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. NICHOLAS EMERY, } JUSTICES.
HON. ETHER SHEPLEY, }
Attorney General, NATHAN CLIFFORD, ESQ.

ADVERTISEMENT.

THE Reporter much regrets, that it has been found impracticable to include the cases at the adjourned term in Penobscot, and all those of the year 1837, in the present volume. The number of cases herein reported, however, exceeds that in any one of the volumes of Reports of decisions in this State; and the cases at the adjourned term and in the county of *Cumberland*, nearly equal that in some of the volumes. The number of law questions has more than doubled since 1835; and the present Reporter has found the mode of reporting, adopted by his predecessors, to be too succinct, to enable him so to condense the increased number of cases, as to bring them all within the same compass required in former years. Much of this increase of law questions in the Courts, has doubtless been occasioned by the advance of population and business, but a considerable portion is believed to have had its origin in causes which have ceased to exist.

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF PENOBSCOT, ADJOURNED TERM, AUGUST, 1836.

Mem.—Hon. *Albion K. Parris* resigned his office of Justice of the Supreme Judicial Court before the commencement of this *Term*, and his successor was not appointed until after its termination.

NATHANIEL HATCH *vs.* STEPHEN KIMBALL.

Where a mortgage is assigned to one having an interest in the premises mortgaged; the mortgage is not extinguished, if it be for the interest of the assignee to uphold it.

Where one man conveys land to another, and at the same time the grantee gives a bond to the grantor, conditioned that the grantee should reconvey the premises on demand, and should permit the grantor to enjoy the premises until the conveyance back; the grantee can maintain no action against the grantor on the covenants of the deed.

If one man convey land to another, covenanting only, that neither he, nor his heirs, nor any person under him or them, shall set up any demand, right, or title to the premises forever, and at the same time takes back a bond to reconvey the premises to him on demand, and afterwards becomes the assignee of a mortgage previously made by him to a third person; he is not estopped from setting up his title under the mortgage, against his grantee, or those claiming under him.

THIS was a writ of entry on the demandant's own seisin. In support of the action the demandant gave in evidence a quitclaim deed from *Stephen Kimball*, the tenant, to his brother, *Daniel Kimball*, dated *Dec.* 23, 1818; the levy of two executions on the 8*th* day of *Nov.* 1827; a conveyance from the execution creditors to the demandant; a deed from *Daniel Kimball* to *Leggett & Hance*,

dated *November* 27, 1828, and a deed from them to the demandant, dated *April* 25, 1832. The tenant then introduced in evidence a bond from the same *Daniel Kimball* to him, dated the said 23*d* of *December*, 1818, conditioned to reconvey the property; also a mortgage deed from the tenant to *John Peabody*, dated *May* 17, 1811, to secure the payment of $1973, 76; an assignment of the same mortgage by *Peabody* to *Wheelwright & Clark*, *April* 24, 1812; an assignment from them to *John Buck*, dated *June* 2, 1827; and a deed from *John Buck*, reciting a judgment on the mortgage and possession taken under it in 1824, to the tenant, dated *June* 2, 1827. The levies were seasonably recorded, and all the deeds were acknowledged and duly recorded. Each deed and the levies covered the demanded premises. The bond to reconvey the same premises was not recorded. The contents of the deeds and bond sufficiently appear in the opinion of the Court. The tenant proved, that he had occupied the premises for thirty years next before the suit, and that he had built a house thereon, and made expensive repairs during the time, both before and after the deed from *Buck* to him. The Judge ruled, that the demandant had maintained his action; and thereupon the tenant became defaulted; which default was to be taken off and a new trial granted, if the ruling of the Judge was erroneous.

Abbott, for the tenant. The object of the arrangement between *Stephen* and *Daniel Kimball* was not to secure money due from one to the other, and make the tenant stand in the relation of mortgagor; but simply to make *Daniel* the trustee of the property during the pleasure of *Stephen*. He could compel a reconveyance at any time. But the tenant has been in possession for thirty years, claiming the property and making extensive repairs. This is equivalent to recording. *Davis* v. *Blunt*, 6 *Mass. R.* 487. There is no evidence of any fraudulent intent between the parties, but if there had been, the creditors of *Daniel* could not set the papers aside, and avoid the effects of them, but those of *Stephen* only. At the time of the conveyance to the demandant, the tenant was in possession claiming title, and nothing passed by the deeds, even if any title had been in his grantors. But the mortgage to *Peabody* was anterior to any title of *Daniel Kimball*, and the tenant can hold under that.

Rogers, for the demandant. Here was a conveyance by the tenant to *Daniel Kimball*, under whom we claim, recorded at the time it was given, and nothing appears of record to destroy its effect. If the bond to the tenant would have operated, as a defeasance of the deed, had notice of it appeared by recording, or otherwise, he might have had a remedy, but it would not have defeated this action. But the deed and bond were a mere arrangement to defeat their creditors. The mortgage was redeemed by the payment of the sum secured by it by the mortgagor. But if this can be considered as an assignment by *Buck*, and not a redemption, then the tenant would be estopped by his deed to *Daniel Kimball* to set up this title. This runs with the land and is an estoppel in this action. *Fairbanks* v. *Williamson*, 7 *Greenl.* 96.

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

WESTON C. J. — The deed of the twenty-third of *December*, 1818, of *Stephen Kimball* to his brother *Daniel*, and the bond of the same date, *Daniel* to *Stephen*, both relating to the land in controversy, constitute one transaction. The effect was to transfer the legal seisin of the land to *Daniel*, who was thereupon to hold the same for the use of *Stephen*, to whom the premises were to be assured by a formal deed upon demand. The stipulations in the condition of the bond are the covenants of *Daniel*, the fulfilment of which is secured by a penalty. *Low* v. *Peers*, 4 *Burrow*, 2225. The condition has these words, "I agree and bind myself, my heirs and administrators and assigns by these presents, that the said *Stephen* shall or may occupy the same premises, in all its parts as shall best suit him, by himself, or by any other person or persons, unmolested in any manner by me or mine, free of any expense, and I will re-deed to him, or his heirs or assigns, by a deed of quitclaim on demand." This being an instrument executed between brothers, it may be regarded as a covenant by *Daniel* to stand seised to the use of *Stephen*. For although it does not purport to have been made upon the consideration of love and affection; yet this may be implied from the relation subsisting between them.

In *Bedel's case*, 7 *Coke*, 40, it was resolved, that although the consideration in the deed of the covenantor did not run to the wife, yet the limitation of a use to the wife imports a consideration in itself, so if it be to any of his blood. To the same effect is the fifth resolution in *Henry Harpur's case*, 11 *Coke*, 23. Nor is it essential, that the relation between the parties should be stated in the instrument. It is sufficient if it exists. *Goodtitle* v. *Petto*, 2 *Strange*, 935. The bond with its condition was not recorded; but the continued possession of *Stephen Kimball* was equivalent to registry. *Davis* v. *Blunt*, 4 *Mass.* 487, and the cases there cited. But we give no decided opinion, whether that instrument is to be regarded as a covenant to stand seised, executed by the statute of uses, with a covenant for further assurance, as in our judgment the title of the defendant is sustained upon another ground, not liable to objection.

The deed from the tenant to *John Peabody*, conveying the demanded premises in fee and in mortgage, was executed many years prior to that, under which the demandant claims. The title thus created, passed through several mesne conveyances to *John Buck*. Upon this mortgage, judgment was rendered against the tenant, for the purpose of foreclosure, at the *June term*, 1823, of the Common Pleas for the county of *Penobscot*, and a writ of possession was duly executed thereon, on the fourth of *June*, 1824. On the second of *June*, 1827, *John Buck*, for a valuable consideration, remised, released and forever quitclaimed to the tenant, *Stephen Kimball*, his heirs and assigns, all his right, title and interest in said lot of land, by virtue of the mortgage, assignment, judgment and possession, which had been before recited, "to have and to hold the same to him the said *Kimball*, his heirs and assigns forever."

To the title of the tenant, under the deed from *Buck*, two objections are made; first, that it was a discharge and extinguishment of the mortgage; and secondly, if it was not, that it enured by estoppel to *Daniel Kimball*, and to those claiming under him. The deed from *Buck* has words of conveyance and assignment, to *Kimball*, his heirs and assigns. As he had before parted with the formal title, and his right under the bond was in some danger of being defeated by *Daniel Kimball* and his creditors, it became manifestly the interest of the tenant to uphold the title, created by the mortgage

and the proceedings under it. He had entered into no stipulations with *Daniel* or his assigns, to extinguish the mortgage.

In *Gibson* v. *Crehore*, 3 *Pick.* 475, the purchaser of an equity of redemption, who had given bond to pay the debt, for which the land was mortgaged, took an assignment of the mortgage, paying the amount due thereon. This was held to be no extinguishment, it being the interest of the purchaser to uphold the title created by the mortgage, and his intent to do so being manifest, as it is here, by the form of the instrument. And the doctrine was there recognized, that effect is to be given to an assignment, according to the interest of the assignee. This question was fully considered also by this Court in *Freeman* v. *Paul*, 3 *Greenl.* 260; and it was regarded as a settled principle, that a mortgage is not extinguished, if it be the interest of the assignee to uphold it.

Did it enure to *Daniel Kimball* and his assigns by estoppel? Estoppels are allowed to prevent circuity of action. *Coke Lit.* 265 *a.* In the deed, *Stephen Kimball* to *Daniel*, the former covenanted that neither he, nor his heirs, nor any person under him or them, should set up any demand, right or title to the premises forever. But in the deed of the same date, *Daniel Kimball* to *Stephen*, which is part of the same transaction, *Daniel* covenanted under a penalty, that *Stephen* should enjoy the premises; and that he would reconvey the same to him on demand. Taking both instruments together, *Daniel* was to take no beneficial interest. He could not avail himself of the covenant in the deed to him. He could neither enforce its performance, nor recover damages, if it was not performed. It was completely neutralized and defeated by the condition in the bond. *Stephen* then is not estopped to claim the land; and he was at liberty to acquire for his own use any collateral title or assurance. An estoppel does not arise between the parties. The title of the tenant is perfect under his deed from *Buck*, the mortgage having been long since foreclosed.

Nor have the creditors or grantees of *Daniel* any right to complain. *Stephen* continued in the undisturbed possession. This was sufficient to put them on their guard. And if upon their inquiry, *Stephen* had disclaimed title, he would not afterwards have been permitted to set it up to their prejudice. But no such fact appears.

If fraud was meditated by these brothers in their transaction, which there is too much reason to suspect, it was to the prejudice of *Stephen's* creditors. They might have treated the deed to *Daniel* as fraudulent and void. But *Daniel's* bond and covenants to *Stephen* had no tendency to defraud the creditors of the former. He thereby relinquished nothing, to which he or they had any just claim. Stephen continuing in possession, they were bound to take notice, that he might have an interest, notwithstanding the apparent record title in *Daniel.* By sustaining the title of *Stephen,* to whom the property rightfully belongs, it becomes accessible to his creditors, and any fraudulent purpose, he may have entertained with regard to them, is thereby defeated. The default is taken off, and a new trial granted.

JOSEPH B. STEVENS *& al. vs.* THEODORE B. McINTIRE.

Between the original parties to a note, the consideration is open to inquiry.

Where the consideration of a note was the assignment of one half of the interest in a bond for the conveyance of land, and it was agreed between the parties, that the assignee should pay, by his note to the assignors, the same amount they had given therefor; and where through the misrepresentations of the assignors the note was taken for four times the sum by them paid for the same; *it was held,* in an action on the note between the original parties, that the assignors should recover the amount by them paid, and no more.

ASSUMPSIT on a note of hand, given by the defendant to the plaintiffs, dated *March* 18, 1833, for $500, in 90 days and interest. The execution of the note was admitted, but the right of the plaintiffs to recover was resisted, on the ground of fraud and misrepresentation on their part. The defendant introduced evidence tending to prove, that on the 10*th* day of *March,* 1833, one *Hatch,* being the owner of a bond from *Reed & Porter,* conditioned to convey to him a township of land, sold and assigned one half thereof to the plaintiffs for the sum of $500. The defendant also introduced evidence tending to prove, that the plaintiffs agreed to

convey to the defendant one half of their purchase at the same rate they had given to *Hatch*. They in fact took notes of the defendant for one thousand dollars, representing to him that they had given *Hatch* two thousand dollars. The note in suit is one of those notes. The defendant, for the purpose of showing false and fraudulent representations to him, offered one *Baldwin* as a witness, to prove false statements made to *Baldwin* by the plaintiffs in relation to the same bond. This testimony was objected to by the counsel for the defendant, but was admitted by *Emery J.*, who presided at the trial. There was evidence in the case, that the defendant said, that he had bought the bond on speculation, and that he did not know how much the plaintiffs gave for the bond. It also appeared in evidence, that after his purchase of the plaintiffs, the defendant and the others interested in the bond employed one *Valentine* to go to *Reed & Porter*, and obtain a new bond from them, and that he paid a portion of the expense; that a new bond was obtained running to *Valentine* and by him immediately indorsed to the plaintiffs and defendant and the others interested in the bond, and that the defendant assented thereto. It was proved, that the last bond was sold to one *Dibble*, and notes and $500 in money taken of him. Those notes, when this action was tried, were in suit in the name of the plaintiffs. There was no evidence, that the defendant had ever offered to reconvey to the plaintiffs his rights derived from the purchase of the bond, or his interest in what was received from *Dibble*. It did not appear, that the defendant did any act confirming the contract, or interfering with the property after he had obtained full knowledge of the misrepresentations of the plaintiffs.

The counsel for the defendant contended, that the note was not recoverable on account of the fraud and misrepresentation practised upon him by the plaintiffs; and the plaintiffs' counsel urged, that an offer to reconvey was necessary on the part of the defendant before any defence could be made against the notes. *Emery J.*, instructed the jury, that if they believed, that such contract was made by the plaintiffs to sell to the defendant at the same rate they gave to *Hatch* for the bond, and that they took notes for a larger sum on a false and fraudulent representation of the amount given by them for the bond, that this note should be apportioned, and that they should find a verdict for the plaintiffs for such proportion of

the note, as the sum of $500 bore to the sum of $2000. The verdict, which was for the plaintiffs, on these principles, was to be set aside, if the testimony was improperly admitted, or if the instructions to the jury were erroneous.

W. P. Fessenden, for the plaintiffs, in his argument said:

1. That if the transaction was to be viewed merely, as a contract between the parties, then the statements of the sum the bond cost the plaintiffs were to be considered merely, as inducements to the purchase, and that the written contract alone must govern. As a contract the price for which the article is sold is the only evidence of its value, and the defendant is bound to perform it on his part, and pay the notes. If the testimony be admissible, it is only for the purpose of showing, that there was fraud on the part of the plaintiffs, which would avoid the sale. In all cases of fraud there are necessarily false representations, and a contract in form occasioned by them. But these representations are no part of the contract, and can be admitted only to show, that there was no binding contract between the parties by reason of the fraud. If there was fraud here, it affords no defence to the notes. It might enable the defendant to rescind the contract; but in such case he must place the other party in the situation he was in before the making of the contract. He must return the property he has received under it, and not attempt to take advantage of the fraud in reduction of damages. He must go for the whole or none. He cannot keep the property, and avoid the notes, or any part of them. 2 *Stark. Ev. Metcalf's Ed.* 640; *Kimball* v. *Cunningham*, 4 *Mass. R.* 502; *Conner* v. *Henderson*, 15 *Mass. R.* 319; *Norton* v. *Young*, 3 *Greenl.* 30; 9 *Greenl.* 309, *Sale*, 9, and cases there cited.

2. The testimony of *Baldwin* was improperly admitted.

This was a distinct conversation with another person at a different time, and was not communicated to the plaintiff. 2 *Stark. Ev.* 470; *Flagg* v. *Willington*, 6 *Greenl.* 386; *Somes* v. *Skinner*, 16 *Mass. R.* 348; *Carter* v. *Pryke*, *Peake's N. P. cases*, 95; *Boldron* v. *Widdons*, 1 *Car. & P.* 65.

3. Although it is admitted, that this position is inconsistent with the other; it is contended, that the plaintiffs are entitled to recover at least to the amount of the verdict.

Where a party has been imposed upon, the security taken is still good for the actual value of the property sold. *Powell on Contracts*, 97 to 100; 5 *Dane's Ab.* 112, 113.

Abbott, for the defendant.

The verdict should not stand for any sum. The fraud cannot be separated from the contract, and the bargain held good for part, and bad for the residue. The party guilty of the fraud cannot come into court and be permitted to say, that although he has committed a fraudulent act, still he may recover on the note, as much as would have been due, if he had conducted honestly. But it is said, that the plaintiffs are entitled to recover the amount of the note, because the notes of *Dibble* were not returned. But they were in the hands of the plaintiffs, as the case shows, and no other return could be made. The bond had been given up by the assent of both plaintiffs and defendant before the defendant had any knowledge of the fraud. In the cases cited for the plaintiffs some beneficial interest passed; but here there was was none. Nothing passed, unless the interest in the *Dibble* notes, which could not be returned to the plaintiffs, as they already had them.

The question is not whether *Baldwin's* testimony was sufficient to prove the fraud, but whether it was competent evidence for that purpose. The intentional misrepresentation of the plaintiffs was the subject of inquiry, and for that object, what the plaintiffs said to others on the same subject is admissible. *Seaver* v. *Dingley*, 4 *Greenl.* 320; *McKenney* v. *Dingley*, *ibid.* 172.

Kent replied for the plaintiffs.

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

Weston C. J. — If the defendant would rescind the contract, out of which the note in controversy grew, on the ground of fraud, he should, as soon as he discovered the fact, have given notice to this effect to the plaintiffs, assigning or offering to assign to them what he received, or the proceeds of it. This is required by the uniform current of authorities.

From the view we have taken of the cause, we do not regard as material the testimony of *Edward P. Baldwin*, the admissibility of which was objected to by the counsel for the plaintiffs. The de-

fendant, retaining the consideration, cannot treat the note as fraudulent and void. It is not necessary to resort to the ingredient of fraud, to do justice to the defendant. The facts reported and found by the jury, from testimony not objected to, independent of any direct false representations, are quite sufficient to sustain the verdict. It is not necessary then to decide the question raised as to the competency of the testimony upon which the jury found, that such false representations were made.

The note acknowledges that value was received, which is *prima facie* evidence of the fact. But between the original parties, the consideration is open to inquiry. It might perhaps have been difficult, from the nature of the property, to estimate the exact value of what the defendant received; but we are relieved from that difficulty, by the express agreement of the parties. The value fixed, was the one half of what the plaintiffs paid to *Nathaniel Hatch*, which half was two hundred and fifty dollars. This valuation, settled by compact between the parties, must be conclusive as to the consideration received. The rate paid to *Hatch*, was the measure of value, proposed by the plaintiffs and accepted by the defendant. When, therefore, the defendant promised to pay one thousand dollars, acknowledging the receipt of so much in value, he evidently acted under a mistake. He had in truth received but one fourth part of that sum. The other three fourths, supposed to have been received, never had any real existence. It is not material to inquire from what cause the mistake originated. Whether it was mutual, or whether it was occasioned by the practices of the plaintiffs, the defendant is equally entitled to be relieved from its injurious consequences. The jury have, as we think, very equitably and properly, charged him only to the extent of the consideration received.

Judgment on the verdict.

NOTE.

The question, whether in an action for the recovery of the price of an article, sold with warranty of its goodness, or in relation to which there was a fraudulent misrepresentation, the defendant may give in evidence the breach of warranty, or fraud, in reduction of the plaintiff's claim, without having returned the article, seems to have been, as yet, undecided in this State.

Kimball v. *Cunningham*, 4 *Mass. R.* 502; *Conner* v. *Henderson*, 15 *Mass. R.* 319, before the separation of this State from *Massachusetts*, and *Norton* v. *Young*, 3 *Greenl.* 30, since, are cases where the party attempted to rescind the contract and avoid it entirely, and have no application to this inquiry. The case of *Lloyd* v. *Jewell*, 1 *Greenl.* 352, was an action on a note given for the purchase money of land conveyed by deed with covenants of warranty of title, and a failure of title to part of the premises was set up to reduce the damages. The decision of the Court, that this evidence was inadmissible for that purpose was placed on the ground, that the only remedy was on the covenants of the deed, and denies, that the principle now under consideration applies in that case.

In *Massachusetts* no case has been found decisive of the question. *Rice* v. *Goddard*, 14 *Pick.* 293, in which the authority of *Lloyd* v. *Jewell* is denied, and, *Dickinson* v. *Hall*, *ibid.* 217, merely decide, that an entire failure of consideration is a good defence to an action for the purchase money. The *decision* in *Parish* v. *Stone*, 14 *Pick.* 198, is founded on the same principle, as *Stevens* v. *McIntire*, and does not profess to *decide* the subject of this inquiry.

In *New York* the affirmative has been fully established by a series of decisions. *Beecker* v. *Vrooman*, 13 *Johns.* 302; *Sill* v. *Rood*, 15 *Johns.* 230; *Hills* v. *Banister*, 8 *Cowen*, 31; *M'Allister* v. *Reab*, 4 *Wend.* 483, and the same case in the Court of Errors, 8 *Wend.* 109. Other cases in this country have been noticed affirmatory of the principle. *Miller* v. *Smith*, 1 *Mason*, 437; *Steigleman* v. *Jeffries*, 1 *Serg. & R.* 477; 2 *Kent's Com.* 3*d Ed.* 476, and cases cited in *note a*; *Shepherd* v. *Temple*, 3 *N. H. Rep.* 455, where it was held, that proof, that the article sold was of no value to the purchaser, furnished a good defence in an action for the price, without a return of the article.

On the other side, in some of the States, decisions have been made in the negative. 2 *Kent's Com.* 3*d Ed.* 474.

In *England* the authorities are in some degree conflicting, but the latest, which have been found on the subject, and which are of very high authority, seem to settle the law there in accordance with that in *New York*. Among them are *Street* v. *Blay*, 2 *Barn. & Adol.* 456, (22 *Com. L. Rep.* 124); *Poulton* v. *Lattimore*, 9 *Barn. & Cr.* 259, (17 *Com. L. Rep.* 373); and *Pearson* v. *Wheeler*, 1 *Ryan & Moody*, 303, (21 *Com. L. Rep.* 446).

Circuity of action and multiplicity of suits are always to be avoided, where justice can be done without them; and on the whole view of the cases, the true principle is believed to be this:—

In an action for the recovery of the price of an article sold, where the seller has warranted its goodness, or in relation to which he has made a fraudulent misrepresentation, the breach of warranty, or fraudulent misrepresentation, may be given in evidence to reduce the damages, although the article has not been returned.

Where an exchange has been made, under similar circumstances, and an action is brought for the difference money, the same rule would follow; and some of the cases cited are of that description.

GILBERT KNOWLTON *vs. Inhabts. of* PLANTATION No. 4.

The general agent of a town or plantation has sufficient authority to employ counsel to defend an action brought against such town or plantation.

An objection to the right of counsel to appear in defence of an action cannot be taken after the term at which such appearance is first made.

