agreed by the parties, that in 1802, several individuals being desirous of establishing an academy, made an agreement in writing, that each

* Emery J., having been detained in the trial of jury cases in the County of Washington, did not attend at this term.

should pay his proportion according to the shares he subscribed in erecting a building and supporting an academy for the term of ten years; and that the defendant subscribed for fourteen shares; and that it was understood by the parties to that agreement, that when the funds of the academy should be more than sufficient to support it, the surplus should be applied to liquidate the advances that might be made to the parties of that agreement; and that the subscribers were incorporated *March* 8, 1803, by the name of "*Bluehill Academy*"; and that the defendant has paid all assessments made on his shares; and that the funds of the academy that were on hand in 1832, previous to the erecting a new building, were about twelve hundred dollars, which sum was appropriated to the expense of the new building, and was not sufficient to defray the expenses thereof by the sum of about four hundred dollars. That the lot of land on which the academy, both the original and present one, was erected, was conveyed by *Theodore Stevens* to the trustees of *Bluehill Academy*. It is also admitted that it was generally understood by the original subscribers, that the old academy erected by them would remain their property, after the ten years had expired during which they were to support the institution; and that the plaintiffs in two instances received deeds of release of the shares taken by original subscribers; that the old academy was occupied for the purpose for which it was erected until the year 1832; and that many of the original subscribers, and especially the defendant, were opposed to the sale of said old academy; that the defendant has received no pay for the use of said building, or from the proceeds of the sale of it, or from any funds of the academy, except his proportion of $200, that was divided among the original subscribers in *May*, 1815. It was further admitted, that during one quarter the plaintiffs allowed the original subscribers to send scholars to the academy free of tuition; and that the shares of the original subscribers were bought and sold and conveyed by deed, and understood to be valuable, as private property.

W. Abbott & Pond, for the plaintiffs.

The action is on a note given for money lent by the corporation to the defendant, which was not contributed in any part by him, having been received from the bounty of the State. To this

note the defendant sets up, as a sett-off, certain demands, which he claims to have, as one of the gentlemen, who aided in contributing funds before the corporation existed, to obtain a charter for it, and for encouragement in the infancy of the institution. The funds were invested in a schoolhouse which was afterwards conveyed to the academy. Whatever understanding there might have been among the subscribers, the plaintiffs were not parties to it. It requires as much evidence to support the offset, as it would to support an action. The sale of the old building can give the defendant no claim, for it belonged to the plaintiffs, and the money for which it sold belongs to them. The case, *Limerick Academy* v. *Davis*, 11 *Mass. R.* 113, is decisive in our favour. In accordance with it is 1 *Dane*, 157.

Hathaway, for the defendants, contended, that the orginal subscribers agreed to support the academy for ten years, with the understanding that the sums paid by them should be returned, when the academy had funds for that purpose. They had such funds, but appropriated them towards building a new academy against the will of the defendant. The old building was the property of the subscribers and the defendant is entitled to his share of rent, after the ten years had expired, and to his share of the proceeds of the sale of the old building. This understanding was recognized by the trustees by their permitting the children of the subscribers to go to the academy free from payment of tuition, and by dividing among them the $200,00. The trustees of the academy have assumed the responsibility of performing the duties of original subscribers, and have made themselves liable to repay the sums advanced by the defendant, and he is entitled to a set-off of the amount against the note.

After a continuance, the opinion of the Court was drawn up by

WESTON C. J. — The amount of the note, for which this action is brought, is due to the plaintiffs, unless the defendant is entitled to the offset, upon which he relies. Neither the subscription paper, nor the act of incorporation which followed, is evidence of any contract, on the part of the plaintiffs. The understanding among the subscribers, was not binding upon the trustees, after the incorporation. Nor did the engagement itself, of the persons

associated, bind them to the corporation, for want of mutuality, according to the case of *Limerick Academy* v. *Davis*, 11 *Mass. R.* 113, cited in the argument. If the associates had intended to confer upon the plaintiffs only the use of their building for ten years, they should have taken care that it should not have been conveyed to them for a longer period.

But the owner of the land, upon which the building stood, conveyed it to them in fee, so long as the land was wanted for the purposes of an academy. There was no reservation whatever of any interest in the building, in behalf of the associates. The conveyance may be presumed to have been made with their consent and procurement; and carried with it the academy, which was attached to and formed part of the freehold. It became therefore by law the property of the plaintiffs; notwithstanding there may have been an understanding among the associates individually, that it would remain their property.

The limitation of ten years in the subscription paper, very clearly applies to the engagement of the associates, to support a preceptor for that period, which cannot by any fair construction be extended to the building. While that was found adequate to the purpose, for which it was erected, it was used accordingly; and when it became necessary to rebuild, it was sold for the most it would bring, and the proceeds applied, as far as they would go, to the new erection. All this is to be regarded, as in furtherance of the general objects of the associates. If they proposed to themselves a further private benefit from the first building, they should have taken care to secure it, either by a reservation in the conveyance of the land, or by a direct and express contract with the plaintiffs. In the opinion of the court, the offset is not sustained, and the plaintiffs are entitled to judgment.

AMOS T. THOMPSON *vs.* CORNELIUS H. OAKES *& al.*

Although it is essential to the validity of an extent, that it should show, that the debtor was duly notified to choose an appraiser; yet such notice may be implied from the return of the officer, that the debtor *had neglected and refused* to choose an appraiser.

Thompson, in his petition for partition, claimed three undivided fourth parts of a tract of land in *Eden*. In a statement of facts, referring to the petition, execution and levy, it was agreed, that the petitioner was entitled to two fourth parts; and if there was a fatal defect in a levy upon another fourth part, so that no title passed by that levy, then that he was entitled to an additional fourth part. The objection relied on to defeat the levy was, that the debtor had not been duly notified, as the statute requires, that he might avail himself of his right to choose one of the appraisers. The portion of the officer's return relating to the choice of appraisers was in these words. "Three disinterested and discreet men, being freeholders in said county of *Hancock*, viz:—*Abraham Thomas*, chosen by the creditor, *David Leland*, chosen by myself, and *Leonard J. Thomas*, by me, for the said *John Thompson*, debtor, who neglected and refused to choose." If the levy was good, the petitioner was to have judgment for two-fourths; if it was invalid, then for the three-fourths claimed.

The case was briefly argued by *Hathaway*, for the petitioners, who cited and relied on the case, *Means* v. *Osgood*, 7 *Greenl.* 146; and by *T. Robinson*, for the respondents, who cited *Blanchard* v. *Brooks*, 12 *Pick.* 47, as in direct contradiction to *Means* v. *Osgood*; and who also contended, that if the remarks of the Court in the latter case were to be considered as law to their utmost latitude, that the levy was good, because even if a man could neglect to choose, when no opportunity had been given him to act, still he could not *refuse* to choose his appraiser, unless he had been requested so to do.

The opinion of the Court was delivered by

WESTON C. J. — The opinion of the Court is, that from the return of the officer, that the debtor neglected and refused to appoint an appraiser, notice to him to do so, is to be implied. So

this Court decided in the case of *Sturdevant* v. *Sweetser et al.*, 3 *Fairf.* 520, to which we refer. We also refer to the case of *Bugnon* v. *Howes, ante* 154, without repeating the reasons upon which the judgment of the Court in those cases was founded. The petitioner is accordingly entitled to two-fourths of the premises, of which partition is sought, in conformity with which, judgment for partition is to be entered.

HANNAH JANE BRIDGES *vs.* DAVID A. BRIDGES.

The process, given by the *stat.* of 1821, *ch.* 66, "for replevying a person," cannot be maintained in behalf of a minor child against the father or guardian of such child.

EXCEPTIONS from the Court of Common Pleas.

The process in this action was a *writ replevying a person*, in which it was alleged, that the plaintiff was taken and detained by the defendant *by duress.*

The general issue was pleaded, with a brief statement by the defendant, "that he held the plaintiff as the *child* and *infant* of him, the said *David A. Bridges.*"

The general issue was joined by the plaintiff, who in answer to the brief statement, "said that the right to the control and possession of the plaintiff by the defendant has been transferred and yielded to *Robert Bowden*, who is grandfather to the plaintiff, with whom she has resided from early infancy, and who has furnished her with her support, and is entitled to her services until she shall arrive at the age of eighteen years."

It was admitted by the plaintiff's counsel, that the defendant was father of the plaintiff, but it was stated that he had parted with his right to the custody, control and services of the child and transferred the same to *Robert Bowden*, by whose direction this action is prosecuted.

Hereupon the defendant's counsel objected, that this prosecution could not be sustained against the father of the plaintiff. This objection was overruled by *Perham J.*, before whom the action was tried.

To prove the issue on the part of the plaintiff, one *James Bowden*, son of *Robert Bowden*, was offered to testify what he had heard the defendant say to his mother, in relation to the plaintiff.

To the admission of this evidence, the defendant's counsel objected, that the defendant's right to the care and custody of his child could not be transferred by a parol agreement. This objection was overruled.

The witness testified, that the plaintiff went to the said *Robert Bowden's* when she was about ten months old; that she was now about eight years of age, and had continued there ever since, or till she had been taken away recently by the defendant; that about six years ago he heard the defendant tell his mother, plaintiff's grandmother, that he would give the plaintiff to her, as her own child, that she should support and take care of her till she was eighteen years of age, and that she had remained there as one of the family. On cross examination, he said the plaintiff had never been away from his father's house, except to return at night. He further stated, that about four years ago the plaintiff went to the defendant's and staid a day and a half, was discontented and returned to her grandmother, when he heard the defendant again say, as before, that he had given the child to her grandmother.

The plaintiff called one *Emery Thompson*, who testified, that some time in the month of *January*, 1836, the defendant came to the house of *Robert Bowden* and took the plaintiff away, that a number of other persons were with him, and they said they would have the child, dead or alive.

In committing this cause to the jury, the Judge stated, it had been objected, that this action could not be maintained against defendant, he being father of the plaintiff; but for the purposes of this trial, he should rule the law to be with the plaintiff; that the defendant might part with the right to the custody, control and *services* of his minor child to the said *Robert Bowden*, and that this might be effected by an agreement not in writing; and he directed them to inquire, if such agreement had been made, and whether the plaintiff had continued with her grandmother in pursuance of such an agreement, and if so, they would find for the

plaintiff; but if not, for the defendant. The jury returned a verdict for the plaintiff.

To all which the defendant excepted, and filed his exceptions.

W. Abbott & Little, for the defendant, argued, that the action could not be maintained at common law, and that it would not lie in this case under the statute. That statute, revised *stat. ch.* 66, *sec.* 3, provides, that the action shall not be supported, if it be found on the trial "that the plaintiff is the ward or infant of the defendant." In this case the defendant is shewn to be the father of the plaintiff, a mere child. The suit was not intended to be given by the child against the parent, who was bound by law to support it, and entitled to the custody and control of it.

There is no evidence in the case of any description that the parent assigned over the services of the child, or that any person but the parent was bound to support it. The loose conversation with the grandmother, who was a married woman, could not give her husband any rights to the custody of the child, or place him under any obligation to support it. The agreement to be valid should have been in writing, and there should have been some consideration by undertaking to maintain and bring up the child.

If an action can be maintained upon the facts, it should have been brought by the grandfather.

Pond, for the plaintiff, contended, that the verdict of the jury established the fact, that the plaintiff was not the infant of the defendant over whom he had any control. The statute by using the words "ward or infant," places them on the same ground, and his being such is no better defence for the parent, than it is for the guardian. The action may be maintained against *any one* who has no legal right to retain the plaintiff in custody.

Parol evidence is admissible to shew an emancipation of the child by the parent; or that the custody of an infant belongs to some other person, than to him by whom the plaintiff, or applicant for *habeas corpus*, is detained. 3 *Greenl.* 223; 15 *Mass. R.* 274; 4 *Mass. R.* 496; 5 *Binney*, 520; 13 *Johns. R.* 418; 3 *Mason*, 482.

By the "infant of the *defendant*" the statute intends, merely that the action cannot be maintained against the person entitled to the custody of it.

After a continuance, the opinion of the Court was drawn up by

WESTON C. J. — If the defendant had made a contract with the grandmother of the plaintiff, whereby he had transferred to her the care, custody and control of his child, and that contract had enured to the benefit of her husband, she being a *feme covert*, about which we give no opinion, the proper remedy for the party injured is on the contract.

By the third section of the act, establishing the right to the writ for replevying a person, *statute* of 1821, *ch.* 66, it is provided, that if it shall be found upon the trial, that the plaintiff is the ward or infant of the defendant, he shall have judgment for a re-delivery of the body. Under that section, the opinion of the Court is, that this process cannot be maintained against the father or guardian of a minor child, in behalf of such child.

It has been inquired, what shall a master do, if his apprentice is taken away by his father? It is a sufficient answer, that a writ for replevying the person, is not the proper remedy. If an apprentice elopes from his master, he may have a warrant for arresting and returning him, from a justice of the peace. Or the master may have covenant broken upon the indentures against the father, if he withdraws his son without right from his service. And there is no doubt but any unlawful imprisonment or detention of a minor child, may be open to inquiry upon *habeas corpus*.

It is insisted, that the plaintiff is not the infant of the defendant, because another is entitled to her services and the custody of her person. But we think, by infant of the defendant, in the section of the statute before referred to, must be understood child of the defendant, and that it was not intended to give this process against a parent; and so the Judge should have ruled in the Court below.

The exceptions are accordingly sustained, the verdict set aside, and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO, JULY TERM, 1836.

THOMAS PICKARD *vs.* SAMUEL L. VALENTINE *& al.**

The *drawer* of an inland bill of exchange and the *endorser* of a promissory note, as well as the acceptor and maker, are entitled to three days grace, by the statute of 1824, *ch.* 272, when the bill, or note, has been discounted by a bank, or left there for collection.

Where a bill of exchange is entitled to grace, the statute of limitations does not commence running from the day it would have fallen due by its terms, but from the last day of grace.

THIS was an action of *assumpsit* brought by the plaintiff as endorser, against the defendants as drawers of two bills of exchange, the same having been protested for non-payment.

It was proved that the defendants as partners in trade, drew the first bill declared on, as follows:

"*Bangor, Nov. 12th,* 1827 — At four months date, pay the order of *Wm. Davenport* six hundred dollars, value received, and charge as advised to account of your ob't servants.

Valentine and Davenport.

To *Mr. George D. Little,* Merchant, *New-York.*"

Which bill was duly endorsed by said *Wm. Davenport* and accepted by said *Little,* and which was duly presented to him for payment on the 15th of *March,* 1828, and payment refused, and due notice thereof given to the defendants as drawers. The bill had been regularly negotiated through the United States Branch

* Emery J. was engaged in the trial of jury causes in the County of *Washington,* and did not attend at this term.

Banks at *New-York* and *Boston*. The statute of limitations was relied upon. The writ was duly issued in fact on the 12th of *March*, 1834. No new promise was proved. The defendants were defaulted.

If in the opinion of the full Court, the action was commenced within six years after the cause of action accrued, the judgment was to be entered for the amount of both the bills of exchange, declared on, but if the Court should be of opinion that the action on the first bill above described is barred by the statute, their judgment is to be entered only for the amount of the second bill declared on.

White, for the defendants, contended, that the action was not brought within six years from the time the cause of action accrued. Unless the three days grace are to be allowed, the action must have been brought on the 11th day of *March* to have been within the six years. No grace should be allowed in this case, as the action is brought by the endorser against the drawers.

The remedy is only suspended, when the note is entitled to grace. The cause of action accrues, when the note becomes payable by its terms, and the maker or drawer has the three days given him to pay it, by the statute, before he can be subjected to a suit. Besides, the statute gives the days of grace only to the maker or accepter, and not to the endorser or drawer. As this action is between the two latter, the bill is not entitled to grace, and therefore barred by the statute of limitations.

Alden, for the plaintiff.

The statute of limitations does not begin to run until six years after the party has had the power to enforce payment of his demand by a suit. By the common law, all foreign bills of exchange are entitled to three days grace, and our statute specially gives it in case of inland bills, where the note was left in a bank for collection, or has been discounted by a bank. The case shows this bill to have been thus entitled to grace. This bill, being drawn on a man in *New-York*, is to be considered a foreign bill. If an inland bill, the statute gives grace, and the action was commenced within the time. *Chitty on Bills*, 190; *Bayley on Bills*, 15.

But even, if the bill was not entitled to grace, the action was commenced within six years from the time the cause of action accrued. In notes and bills the day of the date is to be excluded, and therefore no action could be maintained on the twelfth. The defendants had the whole of that day in which they might have paid it without suit, and the statute, on the supposition that there was no grace, did not begin to run until the thirteenth of *March.*

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

WESTON C. J. — The drawers undertook that the drawee should accept the bill; and pay it at maturity. Upon his refusal to accept or to pay, upon due notice they became liable to the holder. The bill in question was duly accepted. The holder therefore had no claim upon the drawers, unless upon presentment the acceptor refused or neglected to pay the bill, when due. Then and then only, due notice being given, were the drawers liable to the action of the holder. The bill was payable four months after date. Was the acceptor entitled to grace, in addition to that period? We are very clearly of opinion that he was; and equally whether the draft under consideration, is to be regarded as a foreign, or an inland bill. If foreign, the acceptor was entitled to grace by the custom and usage of merchants, if inland, by statute, if the bill was discounted at any bank, or left there for collection, *statute* of 1824, *ch.* 272; and the report states, that the bill had been regularly negotiated, through the United States branch bank at *New York* and at *Boston.* It results, that the acceptor did not violate the obligation he had assumed, until he refused and neglected to pay on the fifteenth of *March*, 1828, which was the last day of grace. And the liability of the drawers, to the action of the holder, depending as it did upon the failure of the acceptor to pay at maturity, could not arise before.

This action having been brought within six years from that day, is not barred by the statute of limitations. The statute does not begin to run, until the cause of action accrued. It is true the three days of grace are given to the maker of the note, or to the

acceptor of a bill, and the statute is silent as to drawers and endorsers; but as their liability to an action is conditional, and does not arise, except upon the failure of the maker or acceptor to pay, if the latter are intitled to an extension of time, the former must necessarily have a right to the same extension.

The opinion of the Court is, that the action is seasonably brought; and that the plaintiff is entitled to judgment on both drafts.

BENJAMIN MORRILL, *Adm'r vs.* DANIEL MORRILL, *Ex'r.*

An action cannot be maintained against one, as *executor de son tort*, who has not interfered with any personal property belonging to the supposed testator at the time of his decease.

Thus where a father made a voluntary conveyance of real and personal property to his son, and the son during the lifetime of the father sold and disposed of all the personal property so conveyed to him; an action cannot be sustained against the son, as executor in his own wrong.

THIS was an action of *assumpsit* on a note of hand given by *Daniel Morrill*, deceased, to the plaintiff's intestate. The plaintiff claimed to charge the defendant as executor in his own wrong, and offered proof tending to shew, that about twelve years before the said *Daniel's* decease, he conveyed to the defendant, his son, a valuable farm, and stock of cattle, upon the consideration that the defendant promised to support the deceased and his wife during their natural lives. At the time of this conveyance the demand on which this action was founded and some other debts were due and owing by the said *Daniel*, deceased. *Parris J.*, who presided at the trial, instructed the jury upon the principles of law applicable to fraudulent sales; and among other things stated to them, that the property conveyed to the son was liable in his hands during the father's lifetime, for the payment of this debt; but that if the son during the lifetime of the father sold and disposed of all the property conveyed to him by the father, and none of it remained in his, the son's, hands at the father's death, and he did not thereafter intermeddle with it, he could not be charged as executor in his own wrong.

If the instructions were wrong the verdict, which was for the defendant, is to be set aside, and a new trial granted.

J. Williamson, for the plaintiff.

A fraudulent conveyance or gift of property by a person deceased, in his lifetime, does not prevent the fraudulent donee from being charged, as *executor de son tort*, in a suit, by a creditor of the deceased. *Osborn* v. *Morse*, 7 *Johns. R.* 161; *Hawes* v. *Loader*, *Yelverton*, 196; *Bac. Ab. Fraud, C*; 2 *Wm's Saund.* 137, *note* 2.

The only question in the case is, whether the instruction was not erroneous in saying, that the defendant could not be holden, when the identical personal property had been changed, and other property obtained in its stead. The personal property here had been kept on the farm; and the property substituted for such as had been disposed of is to be considered, as belonging to the deceased, so far as creditors are concerned. *Staples* v. *Bradbury*, 8 *Greenl.* 181. The personal property is identified as the same by being on the farm.

The defendant is also liable, because the real estate, fraudulently conveyed to him, remained in his hands and occupation. The law in *England*, where land is not liable for the payment of debts, may be otherwise, but here there should be no distinction. The counsel commented on *Mitchell* v. *Lunt*, 4 *Mass. R.* 654, and argued, that the decision of that case was not against him in principle.

But intermeddling and taking the profits of real estate, even in England, makes the person doing it, liable, as executor *de son tort*. 3 *Bac. Ab.* 22; *Toller*, 38; *Starkie on Ev.* 553; *Osborn* v. *Morse*, before cited.

Alden, for the defendant, said that the case, *Mitchell* v. *Lunt*, 4 *Mass. R.* 654, was decisive of the case now before the Court. Neither the possession of land conveyed by the deceased, even if done in fraud of creditors, nor owing a debt to the estate of the deceased, will make one executor in his own wrong. Here the case shews, that the property received from the father had been disposed of in his lifetime. The case, *Staples* v. *Bradbury*, cited for the plaintiff, has no application to the facts here. There was no conveyance of the property by the father to the son, and

by the contract, the son was to act as the father's agent in respect to the personal property.

The opinion of the Court was drawn up and delivered at the *April* term following, in *York*, by

WESTON C. J. — The sale of the stock, by *Daniel Morrill*, deceased, to the defendant, was made upon a valuable consideration; and was good between the parties. If it might have been defeated by the creditors of the deceased; until they interposed, the defendant had a lawful right to sell and dispose of it, in the lifetime of the elder *Morrill*. This having been done, it does not appear, that the defendant has, since his death, interfered with any personal property, which belonged to him at the time of his decease; and unless he is proved to have done so, he cannot be charged as executor *de son tort*. The doctrine has never been carried so far, as to unravel transactions in regard to property of this description, which had been lawfully sold and disposed of, before the decease of the supposed testator. The creditors should have looked up the property at an earlier period.

In our opinion, the jury were properly instructed by the Judge who presided at the trial.

Judgment on the verdict.

SAMUEL DUNCAN *vs.* GILMAN SYLVESTER *& al.*

An action of trespass *quare clausum* cannot be maintained, where one tenant in common of land disturbs the temporary, but rightful possession of the common property by his co-tenant.

In an action of trespass *quare clausum*, brought by *demurrer* from the Court of Common Pleas to this Court, under the provisions of the statute of 1829, *ch.* 444, and where the action cannot be maintained in that form, the Court will not permit an amendment by adding a count in trespass *de bonis asportatis*.

THIS was an action of *trespass* originally commenced in the Court of Common Pleas, in which the plaintiff declared in two

counts, first, *quare clausum*, and second, *de bonis asportatis*, and was brought into this Court by demurrer. The plaintiff on his motion, by leave of Court, struck out his second count, and proceeded to trial on the first only.

It was proved at the trial before *Parris J.* that the plaintiff and defendants were tenants in common of the close and salmon fishery described in the declaration, each party owning a moiety thereof. Both parties had placed nets for taking salmon on the common privilege, and the defendants entered and cut away, or cast off and sent adrift, the plaintiff's nets.

The Judge ruled, that this action of trespass, *quare clausum*, could not be maintained on these facts.

The plaintiff's counsel then moved for leave to restore his second count, and again renewed it, for the consideration of the Court, at the argument.

Thayer, for the plaintiffs, contended, that where one tenant in common of real estate disturbs another in his use of the common property, or takes away his personal chattels from land owned in common, trespass *quare clausum* will lie. He cited 1 *Chitty on Pl.* 180, and the cases referred to in notes *s*, and *t*; *Bacon's Ab. Trespass, C.* 3.

To shew that the two counts might be properly joined, he cited 2 *Chitty on Pl.* 383; *Smith* v. *Milles*, 1 *Term R.* 479; *Compere* v. *Hicks*, 7 *T. R.* 727.

W. G. Crosby, for the defendants, relied on the case, *Keay* v. *Goodwin*, 16 *Mass. R.* 1, as conclusive, that trespass *quare clausum* could not be maintained.

The plaintiff having struck out his first count to give this court jurisdiction, ought not now to be permitted to restore it. He has elected to consider it an action of trespass *quare clausum*, and as such only was he entitled to an appeal, on a sham demurrer, by the provisions of the statute of 1829, *ch.* 444, § 2. As he cannot maintain his suit on that count, if he is permitted to put in another count whereby to do it, it will be an evasion of that statute. *Snow* v. *Hall*, 3 *Greenl.* 94.

Thayer, in reply. The case of *Keay* v. *Goodwin* is in favor of the maintenance of the action of trespass *quare clausum*. A

dictum of the Judge, who delivered the opinion, may be opposed, but every thing which was decision in the case, is in our favor.

The action was continued *nisi*, and the opinion of the Court was afterwards drawn up by

WESTON C. J. — The plaintiff had a right to place his net where he did; and the defendants in cutting or casting it off and turning it adrift, were guilty of a trespass. But it is contended, that the plaintiff cannot maintain trespass *quare clausum*, for the injury. The objection is a technical one; and, furnishing no defence to the merits of the case, we have not been disposed to regard it with favor. But upon consideration, we are of opinion that it is sustained by authority. *Littleton*, in his tenures, § 322, says, if two have an estate in common for a term of years, and the one put the other out of possession, the injured party may maintain ejectment. But in the next section he states, that although ejectment will lie, trespass *quare clausum*, will not, for one tenant in common against another. *Coke*, in commenting upon this section, says, if there be two tenants in common of land, and one take up and carry away the mete stones, the other may maintain trespass, *vi et armis*, for the injury. And if there be two tenants in common of a folding, and one of them disturb the other in erecting hurdles, he may maintain the same action for the disturbance. But he does not say that trespass *quare clausum*, can be brought in either case. *Coke Lit.* 200 *b*.

Whenever a party has an exclusive right to the possession, this action may be maintained, although he has not an absolute right to the soil, or the whole property therein. And it may be supported for a trespass in a portion of a common field, after an allotment in severalty to the plaintiff. *Welden* v. *Bridgewater*, *Cro. Eliz.* 421.

The opinion of *Wilde J.* was against the action in *Keay* v. *Goodwin*, 16 *Mass. R.* 1, where one tenant in common disturbs the temporary, but rightful possession of another. And in our judgment, this opinion is in accordance with the principles of law.

It is submitted to the Court, whether if the plaintiff's count, *de bonis asportatis*, should be restored, he would be entitled to judgment upon that count only. If the action cannot be main-

tained upon the count as it stands, it ceases to be an action of trespass *quare clausum*, which alone justified the demurrer in the Common Pleas, under which it was brought into this Court. *Stat. of* 1829, *ch.* 444. To decide otherwise would have the effect to justify an evasion of the statute, by the insertion of a formal count of this sort, in cases where it is not warranted by law. *Snow et al.* v. *Hall*, 3 *Greenl.* 94. As it is brought before us, we cannot sustain it, as an action, *de bonis asportatis*.

ROBERT THOMPSON, JR. *vs.* WILLIAM TAYLOR *& al.* *and Trustee.*

When a judgment creditor commences a trustee process on a judgment against his debtor, who had been committed to prison on an execution issued on the same judgment, and who *was then on the prison limits* by giving bond; it is a sufficient compliance with the requirement of the *stat.* of 1821, *ch.* 61, § 16, as to notice, if the notice be seasonably left with the keeper of the prison to which such debtor was committed.

The officer's fees for the commitment of the debtor cannot be recovered *in such suit on the judgment.*

Where the person, summoned as trustee in a foreign attachment, discloses that he is indebted on account *to one of several defendants*, he is chargeable as trustee.

THE action was debt on a judgment. The plaintiff took out his execution on the judgment and gave it to an officer, who committed *Taylor*, one of the judgment debtors, and one of the defendants in this action, to prison. While *Taylor* was so in prison, the plaintiff commenced the present trustee process, and summoned one *Bowley*, as trustee. Within seven days the plaintiff in writing notified the keeper of the prison of the bringing of the suit, and directed the discharge of *Taylor*. Before this time *Taylor* had given bond to obtain the prison limits and had returned to his own home. No notice was given to the debtor of such discharge from imprisonment.

Bowley disclosed, that he was indebted to *Taylor*, but owed nothing to *Young*, the other defendant, and nothing to them jointly. The parties submitted to the decision of the Court, whether the action could be maintained; and if maintainable, whether the plaintiff could in this action recover the amount of the officer's fees for committing the defendant, *Taylor*, to prison; and also to determine, whether *Bowley* ought to be adjudged to be trustee. The Court were authorized to nonsuit the plaintiff, or default the defendant.

D. F. Harding, for the plaintiff, cited *revised stat. ch.* 61, § 16, to show that this process may be sued out, when the debtor has been arrested and committed to prison. He also cited *Cutts* v. *King*, 1 *Greenl.* 158; and *Codman* v. *Lowell*, 3 *Greenl.* 52. This statute gives the right to attach the property of the debtor or debtors, and to attach the credits of one or both by this process. The language is the same, and the construction should also be the same in both cases. It is sufficient to give the notice to the jailer within seven days, and if the debtor appears to surrender himself, he will then have the notice of his discharge. When the debtor is discharged in this way, the statute says, that the fees of commitment may be recovered.

Thayer, for the defendants.

At common law no action would lie, and the plaintiff has not brought himself within the statute. The debtor was not discharged until notice was given to him, and that was not within seven days of the time of suing out the process. He was as much in jail, when he was on the limits, as when within the walls of the prison. It is not for the debtor to enquire whether he is discharged; and he remains imprisoned, until he is notified of his discharge.

The action is debt upon the judgment, and the officer's fees cannot be added to it. *Taylor* only is liable for the officer's fees, and to add them to the judgment would be to make *Young* also liable. The remedy is by a separate action.

Bowley should not be charged, as trustee. He was the debtor of *Taylor* only, and not of *Taylor* and *Young*. No action in favor of both could be maintained against *Bowley*, and therefore he is not chargeable in this action against both. The allegation

in the writ is, that he is the debtor of both, and the answer shows, that he is the debtor of but one, and he should therefore be discharged.

After a continuance, the opinion of the Court was drawn up by

WESTON C. J. — By the act in relation to foreign attachment, *stat.* of 1821, *ch.* 61, *sec.* 16, it is provided, that a judgment creditor may pursue that process, if he does, within seven days after such process is served, discharge the body of the debtor, in case he is taken in execution upon the same judgment, by a note or memorandum in writing, directed and delivered to the officer, who has him in custody, stating the reason and occasion of the discharge of the person of the debtor. That was done in this case, and it is all which the statute requires. It is not made necessary, that such notice should be communicated by the plaintiff to the debtor. We are therefore of opinion, that the action is well maintained; and that the plaintiff is entitled to judgment.

Ephraim Bowley, the supposed trustee summoned, is by his disclosure the debtor of *William Taylor*, one of the principal defendants. Each of the defendants is liable to the plaintiffs for their whole demand. The goods or estate of each are liable to be attached, or taken on the execution, which may issue on the plaintiff's judgment. We perceive no reason therefore, either on principle or authority, why the several credit of either may not be attached on this process. The plaintiffs have leave to amend their writ, charging *Ephraim Bowley* as the trustee of *Taylor*, and thereupon he is adjudged trustee, according to his disclosure. This being debt on judgment, of which the fees of commitment constitute no part, they cannot be recovered in this action.

JOHN PRESCOTT, *in error*, *vs.* LEWIS MUDGETT.

A division of all the fence in *dispute* between the parties, made in their presence by the fence-viewers, may be legal; although the fence on the *whole line* between them be not divided at that time.

THIS was a writ of error brought by *Prescott*, the original defendant, to reverse a judgment of the Court of Common Pleas in an action commenced originally before a justice of the peace The facts appear in the opinion of the Court.

Wilson, for the plaintiff in error, cited *stat. ch.* 44, and argued that a division of fences by the fence-viewers could not be legal, unless they then divided all the fence on the whole line between the parties.

J. Williamson, for the original plaintiff, contended, that the fence-viewers acted both legally and judiciously in dividing only that portion of the fence in dispute between the parties. A man may be the owner of a farm, which consists of two tracts purchased of different persons, both adjoining on the same neighbour. Before his purchase the line may have been lawfully divided and fenced on one tract, and neither division or fence made on the other. The change of ownership could not break up a division line. This may have been the state of facts in the present case. The fence-viewers can act only in two cases; one where there is no fence; the other, where there is an insufficient one. As both parties were present at the time, and agreed where the fence in dispute was, it is too late for one of them to dissent afterwards. If either party had requested it, the fence-viewers might have divided the whole line. One party has no right to break up a division of fences, whenever it suits his pleasure.

After a continuance, the opinion of the Court was drawn up by

WESTON C. J. — The case finds, that with respect to a part of the partition fence, between the inclosures of the parties, there was no controversy or dispute. We must understand, that they had themselves divided that portion between them, and that such division was equal, effectual and satisfactory. There was no occasion then for the interposition of the fence-viewers, except for

such portion of the line, as was in dispute. When that should be divided, there would be a division of the whole distance; a portion being divided by the parties, and the residue by the fence-viewers. We cannot perceive that the statute requires that the decision of the fence-viewers should extend beyond, or cover more, than the fence in dispute.

The statute requires, that partition fences should be divided in equal halves; in other words, equally. Each should make half the fence; but it is not necessarily to be understood, that the whole portion of each should be contiguous. One portion may be more distant from the residence of both parties, than the other; or may be from the nature of the ground more expensive or difficult to make. Equality would in such case, be best promoted by assigning to each a portion of the nearer and less difficult, together with a portion also of the more remote and more difficult. If the objection now taken by the plaintiff in error, had been taken before the fence-viewers, who proceeded in the presence of both parties, they would doubtless have divided the whole line. Not having been then made, it must be inferred that both parties were satisfied to abide by their own division.

Aaron Davis *vs.* John Moore.

The acceptance and receipt by the vendee of a part of a quantity of goods sold by parol contract, exceeding thirty dollars in value, takes such contract out of the statute of frauds, although no payment was made at the time.

And such sale is valid, although no part of the goods were taken by the vendee until a few hours after the sale.

Where the plaintiff, in the forenoon of a certain day, by parol contract, sold to the defendant a quantity of logs in one lot, then lying together at the distance of a mile, for a sum exceeding thirty dollars; and the defendant in the afternoon of the same day sent and took and converted to his own use a part of the logs; but no payment was made at the time, and no other delivery of the logs took place; *it was held*, that the plaintiff was entitled to recover the value of the whole of the logs, notwithstanding the statute of frauds.

This was an action of *assumpsit* on account annexed to the writ, in which the plaintiff charged the defendant with a quantity

of mill logs. The plaintiff offered evidence tending to prove that in *April* or *May*, 1834, he, through his agent, *John Barber, jr.*, contracted to sell and did sell to the defendant the mill logs as charged at 10*s* 6*d* per M. estimated according to the survey of one *Keating*, making 188 M; that the bargain was made at a place about one mile distant from where the logs were deposited, and in the forenoon, and that the defendant at the time of the bargain employed said *Barber* to haul out a portion of the logs from the river, where they then lay, on to the brow of the defendant's mill, which the said *Barber* did in the afternoon of the same day.