If the Assessors of a plantation from time to time visit a bridge while it is being built by an individual on a highway within the plantation, such acts, unaccompanied with any explanation on their part, will be strong evidence from which a promise by the plantation to pay therefor may be implied; but if the assessors had previously notified such person, that if he should proceed to build the bridge, that he must look to another source for his reimbursement, and after the notice he build the bridge, relying at the time upon the other source for payment, no promise can be implied in his favor from those acts.

If a person build a bridge across a stream on the public road within a plantation, after having been notified by the assessors and other inhabitants not to build the bridge at the expense of such plantation; he cannot recover the value of the bridge against the plantation on an implied promise, by proving that the inhabitants made use of such bridge in travelling upon the road.

THIS was an action of *assumpsit*, brought to recover the value of certain materials, and labor furnished and done by the plaintiff, as he alleged, in building a bridge for the defendants, over *Great Works stream*, in their plantation. The general issue was pleaded and joined. At the *second term* after the pendency of the action in this Court, the counsel for the plaintiff, called upon the counsel for the defendants, for their authority to appear in their behalf. They were employed by an inhabitant of the plantation, who produced evidence of his appointment, as their agent, in general terms, without any particular reference to this action. After a former bridge had been carried away, and prior to the building of the bridge by the plaintiff, the sessions had established a ferry at that point. It was agreed that the defendants had been indicted for a defective highway, and that a fine was imposed upon them of $600, by the Court of Common Pleas for this county, at their *June Term*, 1829, and that the plaintiff had been appointed the agent to cause it to be expended. It appeared that no warrant of distress had ever issued, and that the Court of Common Pleas, at their *June Term*, 1832, ordered the same to be stayed. Application was made in behalf of the plaintiff to the Supreme Judicial Court at their term in

this county, in *June*, 1833, for a mandamus to the Court of Common Pleas, to direct that a warrant of distress be issued, which this Court at their *June Term*, 1834, refused. After the fine was imposed the plaintiff called upon the inhabitants of the plantation, and upon their assessors, to work out the fine; and they proceeded to work under his direction; and the jury found, upon being requested to answer to this point, that prior to the building of the bridge by the plaintiff, the fine had been worked out in full. The plaintiff introduced a letter from the assessors of the plantation of which the following is a copy.

Plantation No. 4, *March 7th*, 1832.

Mr. Knowlton,

Sir,

Having advised with some of the principal inhabitants of the plantation, we are of opinion, that the fine now standing against the plantation had better be appropriated to the building of a bridge across *Great Works stream;* provided the same can be built in a substantial and workmanlike manner for a sum not exceeding five hundred and twenty-five dollars.

Thos. S. Cram,
Bradley Blackman,
Geo. Vincent,
} Assessors of Plantation No. 4.

Thomas S. Cram testified that he and the other assessors visited the bridge occasionally while it was building; that he considered it his duty so to do, but that he took no charge or direction of it, any more than any other inhabitant. It appeared that in *April* or *May*, 1832, before the plaintiff built the bridge, but after the timber had been obtained by one *Delvin*, who afterwards sold it to another person who sold it to the plaintiff, in the summer, he met informally a majority of the inhabitants of the plantation, who told him not to proceed to bring a charge upon them. And *John Brown* testified that he heard *Spofford*, one of the assessors, forbid the plaintiff from proceeding the day he commenced. The bridge was commenced building in *July* or *August*, and completed by the plaintiff in the summer of 1832, since which time it has been used by the inhabitants of the plantation and others, having occasion to pass over it. *Joseph W. Williams* testified, that as surveyor of highways he did in the season of 1835, since the commencement

of this action, cause two cart loads of earth to be placed upon the abutments at each end of the bridge, to fill up some small excavations, but that he had no special authority to work upon the bridge. A verdict was returned for the plaintiff; it being agreed that if in the opinion of the Court, the action is not supported by the foregoing evidence, the verdict is to be set aside, and the plaintiff to become nonsuit.

Kent, for defendants.

Every thing stated in relation to the fine for badness of road, and the appointment of the plaintiff as agent for laying it out, may be laid out of the case, because, prior to the commencement of building the bridge, the fine had been fully worked out, and the Common Pleas, before that time, had ordered the writ of distress to be stayed, and this Court had refused a mandamus. If the fine had not been worked out, he must seek his remedy under the statute process, and cannot maintain *assumpsit* against the town.

The assessors of a plantation have no authority to bind a town in relation to making roads or bridges without being specially authorised by the inhabitants. If highways are out of repair, the surveyors are to put them in order. *Loker* v. *Brookline*, 13 *Pick.* 346. But in this letter there is no contract, or proposition for a contract. It is merely advice to the agent to proceed under his agency. Nor is any act of ratification proved on the part of the assessors.

The plaintiff did not suppose, that he was acting under a contract with the town. His persevering application for the warrant of distress shews the contrary.

As no express promise is proved, the question is, whether a person who voluntarily does work in a town or on the highways, without contract or request, can recover in *assumpsit*? *Assumpsit* must be grounded either on express or implied consent. *Whiting* v. *Sullivan*, 7 *Mass. R.* 107; *Jewett* v. *Somerset*, 1 *Greenl.* 125; *Stokes* v. *Lewis*, 1 *T. R.* 20; *Tappin* v. *Broster*, 1 *Car. & P.* 112; *Andrews* v. *Callender*, 13 *Pick.* 491. A contract is the assent of two minds. 2 *Black. Com.* 443; 2 *Kent's Com.* 477, *note*. But in this case, the plaintiff had express notice not to build the bridge for defendants. Even if the work was necessary and beneficial, that is not enough. No individual has a right to

assume the discretion of a town or plantation. *Bartholomew* v. *Jackson*, 20 *Johns.* 28; *Comstock* v. *Smith*, 7 *Johns.* 88; *Jones* v. *Lancaster*, 4 *Pick.* 150; *Loker* v. *Brookline*, 13 *Pick.* 343; *Haskell* v. *Knox*, 3 *Greenl.* 445; *Bath* v. *Freeport*, 5 *Mass. R.* 326. But it is not certain, that the defendants were bound to build the bridge, as a ferry had been established by the Court of Sessions; and if they were, they had a right to do it with labor and materials furnished by themselves.

Nor has there been any ratification by the defendants. If a man will work on the roads, he cannot thereby prevent the people from passing over it, and the town will not be compelled on that account to pay for the work. And so this Court said in *Hayden* v. *Madison*, 7 *Greenl.* 79.

The putting on the two loads of earth cannot be a ratification by the defendants. 1. The surveyor had no authority from the defendants, and did it at his own instance. 2. It was done after the suit was brought. 3. The town was obliged to keep the road in repair to prevent a fine.

T. P. Chandler, for the plaintiff, contended, that the verdict ought to stand:

1. The defendants have received the benefit of the plaintiff's services, which were rendered at the request of the principal officers of the plantation.

2. The inhabitants of the plantation all knew of the building of the bridge, and made no formal objection to it.

3. The defendants have accepted the bridge by using and repairing it; and the plaintiff has now no right to remove it without their consent, which has not been given.

4. The plaintiff, as agent never accepted the road, built by the defendants; and if he was not justified in building the bridge, on account of the fine, yet he acted honestly under a mistake of the law; and under such circumstances the party who has received the benefit ought to bear the burden.

5. The plaintiff was a public officer honestly discharging what he believed to be his duty, the defendants looked on and approved his acts; the parties were equally in error, and neither should derive a benefit at the expense of the other.

6. If the plaintiff is not entitled to the amount expended, he ought to recover such sum, as the bridge is actually worth to the defendants; and he cited *Hayward* v. *Leonard*, 7 *Pick.* 181; *Hayden* v. *Madison*, 7 *Greenl.* 76; *Abbott* v. *Hermon*, *ibid.* 118.

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

WESTON C. J. — The counsel for the defendants, having been employed by their general agent, was sufficiently authorised to appear in their behalf, if the objection to his authority had been taken at the first term, as it should have been.

There has been no evidence of an express contract, upon which the action could have been founded. The letter of *March*, 1832, from the assessors of the plantation to the plaintiff, contains only the intimation of an opinion, as to the course, which it was most expedient to pursue, in the appropriation of the fine. If that had been otherwise appropriated and expended, as the jury have found, there was nothing in the letter, which has the slightest bearing to authorise the plaintiff to build the bridge, or to pledge to him therefor the credit of the plantation.

If there was no express contract, is one to be implied from the facts in the case? It appears that the assessors visited the bridge from time to time, while it was building. If they had been authorised to cause a bridge to be built, these acts of inspection, unaccompanied with any explanation on their part, would have been strong evidence to charge the plantation. As the assessors were their prudential officers, an implication to the same effect might have been justified, if no such authority had been specially confided to them. But they had previously explained themselves. Their letter to the plaintiff had in effect advised him, that if he proceeded, he must look to the fine for his reimbursement. The plaintiff seems unaccountably to have cherished a belief, that the fine might be enforced for his benefit, even after a warrant of distress therefor had been refused by the Common Pleas. That he relied upon that source is manifest from the application, which he subsequently made to this Court, for a mandamus to the Common Pleas, to cause such a warrant to issue. He had, before he commenced the work, informally met a majority of the inhabitants of the plantation, who

had insisted that he should not proceed, to bring a charge upon them; and he was forbidden to do so by one of the assessors. His pertinacity in going on, not only without authority, but against their protestations, seems to exclude the implication of an *assumpsit* on their part. Nor is there reason to believe that he expected to charge them on a contract, express or implied. He was looking to another remedy, the fine, which has failed him.

The counsel for the plaintiff has cited those cases, upon the authority of which, he claims to prevail. In *Hayward* v. *Leonard*, 7 *Pick.* 181, the Court say, "we mean to confine ourselves to cases, in which there is an honest intention to go by the contract, and a substantive execution of it, but some comparatively slight deviations, as to some particulars provided for." In such cases, they were disposed to sustain an action, where the real estate of the defendant had been rendered more valuable by the labor and materials of the plaintiff. Here there was no contract, and the plaintiff proceeded against the will of the defendants.

In *Hayden* v. *Madison*, 7 *Greenl.* 76, there had been a contract to make a piece of road, the greater part of which was completed. One of the conditions was, that the town should pay half the price agreed, when the road was done. A small portion of the distance was not made, which the town caused to be completed, and paid the plaintiff the one half of his claim. And this was principally relied upon by the Court as a waiver of strict performance, and he was permitted to recover the other half, deducting the expense incurred by the town in completing the road.

The principle stated to have been decided in the case last mentioned, by the late Chief Justice, in *Abbott* v. *Hermon*, 7 *Greenl.* 118, may be laid down more broadly, than that case will warrant. In the case last cited, there had been a contract by the plaintiff to build a school house. It was nearly but not quite, completed; but it had been used for two successive winters, by the direction of the district school agent, for the district school. This was holden to be such an acceptance of the house, as rendered the district liable to the plaintiff.

If a man will voluntarily build a house, or make any other erection upon the land of another, against the will and against the protestations of the owner, although his estate may be rendered more

valuable by the erection, we have been referred to no case, which decides that he is under obligation to pay for it; at least until he has manifested an unequivocal act of acceptance.

It has been urged, that a promise to pay for the bridge, may be implied from the use made of it by the defendants. It appears, that the plaintiff having erected his bridge, where a ferry had been established before, it had been passed over by the inhabitants of the plantation and others. The bridge was doubtless more convenient for the citizens than the ferry; but it does not appear from the case, that the defendants were under obligation to build the bridge. The establishment of the ferry would rather justify a different inference. In *Hayden* v. *Madison*, where the benefit to the town was manifest, the use of the road by the public, was considered as very equivocal evidence, upon which to charge the town; and we cannot regard it here as sufficient to sustain the action. As to what was done by the surveyor, that having been since the action, can have no effect upon it, if it would have had any, if it had been before, which is denied by the defendants.

According to the agreement of the parties, the verdict must be set aside, and a nonsuit entered.

William P. Deane *vs.* Ralph Annis.

Where a minor son had left the house of his father against his will, and had refused to return at his request, but on being taken sick had returned home, and had been received by him; the father was held liable to the physician for medical attendance upon the son at the house of the father and with his knowledge and assent, on an implied promise, without proof of any express one.

Exceptions from the Court of Common Pleas.

Assumpsit for a bill of $26,50 for medical attendance and medicine furnished the defendant's minor son. This son had left the father's house about a year before his sickness, and had lived in the neighborhood laboring industriously at several places, was a steady boy, but dying of the sickness left no property, excepting his clothing. On being taken sick the son returned to his father's house, and there remained until his death. The father, who was a man of

property, went with the son to the house of the plaintiff, a physician in *Bangor*, to obtain medical assistance, and it was then understood by them that the plaintiff was to visit the boy at his father's house. There was testimony introduced by the plaintiff to show the liability of the defendant, and by the defendant to show, that the son had left his house against the consent of the father, and had refused to return at his request. No express promise by the father in words, was proved, to pay the plaintiff, nor that the father notified the plaintiff, that he did not expect to pay him.

The plaintiff's counsel offered to prove, that the defendant had treated his whole family with harshness and cruelty. This evidence was objected to by the defendant, and *Perham J.*, before whom was the trial, ruled, that the plaintiff might show the defendant's treatment of this son, but not of the rest of the family. The plaintiff's counsel requested the Judge to give the following instructions, viz. "If the medical services rendered by the plaintiff were necessary to the son in the circumstances in which he was placed, the plaintiff is entitled to recover." The Judge did not thus instruct the jury, but did instruct them, "that the father by law is liable for the support and education of his minor son, and in return he is entitled to reverence, respect, and service from his son; that if the son, during his minority leave his father against his will to seek his own fortune, or to avoid domestic restraint, he carries no credit with him, and the law will imply no promise to pay by the father even for necessaries. But if the father neglect his duty, and permit his minor son to go abroad without providing for him, and a stranger supplies him with necessaries, the father is bound to pay, the law will imply a promise."

After the cause was fully committed to the jury, and they had deliberated sometime, this written request was sent into Court by them. "The jury wish to inquire, whether the father incurred any liability in point of law in going with his son, and consulting the physician, there being an express understanding, that the physician should visit him at his father's house." To which the Judge returned, "Not unless this fact connected with the other circumstances satisfies the jury that he undertook and bound himself." The jury then returned into Court with a verdict for the defendant. To the foregoing rulings, doings, and instructions of the Judge the plaintiff excepted.

T. P. Chandler, for the plaintiff.

1. The general rule is, that the father is bound to provide his minor child with necessaries. 13 *Johns. R.* 480; 4 *Mass. R.* 97; 2 *Mass. R.* 415; 2 *Dessaus.* 94. The only exception is, where the minor has left the country, as in *Angel* v. *McLellan*, 16 *Mass. R.* 28. The instruction requested should have been given.

2. The evidence offered and rejected should have been admitted to explain the cause of the son's leaving his father's house.

3. The Judge erred in sending written instructions into the jury room without calling them into Court. 1 *Pick.* 337; 13 *Johns. R.* 487; 1 *Cowen*, 258.

4. The written instructions given by the Judge were wrong, the jury had a right to imply a promise from the acts of the father, without any express one. The instructions required an express promise to be proved.

Abbott, for the defendant.

The general rule has been rightly stated, but the exception is much too limited. The true one is, that whenever the minor leaves his father's house against his consent, the father is under no more obligation to support such minor, than any other person. It is not true, that the only exception to the rule is, when the minor leaves the country, nor does the case referred to authorize any such inference.

The Judge allowed any improper treatment of this son to be proved, which was going quite far enough.

The instructions sent by the Judge to the jury were merely a repetition of those already given, and done in open court, and in the presence of the plaintiff's counsel without objection.

The instructions given were correct, being in substance, that if the jury were satisfied, that the defendant intended to employ the plaintiff, he was liable to pay him for his services, and did not require an express promise.

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

Weston C. J. — The minor child of the defendant, to whom medical aid was afforded by the plaintiff, had left his father's house against his will, and had, prior to his sickness, refused to return, although thereto required. Undutiful as he was, in thus refusing to

obey the lawful commands of his father, he had redeeming qualities. The case finds he was steady and industrious; and that he labored actively for his support. At length came the sickness, of which he died. Destitute as he found himself, and unable to procure medical attendance, he desired to be carried to the parental roof, that he might obtain the desired relief through the agency of his father. He was conveyed there; and thereupon his father carried him to *Bangor*, for medical advice. While there he was active in procuring it; and manifested such an interest in his son's case, as became a father. No one deserving the name, could refuse to receive a son, under such circumstances. He was thus restored to the parental protection. The fugitive had returned; I will not say prodigal, for he did not deserve that imputation. The child was forgiven, as he ought to have been. His fault should have been deposited in the earth, which covers him. It reflects little credit upon the father, to exhibit it in the face of the public, with a view to escape some of the expenses of his last sickness, incurred in part at least at his request.

After the son surrendered himself to his father, and sought his aid and assistance, we entertain no doubt he became liable for the medicine and advice, furnished by the plaintiff; more especially as he went with his son, and was active in consulting the plaintiff, as a physician. When therefore the counsel for the plaintiff requested the Judge to instruct the jury, that he was entitled to recover, we are of opinion, that they should have been instructed that he was so entitled, to the extent before intimated: The exceptions are accordingly sustained, and a new trial granted.

NOTE.

But a request by a father to a physician to attend his son, then of full age, and sick at his father's house, raises no implied promise on the part of the father to pay for the services rendered. *Boyd* v. *Sappington*, 4 *Watts*, 247.

JONATHAN KENDALL *Admr. vs.* WILLIAM FIELD *& al.*

Where the plaintiff's intestate was employed by the defendants to hew timber for them in the woods, and while so employed entered daily on a shingle the quantity hewed by him each day; and the timber was taken away by the defendants without a survey, and mingled with other timber; the shingle is competent evidence to be submitted to the jury on the trial in an action to recover the value of the intestate's labor.

Where land of the defendant was attached on the writ, and afterwards conveyed by him by deed of warranty, and his grantee also conveyed the same land by deed of warranty to another; the grantee of the defendant is not a competent witness for him in that suit.

ASSUMPSIT upon an account annexed to the writ, against which the defendants filed an account in set-off.

The plaintiff offered in evidence a shingle, on which it was proved that his intestate entered from day to day in the woods an account of the timber hewed by him each day, under a contract with the defendants. No more of the evidence is given in the report of the trial, and no further description of the shingle; but it was referred to in the report. To the admission of this shingle the counsel for the defendant objected, but *Weston C. J.*, before whom the action was tried, admitted it.

The defendants offered one *Fiske* as a witness, to whose admission the plaintiff objected on the ground of interest. It appeared, that the plaintiff had attached in this suit the land of the defendants, which they had subsequently conveyed by deed of warranty to *Fiske*, the proposed witness, and the witness had conveyed the same land by deed of warranty to another. The witness was rejected, as incompetent, on the ground of interest. The verdict was for the plaintiff, and was to be set aside if the shingle should have been excluded, or the witness ought to have been received.

There was also a motion to set aside the verdict as against evidence.

W. P. Fessenden, for the defendants, argued:—

1. The shingle was improperly admitted in evidence.

All the cases on the subject of admitting books have gone only to books, and from the necessity of the case. When admitted, they are first to be examined, and are open to all possible objections.

To be evidence, the book must be the register of his daily doings not only with one man alone, but with others, and the whole book is subject to examination. It did not appear, nor will it be pretended, but that the intestate could keep a book, and did in fact keep one in writing in which he made his charges generally. Nor was there any evidence to shew, that he had not transferred the charges, if such they may be called, to a leger. No case has gone farther than to admit the book, or books, in which the whole charges in his dealings are made. This can be no better, than for a trader or mechanic, to bring in a loose leaf of paper with charges or marks on it against one man only. It does not come within the principles, on which books have been admitted. *Dunn* v. *Whitney*, 1 *Fairf.* 9; *Prince* v. *Smith*, 4 *Mass. R.* 445; 3 *Dane*, 320.

2. The witness ought not to have been rejected.

If *Fiske*, the person offered as a witness, had any interest in the result of the suit, it was a balanced one, and the case comes within the principle of *Bean* v. *Bean*, 12 *Mass. R.* 20. If *Fiske* was exposed to liability on his covenants by reason of the attachment, he had a remedy on the covenants in his deed from the defendants to recover the same amount. The possibility of interest is too remote and contingent to exclude the witness.

E. Brown, for the plaintiff.

The question in this case is not whether the shingle was sufficient evidence to prove the demand claimed. Every thing, but the quantity of timber hewed, was proved by other evidence. It was proved, that the intestate worked in the woods, and marked down daily on this shingle the amount of his work. The admission is justified on the ground of necessity, and as being the best evidence the nature of the case would admit. The fact, that it was done with a pencil, makes no difference. 2 *Kent*, 511.

The witness was rightly rejected, as was decided in *Schillinger* v. *McCann*, 6 *Greenl.* 364.

The opinion of the Court was delivered the same term by

Weston C. J. — The plaintiff's intestate was employed by the defendants to hew timber for them in the woods. While there, the intestate entered daily on a shingle, the quantity hewn by him

each day. It was taken away by the defendants, without being surveyed, and mingled with other timber. Considering the nature of his employment, and the place where he was, and that the shingle contained the daily minutes of the business in which he was engaged, we think it was legally admissible. It was a substitute for a memorandum book, which answered the purpose at the time, and was, perhaps, as little liable to alteration or erasure, without being detected by the eye, as if made on paper. And we are of opinion, that it was proper evidence to be submitted to the jury, and to be weighed by them, in connexion with the other testimony.

The witness rejected was clearly inadmissible on the ground of interest. If the defendants, for whom he was called, had prevailed, their land, which has been conveyed to him since this action, and which he has reconveyed with warranty, would be liberated from attachment. That a witness so circumstanced, is incompetent, although he may have taken a covenant of warranty from his grantor, was decided in *Schillinger* v. *McCann*, 6 *Greenl.* 364, to which we refer.

Judgment on the verdict.

Jonathan Greene *& al. vs.* James Harriman.

Where the title to personal property is in question between third persons, mere declarations of the alleged vendor, unaccompanied by any acts, are not admissible in evidence.

This was an action of *replevin* for a chaise and harness. The defendant pleaded the general issue and filed a brief statement, alleging property in himself. Both parties claimed under *Benjamin Hasty;* the defendant by a conveyance, *Feb.* 13, 1833, and the plaintiff by a sale in *July* following. The plaintiff contended, that the conveyance to the defendant was either without consideration originally, or a mortgage to secure the payment of a note which was subsequently paid, and the mortgage thus discharged. To rebut this, the defendant offered *Alvah Huntress* as a witness, who testified, that he heard *Hasty* and the defendant talking together, about the chaise, after witness understood that the latter had a bill of sale of it; that *Hasty* told the defendant he might come and

take the chaise any time he pleased ; that previous to this, witness heard *Hasty* ask defendant for money, defendant told *Hasty* he might have it, and witness afterwards heard *Hasty* say he had got it. This was all previous to the sale by *Hasty* to the plaintiff. Witness further testified, that in *April*, 1833, *Hasty* wanted to hire money of him, when witness proposed to take the chaise as security, to which *Hasty* replied, the chaise is not mine ; it is made over to *Harriman* to secure him. The defendant introduced in evidence a written conveyance of the chaise and harness from *Hasty* to himself, dated *Feb.* 13, 1833, also a note to him from *Hasty* for $100, dated *March* 27, 1832. It appeared, that *Hasty* absconded on the 29*th* of *July*, 1833, and left this part of the country, and that his place of residence is unknown. The plaintiff objected to the testimony of *Huntress* as inadmissible, but it was admitted by *Parris J.*, who tried the action, subject to the opinion of the whole Court. If the testimony of *Huntress* was improperly admitted, the verdict, which was for the defendant, is to be set aside.