The defendant sawed and used about 50 M. only of said logs and left the remainder where they were at the time of the contract and refused to pay therefor.

The defendant's counsel requested *Parris J.* who presided at the trial, to instruct the jury, that if they should find that *Barber* did make an agreement with the defendant to sell him the whole quantity of logs at 10*s* 6*d* per M. estimated according to the survey of one *Keating*, making 188 M. as he testified, that still, if there was at the time and place of making the same, no money paid and no memorandum in writing of said agreement, and no delivery of the logs at the time, or any part thereof, said place of agreement being a mile distant from said logs; that in such case the said agreement would be void by the statute of frauds, and no action could be maintained upon it, notwithstanding a portion of the logs might have been afterwards and on the same day delivered by *Barber* and received by the defendant.

But the Judge charged the jury, that if they found, that the defendant purchased all the logs charged in the plaintiff's account, and that the logs were all deposited at the same place, and that the defendant, at the time of the purchase employed *Barber* to haul them out, and he actually did haul out a portion of them on the same day in which the bargain was made, and as soon thereafter as could be conveniently done, and that they were received and used by the defendant under the contract, that this was such a delivery and acceptance as the law required, and that the defendant would be chargeable for the whole quantity sold.

If the instructions were wrong, the verdict, which was for the plaintiff, is to be set aside and a new trial granted.

F. Allen, for the defendant.

The instruction requested by the counsel of the defendant should have been given, and that actually given was erroneous.

The value of the logs was more than thirty dollars. There was no contract in writing, nothing was paid, and there was no delivery. The *statute of frauds, ch.* 53, § 3, of the revised statutes, is a sufficient answer to the plaintiff's claim.

The case finds, that the supposed contract was made in the forenoon, a mile distant from the logs, and that a portion of them were hauled in the afternoon; and it is said, that this was an acceptance of the whole by the defendant; and that a part was received for the whole. The effect of such rule of law would be, that if a man had a whole cargo of goods, and sold one article, which was afterwards taken away, that he might charge and recover for the whole cargo. So in this case, if the charge of the Judge was right, then the plaintiff might sell a single log, and the defendant might take it away, and then the plaintiff might obtain a witness to prove a contract, and charge the whole thousand. But it was such evidence which the statute was designed to guard against. Hence the title of the act, "an act to prevent frauds and perjury." The plaintiff should at least have furnished proof, that the defendant agreed to accept a part for the whole, before the instructions given would have been authorised.

J. Williamson, for the plaintiff.

1. If any of the property sold be delivered within a reasonable time it is sufficient. *Damon* v. *Osborn*, 1 *Pick.* 476; 1 *Dane*, 652; 2 *Selw. N. P.* 871, and *note*.

2. If such agreement be executed in part, the parties are not permitted to treat it as a nullity; and acceptance within a reasonable time is sufficient. *Davenport* v. *Mason*, 15 *Mass. R.* 92; 2 *Stark. Ev.* 610; *Ricker* v. *Kelly*, 1 *Greenl.* 117; *Gale* v. *Nixon*, 6 *Cowen*, 445.

3. Nor is it necessary, that the property should be delivered at the very time of the sale. *Vincent* v. *Germond*, 11 *Johns. R.* 283; *Holbrook* v. *Armstrong*, 1 *Fairf.* 31.

4. Actual delivery, in the popular sense of the word, is not in all cases requisite, but a virtual or symbolical delivery in some cases is equally effectual. *Bailey* v. *Ogden*, 3 *Johns. R.* 399; *Parsons* v. *Dickinson*, 11 *Pick.* 352.

The opinion of the Court, after a continuance, was delivered by

WESTON C. J. — The logs, which were the subject matter of the contract, were not capable of a manual delivery. The quantity had been estimated by one *Keating*; and they were agreed to be sold by that estimate. The plaintiff then had nothing more to do; and they remained subject to the disposition of the defendant. He thereupon forthwith agreed with the agent of the plaintiff, to haul a portion of the logs to his mill, they being at the distance of a mile; and this was done in the afternoon of the same day, and as the jury have found, as soon as it could be conveniently accomplished. We entertain no doubt, that this was such a delivery and acceptance of part of what was sold, as takes the case out of the statute of frauds. The actual delivery of part was made by the agent of the plaintiff; and the defendant employed the same agent to haul them to the brow of his mill. The case before us is so plain and direct a compliance with the statute, that we do not perceive the least room for doubt or hesitation. The defendant had no right to take a single log, except upon the basis of the contract, which was entire; and having taken part, he is bound as a purchaser of the whole. The authorities cited for the plaintiff, fully sustain the ground taken by him.

It has been insisted, that this construction may leave a purchaser, who buys and receives a single article, liable to be charged as the purchaser of more, if the vendor can bring perjured witnesses to say that it was delivered as part of the greater number purchased. Parties are exposed to the commission of perjury, in relation to all facts depending on human testimony. If the sanctions of an oath, and a severe cross examination prove an insufficient security, the party liable to suffer must seek protection in the congruity and consistency of truth, and the extreme difficulty of making falsehood accord with the context of circumstances. The statute of frauds has interposed some salutary safeguards.

If they are not sufficiently enlarged, the legislature alone has power to extend its provisions.

Judgment on the verdict.

JOHN WITHERELL *& al. vs.* JOHN MILLIKEN *and Trustee.*

Where one had contracted to sell part of a vessel, had received a portion of the purchase money, and was ready to give a bill of sale thereof on being paid the balance, but retained the possession; he *was held* chargeable, as trustee, under the *stat.* of 1835, *ch.* 188.

EXCEPTIONS from the Court of Common Pleas.

It appeared from the disclosure of *Noyes*, that before he was summoned, as trustee, he had agreed to sell the defendant a share in his schooner; that the defendant had paid him the greater portion of the purchase money; that he had requested the defendant to pay the balance and take a bill of sale, and that the defendant had neglected to do it; that by the agreement he was not to give a bill of sale until the whole of the consideration money was paid; and that he was still ready to give a bill of sale to any person lawfully entitled to receive it, on being paid the amount then due. *Noyes* had retained the possession of the schooner.

C. R. Porter, for the plaintiffs, cited the *stat.* of 1835, *ch.* 188, concerning mortgages and pledges of personal property, and contended, that this case came within its provisions. The transaction was in fact a sale, and the possession only retained by the vendor until the balance due should be paid to him. The statute extends not only to technical pledges and mortgages, but to all cases, where two persons, one as creditor and the other, as debtor, are interested in the same personal property.

Thayer, for the trustee. The terms made use of by the legislature are as well understood, as any in our language. The question is merely, was this share in the schooner pledged or mortgaged by *Milliken* to *Noyes?* The property of the schoon-

er never has been in *Milliken*, and he could not pledge it, or mortgage it, to *Noyes*, or to any one else, nor did he attempt it. The defendant had no interest whatever in the vessel, and his only claim was to become the purchaser on paying for the property. He cannot therefore be holden, as trustee, by the provisions of the *stat.* of 1835. Nor can he be holden in consequence of having received money from *Milliken*, because he always has been, and still is, ready and willing to perform the contract on his part.

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

WESTON C. J. — At the time of the service of process upon the supposed trustee, the principal debtor had paid two thirds of the stipulated price of the proportion of the vessel, he had agreed to purchase. The general title remained with the trustee, but he was ready and desirous to execute a bill of sale, upon payment of the residue of the price. Viewing the transaction, as both parties understood it, we are of opinion that the trustee must be considered as virtually and substantially holding the vessel, by way of mortgage or pledge, for what remained due of the purchase money. This certainly best accords with the equity of the case, and the policy of the statute, upon which the plaintiff relies. *Stat.* of 1835, *ch.* 188. This construction is aided by the case of *Pearce et al.* v. *Norton*, 1 *Fairf.* 252. There the plaintiffs, original owners of a vessel, had agreed to sell her to the defendant, and had delivered her to him, he agreeing to furnish security for the price, or to return her, within a stipulated time. The title remained with the plaintiffs, which they were considered as holding by way of mortgage, as security for the price.

In the case before us, the trustee is ready and willing to give the principal debtor, or the plaintiffs, his creditors, if the court shall so adjudge, the benefit of the property in his hands, upon being paid what is due to him. Under all the circumstances, in our judgment, the order of the court below ought to be affirmed.

Exceptions overruled.

Paul Thorndike *vs.* Abraham Richards.

A vote of the proprietors, that a specified portion of their common lands be sold by their standing committee at public or private sale, and that a deed thereof be given to the purchaser by their Clerk, approved by the committee, is a mere authority to sell, and does not convey the land without a deed.

Where the description in the deed, of the land intended to be conveyed, is "all that tract of land called and known by the name of *Pitts* or *Beauchamp Neck*, lying in the town of *Camden*, and bounded on land of *Ogier*, land of *Thorndike*, on a *Pond*, *Goose Harbour*, and the *Ocean*;" no more land passes, than is included within those boundaries, although the *Neck* may extend farther.

This was a writ of entry brought to recover a tract of land in *Camden*, and was tried upon the general issue.

The demandant offered in evidence a copy of a deed from *John Molineaux*, clerk of the proprietary, known by the name of the Twenty Associates, to *William Molineaux*, dated *September* 14, 1790, which is to be found in the case, *Thorndike* v. *Barrett*, 3 *Greenl.* 380; and a deed to him from the administratrix of *William Molineaux*, conveying the tract described in the writ. The whole of the descriptive part of the deed from the proprietors to *Molineaux* is given in the opinion of the Court in the present case.

The tenant offered in evidence a deed from the same Twenty Associates, dated *February* 15, 1806, conveying the demanded premises to *Joseph Pierce*, a deed from said *Pierce* to *Daniel Barrett*, a deed from *Barrett* to *Abraham Richards*, and also a deed from him to the tenant, all conveying the demanded premises by a pertinent description, and the latter containing after the description these words, "and being a part of *Pitts* or *Beauchamp Neck*."

The questions submitted for the opinion of the Court were:

1. Whether the grant and deed of the Twenty Associates to *William Molineaux* confined the extent of his grant to the premises included within the boundaries, *viz:* on land of *Ogier*, on land of *Thorndike* and the *Pond;* or whether the grant included all the land on *Beauchamp Neck* situated beyond those boundaries.

2. Whether the tenant, by the terms of the deeds referred to, is estopped, so that he cannot be permitted to prove, that the demanded premises are not a part of *Beauchamp Neck.*

The question of estoppel was fully argued, but as the opinion of the Court was made on other grounds, whereby the consideration of this became unnecessary for the decision of the action, neither the arguments nor the substance of the deeds, relating to this point, are given.

The case was argued in writing by

F. Allen, for the demandant, and by

Thayer and *J. & E. Shepley*, for the tenant.

In the argument for the demandant the following positions were taken.

1. That the demanded premises passed by the *votes* of the proprietors.

The paper called a deed, from them to *William Molineaux*, is in fact nothing more than an exemplification of the votes passed by the proprietors and certified by the clerk. As a deed merely, being by *John Molineaux* under his own hand and seal, it would pass nothing. *Elwell* v. *Shaw*, 16 *Mass. R.* 42; *Stinchfield* v. *Little*, 1 *Greenl.* 231. But as a certificate of the vote, it is effectual, and passes the premises described in them. *Thorndike* v. *Barrett*, 3 *Greenl.* 380; *Mayo* v. *Libby*, 12 *Mass. R.* 339; *Springfield* v. *Miller*, *ibid*, 415; *Codman* v. *Winslow*, 10 *Mass. R.* 146. At the meetings they voted, "that *Beauchamp Neck* be sold", that they "sell all the unappropriated land on *Beauchamp Neck*", and that "the clerk execute a deed of *Beauchamp Neck*". These terms are sufficiently comprehensive to include the demanded premises. As the land demanded is a part of *Beauchamp Neck*, it passed by the votes; and all further proceedings in relation to it are merely void.

2. The clerk could not by any description of his, restrict or enlarge the description contained in the votes.

He had as much power to convey more, as he had to convey less, than he was directed and empowered by the votes. He was a mere ministerial officer, without any discretion of his own. That part of the description, "all that tract or parcel of land call-

ed and known by the name of *Pitts* or *Beauchamp Neck*, lying and being in *Camden*," was according to the authority given the clerk by the votes. This was a general and sufficient description. He however does proceed to define the bounds of *Beauchamp Neck* as on *Thorndike*, *Ozier*, and the *Pond*, thereby excluding a part of *Beauchamp Neck*, viz. the premises demanded. This is void for want of authority, and for that cause, does not restrict the premises conveyed to those bounds.

3. But if the clerk had possessed sufficient authority, and indeed had himself been the owner of the land, general words are not restrained or restricted by words added *ex majori cautela*. *Bott* v. *Burnell*, 11 *Mass. R.* 163; *Worthington* v. *Hylyer*, 4 *Mass. R.* 196; *Keith* v. *Reynolds*, 3 *Greenl.* 393.

In *Keith* v. *Reynolds*, the reporter's note is, "where a parcel of land is conveyed, as being the whole of a certain farm, which is afterwards described by courses and distances, which do not include the whole farm; so much of the description will be rejected, as that the whole may pass." The case itself warrants the note of it. Now the description in that deed, "a certain tract of land or farm," is not more definite, than "*Beauchamp Neck*."

4. If there are two clauses, or parts, in a deed repugnant, the one to the other, the first shall be retained and the latter rejected, though it is otherwise in a will. *Shepherd's Touchstone*, 88; *Worthington* v. *Hylyer*, before cited.

The latter case is directly in point, or as far as there is any difference, it is strongly in favor of the demandant. There the general words were, "all my farm on which I now dwell." Then follow the descriptive words, particularly bounding out a tract of land, but an entirely different one from the first. The general words were held to govern, and to control the specific boundary, which was wholly rejected. No part of it was permitted to stand against the general description; and this too in a case where the grantor himself owned the land, was at liberty to use his own language, and could convey what he pleased. The intention of the parties is to govern, but that intention is to be sought from the terms of the deed. On inspecting the deed no one can doubt, but that the Twenty Associates intended to convey the demanded premises.

The counsel for the defendant in their argument contended:

That it appeared by the report, that the demanded premises were not included in the particular description in the deed, and did not pass thereby; and that the demandant had no title unless it passed by the *votes* of the Twenty Associates. No shadow of title is shewn to maintain the action, unless from this deed, or these votes. The votes are recited in the deed by way of preamble, but precede the portion of it containing the words of grant, as well as of description of the premises granted.

There are but two votes of the proprietors recited in the deed, or appearing in the case. The first of these merely authorises their clerk to execute deeds to be approved by two of the Committee. It is not pretended that this vote of itself passes any title to land. The other vote declares, "that *Beauchamp Neck* be sold by the standing committee either by public or private sale," and directs the manner of sale and the disposition of the money. This vote passes no title from the proprietors. It is a mere authority to sell, and if nothing more had taken place; if in fact no deed had been given; the votes would have been wholly inoperative. The counsel for the demandant has likened it to the case of *Mayo* v. *Libby*, 12 *Mass. R.* 339, where a resolve of the legislature, quieting settlers on the State lands, passed a title to such settlers. No similarity in principle exists. The resolve clearly shews, that the State, by that alone, intended to part with all their interest in the land; and the persons intended to take it are also distinctly pointed out. True it is, that the names are not given, but it is only to find, who had settled on the land, and the description is perfect. The name of the settler could be ascertained on enquiry, and this was sufficient. *Com. Dig. Grant, B.* 1.

But in our case, the title was designed to remain in the proprietors until other acts were done, and among them, giving a deed of the land. Here, too, there was no indication in any manner of the person to take, and no mode pointed out to ascertain, why any one individual rather than another, should be the grantee. These two essential requisites are wanting, and nothing can by possibility pass.

Nor can the vote be construed to pass the title by way of covenant to stand seized to uses. Here also, the two essential ingre-

dients are wanting; the intention to pass a title, and the covenantee, or person designed to take.

The other votes are mere votes of a committee, and can have no effect to convey a title. The principle of law, which authorises towns and proprietors of lands to convey by vote, does not extend to a committee authorized to sell, nor do the decided cases warrant such inference. *Codman* v. *Winslow*, 10 *Mass. R.* 146; *Springfield* v. *Miller*, 12 *Mass. R.* 415. And besides, the deed was to be given by the clerk, and not by the committee.

No title therefore could pass from the proprietors to *Molineaux*, unless it was conveyed to him by the deed. The vote of the proprietors had determined what should be a proprietor's title to pass land, and it was by way of a *deed* executed by their clerk, and approved by at least two of the committee. The principle, that an attorney must execute a deed in the name of his principal does not apply to cases, where proprietors acting in a corporate character give authority to convey, *and also prescribe the manner of doing the act.* The cases, deciding that the attorney must act in the name of the principal, are all restricted to attempted conveyances, where the mode of conveyance is not pointed out in the instrument, or vote, giving the authority; and such must have been the grounds of the decision in *Thorndike* v. *Barrett*, 3 *Greenl.* 380, and justifies the remark, that the case differed from *Stinchfield* v. *Little*, 1 *Greenl.* 231. The deed being executed by the agent of the proprietors, in the mode by them directed, is their deed. By that alone the demandant must obtain his title, if any he has.

The deed does not convey the demanded premises. As the boundaries of the tract of land described in the deed do not include the land demanded, such construction must be given to the deed, as to include a different tract, or the action must fail. There is nothing in the case, or in the deeds referred to, tending to shew any particular tract of land designated as *Beauchamp Neck*, and therefore, even if there had been an intention to convey, nothing would have passed for the uncertainty. But there is evidence on the face of the deed, that the whole *Neck* was not intended to be conveyed by it. The committee did not agree to sell to *Molineaux* the *Neck*, but only a portion of it; to sell

only "all the unappropriated land on *Beauchamp Neck*." How great a portion of it was then unappropriated does not appear, except from the boundaries of the tract described in the deed. The land too was sold by the acre, which precludes the supposition that any indefinite quantity was intended. The only construction of the deed, which will give effect to all its parts, is the plain and obvious one; that so much of *Beauchamp Neck* was conveyed as is described within the boundaries. The case of *Worthington* v. *Hylyer*, has been insisted on, as directly in point for the demandant. But the cases have very little resemblance in any respect, and none in principle. That was a case, where two distinct and separate tracts were described in the deed, and the question was which should pass. Here there is but one tract described in the deed, and but one in question between us; and we differ only in the extent of it.

Strike out the words "called or known by the name of *Pitts* or *Beauchamp Neck*," and the description is as perfect, as the power of man can make it. Those words only designate the part of the town of *Camden*, wherein the land is.

The obvious meaning of the deed is the same, as if the words "which is," had been inserted before the words "butted and bounded." As the demandant can recover only on the strength of his own title, he cannot support his action; even if he has succeeded in shewing, that we are estopped to set up ours.

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

Weston C. J. — The validity of the deed by the Twenty Associates, by their clerk, approved by their standing committee, of the fourteenth of *September*, 1790, to *William Molineaux*, was before this Court, in the case of *Thorndike* v. *Barrett*, 3 *Greenl.* 380. It was there contended, that there was no vote of the propriety, conveying the land to *Molineaux*, and that if they authorised any person or persons, to sell and convey their lands for them, that power was to be exercised, by making a deed, conforming to the settled principles of law. But it was holden by the Court, that under the power which had been given to the proprietors of lands in common, to order, manage, improve, divide

and dispose of their lands, in such way and manner, as shall be concluded and agreed upon, by the major part of the proprietors present, voting respectively according to their interests, the deed might be sustained in virtue of the vote of the propriety of 1768. And having been made, executed, and sanctioned, in the manner and form prescribed by a vote of the proprietors it was holden by the Court, that they never could be permitted to deny, that the title to the lands, described in the deed, passed to the grantee. The late Chief Justice of this Court, in giving the opinion pronounced by him in that case, further states, that the deed under consideration "has several peculiar characteristics, which distinguish it from all those, with which it has been compared; and not deeming the decisions in those cases as necessarily applicable to this, we feel authorized, as well as disposed, to pronounce the deed, under all the circumstances attending it, as a conveyance of the land therein described."

We are now called upon, to determine the limit and extent of the land, conveyed by that deed. It is preceded by a long recital of several votes of the propriety, and of their standing committee, upon which the authority of the clerk to make the deed is based. Then follows in form the deed itself, made by him in his official capacity, by which there is conveyed to the grantee, "all that tract or parcel of land, called and known by the name of *Pitts* or *Beauchamp Neck*, lying and being in the township of *Camden*, and County of *Hancock*, and Commonwealth of *Massachusetts*, butted and bounded as follows, *viz.* north-west on land of *Abraham Ogier* and land of *Robert Thorndike*, containing fifty acres, and a pond, south-west on *Goose Harbour*, south-east and north-east on the *Ocean*, containing five hundred acres more or less." These bounds, thus definitely pointed out, which were well known, and have been ascertained, exclude the land in controversy.

But it is urged, that although not within the particular boundaries given, it is a part of *Beauchamp Neck*, and therefore passes under that general term, which it is said must prevail over the special description. The land as bounded, was not the less known and called by the name of *Beauchamp Neck*, because that *Neck* might also embrace a few acres, not within the boun-

daries given. The whole description, fairly understood, conveys all the tract of land, called *Beauchamp Neck*, which lies within those boundaries. Looking at the deed, without reference to the recitals, we perceive no conflict or incongruity in the description. The limits prescribed, are plain, intelligible and well known. They cannot be misunderstood. To depart from them, would be to pervert the manifest intention of the parties. *Beauchamp Neck*, unaccompanied by any terms of qualification or restriction, would doubtless embrace all the land, known by that name. From the recitals it appears, that the propriety authorized the sale of the land, using that term; and that the standing committee had agreed to sell all the unappropriated land on *Beauchamp Neck*. But the recitals, from which the authority to convey is deduced, and which set forth the progress and close of the negotiation for the sale, are only a preamble to the conveyance, which followed afterwards in due form, and where we are to look for the operative words. The variance arises only from the omission of the small triangular piece of land now in dispute, of about five acres, detached and separated from the other land, by the intervention of the pond, and which being omitted, would enable them to make the pond one of the boundaries.

It is however insisted, that the clerk had no authority to depart, in any degree, from the previous votes; but he was under the direction of the standing committee, to whom the business was confided, and they expressly, and under their hands, approved of the deed drawn by him. It was accepted also by the grantee, who must have understood that he was restricted to the very precise and exact limits, set forth in the deed. And we are very clearly of opinion, that the demanded premises, not being within those limits, the demandant has failed in his title. And this is the conclusion, to which we feel constrained to come, if these premises are to be taken and regarded as a part of *Beauchamp Neck*. Whether therefore, the tenant is, or is not estopped to deny that fact, it is not necessary to decide.

Demandant nonsuit.

SAMUEL DUNCAN *vs.* GILMAN SYLVESTER.

If the plaintiff, in an action of assumpsit, appeal from a judgment on a verdict in his favor, at the Court of Common Pleas, for less than twenty dollars, and on trial in the S. J. Court, he recover more then twenty but less than one hundred dollars; under the *stat.* of 1829, *ch.* 444, the *plaintiff* is entitled to *full costs* in the C. C. Pleas, and the *defendant* to *costs* in the S. J. Court.

THIS was an action of *assumpsit*, commenced before the passing of the act prohibiting appeals from the Court of Common Pleas in civil actions. The damages demanded exceeded one hundred dollars. On the trial in the Court of Common Pleas, the plaintiff recovered but nominal damages, and he appealed to the S. J. Court, where on trial, he obtained a verdict for twenty-eight dollars.

W. G. Crosby, for the defendant, cited the *stat.* of 1829, *ch.* 444, being the "act additional to an act to establish a Court of Common Pleas," and contended, that the plaintiff was not entitled to recover any costs, but in the Court of Common Pleas, and there but one quarter part as much costs as damages. If there had been no appeal, the plaintiff could have had no more, and he is not entitled to increase his costs by any transactions in the S. J. Court. As he did not recover one hundred dollars, we are entitled to recover our costs in the S. J. Court by the provisions of that statute.

Thayer, for the plaintiff.

Per Curiam. Under the statute cited by the counsel for the defendant, in a case not coming within the exceptions, the plaintiff appeals from a verdict in his favor at the peril of losing his own costs and paying costs to the defendant, unless he recover in this Court over one hundred dollars. In the case before us, the appeal vacated the judgment of the Court of Common Pleas entirely, and the verdict in this Court shows how much the defendant was indebted to the plaintiff. As the amount found to be due is more than twenty and less than one hundred dollars, the plaintiff is entitled to full costs in the Court of Common Pleas, and the defendant to costs in this Court.

WILLIAM MERRIAM *vs.* NATHANIEL MITCHELL.

Where one, through his own error, mistake or negligence, causes the arrest and imprisonment of an innocent man, who has given no occasion for suspicion by his own misconduct; the assurance of the complainant, however strong it may be, that the accused was guilty of the crime imputed to him, is not sufficient evidence of probable cause for such arrest.

The post office record of mails received and sent away is admissible evidence in an action for malicious prosecution, brought by a deputy postmaster against an agent of the Post Office department, for causing the arrest and imprisonment of the plaintiff on a charge for taking a package from the mail; although such record be in the handwriting of the accused.

In an action for malicious prosecution, the jury may rightly infer malice from want of probable cause.

A verdict will not be set aside merely because irrelevant, or immaterial evidence has been erroneously admitted on the trial.

THIS was an action for a *malicious prosecution*. In one count in the declaration, there was an averment, that the plaintiff had been committed to prison in consequence of the malicious prosecution, and that he had sustained special damage by being injured thereby in his business, as a merchant and trader, and that in consequence of his arrest and imprisonment by the defendant's acts, his property had been attached and sold at a great sacrifice.

The action was tried at the *December Term* of the S. J. Court, 1834, before *Emery J.*, but from the very great length of the report of the Judge, covering one hundred and sixty-two large and closely written pages, and from other causes, the case was not prepared for argument at the next law term, and stood over until *July Term*, 1836. Several questions of law were reserved on the report of the Judge for the consideration of the Court. The following motion was filed by the counsel for the defendant at the term when the trial was had, and the questions arising thereon were argued with the questions on the report.

And now after verdict and before judgment, the said *Mitchell*, being present in Court, moves the Court here, that the verdict aforesaid may be set aside and a new trial granted for the following reasons, to wit.

1st. Because the said verdict is rendered against the facts proved in the case.

2d. Because the jury in rendering their verdict on the points submitted to them by the Court, could not agree to finding a fact proved by legal and uncontradicted documentary evidence; said fact having a tendency to support the defence; whereas the said jury have found that the defendant did fraudulently and designedly conceal from the magistrates the fact, that a staple was gone from the mail-bag, without any evidence whatever having been laid before them, that said *Mitchell* at the time of the examination had noticed the fact, or even knew that a staple was gone from the mail-bag.

3d. Because evidence was adduced to prove, that some of the friendly creditors of *Merriam* called upon him by suit to pay to them certain sums of money due and owing to them, and that afterwards, by consent of parties, the personal property of said *Merriam* which was attached, was sold, as the plaintiff alleged, at a loss; which said testimony was introduced, although objected to by the defendant, for the purpose of enhancing the damages, if any should be recovered.

4th. Because it is manifest, on comparing the testimony laid before the jury with the answers which the jury have given to the questions put by the Court, that the jury in rendering their verdict must have been influenced, however unknown to themselves, by prejudice against the defendant and his cause.

5th. Because the damages given in this case are excessive and not warranted by the evidence in the case, or the facts complained of.

6th. Because during the trial and while the cause was actually in hearing, one of the jurymen, *Benning Pease*, did receive privately a slip of paper from a friend of the plaintiff, *Francis Fletcher*, 2*d*. and after reading the same, wrote upon it and returned it to that friend; who again wrote and passed it back to the juryman, and this proceeding was more than once repeated in Court.

7th. Because since the evidence was closed in this case, the defendant has discovered new and important evidence, tending to prove clearly and unquestionably, that a man in a gig did leave *Camden* on the morning or early part of the day of the 28th of *Sept.* 1833, pass the cross-road from *Camden* to *Warren* in ac-

cordance with the evidence introduced by the defendant, and this under suspicious circumstances.

8th. Because evidence was admitted to show the property of the defendant for the purpose of enhancing the damages, and the jury have evidently proceeded upon the principle of giving vindictive damages.

9th. Because the sum for which the verdict is rendered, to wit, the sum of $1666, proves that they must have chalked for it, or made an average.

10th. Because the defendant is informed and verily believes, that he shall be able to prove, that some of the jurymen not only formed an opinion against the defendant before the evidence was out, but actually expressed an opinion against the defendant.

The report of the Judge commences with the following statement.

"To support the issue on the part of the plaintiff, he proved the complaint of the defendant against the plaintiff, as set forth in the writ; that he was arrested thereon; carried before magistrates; ordered to recognize in 5000 dollars to appear at the Circuit Court of the *United States;* and not finding sureties was detained a prisoner until the grand jury declined finding the bill of indictment to be true, and that thereupon the defendant was discharged.

"In order to facilitate the advance of the case, for the purpose of this trial, I directed the jury on the proof before stated, and the evidence hereafter recorded, that there was no probable cause for the prosecution commenced as aforesaid by said *Mitchell* against said *Merriam;* intending to reserve the question for the consideration of the whole Court. And to enable the jury to pronounce whether there was malice on the part of the defendant in that prosecution, and to ascertain what damages the plaintiff had suffered; and with a view to ascertain facts deemed material for the jury to decide; fifteen questions were submitted to them with a request, that as far as they could agree they would answer them. One was, had losses of money and detention of notes occurred on the mail route from *Belfast* to *Thomaston*, previous to complaint to the Post Office Department? The jury could not agree to answer. Another question was, did *Nathaniel*

Mitchell receive from the Post Office Department, a commission to examine the mail routes the whole length of the route from *Portland* to *Lubec*, and make investigation upon the whole length of it, accompanied by a petition from individuals in *Belfast* and instructions from the Post Office Department for this purpose, as exhibited in evidence; and did he in pursuance of that commission, and instruction, proceed on that duty from *Belfast* to *Camden* on the 28th day of *September*, 1833? To this the jury could not agree to answer. Another question was this; was the *Bath* decoy package in the mail-bag after the examination at *Lincolnville*? The jury answered it was. Another question submitted was this; was the mail afterward on that day delivered to and opened by *William Merriam*? The jury say it was. Another question submitted was this; was the *Bath* decoy package in the mail-bag at the examination at *Goose River*? The jury say that it was. Another question submitted to them was this; Did *Nathaniel Mitchell* in good faith believe, that the *Bath* decoy package had been withdrawn from the mail-bag by *William Merriam* at the time when he made his complaint to justice *Dillingham*, during the trial before the magistrates, and at the time he testified before the grand jury? To this the jury could not agree to answer. Another question submitted to them was this; how many packages were dropped after the examination at *Northport*, and not restored to the mail-bag before its arrival at *Camden*? The answer is, we say one. Another question submitted to them was this; was it practicable between the time that *Mitchell & Pickard* returned from *Goose River*, on the 28th of *September*, 1833, and the time of the stage passing the Post Office at *Damariscotta Mills*, for a person to go in a gig on the cross road from *Camden* to *Warren*, from the Post Office in *Camden* to the Post Office at *Damariscotta Mills* and there deposit a letter in season to be placed in the mail going that day westward? To this the jury could not agree to answer. Another question submitted to them was this; was it practicable at that time to introduce a package of the size of the *Bath* decoy package into the mail-bag then used on this route from *Belfast* to *Bath*, without unlocking the mail-bag? The jury answer, it was. Another question submitted to them was this; was the said *Mitchell*

actuated by malice, in the commencement and prosecution of the complaint against *William Merriam?* They answer, we say he was. Another question submitted to them was this; was the examination of the mail-bag at *Goose River*, and of the packages therein, conducted by *Mitchell & Pickard* with due and reasonable care and caution, and did they honestly believe that the *Bath* decoy package was not then among the packages in the mail-bag? To this, the jury could not agree to answer. Another question submitted to them was this; did *Nathaniel Mitchell* fraudulently and designedly conceal from the magistrates the information that was given to him by *Mr. Reed*, of the finding of the package of letters to *Mr. Whitney?* The jury, answer, we say he did. Another question submitted to them was this; at what time did the *Bath* decoy package arrive at *Bath*, with the money in it in the mail, and was it abstracted from the mail at any time before, after leaving *Lincolnville?* The jury answer, it arrived in due course of mail, and was not abstracted. Another question submitted to them was this; if the *Bath* package was abstracted from the mail after leaving *Lincolnville*, was it abstracted by *William Merriam?* The jury answer, we say it was not. Another question submitted to them was this; did *Nathaniel Mitchell* fraudulently and designedly conceal from the magistrates the fact, that a staple was gone from the mail-bag? Answer, we say he did.

"The plaintiff offered evidence to prove, that after he was so arrested on the complaint of said *Mitchell* against him, his goods were attached, and afterwards sold by consent; and upon the whole evidence already stated, and hereafter recited, the jury by their verdict found the defendant guilty, and assessed damages for the plaintiff, in the sum of sixteen hundred, and sixty-six dollars."

The whole of the testimony given on the trial, on each side, then follows, and the report concludes thus:

"It is to be recollected, that the plaintiff's counsel, though called on especially to say in the close of his argument, whether he insisted on the evidence in relation to the letter opened by *Mr. Mitchell*, as having any bearing on the case, frankly declared, that he did not, and had not noticed it in his argument. If upon the foregoing evidence offered by the plaintiff under the circumstances before stated; and upon the directions given by the pre-

siding Judge and the verdict of the jury thereon, the full Court should be of opinion, that the action is maintainable, the verdict is to stand; but if any of the evidence admitted ought to have been rejected, unless excluded by what is before stated; or if the directions of the presiding Judge to the jury be erroneous, the verdict is to be set aside and a new trial granted."

The foregoing extracts contain all the instructions, which appear in the report to have been given to the jury.

It is intended to give such facts only from the mass of evidence reported, as are pertinent to the *questions of law*, without any reference to the merits of the controversy, as a question of fact for the jury, or for the consideration of the Court in the exercise of their discretionary power to set aside the verdict.