Rogers, for the plaintiff, said, there was but a single question, whether the declarations of *Hasty*, testified to by *Huntress*, were admissible. He was the person under whom both parties claimed, and could be a witness for either. If there is any pretence, that these declarations are admissible, it is on the ground of being part of the *res gesta*. But these declarations are mere recital, and no part of the transactions at the sale, and clearly inadmissible. 1 *Stark. on Ev.* 48 ; *ib.* 306 ; 1 *Phillips on Ev.* 219 ; 1 *Esp. R.* 357, *Phillips* v. *Eamer*.

Godfrey, for the defendant, argued, that the declarations related to the transactions of the parties in making the sale, and as such, were properly admitted. He cited *Stark. on Ev.* 48, cited on the other side ; 1 *Esp. R.* 328 ; 4 *Pick.* 378.

The opinion of the Court was delivered by

WESTON C. J. — Whatever may be said of other portions of the testimony of *Alvah Huntress*, objected to by the counsel for the plaintiff, we are of opinion, that what he testified as to the declaration of *Hasty*, that he had received money of the defendant, was inadmissible. It was matter merely of narration, unaccompanied by any act. The counsel for the defendant insists that he had tes-

timony enough without it, if so, he will prevail on a further trial; but on the last, the jury must have been influenced by testimony, not legally admissible.

New trial granted.

Rufus Jameson *vs.* Henry A. Head.

Where the interest in a bond for the conveyance of real estate to a debtor is seised and sold on execution, agreeably to the provisions of the *stat.* of 1829, *c.* 431, the lien of the creditor becomes fixed by the seisure on the execution, and is not dissolved by a voluntary surrender of the bond to the obligor by the obligee or his agent, without consideration.

A bill in equity may be maintained, under that statute, by the purchaser of such right without making any tender, or offer of payment, if the obligor in the bond, on request made by the purchaser, before the expiration of the time for payment or performance, shall refuse to give true and correct information of the amount due, or condition remaining unperformed.

And it is not a sufficient excuse for withholding this information, that the purchaser had heard it from others.

This was a bill in equity, claiming the right to have a conveyance of certain land on payment of the amount due to the defendant therefor, or to recover damages, if the defendant had incapacitated himself from conveying by a prior conveyance to others without notice. The bill alleged, that one *Norton* had contracted for the land with the defendant, and had received a bond conditioned to convey the same on payment of a certain sum; that he had become possessed of *Norton's* right under a sheriff's sale thereof, according to the provisions of the statute; and that he had requested the defendant to disclose the terms of the contract, and the amount due from *Norton* to *Head*, and a refusal to do either.

The hearing was on bill, answer and proof. The substance thereof will be found in the opinion of the Court.

W. P. Fessenden, for the plaintiff, said that the bill was brought on the *stat.* of 1829, the "additional act respecting the attachment of property," *c.* 431; and stated the substance of the bill, answer and proof. He contended, that it appeared clearly, that *Norton* was entitled to have a conveyance at the time of the sale; and said, that the attempt by the defendant to avoid performance

from a pretended giving up of the bond by the wife of *Norton* to the defendant could not avail him; that the wife had no authority from the husband to give up the bond. If the wife sell or dispose of the husband's property without his assent, such sale is void. 2 *Com. Dig., Day's ed.* 224; 8 *Vesey*, 599. If she could not sell it, much less could she give it away. But there is no sufficient evidence, that the bond was given up until after the sale.

The statute, § 2, expressly provides, that the bill may be supported without a tender, when the obligor shall refuse to give true and correct information of the amount due on the bond. No particular form of words is necessary in making the demand, and in this case it was sufficient; and his refusal to disclose dispenses with the necessity of making a tender. 2 *Pick.* 540; 4 *Pick.* 6.

Rogers, for defendant, contended, that the evidence shew, that the bond was given up and cancelled before the seisure of the right of *Norton* on the execution. As between third persons, the assent of the husband to the acts of the wife is to be implied, when he leaves her to transact the business of the family, and manage the concerns of the husband. Very slight circumstances, far more weak than are proved here, are sufficient evidence of the assent of the husband to the acts of the wife. 2 *Stark. Rep.* 368; *Hill* v. *Hatch*, 2 *Fairf.* 450; 2 *Stark. Ev.* 54 to 58. He argued, that on this account nothing passed by the sale; that the defendant was justly to be considered as a purchaser of the interest of *Norton* in the bond, and even if the purchase was not made until after the seisure on execution, that still a Court of equity will not interfere, or lend its aid under the circumstances of this case. He also contended, that here was no such demand, as would enable the plaintiff to maintain a bill without tendering the amount due. He cited 6 *Johns. Ch. R.* 111; *ibid*, 222; 1 *Johns. Ch. R.* 273; *ibid*, 370; 2 *Johns. Ch. R.* 1; 4 *Mason*, 331

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

WESTON C. J. — By the act additional, respecting the attachment of property, *statute* of 1829, *ch.* 431, such an interest as *Norton*, the debtor of *Hatch*, had in the land in controversy, was liable to be seised on execution. It was so seised on the seven-

teenth of *April*, 1833. That *Norton* had from the defendant a bond conditioned to convey the land, upon payment of a sum of money therein expressed, by a day then future, is a fact charged in the bill, and admitted in the answer. Had it been given up, prior to the seisure of the interest on execution? The bill calls upon the defendant to disclose how and where, he obtained the possession of the bond. He answers, that he was in possession of it on the first of *July*, 1833, and that it had been delivered to him before that day; but he fixes no earlier period affirmatively and positively. There is nothing in the answer, inconsistent with the conclusion, that it may have been delivered to him the day next preceding.

The deputy-sheriff, *Leavitt*, deposes, that about a week after he advertised the interest he had seised, which was done on the eighteenth day of *April*, the defendant told him *Mrs. Norton* had given him up the bond; but he does not in his answer confirm his declaration, that he had it at that time; although specially and properly interrogated as to the time, and although it was his duty to make a full disclosure upon this point. If he had the bond in his possession at and prior to the sale, it is not easy to conceive, that such a fact would have escaped his memory; but he does not say that he had it at that time. Taking the answer and the proof together, it cannot be regarded as an established point, that he had the bond before the sale. But assuming that he received it, as *Leavitt* is impressed he did, the day after the interest was advertised, which would be the nineteenth of *April*, that was two days after the seisure on execution. The defendant does not affirm in his answer, that he had no notice of that fact, when he received the bond, if indeed that would make any difference in the rights of the creditor or of the purchaser. But there is reason to believe, as well from the inquiries, previously put to him by the officer, and the publicity of the advertisement, as from the silence of the answer, that he had notice. The lien of the creditor was fixed by the seisure; and no transactions between the defendant and *Norton*, or any agent of his, could dissolve it. The voluntary surrender of the bond, subsequently made by *Mrs. Norton*, without consideration, certainly could not have this effect.

On the first of *July* then, *Harvey Jameson* was, by operation of law, the assignee of the interest, which *Norton* had on the seven-

teenth of *April;* and on the same first of *July*, he had a right to pay the consideration to the defendant, and to demand and receive a deed. To guard the interest of the purchaser, the second section of the statute before cited provides, that whenever the obligor or contractor, upon request of the purchaser, shall neglect or refuse to give true and correct information of the amount due, or of the conditions remaining unperformed, the purchaser may maintain a bill in equity, without tendering payment of the sum due, or offering to perform any other conditions. The bill charges, that on the first of *July* such information was requested by the purchaser, which the defendant neglected and refused to give. This is denied by the answer.

It appears from the testimony of *Thomas F. Hatch*, that he and *Jameson* did on that day call upon the defendant for the express purpose of obtaining such information, which he, although then possessed of the bond, evaded and withheld. *Hatch* deposes, that he was desirous of purchasing it, if it promised to be advantageous. *Jameson* had a right to the information for himself, and with a view to make the sale to *Hatch.* It was from his testimony, a most manifest evasion to defeat the purchaser; for a day or two after, when the time within which he had a right to pay had elapsed, the defendant voluntarily submitted the bond to the inspection of the witness, for the avowed purpose of apprizing him, that the right was gone.

Rufus Dwinal confirms *Hatch.* He was present at the same conversation, from which he understood, as he deposes, that the object of *Hatch* and *Jameson* was to ascertain the conditions of a certain bond; and especially the amount they had to pay. He says, the defendant avoided giving any definite information, and that to the best of his recollection, they did not succeed in getting any. He thinks the defendant would not acknowledge the existence of any bond; but said if *Hatch* had any money, he might offer it.

Nehemiah O. Pilsbury, a witness for the defendant, heard part of the conversation. *Hatch* wanted to know if the defendant would give up the bond, if he would pay the money due on it; and the witness deposes, that the defendant told him to bring the money, and he would let him know. But the purchaser had a right to the information, before he produced the money. Upon the

whole, notwithstanding the answer, the proof is satisfactory to the Court, that the information, which the purchaser had a right to claim by the statute, was sought by him, and withheld by the defendant. Nor do we think that it was any excuse for him, that the purchaser may have heard before what the conditions were. He had a right to be assured himself upon this point, and to be able to satisfy *Hatch*, with whom he was negotiating for the sale of his interest. There is reason to believe that *Hatch* would have made the purchase, if he had ascertained the terms and had found the defendant willing to fulfil the conditions of the bond on his part.

The rights of the purchaser and plaintiff, his assignee, being preserved by the neglect and refusal of the defendant to give the information requested, the plaintiff has a right, upon payment of the sum stipulated in the bond, to a conveyance of the land, or relief equivalent thereto in damages.

THOMAS A. HILL *vs.* WILLIAM WOODMAN *& als.*

A demise in writing not under seal, of certain premises for a stipulated term by one party, is a sufficient consideration for an express promise in the same writing by the other to pay rent therefor.

Where a demise of a wharf was made to hold for the term of five years, without any agreement by the lessor to put, or keep, the same in repair, and the lessee agreed to pay a fixed rent quarterly therefor during the term; and after the execution of the lease and before entry into possession under it, a large proportion of the wharf was destroyed through natural decay; and the lessee notified the lessor of that fact, and requested him to put the same in repair, and, on his neglect, refused to enter upon the residue of the premises or to pay rent; *it was held*, that the lessor was nevertheless entitled to recover the amount of the rent agreed to be paid.

THE action was *assumpsit* brought to recover three quarters' rent on a lease dated, *October* 1, 1833. The instrument declared on was in the common printed form of a lease, signed by both parties, but no seals were affixed to it, and by its terms leased, demised and let unto the defendants the premises therein described for the term of five years, commenceing on the twenty-second of *May*, 1834, "yielding and paying therefor the rent of one hundred and seventy-five dollars per year, and the lessees do covenant to pay

the said rent in quarterly payments at the end of every three months during said term, and to quit and deliver up the premises to the lessor, or his attorney, peaceably and quietly, at the end of the term in as good order and condition, (reasonable use or wearing thereof, or inevetible accident excepted,) as the same are, or may be put into by the said lessor, and to pay all taxes, and not to make or suffer any waste thereof." The three quarters had expired before the suit was brought.

The defendants introduced a former lease of the same premises dated the 22*d* of *June*, 1833, for the term of eleven months, at the rent of $75,00 per annum payable quarterly. This lease was in form similar to the other.

The defendants then proved that the lot leased by the plaintiff to the defendants was situated on the *Kenduskeag stream* in *Bangor*, and was covered with a wharf on which stood a small building for a store-house; that the value of the property to a lessee arose principally from the wharf, as a place of deposite of goods and lumber, the access to which was from the public street; that before the arrival of the period when the premises were to be enjoyed under the lease sued, but after its execution, a large proportion of the leased premises, to wit, forty feet of the wharf in length, and of the breadth of the whole lot, through the natural decay of the material of which it was composed, was destroyed; that in consequence of the destruction of this part of the premises the residue of them could not be approached without a circuitous route, and over the property of others, except by water, and that by water it could not be approached beneficially. And the defendants further offered to prove, that they called upon the plaintiff immediately after the destruction of the premises and while they were lessees under the first lease, to put the premises in a situation similar or equal to what they were in when the lease was executed; that the plaintiff neglected to rebuild the wharf, and that thereupon and before the arrival of the period, when the defendants were to enjoy the leased premises, abandoned their possession of them, notified the plaintiff of their election to do so, and have never since claimed or occupied them; that the premises on the 1st *Oct.* 1833, and on the 22d *May* 1834, were essentially different in character and value; that at the latter date they were of little or no value, to the

defendants, and that in consequence of the change, and the neglect of the plaintiff to repair them within a reasonable time, they hired other premises in lieu thereof. The plaintiff proved that in another action between the same parties for the first quarter's rent on the lease of *Oct.* 1, 1833, the defendants brought a sum of money into Court. A default was entered by consent, it being agreed, that if in the opinion of the Court, the foregoing facts, if proved, furnish matter of defence, the default was to be set aside and the action stand for trial; otherwise judgment is to be rendered for the plaintiff.

Rogers, for the defendant.

This is a question of construction of the instrument declared on. The intention of the parties is to govern. This is a familiar principle, and but a few cases will be cited to show the extent of it. 8 *Mass. R.* 179; 10 *Mass. R.* 379; 11 *Mass. R.* 302; 1 *Pick.* 332. The contract was conditional and the payment of rent was to depend upon the enjoyment of the property. And such is the language of it, "yielding and paying rent *therefor*." The parties must have understood the contract to have been reciprocal and mutual. 9 *Mass. R.* 78; 11 *Mass. R.* 302; 15 *Mass. R.* 500; 2 *Stark. Ev.* 90, *note M and cases cited.*

There is a good defence to this action from failure of the consideration of the contract. It is under seal, and the consideration may be inquired into. Here was a destruction of the property from causes against which the defendants were not bound to guard, before the time fixed in the contract for the enjoyment of the property had arrived. It is like the case, where one party stipulates, that the other shall have an article at a future day, or a sale of property to be delivered at a coming day. The property here being destroyed without fault of the defendants, there is an entire failure of the consideration on which the promise was made. 1 *Com. Dig.* 297, *Day's ed. and note*; 7 *Dowl. & R.* 117; 1 *Moody & Rob.* 112.

The payment of money into Court merely admits, that the suit can be maintained for the sum brought in. It is only evidence in that case, and not in any other. It has no more to do with this case, than the verdict in the other case has.

The effect of payment of money into Court has undergone some alterations, but the present doctrine of the Courts is as above stated.

2 *H. Black. R.* 374; 1 *Camp. R.* 557; 1 *Taunt.* 419; 1 *T. R.* 464; 2 *T. R.* 275; 2 *Wend.* 431; 3 *Stark. on Ev.* 1004, *and cases cited;* 1 *Phil. Ev.* 149.

Starrett, for the plaintiff.

Here the repairs were in fact made within a reasonable time, and the real question in dispute was, whether so made or not. But this case must be decided on the facts appearing on paper. When there is a written lease, it is not necessary for the plaintiff either to allege or prove an entry or occupation under it, the defendants being parties to it. *Oliver's Prec. of Dec.* 408, 442; *Chitty on Con.* 207; 4 *Har. & Johns.* 564.

If the law be correctly stated on the other side, still there is no defence; it was not an entire destruction of the property, and the remedy would have been by an action for not repairing. 11 *Johns. R.* 495.

But this is a lease, strictly and technically, and a seal is wholly unnecessary. *Jacob's Law Dic., Title, Lease.* Nor is it necessary, that the party should have the immediate right to enter under the lease to give it that character. *Ibid.* This is a lease, and has all the qualities of one, but even an agreement to give a lease, where no other paper is contemplated by the parties, has been held to be a lease. 3 *Johns.* 44.

This lease contains no stipulations on the part of the plaintiff to make repairs, but on the contrary, there are covenants that the defendant shall keep the premises in repair. The plaintiff certainly is not bound to make repairs. 6 *Mass. R.* 63; 16 *Mass. R.* 238; 3 *Johns. R.* 44; 4 *Taunt.* 45; 18 *Vesey*, 115; 3 *Kent*, 2*d ed.* 467; *Com Dig. Waste, D.* 2; 4 *Dane*, 382; 6 *Cowen*, 475. It is sufficient in this action, that the plaintiff is not bound to repair, as the defendant has expressly contracted to pay rent.

The payment into Court of the money due at the time on this lease, is evidence, as between these parties, in all controversies in relation to it, of its existence at the time, as a valid contract.

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

WESTON C. J. — On the twenty-second of *June*, 1833, the defendants took from the plaintiff a lease of the premises in contro-

versy, for the term of eleven months; and on the first day of *October* of the same year, for the further term of five years, at and from the termination of the first lease. Although the term covenant is used in both instruments, the parties did not affix their seals to either. The annual rent, to be paid quarterly, is increased in the second lease one hundred dollars. In all other respects, except as to time, the stipulations in both are alike. By the first the defendants purchased a leasehold estate for eleven months; and by the second, that estate was extended and enlarged five years.

Such was the effect of the second lease. The defendants were, at the time of its execution, in the full possession and enjoyment of the premises, which they were to hold in continuation, until the expiration of the second period. Express covenants for the payment of rent, and for repairs, have been frequently before the Courts; and their effect has been well settled by authority. The affixing or withholding a seal, cannot vary the intention of the parties, or change the construction. In instruments, however, not under seal, the consideration may be gone into; and much of the argument of the defendants' counsel turns upon that distinction. What was the consideration for the express promises made by the defendants in the second lease? It was the demise, made to them of the premises by the plaintiff, for the further period of five years. They well knew the nature and condition of the estate. It had been in their actual possession for more than four months. It is not pretended, that any fraud or deception was practised upon them by the plaintiff. The lease was formally drawn, and consists of two parts, interchangeably executed.

On the part of the lessor is the demise; on the part of the lessees are many stipulations; among others, not to make or suffer any waste in the premises; and to surrender them up at the end of the term, in as good a condition as they then were, by which must be understood, at the time of the execution of the lease, reasonable use and wearing thereof, or inevitable accident, excepted. The lessor made no stipulation to repair. That duty was assumed by the lessees. And if the injury, of which they complain, falls within the exception, they exacted no promise of the lessor to make it good. They must abide by such a contract as they have made.

They took the premises for better or worse; and they had the most ample means of ascertaining their condition.

The injury is directly within the definition of permissive waste. 2 *Bl. Com.* 281. In *Com. Dig. Waste, D.* 2, it is put as an example of permissive waste, if a house, ruinous at the commencement of a lease, is suffered by the lessee to become more ruinous. It is to be remembered, that the stipulation by the lessees, not to make or suffer any waste, is in both leases, and that the injury of which they complain, happened, while they were in possession under the first lease, for the want of necessary repairs.

We cannot perceive any want or failure of consideration. The demise is sufficient to sustain all the promises, made by the lessees. If they had intended to be holden only so long, as the premises were kept by the lessor in the condition in which they received them, they should have required an express engagement from him to this effect. In *Hopkins* v. *Young*, 11 *Mass.* 302, cited for the defendants, *Jackson J.* puts a number of cases, where a party had covenanted to assign and convey a valuable thing, and before the time prescribed for the conveyance, he destroys the thing or renders it of no value, which was adjudged in each case a breach of covenant. Here the plaintiff has done nothing to impair the value of the premises. Nor was the contract on his part an engagement to convey at a future day. The lease was itself a continuance and enlargement of a leasehold interest in an estate, then in the actual possession of the lessees.

Express covenants, to keep the demised premises in repair, and to surrender them in that condition, have been held binding upon the party covenanting, although they have been burnt or destroyed, without any fault in him. With this class of covenants, we have at present nothing to do, except so far as they afford examples of the strictness, with which express covenants in leases have been enforced. But there is no occasion to resort to analogies of this sort. Authorities are to be found directly in point, in relation to covenants to pay rent.

Sergeant Williams, 2 *Saunders*, 422, *note* 2, says, where a tenant covenants to repair, casualties by fire or tempest excepted, if he also covenants to pay rent, he shall be holden to pay, notwithstanding the premises may be burnt or blown down. And even

assuming, that in such case the lessor is under obligation to repair, and he fails to do so, it has been adjudged that the lessee is bound to pay rent, upon his express covenant. *Monk* v. *Cooper*, 2 *Strange*, 763; 2 *Lord Raymond*, 1477, same case; *Belfour* v. *Weston*, 1 *T. R.* 310. But in such case, it seems the lessor is not bound to repair; although he may insist upon the payment of rent. *Pindar* v. *Ainsby*, cited in 1 *T. R.* 312. *Weigall* v. *Waters*, 6 *T. R.* 488. And in *Hare* v. *Groves*, 3 *Anstr.* 687, the same doctrine has been settled in equity, although it had previously been doubted there.

In the case before us, the lessees have made an express promise to pay rent; and we find nothing to relieve them from the obligation it imposes.

Judgment for plaintiff.

Daniel W. Bradley *vs.* Daniel Davis.

An action of *trespass* cannot be supported against one, coming to the possession of goods lawfully, for any subsequent unlawful conversion of them.

Whoever abuses an authority derived from law becomes thereby a trespasser *ab initio;* but it is otherwise, where the authority is derived from the party bringing the suit.

This was an action of *trespass* for taking and carrying away a harness of the value of $30, alleged to be the property of the plaintiff. The plaintiff introduced testimony to show, that the harness originally belonged to one *Jameson*, who sold it to the plaintiff; that the harness remained in the possession of *Jameson*, who was authorised by the plaintiff to sell it for him; that *Jameson* agreed with the defendant to sell him the harness on condition, that he should pay ten dollars in cash on the *Monday* following, and secure the payment of the residue; that the defendant then took the harness, promising to return it the following *Monday*, if he did not before that time pay the money and give the security; and that neither was done; that the agent of the plaintiff did not sell the harness, or give the defendant any permission to keep it, unless payment was made and security given. He also proved, that the defendant afterwards sold the harness to another person.

The defendant contended, that there was an absolute sale to him by *Jameson*, and attempted to prove, that a trustee process had been served on him, as the trustee of *Jameson*. Among other instructions requested by the counsel for the defendant, was one, that upon the facts testified to by the plaintiff's witnesses, no demand having been proved upon the defendant, *trespass* would not lie. Upon this point, *Weston C. J.*, who tried the action, instructed the jury, that *trover* would have been the more appropriate remedy; but that if *Jameson* had made no sale, and had reserved to the plaintiff, whom he represented, the possession on the *Monday* following his interview with the defendant, the plaintiff was entitled to the immediate possession on *Monday*, and that the sale and transfer afterwards by the defendant, might be regarded as a *trespass*. The verdict was for the plaintiff, and was to be set aside, if the jury were erroneously instructed.

J. Appleton, for the defendant.

Trespass will in no case lie, when the goods were lawfully delivered. 1 *Sch. & Lef.* 322. No definition of *trespass* can be found which excludes force directly and immediately applied. The criterion of *trespass* is force directly applied. 2 *Sergt. & Rawle*, 360. The original act must be wrongful, and no subsequent act by relation can make the act, originally lawful, a *trespass*. 1 *Wend.* 109; 3 *Wend.* 242; *Buller's N. P.* 32. Detention does not make one a trespasser. 20 *Johns.* 467; 15 *Johns.* 401; 7 *Johns.* 140. The person guilty of a wrongful act is not of course a trespasser. Where the bailee of a beast put out to be kept, shall sell or kill it, he is not liable in *trespass*, though doubtless he would be in *trover*. The principles on which the two actions are founded are different, and frequently higher damages can be recovered in *trespass* than in *trover*. 2 *Saund.* 47, *note* 1; 4 *East*, 110; *Co. Lit.* 200; *Com. Dig. Trespass, D; Bro. Trespass*, 216; 1 *T. R.* 480; 1 *Bur.* 35; *Cro. Eliz.* 824; 12 *Wend.* 536; 14 *Johns. R.* 352; 4 *Pick.* 467. *Trespass ab initio* is confined to cases of authority conferred by law. 5 *Taunt.* 198; 5 *Dane*, 557; 5 *Bac. Abr.* 162; *Com. Dig. Trespass, D;* 11 *Johns. R.* 380.

Rogers, for the plaintiff, contended, that the sale by the defendant to a third person, after the license to retain the property had

expired, made him a trespasser. All right over the property had ceased, and any act of the defendant in relation to it, injurious to the plaintiff, was without justification or excuse, and made him a trespasser. 3 *Stark. on Ev.* ed. by *M. & J. Trespass, and authorities there cited.* It is very easy to run through the books, and show, that upon any given state of facts *trespass* will or will not lie. The books mean merely, that where the taking was rightful, and there has been no subsequent misuse of the property, that *trespass* will not lie. In this case, if the defendant had merely neglected to return the harness on *Monday*, perhaps *trespass* could not have been supported. But after that time he disposed of the property to a third person, who took it away beyond the reach or knowledge of the plaintiff. He had no more right to do this, than to have taken the harness from the stable of the plaintiff without leave, and sold it. Nor is there any ground for saying, that where the taking was originally by consent for one purpose, and the property is converted to a different purpose, that *trespass* will not lie. If the defendant had borrowed a horse to go to *Oldtown*, and had gone to *Augusta*, directly the other way, he would have been liable in *trespass*. He could not justify the act by any authority from the owner.

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

Weston C. J. — The general property in the harness being in the plaintiff, drew after it such a constructive possession in him, as would enable him to maintain trespass against a stranger. The bailee being answerable to the general owner, may also bring trespass; and the right to maintain it attaches in him, who first brings the action. But a party shall not be charged as a trespasser for goods, which he received by delivery from the owner. *Williams*, in his notes to *Saunders*, 2 *Saund.* 47, *note* 1, says, that where the taking is lawful or excusable, trespass cannot be supported; but the owner must bring trover. And such was the opinion of the Court in *Cooper* v. *Chitty*, 1 *Burrow*, 20, and in *Smith et al.* v. *Miller*, 1 *T. R.* 475. In *ex parte Chamberlain*, 1 *Schoales & Lefroy*, 320, *Lord Chancellor Redesdale* says, that trespass cannot be brought for goods that were lawfully delivered.

If a party comes to the possession of goods lawfully, for any subsequent unlawful conversion of them, the appropriate remedy is trover. And this action will lie, where trespass will, for the unlawful taking is a conversion. But *Sergeant Williams*, in the note before cited, says, that the converse of this proposition is not true.

It has been ingeniously argued by the counsel for the plaintiff, that any act is a trespass, in relation to the goods of another, for which there is no justification or excuse. But the remedy for every such act, is not trespass *vi et armis*. That would be confounding all distinction between trespass and trover. Every unlawful conversion, is without justification or excuse. If a man hires a horse to use two days, and he continues to use him the third day, it could hardly be contended that trespass would lie; although such use would be unlawful; and the owner would be entitled to the immediate possession. Yet being the general owner, and as such having a constructive possession, he might undoubtedly maintain trespass against a stranger, who should presume to use the horse on the third day. The ground of distinction is, that the taking by the stranger, would be tortious from the first. If *A* permits his goods to remain with *B* for his own use, and *B* delivers them to *C* to carry to another place, trespass does not lie by *A* against *C*. 6 *Comyns, Trespass, D.* The reason is, that *B* had the goods by delivery from the owner.

In the *Six Carpenters'* case, 8 *Coke*, 146, it was resolved, that whoever abuses an authority or license derived from the law, becomes thereby a trespasser *ab initio;* but that it is otherwise, where the license or authority is derived from a party. And *Baron Comyns* deduces from that case the general principle, that if a man has license or authority from the plaintiff himself, trespass does not lie against him, though he abuses his license by misfeasance. 6 *Comyns, Trespass D.*

The opinion of the Court is, that upon the facts in the case, an action of trespass cannot be supported.

Verdict set aside.

LEVI CRAM *vs.* GEORGE SHERBURNE.

In an action of assumpsit against the drawer of an order for the payment of money, where the only count in the declaration is one setting forth the order, and averring presentment and notice: a Judge of the Court of Common Pleas has power to permit an amendment during the trial and after the argument of the defendant's counsel to the jury, by inserting another count for money had and received.

Where the defendant had drawn an order on a third person requesting him to pay the plaintiff a sum of money in three days; and where it appeared in evidence, that the defendant, one month afterwards, was informed that the order was not paid, and that thereupon he took the order to obtain payment of it, and brought it back again saying, that he could not obtain payment then, but that there should be no difficulty about it, and that he would pay it himself; *it was held*, that an instruction to the jury, that if they were satisfied, that such promise was made with a knowledge of all the facts, they might return a verdict for the plaintiff, was not erroneous.

EXCEPTIONS from the Court of Common Pleas.

The action was *assumpsit* on the following order.

"*Messrs. E. & S. Smith*,

For value received of *Levi Cram* pay him or bearer forty-one dollars and twenty-four cents in three days, and place the same to my account.

Yours, &c., *George Sherburne.*

December 20, 1833.

The plaintiff proved, that the order was executed in the office of the plaintiff's attorney, who at the request of the plaintiff carried it to *S. Smith*, one of the firm of *E. & S. Smith*, and requested him to give a draft on some Bank in *Bangor*, where the transaction took place, and *Smith* declined, but said he would give his note, which was refused, and the order was retained for about a month, when the attorney saw the defendant, and informed him that the order was not paid. The defendant replied, that there should be no difficulty about it; that he would take the order and get the money, that he did take the order, carried it away, and soon after returned with it, saying that *Smith* declined paying it, and also said, that he would pay it himself and that there should be no difficulty about it; and that the attorney a short time before the commencement of this suit again saw the defendant, who informed him, that *Smith* would defend an action, if one was brought. The counsel for the defendant contended, that the action could not be

supported on this evidence. The declaration was against the defendant, as drawer, and averred a presentment for acceptance, refusal, and notice. After the argument on the part of the defendant, the Court permitted the plaintiff's counsel to file a new count for money had and received, the defendant objecting thereto. The trial was before *Whitman C. J.*, who instructed the jury, that it was competent for the defendant to waive the demand and notice, and that they would judge from the evidence in the case, whether the defendant had not waived the demand of the order, and notice of nonpayment, and had promised to pay it, well knowing all the facts; and that if they were so satisfied, they would return a verdict for the plaintiff. The verdict was for the plaintiff, and the defendant excepted to the ruling of the Judge, and to his granting the amendment.

Rogers, for the defendant, contended, that to support an action, on a paper of this description, a presentment and notice must be proved to have been seasonably made. 6 *Mass. R.* 524; 2 *Greenl.* 121; *Bayley on Bills*, 124. Here was no evidence of either within the proper time. Nor was there any waiver of either demand or notice. If there had been such evidence, the action would not have been maintained, because this was not set out in the declaration, as an excuse for not making them. Nor is the defendant liable on an express promise to pay, because it was made under a mistake of the facts; and such promise is not binding in law, nor should it be. There was no evidence of knowledge by the defendant of the laches of the plaintiff, and nothing on which the construction was predicated, and nothing for the jury to decide. 4 *Mass. R.* 341; 12 *Mass. R.* 52; 5 *Johns.* 375; 12 *Johns.* 423; 16 *Johns.* 152; 2 *Mason*, 241; *Bayley on Bills*, 187; *Chitty on Bills*, 240; 9 *Mass. R.* 408; *ibid*, 332; 8 *Johns.* 384; 5 *Wheat.* 277; 7 *Mass. R.* 449. As to the amendment, it is rather too late in the proceedings to grant the plaintiff liberty to insert a new cause of action, when he had nothing to support the one declared on.

J. Godfrey, for the plaintiff, contended, that the defendant had the power to waive demand and notice, and that the instruction on this subject was right; and cited *Chitty on Bills*, 232; 2 *N. H. Rep.* 340; 12 *Mass. R.* 52; 5 *Pick.* 436.

The discretionary power to grant amendments by the Court of Common Pleas is not the subject of exception. The Court has power to grant amendments of this character, even after verdict, or order of nonsuit. 4 *Pick.* 422; *ibid,* 341; 3 *Pick.* 446; 5 *Pick.* 425; 8 *Pick.* 83.

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

WESTON C. J. — We entertain no doubt it was within the discretion of the Judge, at the time he did, to allow the plaintiff to amend his declaration, by filing a new count for money had and received; and that exceptions do not lie, upon the exercise of such a discretion.

The law is very clearly settled, as is conceded by the counsel, that if the drawer promise to pay, with a full knowledge of all the facts, notwithstanding laches in the holder, he becomes legally liable. Such a promise by the defendant, with such knowledge, has been found by the jury. It is, however, insisted, that there is no evidence, that the defendant knew, that the plaintiff had been guilty of laches; and that therefore the Judge was not justified in leaving it to the jury to find such knowledge. We think otherwise. The defendant knew that no notice had been given to him that the note was not paid, until a month after it was drawn, although it was payable in three days. And his conduct is evidence, that he knew the order had not been demanded at its maturity; for he himself undertook at that time, to make the demand for the plaintiff of the drawer, who declined to pay it. He knew this demand was unseasonable, notwithstanding which, he expressly promised the plaintiff to pay him the amount of the order. The demand made by the defendant, was either made by him, as the agent of the plaintiff, the holder, or it is evidence that he undertook to do it himself, waiving his right to require, that it should be done by the plaintiff. And in either case, it is evidence by necessary implication, of a waiver of notice of nonpayment from the plaintiff.

It is further urged, that the plaintiff, having averred demand and notice, was bound to prove it. In *Taunton Bank* v. *Richardson et al.* 5 *Pick.* 436, the Court held, that waiver of notice is equivalent to actual notice, and is properly proved on the allegation of

actual notice. Upon the same principle, there seems to be no sufficient reason, why proof of waiver of demand should not be regarded as equivalent to proof of demand. But it is not necessary to give an opinion upon this point; as we are satisfied that upon the facts, the plaintiff is entitled to recover, upon the count for money had and received.

Exceptions overruled.

WILLIAM RANDELL *vs.* SAMUEL T. MALLETT.

The lien created by a mortgage of an undivided portion of a township of land attaches to the share set off in severalty to the mortgagor on a partition among the proprietors.

And if the mortgagor have a greater share in the township, than was covered by the mortgage, and the whole be set off together in severalty, the lien of the mortgagee will attach, as tenant in common, to the whole land thus set off, in the proportion that the quantity mortgaged will bear to the whole land thus set off.

Where the grantor, by deed of warranty, of an hundred acre lot by metes and bounds, at the time of the grant, owned 7500 acres of land subject to a mortgage of 6000 acres thereof in common; in an action by the grantee upon the covenants of the deed, he is entitled to recover nominal damages, the mortgage not having been extinguished.

THE action was covenant broken, founded upon a deed of defendant covenanting among other things, that the lot conveyed to the plaintiff, No. 16 in the 4th range, *Williams College* township, was free of all incumbrances, and alleging as a breach, that the premises were encumbered by a mortgage of 6000 acres, lying in common and undivided with the residue of said township, made by the defendant to the Trustees of *Williams College*. The plaintiff gave in evidence his deed and the mortgage, and there rested, claiming only nominal damages, as the mortgage was not paid off. This was resisted by the defendant, on the ground that the lot in question was not incumbered by the mortgage. The defendant then gave in evidence a deed to him from *Nathaniel Ingersoll*, of 6000 acres of land, with the same description, as that in the mortgage to the College, bearing date the same day, and all a part of the same transaction. He then gave in evidence deeds to him of

fifteen hundred acres more, in the same township, in common and undivided with the residue of the township; also a deed from the Commonwealth of *Massachusetts* to the Trustees of *Williams College;* and also the same organization of the proprietors and partition of the township, mentioned in *Williams College* v. *Mallett*, 3 *Fairf.* 398. At the meeting of the proprietors it was voted to set off to said *Ingersoll* thirteen lots, and to said *Mallett* fourteen lots of 100 acres each, on which improvements had been made, and which were described in the vote as having been sold by *Mallett* to settlers and as settlers' lots, one of which was the lot in question. The defendant also offered to prove the attachment and sale of the equity of redemption of the defendant in the land described in the mortgage, and a deed by the officer, enumerating between 50 and 60 of the lots, but this lot was not included among them. *Parris J.*, before whom was the trial, excluded this testimony. If the evidence offered ought to have been received, or if the evidence which was received was sufficient to sustain the defence, the default was to be taken off.

F. Allen and *T. P. Chandler*, for the defendant.

1. There is no incumbrance on the plaintiff's lot, the defendant owned 1500 acres more than he mortgaged to the College, and there is no certainty, that the mortgage will fall on any part of this lot. The mere possibility of an incumbrance will not support an action. It must be fixed, certain and determined. *Barnard* v. *Fisher*, 7 *Mass. R.* 71; *Borden* v. *Borden*, 5 *Mass. R.* 75; *Powell* v. *Monson Man. Co.* 3 *Mason*, 365.

2. If there was originally an incumbrance, it was extinguished before the commencement of this action. Partition had been made by the proprietors and this was binding upon them. *Williams College* v. *Mallett*, 3 *Fairf.* 398. The interest of the College attached only to the land set off to *Mallett* other than the settlers' lots; and the land left was more than the land mortgaged. *Crosby* v. *Allyn*, 5 *Greenl.* 453. On a division of the remaining lands, were that necessary, these lots would be assigned to the settlers.

3. In the sale of the equity, this lot was excluded in the officer's deed, and when the mortgage is paid off by the purchaser, he can have no claim on this lot.

Abbott, for the plaintiff, remarked, that if all the facts had been known at the time, the action would not have been brought, but as it was here, the law must decide it. He admitted, that the partition was binding, but argued, that the effect of it was to confine the claim of the College, under the mortgage, equally over the remaining 7500 acres, instead of extending over the whole township; and thus increasing, instead of diminishing, the lien by the mortgage on this lot, existing at the time of the conveyance to the plaintiff.

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

WESTON C. J. — The defendant, having purchased of *Nathaniel Ingersoll* six thousand acres of land, in the township granted to *Williams College*, in common and undivided, mortgaged the same to that corporation. He became the owner also, by purchase from other persons, of fifteen hundred acres more in common and undivided, in the same township. He afterwards sold to settlers fourteen lots, of one hundred acres each, by metes and bounds. These were afterwards drawn to the defendant's right in a division of the lands, for the purpose of quieting the settlers, holding under him, in their titles. The lien, created by the mortgage to the College, although at the time of its execution extending over the whole township, with certain exceptions not affecting the present case, would follow and attach to the defendant's right, when severed. *Williams College* v. *Mallet*, 3 *Fairf.* 398; *Crosby* v. *Allyn*, 5 *Greenl.* 453.

If there was set off to the defendant a greater quantity of land, than he mortgaged to the College, their lien would attach to his land when divided, in the proportion that the quantity mortgaged to them might bear to the whole quantity, of which he was owner; and in that proportion they would be interested in common with him. It was not in his power, by a sale of part of the land by metes and bounds, to extinguish their lien in the part thus sold, without their consent. The fact that there would be a sufficient quantity left for their security, or as many acres as he had mortgaged, would not withdraw the incumbrance from the land sold. Although embracing but a small part in quantity, it might constitute a great part in value. If the defendant had subsequently sold the

remaining lands by metes and bounds, and the purchasers had extinguished the mortgage, they would doubtless have had a right to call upon those, who first bought for contribution. The defendant had no right to charge one portion of the land with the incumbrance, and to exempt another from the burthen, without the consent of the incumbrancer.

All the owners in the township may have had an interest, in getting on the requisite number of settlers provided for in the original grant; but how this was to be effected would be matter of arrangement, among the proprietors. The defendant, by selling to the number of settlers assigned to him, would not be entitled to receive all the purchase money, to the prejudice of the mortgagee under him. He could not give an unincumbered title, without obtaining a release from the College of this part, which he has not done.

We are, therefore, very clear, that the defendant's covenant to the plaintiff, that the land he purchased was free from incumbrance, was broken, of which the mortgage to the College was evidence; and that he is entitled to nominal damages, although he had not extinguished the incumbrance. The lien of the College was in no degree affected, by the attachment and sale of the equity of redemption at the suit of *Solomon H. Chandler*, or by the terms of the deed, from the officer to the purchaser of that equity. The evidence of these transactions were therefore properly excluded, as they could not avail the defendant by way of defence.

Defendant defaulted.

Thomas F. Kennedy *& al. vs.* Salmon Niles.

One of several plaintiffs on the record, although having no interest in the suit, and being willing to testify, is not a competent witness for the defendant.

This was an action of *assumpsit*, for money had and received, brought in the names of *Thomas F. Kennedy*, *Thomas D. Scudder* and *Calvin W. Kennedy*, and for the benefit, as it was proved, of *Josiah Scudder*. In support of the action the plaintiffs produced a note of hand dated *January* 18, 1834, for 590 dollars, on demand,

with interest, payable to *Thomas F. Kennedy & Co.* and purporting to have been signed by "*Chesley, Niles* and *Kennedy,*" but the signature was placed there by the defendant only, after the dissolution of the latter firm, of which he had been a member. It appeared, that *Josiah Scudder*, having a demand against *Thomas F. Kennedy* and *Thomas D. Scudder*, called upon them for payment, upon which they turned out to him the note before described, and wrote a guaranty thereon, dated *May* 3, 1834, which they signed; which arrangement was made in the presence and with the knowledge of *C. W. Kennedy*, who made no objection. Soon after the note was assigned to *Josiah Scudder*, notice thereof was given to the defendant, who promised to pay the note, and at the same time admitted and declared, that all the plaintiffs in this action composed the firm of *Thomas F. Kennedy & Co.* To prove that *T. D. Scudder* was not one of that firm, the defendant's counsel proposed to call as a witness, *T. F. Kennedy*, one of the plaintiffs, he being willing to be thus examined. He was objected to by the plaintiffs, and *Weston C. J.*, presiding at the trial, refused to admit him. The counsel for the plaintiffs then proposed to put questions touching the same point to the same plaintiff, and an objection being made, he was not permitted by the Court. The verdict was for the plaintiffs and was to be set aside, if the testimony offered ought to have been received, or the questions proposed to be put ought to have been permitted to have been put, and answered.

W. P. Fessenden, for the defendant, said, that the question intended to be raised in this case was; whether a nominal plaintiff, having no interest in the question, and willing to testify, can be a competent witness for the defendant.

A party in interest, it is admitted, cannot be forced to testify, but his confessions may be given in evidence. The confessions of a partner, even after the dissolution, if his interest continue, may be given in evidence to affect the rights of his copartners, but not if his interest has ceased. *Parker* v. *Merrill*, 6 *Greenl.* 41. We could not therefore give the confessions in evidence, as they were made after the interest of the proposed witness had ceased. No objection can be made on the ground of interest. If the witness is to be excluded, it must be solely because he is a nominal party. There are cases, where a party has been permitted to testify, even

in his own favor, from the necessity of the case. *Herman* v. *Drinkwater*, 1 *Greenl.* 27; 3 *Stark. on Ev.* 1060, and note. So where one defendant has been defaulted, he may be a witness for the other. *Wara* v. *Haydon*, 2 *Esp. R.* 552. Where a witness for the plaintiff married a defendant before the trial, and was willing to testify, she was admitted. *Pedley* v. *Wellesley*, 3 *Carr. & P.* 558. The case, *Norden* v. *Williamson*, 1 *Taunt.* 378, is directly in point, and conclusive. In *Massachusetts*, recently, the question came directly before the Court, and an intimation was given, that a party with his assent might in some cases be a witness, but the decision was made on other grounds. Were it not for the technical rule, that the action must be brought in the name of the payee, when the interest has been assigned, instead of the party in interest, the witness would be wholly unobjectionable; and such rules should not be permitted to exclude the merits of the case.

T. P. Chandler, for the plaintiffs, remarked, that the rule, that a party to the record cannot be admitted to testify, was one of the oldest and best settled rules of evidence. The cases of departure from it in *Massachusetts* and *Maine*, are only those arising out of actual necessity. Here is no necessity, for if true, the fact might be proved by other evidence.

Kennedy could not be a witness for two reasons. 1*st.* He is a party to the record. 2*d.* The note had been assigned by him. *Gilmore* v. *Bowden*, decided in this County and not yet reported (3 *Fairf.* 412); *Hacket* v. *Martin*, 8 *Greenl.* 77; *Matthews* v. *Houghton*, 1 *Fairf.* 420.

The declaration of the defendant at the time of the assignment, that the three plaintiffs composed the firm of *T. F. Kennedy & Co.*, he is not at liberty to contradict. It is an *estoppel in pais*. 5 *Mass. R.* 97; 10 *Pick.* 275; 4 *Mum.* 124; 7 *Serg. & R.* 467; 14 *Johns.* 446; 4 *Dallas*, 436; 9 *Price*, 269; 3 *Pick.* 38; 1 *Stark. Ev.* 305; 2 *Stark. Ev.* 31; 9 *Cowen*, 274.

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

Weston C. J. — The claim, set up by the defendant at the trial, to be permitted to put questions to *Kennedy*, one of the plaintiffs, when not under oath, whether or not *Thomas D. Scudder*, another of the plaintiffs, was of the firm of *Thomas F. Kennedy*

& Co., has been abandoned in the argument. But it is still insisted that *Kennedy*, though a party, if willing, might have been examined by the defendant as a witness. The question, whether a party could be thus examined, was discussed and decided in this Court, in the case of *Gilmore* v. *Bowden et al.*, 3 *Fairfield*, 412. We adhere to the opinion there expressed, that such party is inadmissible; and we refer to that case, without repeating the reasons, or citing the authorities, upon which our judgment was founded.

Judgment on the verdict.

Isaac Kingsley *vs.* Daniel Wallis, Jr.

What is, or is not, a reasonable time within which a party may rescind a contract, where no time is fixed by its terms, is a question of law.

In the absence of all testimony, tending to show that so long a period was necessary, *it was held*, that a delay of two and an half months was beyond a reasonable time.

Exceptions from the C. C. Pleas.