Complaints had been made to the Postmaster General, that letters containing money had been taken from the mail on the lower route between *Lubec* and *Bath*, in the summer of 1834; and in the month of *September* of that year, the assistant Postmaster General appointed the defendant, then postmaster at *Portland*, agent of the Department to make an investigation. In a letter from the department he was specially instructed in the mode of performing the duties of the agency, and detecting such as might be guilty. One of the modes suggested, was that of preparing and putting a package into the mail containing money, ascertaining that it was in the mail before it reached a post office, and then passing by and examining the mail, when out of sight of the office. Having received notice of his appointment, with the instructions, the defendant proceeded to *Lubec*, and on his return westward arrested one of the postmasters between *Lubec* and *Belfast* for robbing the mail, who pleaded guilty to the charge. On the evening of the 27th of *September*, 1834, the defendant was at *Belfast*, and there with the knowledge and assistance of the postmaster at that place made up, and put into the mail, two packages containing money, one directed to a person at *Bath*, and the other to one at *Wiscasset*. From *Belfast* the defendant, with a gentleman of that place as an assistant, proceeded westward, opened the mail before reaching *Camden*, proceeded past the office, and at a place in the vicinity, called *Goose River*, again opened the mail, returned back to *Camden*, and made

complaint to a justice of the peace, that the plaintiff had taken the *Bath* package from the mail. A warrant was issued, and the plaintiff, then acting as postmaster at *Camden*, as the deputy of *Col. Hall*, postmaster at that place, was arrested and carried before two magistrates. After an examination the plaintiff was bound over by the magistrates to appear at the Circuit Court of the *United States* to be holden at *Wiscasset*, on the first day of *October* following, and in default of obtaining sureties, was committed to prison at *Wiscasset*. The grand jury did not find a bill of indictment against him, and he was discharged, and then brought this suit. On the trial it was proved, that the *Bath* decoy package, as it was denominated, was received by the mail at *Bath* on that day, and delivered to the person to whom it was addressed. It was also proved, that the defendant and his assistant with the stage driver, made on examination of the mail-bag at *Goose River*, west of *Camden* post office, and did not find the *Bath* package. The defendant offered evidence for the purpose of showing, that the *Bath* decoy package, which was alleged in the complaint to have been taken from the mail at *Camden* by the plaintiff, was not in the mail-bag when it was examined at *Goose River*, and that it was sent from *Camden* after the departure of the mail from that office by a different route, and again put into the mail either at the post office at *Damariscotta*, where packages mailed at a neighboring office, where there was no regular conveyance of the mail, were forwarded without being again mailed, before the mail arrived at *Bath*, or was put into the mail before it reached the *Bath* office at some place where the stage conveying it stopped, through an opening in the mail-bag occasioned by the loss of one of the staples through which the chain passed. There was evidence offered on the part of the plaintiff for the purpose of shewing, that the decoy package could not thus have been put into the *Damariscotta* office or into the mail-bag. The fact, that the decoy package arrived at *Bath* by course of mail was communicated to the defendant at *Wiscasset*, and he afterwards continued his endeavours to have a bill found by the grand jury against the plaintiff.

From the report it appeared that there was before the jury, as evidence offered by the plaintiff, testimony that the defendant

opened a letter taken from the mail at a post office on the route from *Belfast* to *Camden*, addressed to a person, who did not reside at the latter place; also the record or account of mails received at and sent from the *Camden* post office on the day of the arrest, in the handwriting of the plaintiff; also the statement in a deposition, that the deponent had heard, that the defendant had arrested *Col. Hall* for robbing the mail, given by the deponent in answer to a question thus stated in the deposition, "did your hear on Monday, that *Col. Hall* of *Camden* had been arrested by *Mr. Mitchell* for robbing the mail, (objected to by defendant's counsel)." Also testimony, that the personal property of the plaintiff had been attached at the time of the arrest, and afterwards sold by consent of parties on the writs at a loss upon the costs thereof, but the suits were in favor of persons friendly to the plaintiff, one of whom was his mother. And also testimony by the magistrates, before whom the examination of *Merriam* was had, that if the dropping of a package by the defendant, when he opened the mail before it arrived at *Camden*, and which fact had become known to the defendant during the examination, had been communicated to them, that it might have prevented their committing *Merriam* to prison. It did not appear from the report, that the objection made in the deposition to the testimony, as to the arrest of *Col. Hall*, was renewed at the trial. The counsel of the defendant objected to the admission of the other evidence.

The case was very fully argued by *Preble* for the defendant, and by *Sprague* and *G. M. Chase*, for the plaintiff.

Preble, for the defendant.

After giving a history of the case, he remarked, that the plaintiff, to make out his case, must among other things prove: first, that the prosecution was commenced by the defendant against the plaintiff without probable cause therefor: and second, that it was done, not from a sense of duty, but from malice on the part of the prosecutor. As actions of this character tend to discourage enforcing the laws, and bringing offenders to justice, they are not to be favoured. *Buller's N. P.* 14. Both these points are clearly to be made out, and if either fail, the action fails with it. 2 *Dane's Ab.* 723. In the *English* practice,

where copies of a case tried can only be had by permission of the Court, the Courts never suffer copies to be taken, that a suit may be instituted, unless in their opinion, there was no probable cause. 3 *Bl. Com.* 126. Within this principle are many cases, such as where a father complained on information from a young daughter, where it was held, that there was probable cause to make the complaint from that information; and the magistrate having bound over the accused, it was also held, that it was the duty of the prosecutor to appear before the grand jury, and it was adjudged that there was probable cause, although it turned out, that the accused was innocent. *Cox* v. *Wirrall, Cro. Ja.* 194. In *Virginia* it has been held, that a commitment by a magistrate is sufficient evidence of probable cause. *Maddox* v. *Jackson*, 4 *Munf.* 462. He did not propose to trouble the Court with a citation of a long list of authorities on this subject. The general rule is laid down by this Court in *Ulmer* v. *Leland*, 1 *Greenl.* 135. The essential foundation of an action of the case for malicious prosecution, is, that the plaintiff has been prosecuted without probable cause. Probable cause, in general, may be understood to be such conduct on the part of the accused, as may induce the Court to infer, that the prosecution was undertaken from public motives. In this case the Court cite with approbation the case, *Smith* v. *McDonald*, 3 *Esp. N. P. Rep.* 7, that where the evidence is such, as should induce a jury to pause, that there is probable cause. But want of probable cause is not enough. The action should not be maintained without rank malice and iniquity, the language of *Ch. J. Holt*, as stated in *Buller's N. P.* 14. Even if express malice be proved, want of probable cause cannot be implied from it; nor can express malice be inferred from want of probable cause. They are distinct, and each must be proved. The principle stated in *Willans* v. *Taylor*, 6 *Bing.* 183, is the true one, that express malice and want of probable cause must both be shown, and must be such, as to satisfy every reasonable man, that the prosecutor had no desire to proceed for any purpose, but merely to injure the accused. True it is, that it has been held, that where the prosecutor knew, that there was no ground for the complaint, that it is evidence of express malice. This is because under such circumstances, the

prosecutor cannot proceed but from bad motives. The belief of the prosecutor is important, and it has been held, that where the complainant testified to the guilt of the accused, and other evidence shew, that he was mistaken, that this was evidence of probable cause. His own belief, that he was prosecuting the guilty, is conclusive evidence, that there could not be malice. This is the principle upon which the cases may be reconciled. Where a man prosecutes, with the knowledge, that there is no cause for it, it must be done from bad motives; and where he really believes that he is doing nothing, but what duty demands of him, this forbids the supposition, that such motives can exist. *Burlingame* v. *Burlingame*, 8 *Cowen*, 141; *Jackson* v. *Burleigh*, 3 *Esp. R.* 311; *Snow* v. *Allen*, 1 *Starkie's N. P. Rep.* 502; 12 *Petersdorf's Ab.* 288; and notes; 9 *East*, 361; 5 *Taunt.* 580. Want of probable cause cannot be implied from express malice. *Cox* v. *Wirrall*, *Cro. Ja.* 194; *Bull. N. P.* 14; 2 *Phil. Ev.* 112. In an action like this, there are but three grounds, on which damages can be recovered. 1. Imprisonment of the person. 2. Damages sustained by the scandal to his character and reputation. 3. To his property in making his defence. These are all the subjects of damages recognized by law. *Bull. N. P.* 14; 2 *Stark. on Ev.* 917; 12 *Petersdorf's Ab. Art. Damage*, and notes.

The first class of objections is to the admission of testimony.

The second, is to the charge of the Judge.

And the third to the conduct of the jury in finding the verdict.

Under the first class of objections are:

1. The admission of the evidence of the proceedings at the *Lincolnville* post office, with respect to opening a letter. This was objected to, as a transaction between other persons, and which had no relevancy to this case. It was admitted, and was seized upon, as evidence that the defendant was wholly regardless of the rights of others, and it had an influence upon the minds of the jury.

2. The admission of the statement of letters received and letters sent away on that day, in *Merriam's* handwriting, against our protestations, is alone a sufficient cause for setting the verdict aside. This is creating testimony in his own favor, after the ar-

rest was made, by his own act. The paper has none of the qualities of a record, and is not more legal or proper evidence, than to have admitted *Merriam* upon the stand to testify in his own case.

3. The admission of the false story, that the defendant had arrested *Col. Hall* for robbing the mail, is so glaringly wrong, that comment is unnecessary. It had a direct tendency to injure the defendant, when the integrity of his motives was in question, as well as to increase the damages by inflaming the minds of the jury. It is difficult to imagine a case, where the admission of hearsay testimony would be more improper.

4. The admission of the testimony in relation to the attachment and sale of the property of the plaintiff was altogether wrong. It was not connected with the transaction, and was no lawful subject of damages, as the authorities before cited on this subject prove. In this case, it was got up for the occasion by his friends.

5. The testimony of the magistrates, who committed *Merriam*, of the effect the dropping of the package at *Lincolnville*, would have had on their minds was improperly admitted. As it was not the decoy package, it ought not to have influenced any mind. But if it had been proper to admit testimony to show that a package had been dropped, it was for the jury, under the instruction of the Court, to determine whether that circumstance ought to have had any effect, and not for the Justices to give their opinion on the subject.

The charge of the Judge is highly objectionable. He ruled at once, that there was not probable cause, thus determining what was the effect of the very voluminous, and in some degree contradictory evidence, and taking from the jury their province of deciding the facts, and drawing inferences from them. It was deciding the whole case, but the single question of damages, instead of stating the law to the jury and leaving them to an unbiassed decision. This decision is taking to the Court the determination of the question, whether the defendant acted from good motives and from a sense of duty, or from malice and revenge. After making this decision he put a string of questions to the jury for them to answer, but the answers were made with the prejudice

upon their minds, which a decision by the Court, that the defendant was guilty of the charge, was calculated to produce. But the jury did not answer but a portion of them. If it were proper to put them, they should have been answered. If this practice is to be tolerated, juries may as well be dispensed with.

This course deprives us of the power of knowing upon what legal principles the decision of the Judge was founded, and thus deprives us of the power of excepting to any ruling made in relation to the law. We are therefore driven to show, if the course taken was legal, that on no possible construction, which can be given to the evidence, can the action be supported.

There is no dispute here, but that the magistrates after a full hearing bound the defendant over to appear at the Circuit Court. This in itself is evidence of probable cause. There can be no difference, between the conviction of the magistrate, where he has jurisdiction, and the binding over, where he has not. The one has been decided to be evidence of probable cause in *Massachusetts*, and the other in *Virginia*. *Whitney* v. *Peckham*, 15 *Mass. R.* 243; *Maddox* v. *Jackson*, 4 *Munf.* 462; 2 *Stark. Ev.* 913, and notes. The instructions of the Judge were tantamount to directing the jury to find a verdict for the plaintiff. He undertook to instruct them, that there was no probable cause, he inferred, that there was malice, and the jury considered, that they were bound by it. He told them to find, as to certain facts, but still that the case was to be given to the plaintiff. Such course in the Judge was illegal, and the verdict should therefore be set aside. Under the objections to the finding of the jury, he argued, that they must have been influenced, by some improper causes in the finding, as they did; that some of the answers were given, not only without evidence, but against the evidence; that others were given without evidence; that they refused to give answers, where they would favour the defendant; and he drew the conclusion, that for these causes the verdict should be set aside.

Chase, for the plaintiff.

It is enough to sustain the verdict, if the defendant from any cause has attempted to procure the conviction of the plaintiff without reference to the question, whether he was guilty or not guilty; whether such conduct was occasioned by suggestions

from others, or from unfounded suspicions of his own. It should always be remembered in this case, that the plaintiff was not guilty, and that the defendant on his own complaint arrested and imprisoned an innocent man.

Where there are questions of fact to be settled by the jury, and much testimony on each side, and not easily to be reconciled, the finding of the jury will not be disturbed. *Hammond* v. *Wadhams*, 5 *Mass. R.* 353; *Hall* v. *Huse*, 10 *Mass. R.* 41; *Smith* v. *Brampston*, 2 *Salk.* 644; *Winchel* v. *Latham*, 6 *Cowen*, 682; *Douglass* v. *Tousey*, 2 *Wend.* 352; *Smith* v. *Hicks*, 5 *Wend.* 48; *Fowler* v. *Ætna F. I. Co.* 7 *Cowen*, 270. In penal actions, in cases of libel, and of malicious prosecution, the Courts will give no second chance of success by setting aside a verdict, unless some positive rule of law be violated. *Jarvis* v. *Hathaway*, 3 *Johns. R.* 180; *Farewell* v. *Chaffey*, 1 *Bur.* 54; *Hurtin* v. *Hopkins*, 9 *Johns. R.* 36; *Paddock* v. *Salisbury*, 2 *Cowen*, 811; *Feeter* v. *Whipple*, 8 *Johns. R.* 369; *Woodward* v. *Paine*, 15 *Johns. R.* 493; *Crafts* v. *Plumb*, 11 *Wend.* 143. A verdict will not be set aside, although against the positive testimony of a witness, where circumstances in the evidence tend to lessen the probability, that such testimony is true. *Waite* v. *McNeil*, 7 *Mass. R.* 261; *Blanchard* v. *Colburn*, 16 *Mass. R.* 345; *Harding* v. *Brooks*, 5 *Pick.* 244. If the verdict be against the weight of evidence in actions of tort, it will not be set aside. *Jackson* v. *Loomis*, 12 *Wend.* 27; *Ayer* v. *Bartlett*, 9 *Pick.* 156; *Feeter* v. *Whipple*, 8 *Johns. R.* 369; *Ex parte Baily*, 2 *Cowen*, 479. If a good cause of action be established by unimpeachable testimony, a verdict will not be set aside because some improper testimony has been admitted. *Stiles* v. *Tilford*, 10 *Wend.* 338; *Baker* v. *Briggs*, 8 *Pick.* 122. The fact, that the plaintiff is innocent is in itself sufficient evidence of want of probable cause. 2 *Stark. Ev.* 916, and notes and cases there cited. Probable cause for the arrest is not to be inferred from slight suspicion. 6 *Petersdorf's Ab.* 131; *ibid.* 88, *Art. A.* The omission of the jury to answer some questions put to them is no cause for setting aside the verdict. *Pejepscot Pro.* v. *Nichols*, 1 *Fairf.* 256. The testimony, as to the injury sustained by the plaintiff by the attachment and sale of his

property, was properly admitted. This is alleged in the writ, as special damage. The jury are the proper judges whether the arrest of the plaintiff was the cause of the loss. No improper motives should be imputed to the jury. *Brewer* v. *Inhabitants of Tyringham*, 12 *Pick.* 547. In a case like this, no new trial should be granted on account of excessive damage. *Coleman* v. *Southwick*, 9 *Johns. R.* 45; *Southwick* v. *Stevens*, 10 *Johns. R.* 443; *Douglas* v. *Tousey*, 2 *Wend.* 352; *Shute* v. *Barrett*, 7 *Pick.* 82; *Thompson* v. *Mussey*, 3 *Greenl.* 305. No new trial should be granted on account of newly discovered evidence merely cumulative. 10 *Wend.* 285; 6 *Greenl.* 479. The condition of the parties is properly to be taken into consideration by the jury in estimating damages. *Tillotson* v. *Cheetham*, 3 *Johns. R.* 55. Merely chalking for damages, without agreeing to be bound by it is no cause for setting aside a verdict. *Dorr* v. *Fenno*, 12 *Pick.* 521; *Winn* v. *Col. Ins. Co. ibid.* 279. He argued, that upon these principles of law, applied to the facts stated in the report, judgment ought to be rendered on the verdict.

Sprague, for the plaintiff, said, that he did not dissent from most of the positions of law laid down by the counsel for the defendant, but differed widely in the application of them. To support the action the plaintiff was bound to show, that the prosecution was without probable cause, and with malice. But malice may be inferred, as a fact, by the jury from want of probable cause. The latter is the great and leading ingredient in actions for malicious prosecution. If the finding of the jury in this particular was right, then all the rest follows. He proposed to consider the case under three general divisions, which seemed to him to embrace the whole of it.

1. That as matter of law on the facts found by the jury, there was not probable cause. The facts are to be found by the jury, and thereupon, probable cause, or the want of it, is for the determination of the Court.

2. That the verdict is not so against evidence, that the Court should set it aside.

3. That there was no material evidence admitted, which ought to have been excluded.

Under the first, he stated this general proposition; that where an innocent man has been arrested and imprisoned, who has given no occasion for suspicion by his own misconduct, he has a remedy against some one; against the prosecutor, if he proceeded on groundless suspicion of his own, or against the slanderer, who gave false information justifying an arrest. The supreme law of the land, the constitution of the *United States*, *art.* 4 of the amendments, protects the citizens from unreasonable seizures of their persons, and forbids the arrest of any one, but upon probable cause. If a man proceed to act in such case on his own carelessness and negligence, he is to suffer, and not the innocent victim of his folly and negligence. The mere belief of the prosecutor, that he is acting honestly is no protection to him. Some people are firm believers in dreams; and would a thrice dreamer that an innocent man had committed a murder, a robbery, or a larceny, be justified for that cause in occasioning his arrest and imprisonment? He dissented entirely from the views of the counsel for the defendant in this part of his law, and believed not only common sense and common justice, but the law of the books, would bear him out in it. 2 *Stark. Ev.* 915; *Roscoe on Ev.* 303. Probable cause must be shewn in defence, if it lies wholly within the complainant's knowledge. 2 *Dane's Ab.* 725. And it must be knowledge and not suspicion.