Assumpsit on a note given on the 9*th* of *April*, 1834, for a deed of an interest in a patent right. The defendant proved, that when the bargain was made, he was to have "the right to give up the trade, if he could not sell it, or if he was sick of his bargain," but nothing was said about the time when it might be done. He also proved, that "sometime in the month of *June* following, he offered to give up the bargain, and to return the deed to the plaintiff, and demanded his note." *Whitman C. J.* ruled, that as there was no time fixed during which the defendant might give up the trade, he was bound to do it within a reasonable time; and that what was a reasonable time, was a question of law; and that in law the offer of the defendant to rescind the trade sometime in the month of *June* following, more than two months after the written contract, was not within a reasonable time. A verdict was returned for the plaintiff, and the defendant excepted to the ruling of the Judge.

Garnsey, for the defendant, contended, that this was a mixed question of law and fact, and should have been left to the jury,

instead of being decided by the Court; and cited 1 *Stark. Ev.* 415 *and notes; Joy v. Sears*, 9 *Pick.* 4; *Hilton* v. *Shepherd*, 6 *East*, 14; and *Parker* v. *Palmer*, 4 *Barn. & Ald.* 387. He also argued, that the decision made by the Judge was wrong, as the defendant had the right to find out, whether he could sell the machine, before he rescinded the bargain; and that the time taken was sufficiently short to find, whether he could obtain a purchaser, or not.

F. H. Allen, for the plaintiff, relied on *Atwood* v. *Clark*, 2 *Greenl.* 249, as conclusive in his favor.

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

WESTON C. J. — We cannot perceive such a difference between the case before us, and that of *Atwood* v. *Clark*, 2 *Greenl.* 249, as to call for the application of a different rule from that, which was laid down in that case. If the defendant here reserved to himself the right to rescind the contract, if he could not sell the interest he purchased, or was sick of his bargain, he was bound to make his election to do so, within a reasonable time. The shortest period, from the testimony, within which he offered to rescind, was more than two months after the contract. And the Judge instructed the jury, as a matter of law, that it was not done within a reasonable time. In the absence of all testimony, tending to show that so long a period was necessary, to enable the defendant to make his election, we cannot say that the jury were erroneously instructed.

Exceptions overruled.

ROBERT BOYD *vs.* MASON SHAW.

The *lawful entry* to foreclose a mortgage under the *Mass. st. of* 1798, *c.* 77, is not restricted to one made in the presence of two witnesses, or obtained by process of law, as required by the former *st. of* 1783, *c.* 22; but extends to *any actual entry* into the premises, lawfully made for that purpose.

THIS was a bill in equity, and was heard on bill, answer, and proof. The bill alleged, that *William Boyd* was seised of a tract

of land in *Bangor*, and on the 3*d of December*, 1813, mortgaged the same to the defendant, to secure the sum of $286, 37, payable in six months, with interest; and that on the 8*th of August*, 1815, the said *William Boyd* made a second mortgage of the same land to *Philip Coombs* and *Richard Pike*, to secure the payment to them of the sum of $321,59 in one year with interest; that on the 4*th* of *June*, 1835, *Coombs* and the administratrix of *Pike* assigned their mortgage to the plaintiff; that the plaintiff, as assignee of the *Coombs & Pike* mortgage, on the seventh of the same *June*, tendered to *Shaw* the amount due on his mortgage to redeem the same; and that *Shaw* refused to receive the money, or give a quitclaim deed, and wholly denied any right to redeem.

The answer denied, that any right of redemption existed at the time of the alleged tender; that on the 9*th of April*, 1816, "he entered upon the premises and took peaceable possession thereof according to law, by virtue of said mortgage deed, and for the express purpose of foreclosing the right in equity of redeeming the same, and that said *William Boyd* was then present, and had full knowledge of such entry to foreclose, and gave his written assent thereto;" that he has ever since, by himself and tenants, peaceably, openly, and exclusively occupied, possessed, and improved the same; and that the said *Coombs*, *Pike*, and *Robert Boyd* well knew the same. The defendant also set up title to the premises, by virtue of a Collector's sale for the payment of taxes; but, as this part of the case is not noticed in the opinion of the Court, any reference to it has become unnecessary. The facts in the case sufficiently appear in the opinion of the Court.

Rogers, in his argument for the complainant, remarked, that the only question was, whether there was a foreclosure in manner provided by law; that the lapse of time should have no influence; that the right of redemption was one favored in law; and that the mere possession of the defendant, without taking the necessary measures to foreclose, could not take away the rights of the assignee of the second mortgage. He contended, that by the *Mass. st.* of 1785, entitled an "act giving remedies in equity," there were but two modes of commencing the foreclosure of a mortgage, by entry under process of law, and by open and peaceable entry in the presence of two witnesses, and in both cases for condition broken.

By the additional act in 1795, 2 *Mass. st.* 853, a *mode of relief* is pointed out, when the mortgagee has entered according to law, but no new *mode of foreclosing* a mortgage is given. The third mode given in this State, "by the consent in writing of the mortgagor or those claiming under him," did not exist until 1821. *Revised st. c.* 39. The written consent of *William Boyd* therefore, being before that time, is of no importance, and an entry by that mode would not operate, as a foreclosure against him. No entry having been made in manner required by law, there was no foreclosure against the mortgagor. Much less has there been any foreclosure against the second mortgagee, under whom we claim. Our mortgage was before any attempt to foreclose, and no notice whatever of any entry to foreclose was given to us. In some of the earlier cases, there are remarks made, that when the mortgagee enters into possession in any way, after condition broken, it is to be presumed, that it is for condition broken; but the latter cases hold notice to the owner of the equity absolutely necessary. The latter decisions were made, where the cases were before the Court for decision on that point; the remarks in the earlier cases were mere dicta of the Judge delivering the opinion, without pertinency to the questions before the Court. The counsel went into an argument to show, that upon the facts, there was no foreclosure of the first mortgage against the holder of the second; and cited *Holdridge* v. *Gillespie*, 2 *John. Ch. R.* 30; *Hart.* v. *Ten Eyck.* 2 *John. Ch. R.* 62; *Woodcock* v. *Bennett*, 1 *Cowen*, 711; *Pomeroy* v. *Winship*, 12 *Mass. R.* 514; *Gordon* v. *Lewis*, 1 *Sumner*, 525; *Taylor* v. *Weld*, 5 *Mass. R.* 109; *Thayer* v. *Smith*, 17 *Mass. R.* 429; *Gibson* v. *Crehore*, 5 *Pick.* 146; and *Hadley* v. *Houghton*, 7 *Pick.* 29.

Mellen, and *F. Allen*, argued for the defendant, and contended:

That without such attending circumstances, as are proved in this case, the law presumes, that when a mortgagee enters after breach, he enters for the purpose of foreclosure; and will also presume, *that all was done according to law, which was necessary to be done. Taylor* v. *Weld*, 5 *Mass. R.* 119; *Pomeroy* v. *Winship*, 12 *Mass. R.* 519. By the Provincial act, ancient charters, 325, the entry was sufficient to foreclese, if the mortgagee "by any ways or means whatsoever obtained possession; and the statute of 1799 restored

the law to where it stood before the act of 1785. It was not necessary, that the entry should be made in the presence of two witnesses in this case. The mortgagee entered into possession, stating his object, and taking a written assent from the mortgagor; and this was sufficient. *Erskine* v. *Townshend*, 2 *Mass. R.* 493; *Newall* v. *Wright*, 3 *Mass. R.* 138; *Pomeroy* v. *Winship*, 12 *Mass. R.* 519; *Skinner* v. *Brewer*, 4 *Pick.* 470; *Dewey* v. *Van Deusen*, 4 *Pick.* 19; *Hadley* v. *Houghton*, 7 *Pick.* 29.

If the entry made by *Shaw* in 1816 was not effectual to bar the right of redemption, his open possession for three years after the act of 1821, with *Boyd's* knowledge of it, was sufficient. That statute speaks of entries before, as well as after its passage, and the right of redemption was barred in 1824 under the provisions of it.

We were not bound to *give notice* to any one, but the mortgagor and his legal representatives, of the entry to foreclose, nor are we bound to prove any notice to the second mortgagee. There was no privity of contract between *Shaw* and *Coombs*. An entry by judgment of law against *Boyd* would have been sufficient to foreclose against all, and an entry by the consent of the mortgagor is a substitute for it. *Erskine* v. *Townshend*, and *Skinner* v. *Brewer*, before cited; *Reed* v. *Davis*, 4 *Pick.* 216; *Thayer* v. *Smith*, 17 *Mass. R.* 429; 4 *Dane, ch.* 112, *art.* 5; 4 *Kent*, 1*st. ed.* 188. But if notice to *Coombs* was necessary, the case shows, that he had it.

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

Weston C. J. — The principal question submitted to us is, whether there has been a foreclosure of the mortgage, executed by *William Boyd*, from whom both parties claim, to the defendant. From the date of that mortgage, which was in *December*, 1813, until 1821, when the statutes were revised, the rights of the parties are to be determined by the laws of *Massachusetts*, then existing. By the *statute* of 1785, *ch.* 22, 1 *Mass. laws*, 251, all real estates pledged or mortgaged are declared redeemable, unless the mortgagee, or person claiming under him, hath by process of law, or by open and peaceable entry, made in the presence of two witnesses, taken actual possession thereof, and continued that possession

peaceably three years. By the additional *statute* of 1798, *ch.* 77, 2 *Mass. laws*, 853, it is provided, that where the mortgagee has lawfully entered, and obtained the actual possession of the mortgaged premises, for condition broken, the mortgagor shall have a right to redeem the same, within three years next after such possession obtained, and not afterwards. And a process is provided by a bill in equity, whereby upon payment or tender made, within the period limited, he is to be restored to the enjoyment of the premises.

It is contended, that by lawful entry under the last statute, must be understood one made peaceably, in the presence of two witnesses, or obtained by process of law, according to the provisions of the former statute. There does not seem to be any sufficient reason, why the term, lawful entry, should receive so narrow a construction. Any peaceable entry made by the mortgagee, upon a surrender to him of the premises, or otherwise, would be lawful.

These statutes have frequently been under consideration in the Supreme Court of *Massachusetts*. In *Earskine* v. *Townsend*, 2 *Mass. R.* 493, it was stated by the Court, that if the mortgagee shall lawfully enter and take possession, after condition broken, the three years will commence from the time of such entry. But if he have entered before, they do not commence, until he shall have given notice to the mortgagor, after condition broken, that he holds for that cause. What shall constitute a lawful entry is not defined, but a mode of foreclosure is expressly recognized, not pointed out by the first statute, namely, by notice to the mortgagor. *Newall et al.* v. *Wright*, 3 *Mass. R.* 138 has the same doctrine. *Parsons C. J.* there says, "when the mortgagor enters after condition broken, the three years commence on that entry.

In *Taylor* v. *Weld et al.* 5 *Mass. R.* 109, it was stated by *Sedgwick J.* who delivered the opinion of the Court, that an entry, after condition broken, shall be understood to be for that cause. In that case it was held by the Court, under the *statute* of 1798, *ch.* 77, that the three years begin to run, from the time the mortgagee shall have made lawful entry for condition broken; and that to effect a foreclosure, it was no longer necessary, as was required by the former statute, that he should enter by process of law, or make open and peaceable entry in the presence of two witnesses. In *Pomeroy* v.

Winship, 12 *Mass.* 514, *Parker C. J.* says, "it has already been decided that, where the mortgagee shall enter after condition broken, it shall be presumed that he entered for that cause; and the time for foreclosure shall run from that entry." The generality however of this intimation has been modified by subsequent decisions.

In *Thayer et al.* v. *Smith*, 17 *Mass. R.* 429, the court held, that the entry must be open and peaceable and actual possession taken, that the mortgagor may know when the three years commence, beyond which his right to redeem will cease; and that nothing short of actual notice to the mortgagor will supply the want of a continued possession. The same doctrine was laid down in *Gibson* v. *Crehore*, 5 *Pick.* 146, and in *Hadley et ux.* v. *Houghton*, 7 *Pick.* 29.

We are warranted then in deducing from the law of *Massachusetts*, as settled by judicial construction, that to effect a foreclosure by proceedings *in pais*, the mortgagee is to make lawful entry for condition broken, of which the parties to be effected must have actual or implied notice; and that notice is to be implied from a subsequent continued possession.

The entry of the mortgagee proved in this case, was after condition broken. The defendant entered lawfully for that cause and for the purpose of foreclosure, as appears by the consent in writing of *William Boyd*, the mortgagor, who had continued in possession up to that period. From that time, *Boyd* considered the land the property of the defendant, and his right was frequently recognized by *Coombs*, who became second mortgagee jointly with *Pike*. The first mortgage was recorded; *Coombs* knew of its existence; and *Boyd*, who was left in possession, and who acknowledged under his hand the entry of the defendant for condition broken, was for many years his near neighbor. *Coombs* found that the defendant had taken possession, after the date of the second mortgage to him.

He now states, that he neither knew or suspected that he did so for the purpose of foreclosure. It is somewhat remarkable, that interested as he was in the property, such a suspicion should not have entered his mind, during the years that the mortgagee had the possession and control of the land by his agents. If he had given himself the trouble to inquire, he might have ascertained the fact from his neighbor *Boyd*, the mortgagor. If he did not know when

the first mortgage was payable, he might have known upon inquiry, which as second mortgagee he was bound to make, the note being referred to in the first deed of mortgage, which was duly recorded.

He stated to *Jason Comings*, in 1828, that he had occupied the land for paying the taxes a few years, under the defendant. It appears, both from the testimony of *Comings* and of *John Bennock*, the agent of the defendant, that about that time *Coombs* applied to him to hire the land, claiming a preference from his former occupancy; and because it was contiguous to his own land. And he was accordingly permitted to continue his occupancy. In his communications with *Bennock*, he uniformly spoke of this land as belonging to the defendant. It appears that he repeatedly proposed to buy it; and that he had once or twice offered for it, to the defendant or his agents, a sum exceeding the amount originally due to the defendant with the interest.

It has been satisfactorily established in proof, that in 1816, the defendant made peaceable and lawful entry into the premises for condition broken. That for several years prior to 1828, and for several years afterwards, being more than three years in the whole, he was in the continued possession by his agent, or by his tenant, *Coombs*. The entry and possession of the mortgagee, after and for condition broken, is implied, if not actual, notice to all persons interested in the equity of redemption. But if it is incumbent upon the defendant to prove affirmatively notice of his entry to the second mortgagee, it is abundantly proved that *Coombs* had such notice; and he ought to have known, and might have known, that it was for condition broken. And the plaintiff is affected with this notice, holding as he does under *Coombs*, by deed dated a few days only before the commencement of this suit.

From the facts in the case, we are satisfied, that the right to redeem, now attempted to be asserted, was foreclosed prior to 1821, under the laws of *Massachusetts*. The defendant had lawfully entered and taken possession for condition broken, by the consent in writing of the mortgagor, *Boyd*, who was then in the actual possession, with the equitable right to redeem from both the incumbrancers. The second mortgagee became the tenant of the defendant for more than three years since the revised statute of 1821, fully acknowledging the defendant's title. If then the equity was

not foreclosed before, as we think it was, if the case required it, there is much reason to hold, that there may have been a foreclosure under the statute of this State. But upon this point we give no decided opinion. The entry of the defendant for condition broken, having been lawfully made prior to 1821, the law of *Massachusetts* must govern the case.

It has been contended in argument, that the right to redeem is a favored claim. But the extent and limit of the favor due to it, has been fixed by law. This we are not at liberty to transcend. It is very manifest, that the movement to redeem had its origin in the very great and sudden appreciation of the land in value. The plaintiff's grantor, a man of ample means, had slumbered upon the claim now set up, for twenty years. He was under no obligation to pay the debt due to the defendant. For the greater part of that period, it was doubtful whether the value of the land was equal to that debt. If it had depreciated, the loss would have fallen upon the defendant; and it is but just that the chance of gain should be accorded to him, who runs the hazard of the loss.

Bill dismissed.

NOTE.

Does not the statute of 1821, *c.* 39, prevent the foreclosure of a mortgage by *any other lawful entry*, than those specially provided in that statute?

In the revision of our statutes, the whole of the *Massachusetts* statute of 1785, *c.* 22, excepting a few words at the close of it, has been omitted. The first section of the statute of 1798, *c.* 77, is reenacted in the first section of our revised statutes, *c.* 39; and is immediately followed by this proviso: — "That the entry above described shall be by process of law, or by the consent in writing of the mortgagor, or those claiming under him, or by the mortgagee's taking peaceable and open possession of the premises mortgaged in the presence of two witnesses."

As the decisions in *Erskine* v. *Townsend*, *Taylor* v. *Weld*, and *Pemeroy* v. *Winship*, were made prior to the revision of the statutes, the Legislature probably intended to exclude the constructive mode established by those decisions.

By the *stat. March* 20, 1838, *c.* 333, another mode is provided, whereby the mortgagee, or his assigns, may foreclose a mortgage by giving public notice in some newspaper, printed in the county where the real estate is situated, that the condition of the mortgage has been broken, by reason whereof he claims to foreclose the mortgage, or causing the notice to be served on the mortgagor, or his assigns, and also causing a record thereof to be made in the Registry of deeds in the same county. The manner in which it is to be done is pointed out in the statute.

David Heaton *& al. vs.* Thomas Hodges.

Where by the terms of the grant of a tract of land, a line commences at a known monument, and from thence runs in a certain course a specified distance to another monument, but which latter monument was never erected, or cannot be found, the grant is limited to the distance specified, to be ascertained by admeasurement.

Where a grant of land is made with reference to a plan, the survey actually made at the time, if it can be ascertained, is to govern; but if no survey was made, or if it cannot be ascertained, and no natural monuments marked on the plan upon the line exist; the extent of the line is to be settled by the length of line given on the plan, according to its scale, exactly measured.

And this rule applies, although it should be found, by measuring from one monument to another, given on a different part of the plan, that large measure was made on that part.

This was a writ of entry on the seisin of the demandants. They derived their title to the lot in question, being 95 containing 110 acres, from *Knapp* and associates to whom the Commonwealth of *Massachusetts* granted the territory, now embraced within the limits of *Brewer & Orrington*, on the 29*th* of *June*, 1785, the deed being recorded *May* 2, 1798. The tenant claimed title under the grant of the Provincial Legislature of *Massachusetts*, of six Townships on the east side of *Penobscot* river, made on the 2*d* of *March*, 1762, of which *Bucksport* was one, and it was admitted that the tenant had title to lot No. 196, from the proprietors of said township. The resolves of the Legislature of *Massachusetts* passed *March* 17, 1785, and *July* 8, 1786, confirmed the grant of 1762. Said lots are laid down on the allotments of said towns respectively, and partly cover each other, and the only question between the parties is, where the northerly corner of *Bucksport* is located in said grant of 1762. The parties agree that the line between said grants on *Penobscot* river commences at where a hemlock tree stood and runs north 70° east. The grant to the proprietors of *Bucksport* gives the length of the line 5 miles and 184 rods to a stone monument, but no such monument can be found. It appears from marked trees on said line, that it was run so long ago as forty-four years. The tenant claims, as the corner of *Bucksport*, a beach tree, now fallen down which stood on the true course of said line, and about 178 rods greater measure, than that mentioned in the grant. There was evi-

dence that the beech tree was known and claimed as a corner by the proprietors of *Bucksport*, as early as the year 1801, when the lots on the back line of that town were run out, when the tree was alive, but the surveyor, *Greeley*, could not recollect the age of the marks upon it at that time. The demandants also proved that the south-westerly line of *Brewer* was run out as early as 48 or 49 years ago, and that a birch stump on said line, where it is intersected by the line aforesaid, leading from the hemlock on *Penobscot* river to the beech tree, claimed by the tenant as the corner of *Bucksport*, was marked 5 miles 184 rods; and according to the survey made by *Addison Dodge*, appointed by the Court in this case, this birch stump was five miles 198 rods and 20 links from the hemlock tree on *Penobscot* river. From the south to north line of *Brewer*, was 6 miles 22 rods and 20 links. If the birch stump, or a point nearer *Penobscot* river, is the true corner of *Bucksport*, the demandants maintained their action; but if the beech tree is the true corner, then the tenant maintained his defence. The tenant introduced the testimony of the surveyor to show, that he had measured the plan returned by the original surveyors, which was adopted by the *Provincial Legislature*, and which was to be referred to in the case, in two or three instances, where the distance was marked on the plan, and measured the distance upon the face of the earth; and also several instances where he measured the plan and compared the actual admeasurement from the same points on the earth, and found that the surveyors had allowed an excess of ten or twelve *per cent.*; the defendant also proved by the testimony of *Philip Greeley*, that he had been acquainted with surveys made 40 or 50 years ago, and had uniformly found an excess as great as ten *per cent.* The counsel for the tenant contended that inasmuch, as it appeared, that at the time this survey was made, an excess of ten or twelve *per cent.* had been allowed by the surveyors in other parts of the lines of said township, and generally in the survey of the six townships, to preserve consistency in the said survey, the jury ought to allow the same excess on the line from the hemlock on *Penobscot* river to the beech tree claimed as the corner of *Bucksport* by the tenant; and he requested the Court so to instruct the jury. There was no scale on the plan of the six townships, referred to in the original grant of the township, now *Bucksport*, and

the five other towns. The demandants had proved that the lines running from the birch stump were the more ancient. *Weston C. J.*, at the trial, instructed the jury that the original survey, if it could be ascertained, would govern the location; and that, if that could not be shewn, the distances on the plan, if made by a scale, should be taken; but if there were no scale on the plan, and the original location could not be proved, the termination of the line from the hemlock was to be fixed by measuring the distance given in the grant, exactly on the face of the earth. The jury returned their verdict for the demandants. If they were not properly instructed, the verdict was to be set aside, and a new trial granted.

When the case came on for argument, the plan was produced, and it was discovered, that there was a scale upon it, and that it was protracted upon a scale of 160 rods to an inch; and that the length of the line in dispute, as laid down on the plan, was precisely eleven inches.

The case was briefly argued by *Mellen* and *Abbott*, for the tenant; who contended, that the only correct and legitimate mode of proceeding in ascertaining the termination of the line extending from the river, as the stone monument could not be found, was to take the ratio of large measure, proved to have been made by the actual measurement of portions of the plan, where monuments could be found, and apply that ratio to all the lines, where existing monuments did not forbid.

And by *J. McGaw* and *F. H. Allen*, for the demandants; who contended, that they were entitled to recover, either on the ground, that the line of the defendant extended only to the birch; or by ascertaining the distance by applying the scale on the plan, 160 rods to an inch, which would give a shorter line still, five miles and 160 rods.

Mellen, afterwards submitted a written argument, which is sufficiently noticed in the opinion of the Court.

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

Weston C. J. — The title of both parties originates from the same source. But the tenant deduces his from an elder grant; and he has a right therefore to have his lot located according to that

grant, whether it does or does not conflict with the title of the demandants. The starting point at *Penobscot* river, from which the line in controversy is to be run, and the course of that line are known and agreed. By the grant, under which the tenant claims, that line was to be five miles and one hundred and eighty-four rods in length, and to terminate at a stone monument. That monument, or the place where it stood, cannot now be ascertained. If the terminating point is not to be located more than five miles, one hundred and ninety-eight rods and twenty links from *Penobscot* river, the demandants have prevailed in their action.

The grant before stated, was made or confirmed with reference to a plan. It was understood on both sides at the trial, that there was not to be found on that plan, any scale, by which it was delineated. It has since been discovered, by a more thorough examination, that it was protracted upon a scale of one hundred and sixty rods to an inch. And it appears, that the length of the line in dispute, as there laid down, is exactly eleven inches. This is equal only to five miles and an hundred and sixty rods. Whether upon this state of facts, the length of line, as deduced from the plan, or that which is actually given in the grant, is to govern, we are under no necessity of determining. If the tenant is to be restricted to either, upon exact measure, he fails in his title.

But it is contended, that from the plan, and other facts proved at the trial, such large measure should be accorded to him, as would give him the demanded premises. And there is reason to believe, from those facts, as well as from the known and acknowledged liberality of admeasurement in the surveys of that period, that such would be the result, applying to this line the same ratio of extension and enlargement. And if this were a question now for the first time presented, not having been before settled by the decisions and practice of our Courts, the argument, submitted by the senior counsel for the tenant, would be entitled to great weight and consideration. But a different rule having heretofore been adopted, we feel constrained to regard it as no longer an open question.

It is of the highest importance, that settled rules of law, affecting the title to real estates, should be adhered to and preserved. The true location of lots of land, made with reference to plans, as ancient as that under consideration, delineating lines, some of which

had been made from actual survey, and others platted without being surveyed, has frequently been before the Supreme Judicial Court, both before and since our separation. We have understood the rule applied in such cases has been, that the survey actually made, if it can be ascertained, is to govern the location. But if that could not be shown, or if none was made, and the lines were not drawn with reference to natural monuments, they were to be settled by the length of line given on the plan, according to its scale, exactly measured. It may have been deemed, that a departure from this rule, would be productive of too much uncertainty, from the want of uniformity in the excess of admeasurement allowed by different surveyors, as well as in that, which may have been made by the same surveyor.

We have been referred to no adjudged case in the reports, presenting this question, prior to the separation. A decision, however, was made upon it by the whole Court, in *Bowman* v. *White*, in 1801, prior to the commencement of the *Massachusetts Reports*, which is noticed in *Loring* v. *Norton*, 8 *Greenl.* 61. Since the separation, the case of the *Proprietors of the Kennebec Purchase* v. *Tiffany*, 1 *Greenl.* 219, may be regarded as being directly in point. The tenant's title there, depended upon *Winslow's* plan, made in 1761. *Winslow* surveyed and fronted the lots on *Kennebec* river, there marking the corners of each; and upon this base, he platted on his plan three tiers or ranges of lots, west of the river, each represented, by the scale on the plan, as one mile in length, and fifty rods in width; but he did not actually run any lines, or make any corners, except at the river. The space between the corners of each lot at the river, was generally found to be fifty-four rods, instead of fifty.

It thus appeared, that the excess of admeasurement made by *Winslow*, was about eight per cent. Accordingly when *Dr. McKecknie* was employed by the proprietors, seven years afterwards, to survey a tract further west, but adjoining that laid down on *Winslow's* plan, in order to ascertain the westerly line of *Winslow's* lots, he measured three miles and seventy-two rods, instead of three miles, allowing about the same excess, which *Winslow* did in his survey on the river. We are not aware, that a single argument has been urged, in favor of liberal admeasurement, in the case before

us, which did not apply with equal force in that case. *Winslow's* rod was proved to be longer by four parts in fifty, than the exact rod. His rod was necessarily applied, in ascertaining the width of each lot, and why was it not adopted also in ascertaining its length? *McKecknie*, an experienced surveyor of that day, so applied it. But the Court overruled this practical, but subsequent location, made in that early day, by a surveyor of the proprietors, and applied the exact rod to *Winslow's* scale, in determining how far his lots should extend westerly from the river.

The late Chief Justice of this Court, who had been many years in extensive practice, prior to our separation, sustains his opinion in that case, by a reference to the application of the same rule to a tract of land, on the eastern side of the river. The result was, that on both sides, upon the principle of exact measurement, the proprietors succeeded in establishing their claim to a strip of land between tracts, before supposed by their surveyors and themselves, to have been contiguous. A stronger case for the application of the rule now contended for, cannot well be imagined. And yet we doubt not both those decisions were in accordance with what had been previously settled and decided in *Massachusetts*. *Loring* v. *Norton*, where the opinion of the Court was delivered by Judge *Parris*, was decided upon the same principles.

In the case under consideration, neither the length of line given in the grant, or deduced from the plan, exactly measured, will give the tenant any part of the land defended; and in our judgment no other rule, than that of exact measurement, can be legally applied.

Judgment on the verdict.

LORENZO EWELL *vs.* GEORGE GILLIS.

In trover for a note, where an unnecessarily particular description of it is given in the declaration, an entire failure of any proof, as to such needless averments, will not defeat the action.

But if there had been proof in relation to them, and a variance between the declaration and the proof had appeared, such variance would have been fatal to the action.

In such action, proof that the defendant received the note from the plaintiff and promised to collect it for him, is *prima facie* evidence of the plaintiff's ownership.

This was an action of *trover* for a note, the writ being dated *Sept.* 9, 1834. The declaration described the note alleged to have been converted by the defendant, as a "certain promissory note in writing, made and drawn by *Rufus Hodgdon* and *Ivory Jefferds*, dated at said *Milford*, in the month of *March*, 1833, whereby the said *Hodgdon* and *Jefferds* promised to pay one *Nathan Winslow*, or order, the sum of eighty dollars and interest from date in six months, on the back of which was the receipt of twelve dollars in the month of *October*, 1833."

For the plaintiff, *Hezekiah Hill* testified, that about two years ago, he and the plaintiff went to the defendant's house, and the defendant asked the plaintiff, if he had such a note, and whether he did not want him to collect it for him; that the plaintiff replied, he should be glad if he would, and that if he would, he should have $5 or $10 for his trouble; that thereupon the plaintiff took the note out of his pocket book, and handed it to the defendant, who read it in his hearing, and it was a note for about $80 or $90, signed by *Hodgdon* and *Jefferds*, and payable to *Nathan Winslow*, but the date, when payable, or whether on interest or not, he did not recollect. The witness further stated, that the plaintiff left the note with the defendant. *Parlin F. Hildrith* testified, that in *August* or *September*, 1834, he went with the plaintiff from the office of the attorney who brought this suit, to the defendant's house; that they there met him, and the plaintiff said in his hearing to the defendant, "I want the note I left with you to collect, that *Nathan Winslow* let me have;" that the defendant replied, "that he did not know where the note was; he did not know but he had lost it; that it might be among his papers, that he would try to find it, and

if he did, he would return it, as he had not collected it." The foregoing was the only evidence in the case. The counsel for the defendant requested the Judge to instruct the jury, that the plaintiff had failed to prove the existence of any such note, as is set forth in his declaration; that the plaintiff's neglect to call either of the parties to said note, by whom its existence and contents could have been more distinctly proved, afforded a legal presumption, that if called, their testimony would have been unfavorable to the plaintiff; that the plaintiff had failed to prove property in himself sufficient to maintain the action; and that there was not sufficient evidence of a conversion of said note by the defendant. The counsel for the defendant, in opening the defence, stated, that he expected the plaintiff would have called *Nathan Winslow*, and was disappointed that he had not; that in truth the note was *Winslow's* property, and the defendant had settled with him. The counsel for the plaintiff, in his argument, urged that it was in the defendant's power to have called *Winslow*, and that his non-production operated as much against the defendant as the plaintiff. The Chief Justice, presiding at the trial, instructed the jury, that whether the plaintiff had proved, that the defendant received from him such a note as is described in the declaration, they would determine from the evidence; that possession of the note by the plaintiff and the proffer of the defendant to collect it for him, was evidence of property in the plaintiff to be submitted to their consideration, and it would be for them to judge how far it was satisfactory, and how far upon either of these points the failure of the plaintiff to call the parties to the note ought to bear to his prejudice; and that it had been insisted by the counsel for the plaintiff, that it ought to conclude as much against the defendant as the plaintiff, that *Nathan Winslow* was not produced; that the plaintiff had taken a witness and gone to the defendant's house to make a formal demand upon him; that it was known to every lawyer, and to many who were not lawyers, that in actions of trover, where there was no other evidence of conversion, than a demand and refusal, that such demand and refusal should precede the action, and that they would apply their experience and judgment of the motives and conduct of men, under such circumstances, in determining from the evidence, whether the demand preceded the action; that if the plaintiff had satisfied

them, that the defendant had received from him such a note, as is set forth in his declaration; that it was the plaintiff's property; and that the defendant had converted it to his own use; the action was maintained, otherwise their verdict would be for the defendant. The jury returned their verdict for the plaintiff. If not properly instructed, the verdict is to be set aside, and a new trial granted; otherwise, judgment was to be rendered thereon, unless the same should be set aside as a verdict against evidence, according to the defendant's motion on file.

Rogers, for the defendant, argued in support of the several positions taken at the trial; and cited 3 *Stark. Ev.* 1491; *Wilson* v. *Chambers*, *Cro. Car.* 262; 15 *Petersdorf's ab.* 197 *and note*; *Bissell* v. *Drake*, 19 *Johns.* 66; 1 *Stark. Ev.* 514; 1 *Stark. Ev.* 1497; *Storm* v. *Livingston*, 6 *John. R.* 44.

J. Appleton, for the plaintiff, argued:

1. That the evidence was sufficient to prove property of the note in the plaintiff; and that if it were not, that the defendant, having received it from the plaintiff, and showing no title to it under any other person, is estopped to deny the plaintiff's title. 7 *Bing.* 339; 3 *Esp. R.* 115; 2 *Barn. & C.* 540.

2. The evidence was sufficient to prove the identity of the note. It is not a case of variance, where the facts stated in the declaration must be proved, but merely whether we proved enough of particular description of the note to enable the jury to find it to be the same. The defendant, having been proved to have the note in his possession, should have produced it, and he cannot now object to any variance. 6 *Serg. & R.* 154; 1 *Day*, 100; 1 *Binney*, 273; 4 *M. & S.* 532.

3. The evidence was sufficient to prove a conversion. 9 *Conn. R.* 309; 2 *Stark. Ev.* 48; 3 *Mason*, 383; 2 *Johns. Ch. R.* 62;

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

Weston C. J. — The authorities cited on both sides, establish the position, that where trover is brought for a bond, or other instrument in writing, a very general description of it only is required to be averred and proved. This requirement would have been sufficiently satisfied, by setting forth and proving that the note in

controversy was valuable, that it was signed by *Hodgdon* and *Jefferds*, and made payable to *Nathan Winslow*. So much was done. But the declaration further describes the amount of the note, for what period it was given, and that it was payable to *Winslow* or order, with interest. It also avers, that there was an indorsement on the note, stating the time and the amount. Of these averments there was no proof whatever, except, perhaps, as to the amount of the note, the testimony upon this point, although not precise, having some tendency to prove that averment, or if not, not being necessarily inconsistent with it.

And the question is, whether the plaintiff having, as it respects the subject matter of the suit, averred and proved all that is legally required of him to maintain his action, is to be defeated, because he fails in proof of other more particular averments, unnecessarily introduced. The origin of the opinion, that such proof is necessary, is to be found in the case of *Wilson* v. *Chambers*, *Cro. Car.* 262. It was error on a judgment in the Common Pleas, in an action of trover for a bond of one hundred pounds, conditioned to pay fifty. It was assigned for error, that no date of the bond was mentioned, but the Court held the error not well assigned, for the bond being lost and converted, the plaintiff might not recollect its date; and if he had misrecited it, it would have occasioned the failure of his suit.

In *Bissel* v. *Drake*, 19 *Johns.* 66, there was a variance between the averment and proof in the description of the note, which was held to be fatal. And if an entire failure of proof in such particulars, unnecessarily averred, is to have the same effect, the plaintiff is not entitled to retain his verdict. But it appears to us that there is a manifest difference between a failure, and a variance in proof. By the latter, the identity is disproved; by the former, the force of what is proved remains unimpaired. It is hazardous, as stated by the Court, in the case from *Croke*, to attempt to describe particularly a written instrument from memory, because, if misrecited, the action is defeated. But it would seem, that before such a result is to follow, such misrecital should be made to appear. The defendant has it in his power to make it appear, by the production of the instrument; hence the danger of a particular description. An action of trover for an instrument, is a very different thing from an

action of assumpsit on the same instrument. The plaintiff proved, that he delivered to the defendant a note, signed by *Hodgdon* and *Jefferds*, payable to *Nathan Winslow;* and he introduced proof also as to its value. This was sufficient to maintain the action, if he also proved that the defendant, without right, converted that note to his own use. And the force of that proof is not at all weakened by his failing to prove other particulars, unnecessarily averred in the declaration. And we are not satisfied, that this objection ought to prevail.

The witness, called by the plaintiff, was as competent to prove the existence and general description of the note, as one of the parties. He saw it, and heard it read. A party might have had its contents more perfectly in recollection ; but his testimony would not have been evidence of a higher character. Each side endeavored to take advantage of the non-production of a party to the note ; and the Judge in summing up, stated the argument of each, leaving it to the jury to determine how far any inference was to be drawn from that circumstance, to the prejudice either of the plaintiff or the defendant.

The defendant received the note from the plaintiff, and promised to collect it for his use. This was evidence of property in the plaintiff; and there was nothing to disprove it.

The witness could not recollect the precise day of the demand. It was either in *August* or *September*. He went from the office of the attorney, who brought the action, with the plaintiff to witness the demand. We think there can be no reasonable doubt, that this was done with a view to the action ; and that the jury were therefore well warranted in the conclusion, that it was prior to the suit, which was instituted on the ninth day of *September*.

The note was not redelivered to the plaintiff, upon his demand. This was evidence of a conversion, proper to be submitted to the jury. The defendant said he had not collected the note, he might have lost it, it might be among his papers, and he would try to find and return it. All this went to the jury ; but they were not bound to believe it all. *Hart* v. *Ten Eyck*, 2 *Johns. Ch. R.* 90; *Roe* v. *Furors*, 2 *Bos. & Pull.* 548. His counsel, in opening his defence, had stated, that the note was *Winslow's* property, and that the defendant had settled with him.

Upon the whole, we cannot perceive, either that the jury were erroneously instructed, or that the verdict is against the weight of evidence.

Judgment on the verdict.

Oliver Lane *vs.* George L. Borland.

Where *L.* made a bill of sale, not under seal, of a horse to *W. & F.*, warranting it free from all incumbrances, and acknowledging the receipt of payment therefor by notes, and at the same time took back from them a writing, stating that the horse was purchased by them of *L.* and was to remain his property until the notes were paid, but that *W. & F.* were to have possession of the horse until the notes became due; and *W. & F.* took possession of the horse, and before the notes were due sold him to *B.*, exhibiting his bill of sale from *L.* as evidence of his title, who was thereby induced to make the purchase, and who had no notice of any claim of *L.* The notes not being paid, *L.* demanded the horse, and on refusal to give it up, brought this action of trover. *It was held*, that *L.* was entitled to recover, either because he had not parted with his original title, or because he had acquired a new one by way of mortgage.

The principle, that if one of two innocent parties is to suffer loss by the fraud of a third, it shall fall on him who has reposed confidence in the fraudulent party, does not apply to cases where the mortgagor of personal property has been suffered to retain the possession.

This case came before the Court on a statement of facts, of which a copy follows.

This is an action of *trover*, brought to recover the value of a horse, which the plaintiff alleged to be his property, and to have been converted by the defendant, on the second day of *May*, 1834. It was agreed by the parties, that the said horse was originally the plaintiff's, and that on the fourth day of *January*, 1834, the plaintiff made the following agreement with the firm of *Washburn & Fling* of *Bangor*, respecting the sale of said horse to them, viz: The plaintiff agreed to sell said horse to them for the sum of eighty dollars, forty dollars and interest to be paid in *March*, 1834, and forty dollars and interest in *June*, 1834, and that the said horse should remain in the possession of the said *Washburn & Fling* until they should fail to pay according to their contract, but should continue to be the property of the plaintiff until payment should

be made according to the contract; at which time the plaintiff gave to *Washburn & Fling* a bill of sale of said horse, and took back a written acknowledgment of the terms and conditions of the agreement; the following is a copy of said bill of sale, viz:

"*Bangor, January 4th*, 1834.

This certifies, that *Washburn & Fling* of *Bangor*, bought a bay horse of *Oliver Lane* of *St. Albans*, and the said *Lane* warrants the horse to be free from all incumbrances. The said *Lane* has received payment by notes.

Oliver Lane."

And the following is a copy of the agreement above referred to, signed at the same time, by *Washburn & Fling*, viz:

Bangor, January 4th, 1834.

This certifies, that we, the firm of *Washburn & Fling*, bought a bay horse of *Oliver Lane*, of *St. Albans*, and the said horse shall remain in our hands until the said *Lane* receive his pay, then the said horse shall be our property, otherwise, shall be the property of said *Lane*, the payments become due, forty dollars in *March* and forty dollars in *June* with interest.

George W. Washburn,
Sanford Fling."

And it is admitted that the plaintiff can prove, by *parol*, if legally admissible, that the plaintiff refused at the time to sell the said horse to the said *Washburn & Fling* without security, and that it was then agreed that the plaintiff should continue to own the horse until he should receive payment, and that the said *Washburn & Fling*, in the mean time, should not sell said horse. It is also agreed, that one of the said firm drew both of the writings above named. It is also admitted, that the defendant can prove by one of the firm of *Washburn & Fling*, that they sold the same horse to one *Vickory* for a valuable consideration, without giving him any notice of any incumbrance on the horse, or any facts attending the sale to *Washburn & Fling*, and that the said *Vickory* afterwards sold the same to the defendant without giving any notice of any incumbrance; and that *Vickory* was shewn the bill of sale by *Washburn & Fling* at the time of his purchase, and bought on the strength of it. It is admitted, that no part of the sum, which the

said *Washburn & Fling* were to give for said horse had been paid, and that the plaintiff made a demand of the defendant for said horse, as stated in the plaintiff's writ. It is agreed, that if the Court should be of opinion on the above statement, that the plaintiff can recover, that the defendant shall be defaulted for the amount of the notes and interest, and costs; otherwise, the plaintiff shall be non-suited, and the defendant recover his costs.

E. Brown, for the plaintiff.

1. The *parol* evidence offered by the plaintiff, was admissible. It is not contradictory to, or inconsistent with, the written papers, and may be admitted to extend the time, to explain the circumstances, and to shew the contract to be conditional. 1 *Comyn on Con.* 40; 3 *Stark. Ev.* 1047; *Houghton* v. *Brown*, 7 *Greenl.* 421; *Nason v. Reed, ibid.* 22; *Fowle* v. *Bigelow*, 10 *Mass. R.* 379. Or to establish an independent fact. *Davenport* v. *Mason*, 15 *Mass. R.* 85.

But it is of little importance, whether this testimony be admissible or not, as the written and *parol* evidence is nearly the same.

2. Upon the facts agreed, the plaintiff has a valid title to the horse. The fair construction of both papers is, that this was but a conditional sale, and that the property never passed from the plaintiff, and was not to pass, until payment should be made. If a man parts with his property, he may annex any condition to it, he pleases. The most favorable ground for the defendant is to consider the transaction a mortgage. As it was agreed, that *Washburn & Fling* should have the possession of the horse until they failed to pay according to agreement, it may be said that this enabled them to commit a fraud. But it has been many times decided, that the possession of mortgaged property by the mortgagor, is no evidence of a legal fraud. *Brooks* v. *Powers*, 15 *Mass R.* 244; *Badlam* v. *Tucker*, 1 *Pick.* 389; *Homes* v. *Crane*, 2 *Pick.* 607; *Wheeler* v. *Train*, 3 *Pick.* 255; *Ward* v. *Sumner*, 5 *Pick.* 59; *Edwards* v. *Harben*, 2 *T. R.* 596; *Marston* v. *Baldwin*, 17 *Mass. R.* 605. Parol evidence is admissible to prove, that a bill of sale, absolute on its face, was intended to be merely a security for money. *Smith* v. *Tilton*, 1 *Fairf.* 350; *Reed* v. *Jewett*, 5 *Greenl.* 96; *Gleason* v. *Drew*, 9 *Greenl.* 79; *Lunt* v. *Whittaker*, 1 *Fairf.* 310.

J. Appleton, for defendant, said, that this case ought to be entitled the *negligent seller* against the *vigilant purchaser.* The plaintiff gives a bill of sale of the horse, absolute in its terms, and suffers the horse to go into the possession of the purchaser, who offers it for sale to the defendant. He asks for the title, and is shown a bill of sale from the plaintiff. Finding that the plaintiff once owned the horse, and had transferred his title and possession, he makes the purchase. Afterwards, the plaintiff claims it, as his, and because it is not given up, brings this suit. He ought not to be permitted to recover.

1. Because the giving of this absolute bill of sale for the defendant to show, without any condition, is fully equivalent to standing by and seeing another make sale of his property, and keeping silence; and it is well settled, that this prevents enforcing a claim to it, even in the case of real estate. *Sug. Vend. & Pur.* 480; 4 *Paige,* 94; 1 *Johns. Ch. R.* 354; 2 *Johns. R.* 588; 5 *Johns. Ch. R.* 272; 1 *Story's Eq.* 376, 377, 378; *Roberts on Frauds,* 129.

2. The plaintiff is estopped to claim against his own warranty of freedom from incumbrance, and acknowledgement of payment. *Wells* v. *Higgins,* 1 *Littell,* 300; *Chapman* v. *Searle,* 3 *Pick.* 38; *Divoll* v. *Leadbetter,* 4 *Pick.* 220; *Langford* v. *Foote,* 28 *Com. L. Rep.* 285; *Hawes* v. *Watson,* 2 *B. & C.* 540; *Gosling* v. *Birnee,* 7 *Bing.* 339.

3. When the loss is to fall on one of two persons, he who by his negligence has permitted another to deceive the public, must bear the loss. 6 *Mass. R.* 429; 9 *Mass. R.* 60; 2 *Pick.* 202; 2 *Paige,* 172; 27 *Com. L. Rep.* 461.

4. The paper given back was a mere personal contract, binding only on the parties making it, and cannot create a mortgage against third persons. 7 *B. & Cr.* 481.

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

Weston C. J. — The evidence of the contract between the plaintiff and *Washburn & Fling,* is to be found in the paper given by him to them, of the fourth of *January,* 1834, and in that given by them to him of the same date. They both relate to the same transaction, executed at the same time, and are to have the

same effect, as if incorporated in the same instrument. It was not a mode of doing business much to be approved; but it was sufficient between honest men. Whatever apparent contradiction there may be in the instruments taken together, it is manifest that the intention of the parties was, that the property should remain in the plaintiff, until he was paid the price. It was a conditional sale; a contract for a sale, not consummated.