He said that the jury had found, that the decoy letter had passed in regular course of mail to *Bath*, its place of destination, and was in the mail-bag, when the defendant examined it after it had passed the *Camden* office, and before it had reached any other. The plaintiff was therefore innocent of the crime charged against him. The plaintiff, by his own conduct, had not given the slightest occasion for suspicion. It is the case of the arrest and imprisonment of an innocent and wholly blameless man. The defendant had no information from others justifying his conduct, and must be held accountable for the injury he has inflicted. But the defendant not only arrested an innocent man, but one who had resisted a temptation purposely thrown in his way by the defendant. In the case *Pierce* v. *Pierce*, 3 *Pick.* 299, where the husband had laid a snare to induce his wife to commit adultery, the Court refused to grant a divorce. In this case, if it

be allowable for the defendant to place inducements in the way of others to commit crimes, the law certainly should not permit such conduct to be the occasion of his imprisoning an innocent man with impunity.

It has been said on the other side, that this action is of a description not to be favored, and *Blackstone* has been cited to shew it. The old books do contain some expressions, that actions for malicious prosecution are not to be favored; and that actions for libel and slander should be discouraged. If the loose remarks of old writers ever did correctly express the law of the Courts, the doctrine has long since become obsolete. They are to be treated like all other actions, where the plaintiff must make out his case, or he cannot recover. The cases cited from *Cro. Ja.* and from *Cowen* do not conflict with the positions we assume. The first was where the prosecutor had received false information on which he acted, and if the story told him had been true, the accused was guilty. In such case, if the information was of a description, that a reasonable man, with due care, should believe it, the prosecutor will be excused, and the remedy will be against the slanderer. In the *New-York* case the plaintiff's own misconduct had given occasion for well grounded belief of his guilt. All the cases cited on this point go on the ground of misconduct in the party accused, or wrong information from others. In the case now before the Court, there was not the slightest misconduct on the part of the plaintiff, and the defendant was not mislead by false information from others. No case has been found to show, that under such circumstances the accused is without a remedy.

The fair construction of the charge of the Judge is, that he did not undertake to decide any fact whatever, but that he merely said to the jury, you are to take it for granted, that there is a want of probable cause until the facts are found by you, and for the purpose of enabling the Court to enter the proper judgment, you may answer as many of the questions propounded, as you can. It has already been shown, that when the facts are found, it is for the Court to determine whether there was, or was not, probable cause. There were the same materials for the decision at the trial, that are now spread out in the volume of evidence reported.

Under the second division, the counsel went into an examination of the testimony to show, that the verdict was fully justified by the evidence. He said, that it was a well settled principle of law, that the jury may infer malice from want of probable cause, and cited in addition to the cases already cited on this point, *Sutton* v. *Johnstone*, 1 *T. R.* 493. Malice is not necessarily a grudge against an individual, but a want of due care, and a reckless design to accomplish an object regardless of the rights of others. In some cases malice is but wilfulness. *Dexter* v. *Spear*, 4 *Mason*, 115; *Roscoe on Ev. Phil. Ed.* 302; *United States* v. *Coffin*, 1 *Sumner*, 394.

Under the third division, that there was no material testimony admitted, which should have been excluded, he said:

1. That if any objection was made to the admission of the testimony in relation to the opening of the letter at *Lincolnville*, the objections were entirely waived. The testimony in relation to the dropping of the package was proper and admissible. One portant question on the trial was, whether *Mitchell* had acted with care or with carelessness. Another was, whether he did or did not overlook the *Bath* decoy package at *Goose River*. On both these subjects, whether the defendant was so careless, as to drop a package without knowing it, was very important; and the relation of his whole conduct on this business was proper.

2. The record kept in obedience to the law at the *Camden* post office, of which another man was postmaster, was proper evidence, and it is wholly immaterial, whether it was in the handwriting of *Merriam* or any other man. It is equally a record in either case. The effect of the evidence when admitted might be greater in the one case, than the other; but its competency would remain the same.

3. It does not appear on the report of the Judge, that any objection was made to the very unimportant testimony in relation to a story of the arrest of *Col. Hall.* If it could have had an influence in any part of the case, it is on that about which the jury did not agree.

4. We cannot assent to the limitation of the subjects of damage made by the counsel for the defendant. The destruction of a man's credit, as a man of property, is a legitimate subject of

damages. 2 *Stark. Ev.* 917. The case in *Burrow*, 1971, *Farmer* v. *Darling*, not only decides, that the loss of credit may be taken into consideration in estimating damages, but that the jury may infer it from other facts proved. 2 *Dane's Ab.* 730, 735. Here the loss of credit, and loss of property in consequence of it, were proved.

5. The act of the magistrates in binding over *Merriam* is relied on by the defendant, as showing probable cause. It becomes therefore both pertinent and important to shew, what occasioned the binding over by the magistrates, and the grounds of their decision. This could come only from them, or at least not so properly from any other source. The testimony went to show, that the concealment of a material fact by the defendant occasioned the act of the magistrates in the binding over of the defendant. The want of ordinary care in the examination of the mail, just before the arrest, would have an important bearing on the question of care in examining the mail so soon afterwards.

The decision of the Court upon the case was communicated at the *July Term*, in this county, 1837.

By the Court. The testimony of *Albert Reed* and of *Francis Crooker*, in regard to the letter directed to a lady, and opened by the defendant at *Lincolnville*, if not admissible as a part of what was said and done by him on the tour, which led to the prosecution of the plaintiff, was at most irrelevant and immaterial, and in our judgment affords no sufficient ground for disturbing the verdict. It does not appear, that the attention of the Judge was called at the trial to any objection made to a part of *O'Brien's* deposition; and he was not desired to rule upon its admissibility. The idle rumor heard by *O'Brien* of the arrest of *Col. Hall*, was known at the trial to have been false. It was altogether immaterial, and could not have operated to the prejudice of the defendant. That he entertained suspicions of some postmaster west of *Belfast*, is abundantly proved, and is not controverted.

The records of the *Camden* post-office were kept in pursuance of law. They were public records, made by a sworn officer of the government; and were in our opinion legally admissible in

evidence, to show the transactions of that office. If fraudulently or corruptly kept, they were liable to be controverted, but were entitled to credence, until impugned or impeached.

The Judge instructed the jury, that there was, in point of law, no probable cause for the prosecution; but he submitted certain questions of fact to their consideration, the determination of which was designed to enable the Court, to decide upon the correctness of this instruction. From their finding it appears, that the plaintiff was entirely innocent of the charge, preferred against him. And it does not appear from any evidence in the case, that any ground of suspicion could justly or fairly arise from any part of his conduct. It further appears from the finding of the jury, that the package, supposed to be missing, was in the mail-bag, when searched by the defendant; and it was in proof, that it reached its destination at *Bath*, in due course of mail.

The cause of the prosecution, then, was the fact that the package was overlooked by the defendant. That there must have been some carelessness or defect in the search, is sufficiently apparent. The assurance of the defendant, however strong it may have been, was based upon his own error, mistake or negligence; for such it undoubtedly was; although participated in by others, who assisted in the search. The proceedings before the justice, and subsequently before the grand jury, have no other foundation. We cannot but regard it as too much to hold this to have been probable cause, to justify a prosecution against an innocent and unoffending man, who had given no color for suspicion against him.

Reparation is demanded in such a case, by the plainest dictates of common justice. If a man had prosecuted and imprisoned a faithful servant, on the false charge of purloining an article of value, which had remained locked up in his desk, merely because he had carelessly overlooked it, he could not and ought not to rest satisfied with himself, until he had made restitution. He could not reasonably expect, that the claim of the injured party for damages in a court of justice, could be defeated by the strength of his assurance. If such a doctrine were established by law, innocence might indeed escape the punishment due to guilt, if the error were seasonably discovered, but it would be without indemnity

for losses and expenses growing out of the charge, to say nothing of personal suffering and lacerated feelings. The pretence of error and unintentional mistake would become a cloak, to give impunity to malice, and fraud, and falsehood.

The defendant was manifestly excited in the attempt to bring the business, which had been confided to him, to a successful termination. He knew that one package had been lost at *Lincolnville*. It should have occurred to him, that the decoy package might have been lost in the same manner. It was a fact, in itself calculated to weaken any just conviction, that it was abstracted by the hand of the plaintiff. Nor did the more decisive fact of the arrival of the letter, impair his assurance; for when apprized of that by *Col. Hall* at *Wiscasset*, he still insisted upon the guilt of the plaintiff.

The jury have expressly found malice. They had a right to do so, from the want of probable cause. To them also was properly submitted all the testimony, bearing upon the plaintiff's claim for damages. It belonged to them to estimate the loss to the plaintiff, arising from the prosecution; and we perceive no sufficient reason to set aside their verdict upon that, or upon any other ground, taken for the defendant.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT, ADJOURNED TERM, IN AUGUST, 1836.

Mem. *Hon. Albion K. Parris*, after the close of the *July Term* in *Waldo*, and before the commencement of the adjourned *August Term* in *Penobscot*, resigned his office of Justice of the Supreme Judicial Court. No successor was appointed until after the termination of the *August Term*.

BENJAMIN BUSSEY *vs.* HORATIO N. PAGE, *Adm'r.*

B. conveyed to C. certain land, and took his notes with a mortgage of the property, and the parties agreed, that the deeds should remain unrecorded until another survey should be made, and at the same time C. stated to B., that he proposed to sell the land to D., and would transfer the notes and mortgage of D., instead of his own, and B. assented to this arrangement. On the next day C. conveyed the land to D., who recorded his deed without notice of the mortgage to B., giving his notes to C. for the purchase money. After the sale to D. the mortgage from C. to B. was recorded. C. afterwards died intestate and insolvent, and B. brought his bill in equity against the administrator of C., claiming to have the notes of D., then remaining unpaid, assigned to him. *It was held*, that B. was not entitled to a preference above the other creditors, and that the bill should be dismissed.

THIS was a bill in equity brought against the defendant, as administrator of the estate of *Samuel C. Bradbury*, deceased, intestate. The bill stated in substance, that the plaintiff was seised of a tract of land in *Bangor*, and on the 18th of *March*, 1833, bargained and conveyed the same to the defendant's intestate for the consideration of $512,00, and took his notes for $421,25, part thereof, and that a mortgage of the same premises was made to secure the payment of the notes.

That while the deeds were being executed, *Bradbury* said he was dissatisfied with the survey, and proposed to the plaintiff to

keep the deeds unrecorded until a new survey should be made, to which the plaintiff agreed, and kept his mortgage from the registry until *April* 29, 1833, when it was recorded by a mistake of the clerk of the plaintiff's agent. That at the same time, *Bradbury* stated to the plaintiff, that he had agreed to sell the land to one *Bryant*, and requested the plaintiff to take *Bryant's* notes for his own, when *Bradbury* should convey to *Bryant*, on *Bryant's* giving a lien on the land, as security ; to which request the plaintiff assented. That on the next day after the conveyance by the plaintiff to *Bradbury*, the land was conveyed to *Bryant* by *Bradbury* at an advance, taking *Bryant's* notes to *Bradbury* which yet remain unpaid, and that *Bryant* recorded his deed on the 23d of the same *March*, the plaintiff having no knowledge of the existence of the deed to *Bryant* until a long time after. That believing that *Bryant* had notice of the mortgage from *Bradbury* to him at the time of the execution of the deed from *Bradbury* to *Bryant*, the plaintiff commenced an action againt *Bryant* for the possession under said mortgage, but on the trial a verdict was found in favor of *Bryant* on the ground, that he had no notice of the plaintiff's mortgage, and that judgment has been rendered on that verdict. That *Bradbury* died in *January*, 1834; that the defendant was soon after appointed administrator of his estate, that the estate is deeply insolvent, and that a commission of insolvency has been duly issued upon it. That the plaintiff requested the defendant to assign to him so much of the notes given by *Bryant* to *Bradbury*, as would amount to the purchase money of the same land still due to the plaintiff from *Bradbury*, or to pay over the money to that amount received from *Bryant*, but that he refused, saying that the sums received from *Bryant* should be applied *pro rata* in the payment of the intestate's debts. And the plaintiff charged, that there was fraud in *Bradbury's* conveying the land under the circumstances; that *Bradbury* in his lifetime, and the defendant, as his administrator, held the notes of *Bryant*, given for the same land, in trust for the plaintiff; and prayed for an assignment of so much of *Bryant's* notes, as would pay the amount now due to the plaintiff for the same land.

To this bill the defendant demurred.

F. H. Allen, in support of the demurrer, contended:

That the bill shews a case of novel impression; an attempt to obtain in equity in favor of one creditor his debt in exclusion of the others, and from their loss.

1. The promise set forth in the bill is merely a parol one, not to put the deed on record until the survey should be made. The deed was actually delivered, and the notes and mortgage given back, and could not be an escrow. The agreement alleged is void by the statute of frauds both at law and in equity. 9 *Coke*, 137, *Thoroughgood's case; Souverbye* v. *Arden*, 1 *Johns. Ch. R.* 240; 1 *Paige*, 385; *Ward* v. *Lewis*, 4 *Pick.* 518; *Sherburne* v. *Fuller*, 5 *Mass. R.* 133.

2. If there was any fraud practised, all claim from that source is taken away by the death of *Bradbury*. No action for a tort can be supported after the death of him charged with it, unless for some advantage the estate derives in consequence of it. If any right of action existed against the intestate, it cannot be supported against the administrator. *Hambly* v. *Trott*, 1 *Cowper*, 371; *Franklin* v. *Low*, 1 *Johns. R.* 402; *Stebbins* v. *Palmer*, 1 *Pick.* 71; 1 *Saund.* 216, *Wms. Notes; 2 William's Ex'ors*, 1060.

3. The estate was rendered insolvent, and by the statute an equal distribution of all the estate is to be made, with certain exceptions within which this does not fall. The only remedy is by filing the claim before the commissioners.

T. P. Chandler, for the plaintiff.

Bradbury's mortgage conveyed to *Bussey*, as between the parties, the fee in the land; the latter owning the fee, and the former the equity. *Bradbury* conveyed to *Bryant* not only his own interest, but *Bussey's* also. This second sale was a fraud on *Bussey*, the first purchaser. 1 *Story's Eq. sec.* 395, 397; *Ferris* v. *Henderson*, 1 *Edwards Ch. R.* 132; *Dickerson* v. *Tillinghast*, 4 *Paige*, 220. And equity to promote justice will convert *Bradbury* into a trustee for the benefit of the injured party. *Brown* v. *Lynch*, 1 *Paige*, 147; *Haggerty* v. *Palmer*, 6 *Johns. Ch. R.* 437; *Schmidt* v. *Dietericht*, 1 *Edw. Ch. R.* 119; *Livingston* v. *Deane*, 2 *Johns. Ch. R.* 479; 1 *Story's Eq. sec.* 395. On the ground that the proceeds of the sale be-

long to *Bussey*, equity would relieve him on a bill against *Bryant*, he not having paid the purchase money. *Jewett* v. *Palmer*, 7 *Johns. Ch. R.* 65; *Wood* v. *Mann*, 1 *Sumner*, 506.

Bradbury's insolvency did not destroy the trust. The administrator holds the notes subject to our equitable lien. *Lyman* v. *Estes*, 1 *Greenl.* 182; *Moses* v. *Murgatroyd*, 1 *Johns. Ch. R.* 119; *Dexter* v. *Stewart*, 7 *Johns. Ch. R.* 52; *Kip* v. *Bank of New-York*, 10 *Johns. R.* 63; *Badger* v. *Phinney*, 15 *Mass. R.* 359; *Lechman* v. *Carlisle*, 3 *P. Wms.* 217; *Kittleby* v. *Atwood*, 1 *Vernon*, 298; *Adair* v. *Shaw*, 1 *Sch. & Lef.* 262; *Brown* v. *Heathcoate*, 1 *Atkins*, 162; *Taylor* v. *Wheeler*, 2 *Vernon*, 564; *Hinton* v. *Hinton*, 2 *Ves.* 633; *Winch* v. *Keeley*, 1 *T. R.* 619; *Carpenter* v. *Marnell*, 3 *Bos. & P.* 40. By our insolvent law the deceased's *estate* only passes to the creditors, and not the property of others entrusted to him; whereas by the bankrupt act of *England* the assignees take not only all the bankrupt's estate, but all the property he has in possession, and of which he is the apparent owner, whether he actually owns it or not; and yet trust property does not pass. *Stat.* 21 *Jac.* 1. *ch.* 19, *sec.* 10, 11; 1 *P. Wms.* 315.

If land mortgaged be sold under a prior incumbrance, the lien of the mortgagee attaches on the surplus proceeds. *Bartlett* v. *Gale*, 4 *Paige*, 504.

After a continuance, *nisi*, the opinion of the Court was drawn up by

Weston C. J.—The claim of the plaintiff to the relief sought by the bill, depends upon the question, whether the defendant's intestate held the notes of *Bryant* specifically in trust for the plaintiff, and whether the same trust attaches to the notes in the hands of the defendant. For if the plaintiff has no ground of preference over other creditors, arising from such trust, if it exists, his only remedy is by filing his claims before the commissioners, appointed to receive and examine such demands, as might be presented against the estate of the intestate.

It is insisted, that the trust results from a fraud, practised by the intestate upon the plaintiff. Without deciding, how far such a charge can be open to inquiry since his decease, which is at

least questionable, we are not satisfied that it results from the facts set forth in the bill, taking them to be true. The plaintiff sold and conveyed the land, from which this suit has arisen, taking as security for the greater part of the purchase money, the notes of the intestate, with a mortgage on the land. The deeds were delivered, and took effect; as is conceded by the counsel for the plaintiff.

The intestate was dissatisfied with the survey, and proposed a new one, and that the deeds should in the mean time remain unrecorded, to which the plaintiff acceded. It is not charged, that this proposition was made by the intestate in bad faith, as a pretence, upon which to keep the mortgage from being recorded, that he might thereby pass a title to *Bryant*, clear of that incumbrance. For any thing which appears, the intestate was in truth desirous of a new survey; and hoped to derive an advantage from it. It is not charged that he recorded his deed, in violation of his own proposition. If any correction proved to be necessary upon a re-survey, he might intend that new deeds should be substituted, for those already made. And if he conveyed in the mean time, any deed he might receive would enure to the use of his grantee, by way of estoppel.