But if it was to be regarded as a sale, it must be held that there was, at the same time, a mortgage back to secure the consideration. In the one case, the property would not pass, except upon payment; in the other, it would operate as a re-conveyance to the plaintiff, until he was paid his price. Both modes of transacting the business, when free from fraud, have been sanctioned by judicial decisions, as appears by the cases cited for the plaintiff. The mortgage of personal property, the mortgagor remaining in possession, has been resisted as tending to give false credit, and to deceive purchasers; but their validity has been too firmly established, to be shaken, without the interposition of the legislative power. And it has been held, in *Lunt et al.* v. *Whittaker*, 1 *Fairf.* 310, that a mortgage of this kind shall prevail against a *bona fide* purchaser, who had no notice of it, or reason to suspect its existence.

Without resorting in this case to the parol evidence, which it is agreed exists, if admissible, we perceive no reason to doubt that the transaction was fair, and free from fraud on the part of the plaintiff. It does not appear, that he had any reason to suspect, that *Washburn & Fling* would make the fraudulent use they did of the bill of sale he gave them. It was a fraud upon him, as well as upon the purchaser, bringing into jeopardy the interest of both, and subjecting them to the hazard and expense of a lawsuit. But it is said the plaintiff ought to lose his horse; because by his bill of sale, he enabled *Washburn & Fling* to commit a fraud. This consequence could not have been meditated or designed by him. If he had even suspected it, a regard to his own interest would have withheld him from giving it. It contributed to enable *Washburn & Fling* to deceive a purchaser; and purchasers are often deceived by the evidence of property, arising from possession alone, without impairing the title of those, who may have entrusted the fraudulent party with such possession. As the law now is, the

purchaser of personal property, is always exposed to the incumbrance of a secret mortgage. From the bill of sale, the purchaser had reason to believe, that the former owner of the horse had transferred his title; but he would learn from the same paper that it was not paid for; and he ought to have known, that he incurred the hazard of a mortgage, made to secure him or some other person. If the sale had been made in the plaintiff's presence, and he had been silent, he could not afterwards have asserted his claim against the purchaser.

Many cases, some of which have been cited, have turned upon the principle, that if one of two innocent parties is to suffer loss, by the fraud of a third, it shall fall upon him, who has reposed confidence in the fraudulent party, and enabled him to consummate the fraud. But this principle cannot apply to every case, which may fall within its range. A bailee may sell the property entrusted to him; but the purchaser thereby acquires no title against the true owner. The mortgagee, by suffering the mortgagor to keep possession, puts it in his power to defraud a subsequent purchaser, notwithstanding which, his mortgage is adjudged good.

The plaintiff has proved property in the horse; either because he has not parted with his original title, or because he has acquired a new one by way of mortgage; and there is no evidence that he has forfeited it, by fraud or otherwise. And the defendant having refused to give up the horse on demand, the opinion of the Court is, that the plaintiff is entitled to prevail in this action.

Defendant defaulted.

NATHANIEL HIGGINS *vs.* JOSEPH KENDRICK.

It is the duty of a *Constable*, who has attached personal property on mesne process, to deliver it over to a *deputy sheriff*, having the execution issued in the same case, on his making a demand of the property within thirty days after judgment; although such constable be in office, and be authorized to serve the execution.

And if the constable has permitted the property to go back into the possession of the debtor on receiving a receipt therefor from a person, then considered good, procured by the debtor, and the receipter had failed and the property could not be found, when the demand was made; the constable is still liable to the creditor for the value of the property.

Nor can any reduction be made in the amount of damages on account of the keeping of the property, where the expense was incurred by the debtor, and not by the officer.

An offer by the debtor to the *creditor* to give other receipters, and a refusal on his part to take them, furnish no defence to the constable, unless the creditor had accepted the receipt, as a substitute for the liability of the officer.

THIS was an action on the case, against the defendant, as Constable of *Bangor*, for not keeping property by him taken on a writ, at the suit of the plaintiff, to respond the judgment rendered thereon. It was admitted, that the plaintiff sued out an original writ against one *Caleb Shaw, jr.*; that the defendant served the writ, and returned as attached thereon a yoke of oxen; that judgment was rendered in that suit in favor of the plaintiff, at the *January* term of the Court of Common Pleas for this county, 1834, for less than 100 dollars; that within thirty days after the rendition of that judgment, execution duly issued thereon, and was put into the hands of *J. W. Carr*, a deputy of the Sheriff of this county, for service, who testified, that on the 12th of *February*, 1834, which was also within thirty days of the judgment, he, then having the execution, demanded the oxen attached on the writ, of the defendant, then remaining Constable of *Bangor*, who neglected to deliver them.

For the defendant, *John Marshall* testified, that on the 18th of *October*, 1832, the plaintiff, the defendant and *Caleb Shaw, jr.* called at his store, when *Shaw* requested to become with him a receipter to the officer, the defendant, for his oxen then attached, to which he acceded, and signed with *Shaw* a receipt, promising to deliver the oxen to *Kendrick* or bearer on demand, and that a demand was made *June* 27, 1833; that the plaintiff was present, and must

have seen what was done, and made no objection; that he, the witness, owed *Shaw* about $100, and that besides that and the oxen, he did not know that *Shaw* had any other property; that he himself was in credit then, having 5 or $6000 worth of goods in his store; that on the 8th of *June*, 1833, two of his creditors, to whom he owed $1000 each, attached his goods and shut up his store, whereupon that night, or the next day, he assigned all his property to *Milford P. Norton, Esq.* for the benefit of his other creditors, who, however, have not expressed their assent to the assignment; that he enjoined no secrecy on his assignee, although he should not himself at the time have stated to his creditors what disposition he had made of his property, and that after that time he had been insolvent, and had no property that could be attached. He further testified, that the plaintiff frequently spoke to him about his being receipter; the first time within a few days after he had become such; that the winter after the receipt, but before judgment, the plaintiff called on him, told him *Shaw* was good for nothing, and he would have to pay the receipt, and wanted him to permit the plaintiff then to take up goods on that account, which the witness declined. *Caleb Shaw, jr.* testified, that after his oxen were attached, the plaintiff and defendant both advised him to get a receipter, that they all went together to *Marshall's* store, and when the receipt was signed, the plaintiff was present, and made no objection; that not long afterwards, and before judgment, *Marshall* applied to him to get him discharged from the receipt; that he accordingly went to the plaintiff, and proposed giving other receipters, and proposed to go to the defendant and get it done, but that the plaintiff objected, and said he had got a good receipter, and would not release him. The counsel for the defendant contended, 1. That upon these facts, the defendant was not liable; but, 2. If he was, the expense of keeping the oxen, from the attachment to the judgment, which ought to be allowed him, would have been equal to their value. *Weston C. J.* instructed the jury, that the defendant was liable in this action, upon the facts, and that he was not entitled to be allowed any expense for keeping the oxen, which he did not incur. The jury returned their verdict for the plaintiff. If they were erroneously instructed the verdict is to be set aside, and a new trial granted.

Kent, for the defendant, contended: —

1. The defendant is not liable, because the execution was not delivered *to him* within thirty days after judgment, he being still a Constable, and having power to serve the execution.

The officer attaching property is in no case liable to the creditor for not keeping it, unless the execution shall be put into his hands within thirty days, so that he can levy upon it. While he remains in office, he is not liable by a simple demand by the creditor or any other person. *Blake* v. *Shaw*, 7 *Mass. R.* 505; and in *Harrington* v. *Ward*, 9 *Mass. R.* 251, 252, the same position is taken in argument, and not denied by the Court. In all the cases found, where the officer was held liable for this cause, he was either out of office, or the execution was delivered to him. This remark does not apply to the case of a Sheriff and his own deputies, who are in law considered the same. The officer is liable to the debtor, and to after attaching creditors, unless the property be appropriated legally in satisfaction of the first. Is the attaching officer to be made responsible for the acts of the one to whom the property is delivered, if he misapply the property; or shall such delivery over excuse him? It is a familiar principle, that where one officer has attached personal property, no other can take it out of his hands by another attachment. These principles are all opposed to the attempt made in this case. *Walker* v. *Foxcroft*, 2 *Greenl.* 270; *Blake* v. *Shaw*, before cited; *Thompson* v. *Marsh*, 14 *Mass. R.* 269.

2. The plaintiff assented to the defendant's taking this receipt, and to the debtor, or his friends, keeping the property; and cannot now hold the defendant liable for the loss occasioned thereby. *Cooper* v. *Mowry*, 16 *Mass. R.* 8; *Twombly* v. *Hunnewell*, 2 *Greenl.* 224.

3. By his subsequent conduct, the defendant assumed a control over the receipt, and treated it as his own, and prevented the defendant from taking a new one, or securing himself from loss, and should now bear it himself.

4. This is an action for damages for the defendant's neglect in not keeping the oxen, so that they might be taken on execution. He is not entitled to receive more damages, than he has sustained. The receipter was a man of property, when the receipt was taken,

and failed before judgment. If the officer must bear this loss, then the plaintiff is entitled to recover of the defendant only so much as the oxen would have given him, if the officer had kept them, and delivered them over on demand made. The keeping then would surely be a charge upon the oxen, and it should be now. It is a well settled rule of law, in the case of bail, that actual damages only can be recovered. *Hodsdon* v. *Wilkins*, 7 *Greenl.* 113. This very question has been before the Court in *New Hampshire*, and decided in our favor. *Runlett* v. *Bell*, 5 *N. H. Rep.* 433.

Rogers, for the plaintiff, argued, that it was not necessary, that the execution should be delivered to the same officer, who served the writ; that although it might be true, that the Sheriff and any one of his deputies might be considered the same, that different deputies of the same Sheriff were distinct, as much as a deputy and a constable; and that to charge an officer, who had attached property, it was only necessary to deliver the execution to some person authorized to serve it, and that he should demand the property within thirty days. *Phillips* v. *Bridge*, 11 *Mass. R.* 242; *Start* v. *Sherwin*, 1 *Pick.* 521; *Ludden* v. *Leavitt*, 9 *Mass. R.* 104; *Sewall* v. *Mattoon*, 9 *Mass. R.* 535; *Tyler* v. *Ulmer*, 12 *Mass. R.* 163; *Webster* v. *Coffin*, 14 *Mass. R.* 196.

The plaintiff had nothing to do in taking a receipter. It was wholly a matter of the officer's, and the officer might take the property into his own hands whenever he pleased. The refusal of the creditor to take a new receipter, did not prevent the defendant from doing it. The mere knowledge by the plaintiff of the doings of the officer, cannot excuse him, though perhaps directions to him what to do might have done so. The cases in relation to bail have no application, as in that case the officer is by law obliged to take bail, but has the option to take a receipt or refuse it, when property is attached. It would seem from the case cited from *New Hampshire*, that the officer is there obliged by law to take a receipter, if offered, and if so, would very properly stand like bail.

The same question, as to damages, has been at least twice made, and twice rejected by the Court. *Tyler* v. *Ulmer*, 12 *Mass. R.* 163; *Sewall* v. *Mattoon*, 9 *Mass. R.* 535.

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

WESTON C. J. — The defendant, as Constable of *Bangor*, having on the plaintiff's writ attached a yoke of oxen, was bound to keep them until taken in execution, or until the attachment was dissolved. For the service of the writ, he was entitled to his legal fees, and for keeping the oxen, a reasonable compensation. That fully satisfied all his claims. We are not now considering rights and liabilities, arising from subsequent attachments. It does not appear that there were any other. The defendant had a right to keep the property, until he could discharge himself of his responsibility to the creditor or debtor, depending on the termination of the suit. When he had it in his power to do that, a further detention on his part, could not be justified.

When called upon by *Carr*, the deputy, who had the execution, to deliver up the oxen to him, to be taken thereon, within thirty days after the rendition of judgment, if he had done so, he would have discharged his official duty, and relieved himself from liability. We cannot find, that the creditor was under any legal obligation to employ him to serve the execution. If not called upon for the property, within thirty days after judgment, unless he had put it out of his power to produce it, he might have a claim to be discharged. In this case, he had parted with the oxen, and did not succeed in reclaiming them, although he demanded them of his receipter, some months before judgment, as appears by an indorsement on the receipt. If then, the execution had been put into his hands, he could not have taken to satisfy it, the property attached.

The same objection was taken in *Phillips et al.* v. *Bridge*, 11 *Mass. R.* 242. The attachment, under consideration there, was made by *Webster*, a deputy of the defendant, and although *Webster* was still in office, the execution was delivered to *Wyman*, another deputy, with notice of the attachment. There as well as here, the property had been delivered to a receipter, and had disappeared. But the Court held, that the delivery of the execution seasonably to *Wyman*, *Webster* having notice that it had issued, and being called upon for the property, was sufficient to charge both *Webster*, and the defendant, his principal. The Court say in that case, that an actual delivery of the execution to *Webster*, was not necessary to continue his liability; for there was nothing, upon which it could

be levied. And further, that "the execution was seasonably delivered to *Wyman*, another deputy, and had the ship been at *Bath*, where she had been attached, or any where within the body of the county, and within the control of the Sheriff, she might have been seised on execution."

The contract made with the receipter, is an affair between him and the officer. The creditor has no interest in it; but the officer acts at his peril. The creditor was present, when the receipt was taken, and made no objection. He could make none. Before the judgment, the creditor would have taken his pay of the receipter; had he done so, the officer would have been discharged; but the receipter was unwilling to pay. He wanted the debtor to procure another receipter, that he might be relieved. And the debtor went to the plaintiff, and proposed to give other receipters, but the plaintiff was unwilling to consent to it. He should have gone to the officer. It was for him, and him alone, to accede to his proposition. The creditor had no control over the receipt. If it had appeared affirmatively, that he had accepted it, as a substitute for the liability of the officer, he ought to be bound by such an election. But it does not appear. There is no evidence of any negotiation or understanding between him and the officer. The latter bestirred himself to endeavor to obtain the property, after the failure of the receipter; but it was too late.

With regard to the claim of the officer, to be allowed what it would have cost to keep the oxen, an expense which he did not incur, the decision of the Court was directly against such an allowance, in the case of *Tyler* v. *Ulmer*, 12 *Mass. R.* 163. It is an authority in point; and we perceive no reason why we should depart from it.

Judgment on the verdict.

ELISHA F. FALES *& al. vs.* CHARLES REYNOLDS.

Where the defendant was indebted to the plaintiffs, and on being called on by them to secure the debt, made an arrangement whereby he paid them a sum of money, indorsed to them several notes said by him to be good, and gave them an absolute deed of certain real estate, not of sufficient value to pay the debt, but with the amount of the cash and notes more than sufficient, and took back their agent's own bond, that the real estate should be reconveyed if the whole debt was paid in eight months, the plaintiffs declining to take a mortgage thereof, and no receipt or discharge of any part of the debt being given; and where it afterwards proved, that most of the notes were not good, and an action was brought on the original demand within the eight months, without returning any of the property received; and where at the trial, parol proof was offered, that both the real estate and notes were taken as collateral security only; *it was held*, that the real estate should not be considered a mortgage, but as a payment at its true value for so much; and that, if the value of the land with the cash received and the amount collected on the notes equalled the original debt with interest, the action could not be maintained; but if they did not, that the action was maintained, and that judgment should be rendered for the balance.

THIS was an action of *assumpsit*, brought *February* 8, 1834, upon a note of hand, dated *Nov.* 25, 1832, wherein the defendant promised to pay the plaintiffs $992,56, on demand with interest; also upon an account annexed for merchandize for $183,77. The note declared on was adduced in evidence, upon which there were certain indorsements. It was admitted, that the plaintiffs had furnished the defendant the merchandize stated in the account annexed. For the defendant, *Samuel Garnsey, Esq.*, testified, that he was attorney for the plaintiffs, to whom their demands were forwarded for collection, that having previously made a private attachment of the defendant's real estate, he, by direction of the plaintiffs, by their letter of *November* 1, 1833, on the 26th of that month, went to *Garland*, where the defendant lived, with an officer, for the purpose of securing the demands, by an attachment of the defendant's goods; that he saw the defendant, and proposed to him to secure the plaintiffs by indorsed notes, which he declined to do, saying he had never asked any one to sign with him; that he was then about to attach the defendant's goods, who thereupon offered to pay him on behalf of the plaintiffs $100 in cash, to turn him out good demands which might be collected in 3 or 4 months, to

the amount of four or five hundred dollars, and to secure the balance due by a mortgage of his real estate; that he, the witness, declined taking a mortgage, stating as a reason, that he wished to avoid the long time required to foreclose a mortgage, and proposed in order to attain the object, to take an absolute deed, and to give him a contract or bond to reconvey on payment, to which the defendant consented; that confiding in the assurance, that the demands were good, and influenced by that consideration alone, he received the $100, for which he gave a receipt, that sum not being indorsed on the note, received the notes and demands amounting, exclusive of interest, to $461,07. At the same time, he took an absolute deed of the defendant's real estate, and gave his own bond, conditioned, that the plaintiffs should give their bond to the defendant to reconvey the same, on payment of the amount due, within eight months. He also testified, that the land was conveyed, as collateral security; that he used all proper diligence to collect the demands assigned; that he had collected on them at the commencement of the suit only $36,91, whereupon being dissatisfied with the demands, not proving to be such as he expected them to be, and in pursuance of letters of instruction from the plaintiffs, he commenced the present action, and *Feb.* 18, 1834, went again to *Garland* to see the defendant; that he told him the plaintiffs were dissatisfied with the security he had taken, and wished him to get security by indorsed notes, payable at certain periods; that the defendant offered to give them security by indorsed notes, if they would restore him the security they already had, but he would not agree to give it payable in so short a time as the witness proposed, which not being acceptable, the witness caused all the defendant's attachable property to be attached in this suit. He further testified, that he never supposed the defendant intended to deceive him in relation to the character of the demands, and that since the commencement of this suit, he had informed the defendant that if the suit were not settled, he should sell the real estate; that he had at his office the bond stipulated for in his bond to the defendant within the time stated in his bond; that he notified him of it, and in *June*, 1834, offered it to him, if he would give up his, the witness', bond; that before he commenced this suit, he had ascertained that the demands assigned were a poor lot; that the defendant had, before and since the suit,

advised with him as to the best mode of managing them, and read the defendant's letters to himself respecting them; and that now he had collected on all of them, $159,64, and he thought he should be able to collect little or nothing more. The consideration expressed in the deed was $850, and four witnesses testified, that it was worth that money.

The defendant's counsel contended:

1. That the absolute deed, taken by the plaintiffs, paid their debt.

2. If it did not, that by that and the bond given by the plaintiffs, the defendant's term of credit was extended eight months, and that the action was prematurely brought.

3. That the witness should not be permitted to testify what the meaning and intention of the parties to the papers aforesaid were; but that the intention should be gathered from the papers alone.

4. That the plaintiffs could not lawfully commence the suit, without first restoring the demands assigned.

A default was entered by consent, it being agreed that if in the opinion of the Court, either ground is maintained by the defendant, the default was to be taken off, and a nonsuit entered, otherwise the default was to stand, and such judgment entered as the plaintiffs are entitled to by law upon the facts.

J. Appleton, for the defendant, enforced the position taken at the trial, and cited *Erskine* v. *Townsend*, 2 *Mass. R.* 493; *Kelleran* v. *Brown*, 4 *Mass. R.* 443; *Lund* v. *Lund*, 1 *N. H. Rep.* 39; *Runlett* v. *Otis*, 2 *N. H. Rep.* 167; *Bickford* v. *Bickford*, *ib.* 71; *Bodwell* v. *Webster*, 13 *Pick.* 413; *Hale* v. *Jewell*, 7 *Greenl.* 435; *Grafton Bank* v. *Woodward*, 5 *N. H. Rep.* 99; 1 *Wend.* 318; 3 *Camp.* 57; and *Cleverly* v. *Brackett*, 8 *Mass. R.* 150.

Kent, for the plaintiffs, remarked, that this was not a question about title, but simply on this point, whether there was any payment; and if any, for how much. In equity, the transaction would be considered a mortgage, and in this action of *assumpsit*, it should be so treated. 4 *Kent's Com.* 142; *Hughes* v. *Edwards*, 9 *Wheat.* 489. But even by the strict rules of the common law, this would be considered a mortgage. *Blaney* v. *Bearce*, 2 *Greenl.* 132. Both the parties considered it a mortgage at the time. But if not a mortgage, it could not be considered a payment for more than the

plaintiffs could realize from it. There was no indorsement on the notes, and they could not have supposed it a payment. The defendant, by paying the amount due, may still have his land back. The intention of the parties was properly given in evidence. An absolute bill of sale has been permitted to be proved conditional by parol. But here the witness was called by the defendant, and it is his own evidence, to which he cannot object. *Read* v. *Jewett*, 5 *Greenl.* 96; *Smith* v. *Tilton*, 1 *Fairf.* 350.

The taking of collateral security, or accepting a partial payment, cannot amount to an extension of the time of payment. Giving a time for the redemption of the property mortgaged, cannot take away the right to enforce the original demand by action.

The demands indorsed, or assigned, were not to be a payment further than collected. Deducting the sum received on them, and even allowing the land at the valuation in the deed, and there is still a balance due. But we are entitled to recover at least the amount of the demands assigned as good, and which proved of no value.

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

Weston C. J. — The agent and attorney of the plaintiffs, on his first visit to the residence of the defendant, made an arrangement about this debt, satisfactory to himself at the time, and finally approved by them. He received one hundred dollars in cash, demands supposed to be good to the amount of four hundred and sixty-one dollars, and for the balance, an absolute deed of the defendant's land. A time was allowed to him, within which to redeem it; but he entered into no engagement to do so. It was a privilege conceded to him, of which he might or might not avail himself, according to circumstances. It is true the attorney testifies, that the whole was received as collateral security; but he further testifies, that he refused to take the land by way of mortgage, but insisted upon an absolute deed. The right to redeem within a stipulated period, secured to the defendant in a subsequent instrument, was introduced for his benefit, not theirs. If we had no statute, defining and regulating mortgages, according to the principles which have prevailed in Courts of chancery, the transaction

between these parties might be regarded as a mortgage; but not under our law, as appears by the cases cited for the defendant. There is no controversy as to the purpose for which the land was conveyed. It sufficiently appears, under the hands of the plaintiffs. The land is absolutely theirs, and the effect of it is, that it has extinguished the balance for which it was received. They would not take a mortgage, and wait until there could be a foreclosure of the equity. They insisted upon having the command of the property at once. It paid their debt then, at least to the amount for which it was received; as land mortgaged after foreclosure, if of sufficient value, extinguishes the debt of the mortgagee.

But it is insisted, that although the land may pay the amount due to the plaintiffs, after deducting the payment in money and the amount of the personal securities, yet that the part of the debt, to which the personal securities were to be applied is not paid, because the greater part of them proved bad. The plaintiffs' agent, however, *Mr. Garnsey*, acquits the defendant in his testimony, of any fraud or intentional deception, in relation to the available value of these demands. If the fair expectations of the plaintiffs, arising from the assurance of the defendant, that they were all good, have been disappointed, as the case finds, and they would for that reason have repudiated the arrangement, and sought other security, they should have returned to the defendant what they had received of him, with which they had become dissatisfied. But they retained all, and claim to hold the defendant indebted to them, on their original demand, for the deficiency in the value of the securities. They cannot now place the defendant in *statu quo*. If they would go behind the former arrangement, we are of opinion, that the whole transaction must be considered open to be adjusted upon equitable principles. The plaintiffs should not be held to account for the property, beyond what it may be made available to them. Let it be ascertained what the land would sell for to a fair purchaser. If this sum, together with the money received, and the amount collected on the demands, equals or exceeds the plaintiffs' original debt with interest, the default is to be set aside, and the plaintiffs are to become nonsuit. If there proves to be a balance still due to the plaintiffs, upon such an adjustment, the default is to stand, and the plaintiffs to have judgment for that balance.