It appears by the bill, that he did at the time apprize the plaintiff, that he had agreed to sell the land to *Bryant*, and he desired to know, and was informed, that *Bryant's* notes, secured by a mortgage from him, would be acceptable to the plaintiff, instead of his own. It is not charged, that the sale to *Bryant* was agreed to be suspended, or that it was not to be done, without the approbation and consent of the plaintiff, or that he requested or enjoined it upon the defendant, and not to convey without his knowledge.

The contemplated exchange of securities, rested altogether in proposition. It is not charged, that the intestate agreed, that it should be done. *Bryant* was to be consulted; and his consent was necessary to the arrangement. The plaintiff was very confiding. He must have been aware that he hazarded his security, by delaying the registry of his mortgage deed. He avers, that the intestate conveyed without his knowledge or consent. He might not have had a knowledge of the fact, at the time of the

conveyance; but he certainly knew that the intestate had agreed to make it. It does not appear, that the intestate had anything to gain, by defeating the plaintiff's mortgage. He might reasonably expect in that event, to be more severely pressed for payment.

The plaintiff sets forth no request or demand upon the intestate, to exchange the securities. For anything which appears, the intestate may have been at all times ready to make the exchange. *Bryant* could have had no objection to it. To him, it must have been desirable; for in that case, when paid, the plaintiff's incumbrance would be extinguished. If not done, he was exposed to that claim, which he escaped only, after the trouble, expense and hazard of a lawsuit. If the exchange had been made, *Bryant* would probably have had no objection to the giving of a mortgage, as collateral security. It does not appear, that he gave any to the intestate, and it may have been omitted, with a view to the contemplated arrangement. There might have been an understanding between *Bryant* and the intestate, that this should be carried into effect. The plaintiff avers, that he believed the intestate apprized *Bryant* of the existence of the mortgage. But he was unable to prove it; and *Bryant* escaped the incumbrance.

We have taken this view of the case to show, that the bill may be true, without necessarily imputing fraud to the intestate. He deceased in less than a year after these transactions, probably before any of the notes had become due. The plaintiff had confidence in him. We know not that it was not well warranted, from his character. The facts stated in the bill do not afford sufficient evidence, that it was his intention to circumvent the plaintiff. Had he lived, every thing might have been arranged to the satisfaction of all concerned. Mere delay on the part of the intestate, the plaintiff making no movement to hasten him, we cannot regard as evidence, that fraud was meditated.

Upon the whole, it may be deduced from the bill, that the intestate bought land of the plaintiff, having previously agreed to sell it again to *Bryant*, at an advance. That it was his intention, as it was his interest, to exchange the securities with the plaintiff, who consented to receive *Bryant's*, for those of the intestate.

That although this was not positively agreed, the plaintiff had reason, from the proposition of the intestate, to believe that it would be done. That the business was neglected, until the intestate died, when his estate proving insolvent, the arrangement was defeated.

It is not pretended, that the intestate received or held *Bryant's* notes, under any express trust, in favor of the plaintiff. As far as the trust is based upon the charge of fraud, if that ground was now open, we are not satisfied, that it is sustained by the bill. We perceive nothing in the transaction, which can give the claim of the plaintiff a preference over other creditors. It is the policy of the law, in relation to the estates of persons, who have died insolvent, that they should be distributed *pro rata* among the creditors, with certain specific exceptions. And this policy is carried so far, that attachments are dissolved in suits, pending at the decease of the insolvent. Whether trusts, in reference to personal property, express or resulting, are or are not to be excepted from the general operation of the law, we have no occasion to decide in the case before us.

The bill is dismissed, but without costs.

TIMOTHY H. CHAMBERLAIN & al. vs. The Inhabitants of DOVER.

Where a town clerk has made a defective or erroneous record of a vote, it is competent for him, while in office, to amend it according to the truth.

When a town clerk has made on erroneous record of a vote, the inhabitants of the town are not bound by it, because others have confided in its correctness; but are entitled to have it set right.

There cannot be a legal town meeting, unless it be originally held at the time and in the place appointed in the warrant for calling the meeting.

When a meeting is once fairly organized at the time and place appointed in the warrant, it possesses the incidental power of adjourning to a future time.

Where a meeting is called at a school house, it must be understood to mean within its walls.

Where the record of a town meeting states, that "the inhabitants met in the highway, and read the warrant in the open air, and adjourned the meeting" to a different place; parol evidence is admissible, at the instance of the inhabitants, to prove the time when and the place where the transactions took place, how many persons were present, and that others came afterwards to attend the meeting, and finding no appearance of such meeting, went home.

Where a town meeting was called at a school house at one o'clock, P. M., and the town clerk and four or five others went into the street opposite to the school house, and at half past one read the warrant in the open air, and immediately voted to adjourn, before the choice of a moderator, and without leaving any notice at the school house, to a store at the distance of a mile and on the border of the town, at which place not more than fourteen of two hundred and sixty voters attended, and when other inhabitants went to the school house to attend the meeting, and finding no indications of one, went home; *it was held*, that the acts of the meeting at the store, although placed by the town clerk on the town book of records, were not binding upon the town.

THIS was an action of *assumpsit* on a contract dated *January* 24, 1834, made with the plaintiffs, by *A. S. Patten* and *E. R. Favor*, assuming to be authorized by the defendants to contract to build a bridge at the great falls in *Dover*, and was tried before *Weston C. J.*

To prove the authority of *Patten* and *Favor* to make the contract in behalf of the defendants, the plaintiffs called *Flavel Bartlett*, the town clerk of *Dover* for the years 1834 and 1835, who produced the records of the town, and testified, that the entry in the margin of the record of the proceedings of the meet-

ing of *Jan.* 15, 1834, was not made by him at the time he made the other parts of the record; and he also stated on cross-examination, objection being made thereto by the counsel for the plaintiffs, that the marginal entry was in fact true.

The meeting was called at the school house in district No. 2, where the town meetings had usually been called for several years previously, on the 15th day of *Jan.* 1834, at one of the clock, P. M.

The second article in the warrant was, "To see if the town will rebuild the bridge at the great falls in *Dover*." The record of the proceedings of this meeting commenced thus:

"The inhabitants of *Dover* met agreeably to warrant and opened the meeting by reading the warrant and adjourned the meeting to *A. S. Patten's* store. Met according to adjournment and proceeded to business in the following manner, viz:

Art. 1st. Voted, and chose *Benj. Spaulding*, moderator to govern the meeting.

2d. Voted to re-build the bridge at the great falls."

In the margin of the book of the records and opposite the extract here given, the town clerk had made the following entry:

"*Dover, Jan.* 15, 1834. The inhabitants of *Dover* met in the highway near the school house, in district No. 2, and read the warrant in the open air, and adjourned the meeting to *A. S. Patten's* store."

The manner of building the bridge was prescribed in another vote, and *E. R. Favor, Flavel Bartlett* and *A. S. Patten* were chosen "contracting and building committee." *Bartlett* did not act as one of the committee.

The defendants read from the same records the proceedings of a legal meeting of the inhabitants of *Dover*, holden on the 8th day of *February*, 1834, the following votes; sufficient authority to act on the subject having been given in the warrant calling that meeting:

"2d. Voted, to reconsider certain votes taken and recorded on the 15th day of *Jan.* 1834.

"Voted, to repair the bridge at the great falls, in *Dover*, so that it shall be a good and sufficient bridge.

" Voted, That the selectmen and town agent be instructed to forbid any person or persons from interfering with or disturbing the old bridge, under any vote or supposed vote of said town, prior to *Jan.* 30, 1834.

The defendants then offered to introduce parol evidence to shew, what had been done at the school house of district No. 2, at the time the meeting in *January* was appointed to be held there, and what had been done afterwards on that day at *Patten's* store, which testimony was admitted by the Chief Justice, although objected to by the counsel for the plaintiffs. The testimony reported on this subject is not entirely consistent; but it appeared, that on the day appointed for the *January* meeting, the town clerk and four or five other persons met near the school house door at about half past one, P. M.; that there was a lock on the door and a snowdrift before it; that the weather was cold and no fire there, and that they did not enter the school house; that after about five minutes the town clerk read the warrant in the open air, and *Patten*, or *Favor*, moved to adjourn to *Patten's* store, which motion was put and carried without dissent; that *Patten's* store was more then a mile from the school house and within fifty or sixty rods of the line of the town of *Foxcroft*, but in a village where considerable business was done; that a motion was made at *Patten's* store to adjourn the meeting, which was not carried; and that at *Patten's* store five voted in favor of what was done there, and four against it, and that there were three or four present, who did not vote. It also appeared, that there were in town from 260 to 300 voters, and that the vote of *February* 8th, to reconsider what was done at the meeting in *January*, was passed by over one hundred majority. But one instance of an adjournment of a meeting to a different place was shewn, and that to a place but a few rods distant from the place, where the meeting was called. Several persons went to the school house, where the *January* meeting was called, soon after the appointed time, and seeing no appearance of a meeting, and no notice on the door, that the meeting was adjourned to another place, went home. Some of them would have gone to *Patten's* store, had they known of the meeting there. The plaintiffs, who were not inhabitants of *Dover*, made preparations for building the bridge,

procured some materials, and were at some expense, but desisted from further operations, after being notified of the proceedings of the inhabitants of *Dover* at the meeting on the 8th of *February*.

The counsel of the defendants insisted, that the town was not bound by what was done at *Patten's* store, but consented that the verdict should be taken for the plaintiffs; it being agreed by the parties, that if in the opinion of the Court upon the evidence, so far as it is competent and admissible, the action is not supported, that the verdict should be set aside, and the plaintiffs become nonsuit.

J. Appleton, for the defendants, said, that on this report, they were entitled to a new trial, if any legal grounds for it appeared in the case. In his argument he took these positions.

1. The clerk had legal authority to amend his record according to the truth. *Welles* v. *Battelle*, 11 *Mass. R.* 481; *Thacher* v. *Miller*, *ibid.* 413; *Avery* v. *Butters*, 9 *Greenl.* 16.

2. The meeting at which the committee are said to have been chosen was illegal and void. It was not held at the time or place ordered by the selectmen, as required by the *stat. ch.* 114, *sec.* 5. The meeting was called at the school house in district No. 2, and was held at *Patten's* store, and called at one P. M., and before the expiration of the hour adjourned to another place. *Angell & Ames on Corp.* 279; *Rex* v. *May*, 5 *Burrow*, 2682.

The meeting was void, because it appears by the record, that the meeting was adjourned before a moderator was chosen. The meeting is not organized until a moderator is chosen, and the town clerk has no right to preside, or put or declare any vote, but such as relate to the choice of a moderator. *Stat. ch.* 114, § 3. If one act may be done before the choice of a moderator any other may. The statute is imperative, that the moderator shall first be chosen. An adjournment presupposes a meeting, and there can be no organized, or legal meeting until the choice of a moderator has taken place.

The meeting at *Patten's* store was void, because no time was fixed for the alleged adjourned meeting there.

Thus far the question has been considered on what appears on the face of the record; and in the view of the defendants, the record alone shews, that there could be no act done at *Patten's* which can bind the town.

3. The parol testimony was rightly admitted. It does not contradict the record, nor is inconsistent with it, and may be admitted to shew the actual proceedings. The testimony is also admissible to shew fraud in the transactions. Fraud may be practised upon a town, as well as upon individuals, and parol evidence is competent to prove fraud to avoid a record. *Angell and Ames on Corp.* 289, 290, and cases there cited.

The counsel then examined the evidence, and urged, that on the facts there was no meeting having the semblance of a legal one, and that gross fraud had been practised upon the town by the persons calling themselves a committee, and which absolved the town from all legal and honorary obligations to perform any contract thus made. The remedy of the plaintiffs is on the persons, who employed them, and not on the town.

Rogers and W. P. Fessenden, for the plaintiffs, in their arguments, contended, that the plaintiffs were not bound to look beyond the record, as it stood when the contract was made, to ascertain that the persons contracting with them had authority from the town. Unless reliance can be placed upon the record, it would be wholly unsafe ever to make a contract with a corporation. It is not competent for the town to alter a record of their own to avoid a contract made with the plaintiffs in pursuance of it. That no alteration or amendment of a record can be made after the rights of third persons have intervened to affect them, is a principle of law too well settled to require the citation of authorities for its support. By that record, as it then stood, the committee, were chosen at a legal meeting and had full power to make the contract. The plaintiffs were not bound to go behind the record. *Thayer* v. *Stearns*, 1 *Pick.* 109: *Moor* v. *Newfield*, 4 *Greenl.* 444. The record, as it then stood, shew, that the inhabitants met at the time and place appointed for holding the meeting and adjourned to another place. But it is said, that there was no legal adjournment, because it appears that the moderator of the meeting was chosen afterwards. The statute is merely directory, and there must necessarily be an organization of the meeting before the moderator can be chosen. One provision of the same statute is, that the meeting shall first be opened. Now the argument for the defendants would preclude any ad-

journment whatever until the moderator was chosen, even if the town was unable to make choice of one. The adjournment was a mere preliminary proceeding, and might well take place at any time, when convenient, and must sometimes take place before the choice of moderator. Nor is there any insuperable objection to acting without any moderator, if the town waive the choice, as the clerk records the votes. The case *Dodds* v. *Henry*, 9 *Mass. R.* 262, decides, that the town clerk properly acts, as moderator, until one is chosen. It is said, the inhabitants of the town have no power to adjourn a meeting to a place different from that at which it was called by the selectmen. If this be true, then however inconvenient the place may be; although as in this case the door may be locked and the proprietors of the building will not suffer the people of the town to enter, although there is no fire, and no means of writing a vote or recording it are found, and although it might be, that the building was burned down; still no adjournment to a suitable place can be had. There is nothing in the statute restricting the town from adjourning to a different place, any more than to another time. If the right exists, the rest is a mere exercise of discretionary power at the will of the majority. It can make no difference by what majority a vote passes. The vote is equally binding on the town whether the majority be one or one hundred. The committee may be authorised to contract by a subsequent ratification, as well as by a prior authority. The votes at the meeting on *February* 8th, affirm the former votes. They undertake to rescind as well as to affirm them, but they have power to affirm and ratify, but not to rescind, when the rights of third persons have intervened. *Prop. Canal Bridge* v. *Gordon*, 1 *Pick.* 304; *Hayden* v. *Madison*, 7 *Greenl.* 76; *Abbott* v. *Hermon*, *ibid.* 118.

The counsel also contended, that neither in the case, nor on the facts, was there any ground for imputing fraud to any one; but this, if made out as to inhabitants of the town, could not alter the rights of the plaintiffs, who were neither parties to it, nor conusant of it.

After a continuance, *nisi*, the opinion of the Court was drawn up by

WESTON C. J. — It was the duty of the town clerk to record the doings and proceedings of the town. And if through inadvertency or misapprehension, the record has been defectively made, it is competent for him while in office to complete it, by amending it according to the truth. He acts at his peril, and will be liable, if he falsifies or mistakes what it is his duty to record. *Welles et als.* v. *Battelle et als.* 11 *Mass. R.* 477, is a case exactly in point. The town clerk testified, that the record is true as amended which, at least until impeached, must have been presumed without his testimony.

The principal question presented to our consideration is, whether the town are bound and concluded, by the proceedings of the meeting, held on the fifteenth of *January*, 1834. In all measures, in regard to which towns are authorised to act, at all legal meetings the doings of the majority present bind, not only the minority, but all who are absent. But the exercise of this power is subject to certain regulations, intended to afford full and fair opportunity to every citizen to be present, and to take part in any business, by which the interest of the town may be affected. Thus public notice is required to be given in a certain, manner, and for a certain number of days, of the time and place of meeting, and of the subjects to be acted upon. When a meeting is fairly organized, it doubtless possesses the incidental power of adjournment to a future time. We do not say that they may not have the right to adjourn to another place. But there should be limitations to the exercise of such discretion. It could not be tolerated that a few persons, by concert or otherwise, should be permitted to attend at the precise time appointed, and forthwith adjourn from a central to an extreme part of the town. In the case before us, the meeting called was never held at the place appointed. It was to be at the school house, which must be understood to mean within its walls. If the adjournment from the usual place of holding town meetings to a distant point on one side of the town, could under any circumstances be proper, about which we give no opinion, it was a measure, which could be taken only at a regular meeting, to the validity of which place, as well as time, is undoubtedly essential. This case is as strong, as any one that could be selected, to illustrate the necessity of

maintaining this principle. The meeting was appointed at one. In half an hour from that time, half a dozen persons, one of whom is the town clerk, appear in the street. The town clerk reads the warrant; and they there vote forthwith to appear at a distant place, to which they immediately repair. Other citizens attend at the place first appointed, with a view to take part in the business, and finding no trace of a meeting, return home. They had no means of knowing, that it was then going on at *Patten's* store. We cannot but regard it in the highest degree dangerous to the rights of towns to hold them concluded by such a course of proceeding. It is most manifest, that the citizens of the town were thus deprived of the privilege of being present at the transaction of important business, affecting their interests. A measure was taken, which a large majority disapproved. This is demonstrated, by the proceedings of a subsequent meeting. Why should the small number at *Patten's* store bind the town? The only reason that could be assigned is, that every citizen had notice, and might have attended there, if he had been so disposed. But this is not true in fact. There is no reason to believe, that one tenth part of the citizens ever heard of the meeting at the store, until it was over.

We are aware of no legal reason, why the town should not be permitted to sustain their objections, by the testimony they introduced. It does not contradict the record. From that it appears that no meeting was held at the place appointed, but that an irregular one was held at a different place; and the testimony objected to shows, what otherwise might have been presumed, that many citizens were thereby deprived of the opportunity of being present, and taking part in their own concerns.

It is contended, that the validity of the proceedings at *Patten's* store, is recognized by the regular meeting in *February*, when the town voted to reconsider certain votes taken and recorded in *January*. But we are of opinion, that no such inference can fairly be drawn from that vote. It was the mode they adopted of expressing their disapprobation of the course previously pursued. To hold that the former doings were thereby ratified, would be to deduce a meaning from their vote, in direct opposition to their intentions. The previous doings did not bind the

town. It should have been one of the articles in the warrant for a regular meeting, to see whether the town would ratify those doings, and an affirmative vote had thereon, before they could be confirmed, so as to be binding on the town. *Stat.* of 1821, *ch.* 114, regulating town meetings, § 5.

It is urged, that prior to the amendment of the record, the plaintiffs had reason to believe that the committee of the town were clothed with sufficient authority, and that being in no fault, the town should be precluded from denying their authority. If the clerk makes an erroneous record, the town are not bound by it, merely because others confide in its correctness. They are notwithstanding entitled to have it set right. Otherwise they would be concluded, not only by their own votes, but by whatever by design or accident, might be improperly entered by the clerk, and that without any chance of relief by amendment. The plaintiffs made their contract with certain persons, assuming to be agents of the town. Their remedy is against the agents, if they acted without authority.

The opinion of the Court is, that the action is not supported; and the verdict is accordingly set aside.

Plaintiffs nonsuit.

William Cutts *vs.* Horace H. Gordon *& al.*

Where one of several defendants in an action of assumpsit pleads his infancy, and gives it in evidence upon the trial, the jury may find a verdict for the infant, and for the plaintiff against the other defendants; and judgment may be rightly rendered on such verdict.

This however is but an exception to the general rule, that if a plaintiff in an action of assumpisit declare against several, he must prove a promise by all the defendants, or he cannot maintain his action against any of them.

Exceptions from the Court of Common Pleas.

This was an action of assumpsit, and was tried before *Whitman C. J.* One of the defendants was defaulted. *Gordon* and *Haskell*, the other two defendants, pleaded the general issue, and filed a brief statement, alleging that *Haskell* was a minor at

the time the contract was made. Evidence was offered to show that *Haskell* was a minor. The counsel for the plaintiff requested the Court to instruct the jury, that they might find a verdict for the infant defendent, and a verdict for the plaintiff against the other defendant. *Whitman C. J.* declined to give this instruction, and instructed the jury, that if they found that *Haskell*, the alleged minor, was under age, that they must find a general verdict for all the defendants. A general verdict for all the defendants was returned. The counsel for the plaintiff excepted to the ruling of the Judge.

The case was argued in writing by *J. Appleton* and *S. H. Blake*, for the plaintiff, and by *J. B. Hill*, for the defendants.

Blake, in his argument, said that he did not deem a reference to many authorities, or much illustration, necessary in support of the exceptions. For however the law may be in England, the tone of American authority is so clear and so strong, that it is apprehended, this Court will not hesitate to listen to it. The case, *Hartness* v. *Thompson*, 5 *Johns.* 160, is a case exactly in point. The cases, *Tuttle* v. *Cooper*, 10 *Pick.* 287, and *Woodward* v. *Newhall*, 1 *Pick.* 500, are also in point, and go at some length into an examination of the principles, that lead to the sound conclusion to which the Court came in *New York*.

1. The question involved in the exceptions is one of practice and convenience. *Minor* v. *Mech. Bank*, 1 *Peters*, 46; *Cate* v. *Pecker*, 6 *N. H. Rep.* 418. The plaintiff ought not to be turned round and forced to commence a new suit.

2. It is said in some cases, that the plaintiff should not enter a "*nol. pros.*" as to one defendant, and proceed against the rest, because it would leave no right to contribution. But the principle does not apply to this case, for infancy is an equally good defence in an action on the note, or for contribution.

3. Infancy is a personal privilege, which he may waive or enforce. 2 *Johns. R.* 279; 15 *Mass. R.* 272.

4. The contract of an infant is *voidable*, but *not void*. If therefore the infant avoids the note it is a defence occurring after the making of the contract, as much as bankruptcy in England. There when bankruptcy is pleaded by one, the plaintiff may enter a "*nol. pros.*," as to him, and proceed against the rest.

J. Appleton, on the same side, to shew, that the Judge of the Court of Common Pleas erred in refusing to give the instruction requested, and in giving one opposed to it, cited as additional authorities, 6 *Dane*, 132; *Cole* v. *Pennell*, 6 *Randolph*, 179; *Tooker* v. *Bennett*, 3 *Caines*, 4; *Bates* v. *Russell*, 22; *Com. L. Repts.* 327.

In reply, he remarked, that the counsel for the defendants prefers the English rule to the American. The English rule is limited in its operation to matter of *subsequent discharge;* the American embraces cases, where an exemption is claimed *from incapacity to contract.* No possible reason can be given why different rules should be adopted in the two cases. The English rule is inconvenient and unjust. It places the plaintiff on the horns of a dilemma. If the plaintiff sue both, he must be nonsuited on the plea of infancy. If he sue only the adult, he may plead in abatement the nonjoinder of the infant joint promissor, and thus defeat the action. It is not enough, that the plaintiff reply infancy, for no one but the infant can take advantage of this personal privilege. *Gibbs* v. *Merrill*, 3 *Taunt.* 307; cases in *Bigelow's Dig. Infancy, C.* The rule seems well settled in this country, and it is believed will not be changed, when the only consequence will be to create more suits, and make more expense. No examination therefore of the *English* cases cited for the defendants will be made.

J. B. Hill, for the defendants, in the course of his argument, took these grounds for sustaining the decision at the Common Pleas.

The question presented by the exceptions in this case is a question of pleading, and is to be solved by a recurrence to well established rules. It has been ruled from time immemorial in *England* in support of the verdict, and that ruling has been fully sustained by this Court. The question is simply this, whether the plaintiff is bound to prove his case, as he alleges it; whether having declared on a joint contract against two he can recover judgment, without amending his declaration, against one. To this rule the defence of infancy of one joint contractor forms no exception. For if a contract be proved to have been made by all the defendants, yet if in point of law it be not obligatory on

one of them, on the ground of infancy, coverture, &c. at the time it was entered into, the plaintiff must be nonsuit; and having commenced his action against too many parties he cannot avoid the objection by entering a *nolle prosequi* as to the infant, or *feme covert*, but must discontinue, and commence a fresh action, omitting such parties, in which case to a plea in abatement for the non-joinder of the infant, the infancy may be replied. 1 *Chitty on Pl.* 35; *Chandler* v. *Parkes*, 3 *Esp. R.* 76; *Viner's Ab. Action, D. d. Pl.* 8; *Tidd's Prac.* 631; *Gibbs* v. *Merrill*, 3 *Taunt.* 307; *Burgess* v. *Merrill*, 4 *Taunt.* 468; 2 *Saund. on Pl. & Ev.* 96; *Gould's Plead.* 280; *Lawe's Plead. in Assu.* 585; *Jaffray* v. *Freebain*, 5 *Esp. R.* 47; *Chitty on Con.* 34; *Hammond on Parties*, 290.

But where one of the parties is discharged from his liability by matter subsequent to making the contract, as by his bankruptcy, the failure as to him does not prevent his recovering against the others. *Chitty on Pl.* 35. When the contract was not in fact, though it might be in form, as alleged, the plaintiff must begin *de novo*. 12 *Petersdorf*, 757.

The law in *England*, on this subject remains unchanged, for the same doctrine is laid down in a work of undoubted authority published in 1832. *Collyer on Partnership*, 425, 426. The law is considered the same in this country by *Judge Gould* in his work on *Pleading*, 280. The doctrine of the common law on this subject, as understood in *England*, has been adopted by this Court in the case of *Redington* v. *Farrar & al.* 5 *Greenl.* 379. It is the duty of Courts, when questions arise on points of law which have been decided, to declare what the law is, and to leave to the legislature to make new laws.

But the cases cited from *Pickering* do not go to the extent claimed in this case. In *Woodward* v. *Newhall & al.*, the plaintiff was only permitted to enter a *nolle prosequi*, as to the infant, amend his declaration, and proceed against the others. In *Tuttle* v. *Cooper* the question presented and decided by the Court was entirely distinct from the one now under consideration, which was but incidentally mentioned. It was wholly foreign to the subject then before the Court, and is not entitled to be called a decision. The claim set up in the case now under consideration is

for the plaintiff to try his chance for a verdict, against the infant, and if he fail in that, to have a verdict against two in an action of assumpsit against three, and without any amendment of the declaration.

In *Massachusetts* the plaintiff must make his election before the case is submitted to the jury, and their decision does not support the plaintiff.

The only case cited, which supports the plaintiff is that of *Hartness* v. *Thompson;* and that case is not only opposed to the principles of the common law; to the uniform current of *English* authorities, and to the law of pleading as laid down in this country by *Judge Gould,* but to a decision of our own Court.

The opinion of the Court was afterwards drawn up by

WESTON C. J. — It is a well established principle in the English law, that in assumpsit, where too many defendants are joined, the plaintiff must fail in his action, though he prove an express or implied promise against some of them; and that the objection cannot be removed by discontinuing or entering a *nolle prosequi*, as to such as ought not to have been joined. And the same rule has been recognized by this Court, in *Redington* v. *Farrar et al.*, 5 *Greenl.* 379. There is, however, an exception to the rule, which is thus laid down by *Sergeant Williams* in note (2,) to *Salmon* v. *Smith*, 1 *Saunders*, 207; "if in such actions, the defendants sever in their pleas, as where one pleads some plea, which goes to his personal discharge, such as bankruptcy and the like, and not to the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others." But it has been ruled at *nisi prius*, in two English cases, *Chandler* v. *Parkes et al.*, and *Jaffray* v. *Freebain et al.*, cited for the defendant, that a plea of infancy is not within the exception. In *Gibbs* v. *Merrill*, 3 *Taunton*, 307, the Court seem to incline to the same opinion. But in *Burgess* v. *Merrill*, 4 *Taunton*, 468, which turned upon the same facts, *Mansfield C. J.* by whom the judgment of the court was delivered, says, no cases are found decided by the courts, upon consideration, upon this point. He then adverts to the two *nisi prius* cases, and decides that the action may be brought against the adult contrac-

tor only, overlooking the promise of the infant, which he considers as void.

But we have cases upon this point in this country, where the contract of an infant is regarded, not to be void but voidable, settled upon consideration. In *Hartness* v. *Thompson*, 5 *Johns.* 160, the court held, that where one of several defendants, in an action of assumpsit, pleads infancy, or gives it in evidence at the trial under the general issue, the jury may find a verdict for the infant, and proceed to judgment against the others. The same question was presented to the Supreme Court in *Massachusetts*, very soon after our separation, when the opinion of that court is to be regarded as high evidence of the law of both States. *Woodward* v. *Newhall et al.* 1 *Pick.* 500. *Parker C. J.* speaking for the court in that case, goes into an examination of the English authorities; and he holds, that neither reason, justice nor principle require that the plaintiff should be turned round to a new action, where the objection of infancy is interposed by one of the defendants. The Chief Justice refers to the case of *Tappan et al.* v. *Abbot et al.* decided to the same effect by that court, before the separation; and he cites with approbation the *New York* case, before referred to.

In *Tuttle* v. *Cooper*, 10 *Pick.* 281, *Shaw C. J.* after citing the English *nisi prius* cases, says, a different rule has been adopted in *New York* and in *Massachusetts*, as an exception however to the more general rule, which is recognized in both States, in conformity with the English practice.

The case of infancy appears to us to fall within the reason of the exception, as much as that of bankruptcy. It secures to the infant the full enjoyment of his privilege. The objection is purely technical. If *Lord Kenyon* and *Lord Ellenborough*, distinguished as they were among English jurists, have unnecessarily narrowed the exception, we are under no obligation to follow their example. The common law of both countries is derived from the same source. But the evidence of what it is, which is authoritative here, is to be found in our own judicial decisions. It should be remembered, that every member of the court, by whom the judgment in *Woodward* v. *Newhall* was pronounced, had been called to the bench, many years before the erection of

Maine into a separate State. If not then our Court, it had been a short time before. The law of both States was the same. If we hold the law to be otherwise here, it must be, because we are satisfied it was erroneously declared in *Massachusetts*. But appreciating as we do the reasons, upon which that decision was founded, and sanctioned as it is, by the authority of the Supreme Court of *New York*, we are of opinion, that it should be regarded also as the law of this State.

It is insisted, that if the action may be sustained against other defendants, the plaintiff should be holden at once to discontinue, or enter a *nolle prosequi* against the infant, as soon as the defence of infancy is set up; but if he elects to try that question, and it is found against him, it shall defeat the whole action. It is the province of the jury to pass upon the facts in controversy, and of the court, to enter such judgment, as is warranted by their verdict. In general in assumpsit, if they find one defendant did not promise, no judgment can be rendered against either. But if they find, that one defendant made no binding promise, by reason of infancy, this forms an exception to that rule, and the promise of the others remains notwithstanding binding upon them. Why should the plaintiff be precluded from trying that question? The protection of the infant does not require it. A *nolle prosequi* is justified and entered, because the objection of infancy is admitted. If tried, the fact is found. In either case, it appears from the record, why judgment is entered for one defendant for his costs, and in favor of the plaintiff against the others. The proof must conform to the declaration; but the plaintiff is not required to prove all that he avers. If one defendant escapes on the ground of infancy, the plaintiff is entitled to judgment, if he proves the alleged promise made by the other defendants. Of this opinion were the Supreme Court of *New-York;* and we perceive no sufficient reason to question its correctness.

Upon the whole, the judgment of the Court is, that the presiding Judge of the common pleas should have instructed the jury, as requested, that they might find for the infant defendant, and for the plaintiff against the other defendant.

Exceptions sustained.

A TABLE

OF

THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

EXECUTION.

EXCEPTIONS.

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STATUTE OF MASSACHUSETTS CITED.

STOPPAGE IN TRANSITU.

See VENDORS AND PURCHASERS, 1, 2, 3, 4, 5, 6, 7, 8.

TENANTS IN COMMON.

1. One tenant in common of a sawmill cannot maintain an action of trespass *quare clausum* against a co-tenant for his entry into the entire common property, and exclusive occupation thereof. *Porter* v. *Hooper.* 25

2. Trespass for mesne profits cannot be maintained by one tenant in common against another without an actual ouster. *ib.*

3. A privilege reserved in a dwelling-house to a person, for a limited time and for a special purpose, does not constitute him a tenant in common of the estate. *Abbott* v. *Wood.* 115

4. Where a lessee for years assigns his lease to the proprietor of the fee, reserving the privilege, if H. moved into the house to have a man board with him to feed out the hay in the barn, or if H. should not move in, reserving the right of having a man cook and board in the house, and also reserving the right to remove his property from the house;" such reservation does not make the lessee a tenant in common of the estate. *ib.*

5. One tenant in common of a personal chattel may maintain an action against his co-tenant, by whom such chattel was received as a common carrier, and by whose negligence and carelessness it was destroyed. *Herrin* v. *Eaton.* 193

6. One tenant in common *may oust* his co-tenant by resisting or denying his right or by excluding him from the enjoyment of it; and an interest thus acquired may become indefeasible by an uninterrupted continuance for a sufficient time. *Thomas* v. *Pickering.* 337

7. A deed of warranty given by one tenant in common in possession to a stranger who records his deed and enters and occupies a part thereof, the residue remaining vacant, ousts the co-tenants of the grantor, and puts the grantee in the seisin of the whole; and he becomes entitled to the protection of the statute of limitations against all conflicting rights. *ib.*

TANANT AT WILL.

See LANDLORD AND TENANT.

TOLLS.

1. If the act granting the right to erect a toll bridge require, that the rates of toll shall constantly be kept exposed to the view of passengers at the place where the tolls are collected; no action can be maintained for the recovery of the penalty given for forcibly passing the bridge without paying toll, unless the corporation have complied with this requirement. *Middle Bridge* v. *Brooks.* 391

2. Where there has once been a compliance with this provision on the part of the corporation, and the board on which the rates of toll were established was afterwards unlawfully destroyed, such action cannot be maintained, unless the rates of toll are again exposed to view, as soon as may be. *ib.*

3. It was held, that an action could not be maintained after the corporation had delayed for six days to exhibit the rates of toll. *ib.*

TOWNS.

1. Where a town voted to indemnify an inhabitant for his costs, in a certain suit, "which had arisen or might arise in the same on account of *Gray* line," and an action had been brought against the town to recover the costs of that suit; parol evidence was *held* admissible to shew, that the suit was brought at the request of the Selectmen and Town Agent for the purpose of settling a disputed line between that and an adjoining town, with the express agreement, that the town should pay all costs incurred either in settling the line or in proving the title; and to shew, that these facts had been communicated to the town before the vote was passed. *Baker* v. *Windham.* 74

2 Also, to shew, that the suit was conducted to its termination with the advice and direction of the Selectmen and Town Agent. *ib.*

3. It was *held*, that the action could be maintained, although it appeared from the verdict of the jury, that the line claimed by the town was the true line, and that the suit failed from defect of proof of title to the land. *ib.*

4. Parol evidence, admitted to prove that the plaintiff had a good title to the land, was held to be immaterial. *ib.*

5. A surveyor of highways cannot maintain an action against the town for services in building a bridge across the highway within his district, without the consent or knowledge of the selectmen; although the inhabitants of such town had passed over the bridge in travelling the road *Moor* v. *Cornville.* 293

6. Where a town clerk has made a defective or erroneous record of a vote, it is competent for him, while in office, to amend it according to the truth. *Chamberlain* v. *Dover.* 466

7. When a town clerk has made an erroneous record of a vote, the inhabitants of the town are not bound by it,