OLIVER LANE *vs.* SETH PADELFORD.

A party to a negotiable note shall not be received, as a witness to prove it to have been originally void.

The promisee of a negotiable note, which had been indorsed after it fell due, is a competent witness to prove, that after it had been made for a different purpose, it was received, as well as indorsed, by him, as collateral security for the payment of another note.

Where a note has been so received and indorsed, no action on the collateral note can be maintained, but by the holder of the principal one.

THIS was an action of *assumpsit* on a joint and several note of hand, signed by the defendant and one *Harry Padelford*, for the sum of $150, dated *February* 26, 1834, payable to *Solon Beale* or order, in 60 days, and by him indorsed to one *Orff* in blank, and indorsed in the same manner by *Orff*.

The defendant offered in evidence the deposition of said *Beale*, and his testimony was objected to, at the time of taking, on the ground of interest, and also, that the facts testified to by him were not legal proof to impeach the note in the hands of the plaintiff. *Beale* stated, that *H. Padelford* had given him two notes for lent money, one of $30 and the other of $20, and that he called on him for payment. He, *Padelford*, made the note in suit, and procured the defendant to sign it with him, to raise money on it and pay *Beale* from the avails, but failing in that object, he soon after its date put it into the hands of *Beale*, as collateral security for the payment of the two notes; that *Beale* paid nothing therefor, receiving it merely, as security; that he held the three notes until about the middle of *June*, 1834, when he transferred the two small notes due to him to one *McDougall*, and also at the same time the note in suit, informing him then, that it was taken and passed over only, as collateral security for the other notes; and the witness stated, that he was told by *McDougall*, just before the giving of the deposition, that he understood, that the $150 note was transferred to him only, as collateral to the other two, and that he, *McDougall*, had so transferred them to one *Hallowell*.

The two small notes were not in the hands of the plaintiff, and it did not appear, that he knew any thing of the agreement, nor the time when, or person from whom, he received the note, other

than from *Beale's* deposition. The defendant was defaulted; and if, in the opinion of the Court, the deposition was admissible in evidence, the default was to be taken off, and such judgment was to be rendered by the Court, as might be deemed proper.

T. P. Chandler, for the defendant, said, that the case presented two points for argument. 1. Is the deponent incompetent on account of being indorser; and, 2. The effect of the testimony if admissible; the objection from interest having been abandoned by the plaintiff's counsel.

1. A new rule of evidence was laid down by *Lord Mansfield*, in *Walton* v. *Shelley*, 1 *T. R.* 296, which, although exploded in *England*, has been adopted, with some qualifications, in *Maine*, *New Hampshire* and *Massachusetts*, and, for a time, in *New York*. This rule renders a party to a negotiable note incompetent to prove it to have been *originally void*. But for all other purposes he may be a witness. He shall not prove his own turpitude, but he may testify to facts, which arose subsequent to the execution of the instrument, and which go to show it ought not to be paid. It was so decided in *New York*, while the rule was in force there. 10 *Johns. R.* 231; 15 *Johns. R.* 270; 17 *Johns. R.* 188; 18 *Johns. R.* 167; 20 *Johns. R.* 285; 11 *Johns. R.* 128; 17 *Johns. R.* 176. And the decisions are the same in other States. 12 *Pick.* 565; 2 *N. H. Rep.* 212; 3 *Mass. R.* 27; 7 *Mass. R.* 470; 6 *Mass. R.* 430; 4 *Serg. & R.* 399.

2. The *effect* of the testimony is to destroy the plaintiff's claim. He purchased the note, when overdue, and is not a *bona fide* holder. The case is open to the same defence, as if the action was by the payee. 4 *Greenl.* 415; 1 *Mass. R.* 1; 4 *Mass. R.* 370; 6 *Mass. R.* 428; 10 *Mass. R.* 51; 5 *Mass. R.* 334; 5 *Johns. R.* 118; 19 *John. R.* 342; 6 *Greenl.* 212; 5 *Wend.* 342; 1 *Cowen*, 396.

J. Appleton, for plaintiff.

The facts to be proved by the deposition are those relating to the original inception of the note. Now the principle is well settled, that the indorsee is incompetent to prove the note originally void, and only may prove subsequent facts. 5 *Greenl.* 377; 4 *Greenl.* 191; 6 *Greenl.* 390. All the cases show that the indorser cannot prove any facts impeaching the original validity of

the note, and is exclusively confined to subsequent facts. 17 *Mass. R.* 95; 4 *Mass. R.* 156; 15 *Johns.* 270.

The facts contained in the deposition show no illegality, nor failure of consideration. There is as much consideration now as ever, as the two notes have never been paid. If there should prove any loss, he who gave his name must bear it. 1 *Taunt.* 224; 3 *Esp. R.* 46; *Bayley on Bills*, 348; 7 *John. R.* 361.

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

WESTON C. J. — The deposition of *Solon Beale* does not prove the note in suit to have been originally void; but that it was made, with a view to be discounted to raise money for the use of one of the makers, part of which was to be applied to pay a debt, due to the deponent. The party did not succeed in that object, but left it with the witness, as collateral security for his debt. To that amount it was his property; for the residue, he held it in trust for the maker. It was not void. If negotiated before it was due, notwithstanding these facts, it would have been good for its whole amount, in the hands of a *bona fide* holder, without notice of the trust.

In *Adams et al.* v. *Carver et als.*, 6 *Greenl.* 390, *Churchill v. Suter*, 4 *Mass. R.* 156, was regarded as the leading case, in which it was decided, that a party to a negotiable instrument shall not be received as a witness, to prove it to have been originally void. The Court there say, "this is the extent and limit of the objection to testimony of this kind." In the same case it was decided, that a party to a note may be received to prove, that it was negotiated after it became due. And we think *Beale's* testimony is admissible to prove also, that after it was made, and after their failure to raise money upon it, he received it as collateral security. As such, it was operative, not void. The objection taken in this case, was urged in *Van Schaack* v. *Stafford*, 12 *Pick.* 565, and upon much stronger ground than here; yet the admission of a party as a witness there, was held not inconsistent with the case of *Churchill* v. *Suter*.

When *Beale* transferred the principal debt, nearly two months after this note was due, he passed the note also, notifying the party to whom he passed it, that it attended the principal debt, only as

collateral security. It is now separated from the principal debt, and by the fraud of some subsequent holder, has passed to the plaintiff, without notice of the purpose for which it was held, or the trust attending it. But being dishonored paper, he must be understood to have taken it, upon the credit of the party, from whom he received it. In his hands, it is subject to every defence, which could have been set up by the maker, if it had remained with *Beale*. *Tucker* v. *Smith*, 4 *Greenl.* 415.

That part of *Beale's* deposition, which states the admissions of *McDougall*, to whom he passed the note, but who was not then the holder, is inadmissible; although the same facts are testified to by the deponent, as within his own knowledge. The plaintiff, the holder, has been deceived, and fails to realize what he may have expected; and so he would have been, receiving the note after it was due, if the maker could prove matter of offset in defence, or payment to a former holder. He must look to the party, who negotiated it to him. Not being the holder of the principal debt, to which this was collateral, he is not entitled to recover any part of the note of the maker. The default is accordingly taken off, and a nonsuit is to be entered.

JOHN SPAULDING, JR. *vs.* JAMES P. HARVEY.

Actions commenced before a Justice of the Peace prior to the statute of 1835, *c.* 178, cannot be brought from the C. C. Pleas into the S. J. Court, in a summary way by exceptions, although the trial was had after the act passed.

EXCEPTIONS from the Court of Common Pleas, *May Term*, 1835.

The action was *replevin*, originally commenced before a Justice of the Peace, and before *March* 21, 1835. The defendant justified the taking as an officer, by virtue of a writ of attachment against the plaintiff. It was attempted to be proved on the part of the plaintiff, that the goods *replevied* were exempted by law from attachment. *T. P. Chandler*, for the defendant, objected, that if this point were made out in evidence, that still the action of *replevin* would not lie; and the Court of Common Pleas sustained

the objection. To this ruling, *C. Gilman*, for the plaintiff, excepted, and entered the action in this Court upon the exceptions.

In this Court, *T. P. Chandler*, for the defendant, moved to dismiss the action, because exceptions will not lie in this case, the suit having been commenced before the passage of the act of 1835, giving the right to except in such actions; and cited *st.* 1822, *c.* 193; *Witham* v. *Pray*, 2 *Greenl.* 198.

J. Appleton and *C. Gilman*, for the plaintiff, contended, that exceptions would lie, as the trial was after the passing of the act.

The question raised at the C. C. Pleas was also argued by the counsel.

The opinion of the Court was afterwards drawn up by

WESTON C. J. — Until the *statute* of 1835, *c.* 178, actions originally commenced before a Justice of the Peace, could not be brought into this Court, in a summary way upon exceptions, and that *statute* was made applicable only to actions thereafter to be commenced. As this suit was instituted prior to the passage of that act, we cannot sustain jurisdiction in the mode now attempted. *Witham* v. *Pray*, 2 *Greenl.* 198. The case is accordingly dismissed.

NOTE.

The chapters are numbered alike in the editions of the statutes published by order of the State, and by *Glazier, Masters & Smith*, until the close of the year, 1831, *chapter* 522, when a new series is commenced in the former, and the old one continued in the latter. Those therefore, who use the edition of *G. M. & S.*, will readily find the chapter in the *State* edition after 1831, by subtracting 522 from the whole number.

JOHN MCDONALD *vs.* EDWARD SMITH *et al.*

Although it is an irregular course of proceeding, a Judge of the C. C. Pleas has power to permit the examination of a witness, after the testimony has been once closed, and the counsel of the opposing party has commenced his argument to the jury.

Where a protest has been admitted in evidence, and the Notary is afterwards called, as a witness, and testifies to all the facts stated in the protest; the admission of the protest becomes immaterial, and furnishes no cause for setting aside the verdict.

Where an inland bill or note is left in a bank for collection, three days grace are allowed under the statute of 1824, *c.* 272.

EXCEPTIONS from the Court of Common Pleas.

Assumpsit against the defendants, as indorsers of a promissory note made by one *Stover Rines* and payable to them, or order, for the sum of $1300,00, dated *June* 1, 1835, and payable in six months. The plaintiff then produced the note, and by permission of the Court, though objected to by the defendant, read a protest made by *William Rice*, a *Notary Public*, living at *Bangor*, where the plaintiff and defendants also resided, stating that he received the note from the *Cashier* of the *People's Bank* in *Bangor*, and on the *4th* of *December*, 1835, made a demand upon the maker and notified the indorsers, the handwriting of the parties being admitted, and here rested his case. The counsel for the defendants then commenced his argument to the jury, after which, the plaintiff, by permission of *Perham J.*, although the defendants objected thereto, called *Rice*, the *Notary*, and proved by him the same facts stated in the protest, which had been read. On this evidence the counsel for the defendants requested the Judge to instruct the jury, that the plaintiff had not maintained his action. The Judge instructed them, that if they were satisfied by the evidence, that the note was left in the *People's Bank* for collection, the demand and notice were in season. The defendants excepted to the admission of the testimony of *Rice*, and to the instruction of the Judge.

Rogers, for the defendants, insisted that the Judge erred, in admitting the protest as evidence; in the admission of *Rice*, as a witness, at that state of the proceedings; and that the demand was not made seasonably, as there was no sufficient evidence of the note having been left in the *Bank* until after it was due.

J. McDonald, pro se, argued, that the admission of the protest was immaterial, as the same person testified to all the facts he had stated in his protest; that the time when the witness should be introduced, was a mere exercise of the discretionary power of the Judge; and the testimony of the *notary*, that he received the note of the *Cashier*, was competent evidence to show, that the note was left in the *Bank* before due, and that the sufficiency of the testimony was not now before the Court.

The opinion of the Court was afterwards delivered by

WESTON C. J. — It was competent for the Judge, in his discretion to receive the testimony of *William Rice*, the notary, at the stage of the cause he did; although after the counsel for the defendants had commenced his argument. It did not comport with the usual course of proceedings, which has been adopted in trials to the jury. But that course is not so inflexible in its character, that it may not be departed from, when occasion requires, under the direction of the presiding Judge. The notary having proved all the facts, for which the protest was adduced, that paper became immaterial; and it is therefore unnecessary to decide upon its admissibility and effect.

The notary testified, that the note was handed to him, by the cashier of the *People's Bank*, either at that bank, or at an insurance office. We cannot take it upon ourselves to say, that this furnished no evidence, that the note was left in the bank for collection. It was properly submitted to the jury to pass upon that fact; and they found it was thus left. The demand made and notice given, on the fourth of *December*, was not then out of season, under the statute of 1824, *c.* 272; and the plaintiff was entitled to a verdict. The exceptions are accordingly overruled.

Judgment on the verdict.

Moses McDonald *vs.* William Bailey.

The rule of the S. J. Court and C. C. Pleas, which does not permit the counsel for the defendant, in actions on promissory notes, orders, or bills of exchange, to deny the genuineness of his client's signature, unless thereto specially instructed, is one which the Courts, severally, have power to make, and applies to those attested by a witness, as well as to others.

A blank indorsement by the payee of a negotiable note, transfers the title to a *bona fide* holder, and it thereupon passes by delivery, the same as if the note had been made payable to bearer.

The filling up of a blank indorsement is a formality wholly unnecessary.

In an action by the *indorsee* against the *maker* of a promissory note, the words "eventually accountable," immediately preceding the name of the indorser, do not restrict or qualify the transfer, and need not be noticed in the declaration.

Exceptions from the Court of Common Pleas.

The action was *assumpsit* on a promissory note made by the defendant, payable to one *Edward A. Emerson*, witnessed by one *S. A. Bailey*, and indorsed one month and twenty-two days after it became payable thus, by said *Emerson*: "eventually accountable —*Edward A. Emerson.*" No other words were added to the indorsement at the trial. The plaintiff offered to read the note in evidence to the jury in support of his declaration, to which the defendant's attorney objected, "and called on the plaintiff to produce the subscribing witness, stating that he was specially instructed so to do by the defendant; but the defendant's attorney further stated, that he was not otherwise instructed to deny the defendant's signature, and that he had notified the plaintiff's attorney a few days before the trial." "Being required to state, if he was instructed to deny the signature, he declined so to state," and *Perham J.*, before whom the trial was, overruled the objection, and permitted the note to be read to the jury without the introduction of the subscribing witness, or accounting for his absence. The counsel for the defendant also objected to the reading of the note, because it did not appear by it, that it was legally indorsed to the plaintiff. The Judge also overruled this objection, it being proved, that the signatures of the maker and indorser were genuine. The verdict was for the plaintiff, and the defendant filed exceptions.

J. Appleton and *Garnsey*, for the defendant, contended:

1. That the instruction to call for the subscribing witness to the note, and the notice to the plaintiff's attorney, were a substantial, if not literal, compliance with the rule of Court; and that if not, and it was intended to apply to witnessed notes, that no rule of Court could change the settled law requiring the subscribing witness to be produced; and cited 1 *Stark. Ev.* 330; 1 *Stark. R.* 53; 2 *Stark. R.* 108.

2. It is a settled rule of law, that the note and indorsement must be truly described in the declaration, and that the indorsement must be filled up before or at the trial. 4 *Pick.* 422; 4 *Camp. R.* 176; 3 *T. R.* 645.

J. McDonald, for the plaintiff, argued:

The exception, that the subscribing witness was not called, is but a captious objection. *Douglass*, 216; 1 *Greenl.* 61, *note.*

The defendant's attorney refused to bring himself within the rule of the Court of Common Pleas on this subject, which rule is precisely like rule 33 of this Court. 1 *Greenl.* 421. The Court of Common Pleas are authorized to make rules to govern their proceedings. *St.* 1822, *c.* 193, § 8. And rules so made are binding upon the Court, and upon the parties. 3 *Pick.* 516; 1 *Stark. on Ev.* 365.

The production of the note by the plaintiff, indorsed by the defendant, is sufficient *prima facie* evidence of property in him; and constitutes a promise by the defendant to pay whoever shall produce it. And it is sufficient to declare according to its legal effect. The words "eventually liable" do not in the least alter the legal effect, as it respects the defendant, and need not be noticed in the declaration. 13 *Mass. R.* 158; 3 *Kent's Com.* 90; *Chitty on Bills*, 173; 5 *East*, 476; 19 *Martin*, 253. A note indorsed in blank is precisely like a note payable to bearer. *Doug.* 633; 2 *Stark. Ev.* 250; 7 *Greenl.* 28; 3 *Greenl.* 76.

It has been the common practice in our Courts, to give judgment without any thing more than a blank indorsement; and this practice has been sanctioned by the Court. 8 *Greenl.* 353; 2 *Greenl.* 263.

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

WESTON C. J. — The rule of the Common Pleas, which corresponds also with a rule of this Court, which does not permit the counsel for the defendant, in actions on promissory notes, orders or bills of exchange, to deny the genuineness of his client's signature, unless thereto specially instructed, is very convenient in practice. It prevents delay; and saves unnecessary expense. A rule to this effect has long been enforced in our Courts; and it is clearly one of those, which the Common Pleas has the power to make, to conduct and expedite its business. It is intended to relieve the plaintiff from the necessity of being prepared with a witness or witnesses, to prove the signature to instruments, of the description before referred to, unless specially denied. We are aware of no reason why the rule should not be applied to such as have a subscribing witness. If he knows other facts, which may furnish ground of defence, the defendant has it in his power to procure his attendance. As the signature was not denied, we are of opinion, that the proof of the execution of the instrument, was properly dispensed with, under the rule.

It has been repeatedly adjudged, that a blank indorsement, by the payee of a negotiable note, transfers the title to a *bona fide* holder; and that it thereupon passes by delivery, as much as if payable to bearer. The cases cited for the plaintiff, fully warrant this position. The course of proceeding formerly was, to fill up the indorsement at the trial; but this may well be regarded as an unnecessary formality; and it has accordingly been dispensed with in modern practice.

The effect of an indorsement in blank, is, to transfer the note, and to impose a conditional liability upon the indorser. As against the maker, the plaintiff may set forth the transfer by indorsement, according to its legal effect, of which the name of the payee, upon the back of the note, will be competent evidence. In the note under consideration, the name of the payee was preceded by the words, "eventually accountable." The effect of this was, to hold himself liable as indorser, waiving demand and notice. This was a circumstance which did not restrict or qualify the transfer of the

note, and there was no occasion to notice it, in declaring against the maker.

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

CHARLES A. REYNOLDS *vs.* DANIEL WILKINS.

Representations by a creditor to a debtor, that he did not wish for the property so much for his own security, as to secure it to the debtor from attachment by other creditors, made to obtain a bill of sale of property to secure a debt, then justly due, are not conclusive evidence of fraud; but circumstances merely to be left to the jury from which fraud may be inferred.

TRESPASS against the defendant, as sheriff of the county, for the taking of two horses, by one of his deputies, belonging to the plaintiff. The taking was justified, in a brief statement, by an attachment thereof, as the property of *Washburn & Fling*. The horses were once the property of *Washburn & Fling*, and the plaintiff claimed them by virtue of two bills of sale from them to him, as collateral security for the payment of two notes given by them to him, and proved, that the value of the horses was not more than two thirds as much, as the sums due on the notes, and also proved a delivery of the horses to him. The defendant then called *Washburn & Fling*, who testified that they were indebted to the plaintiff in about the sum of $150,00, who applied to them, and wished to have a bill of sale of the horses to secure him, and stated to them, that it was a hard time for money, and that he was afraid their creditors would trouble them; that if they would put the horses into his hands, so that they could not be attached, they should have the control thereof as much, as if no bill of sale had been given; and that he did not want the bill of sale so much for his security, as to prevent an attachment; that the plaintiff advised them to put all their property into his hands to prevent its being attached and sacrificed by their creditors, but that they declined doing more than signing the bills of sale of these two horses. There was much other testimony in the case, not pertinent to the questions of law.

The counsel for the defendant requested *Weston C. J.*, at the trial, to instruct the jury, "that whatever might have been the secret object of the plaintiff, yet if he persuaded the debtors to convey to him, with a view to delay and defraud their creditors, and they were induced by his representations and promises to convey their property to him with such design on their part, which design was known and encouraged by him, and which design was also held out by him, as his object, that it constituted such a fraud upon creditors as vitiated the transaction; although his sole motive might have been to secure his own demand against them; and that he was estopped to deny, that such was his intention and object, when such was the only object avowed." The Chief Justice instructed the jury, that it was in itself no fraud to give, or receive, a pledge for the payment of an honest debt, especially if the pledge did not exceed in value the amount of the debt; that if this, however, was done collusively, while the real object was to delay or defeat other creditors, it could not be sustained. This point was left to the jury, as a question of evidence, the Judge at the same time remarking to them, that they would consider whether the plaintiff was not looking only to his own security, and whether his suggestions to the debtors, that unless they secured him, the property was exposed to attachment by others, were not made with a view to bring them into the measure. The instruction requested was not given. The verdict was for the plaintiff, and the defendant excepted to the charge of the Judge, and to his refusal to give the instruction requested.

W. P. Fessenden, for the defendant, cited and relied on the case, *Howe* v. *Ward*, 4 *Greenl.* 195, to show, that the Court should have given the instruction requested by the counsel for the defendant. Our request was founded on the principle, that if the sellers intended to defraud creditors, and the purchaser was knowing of such intention, that the sale would be void, as to creditors, even if the purchaser had paid for the property, or had debts to its value. The charge was in substance, that if the conveyance was received by the plaintiff only for his security, without intent to defraud, it was good, without any reference to the inducements held out by him to obtain the property, or of his knowledge of the fraudulent

intention of the debtors. When the parties at the time avowed the design to be fraudulent, the Court cannot hold it to be lawful.

A. G. Jewett, for the plaintiff, contended, that this was but the common case of one creditor obtaining a priority over another. The debt to him was fairly due, and the property obtained less than the amount. The object then was legal and justifiable, and the worst that can be said is, that the plaintiff made use of misrepresentations to obtain the property by a sale, instead of making expense by resorting to process of law. The case cited, relates only to the case of one enabling a debtor to realize the value of the property himself, and carry it beyond the reach of his creditors, and not of an honest creditor obtaining security, as in this case.

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

EMERY J. — This is a case of exceptions. The defendant's counsel requested the Judge to instruct the jury, that whatever might have been the secret object of the plaintiff, yet, if he persuaded the debtors to convey to him with a view to delay or defraud their creditors, and they were induced by his representations and promises to convey their property to him with such a design on their part, which design was known and encouraged by him, and which design was also held out by him, as his object, that it constituted such a fraud upon creditors as vitiated the transaction, although his sole motive might have been to secure his own demand against them; and he was estopped to deny that such was his intention and object, when such was the only object avowed.

But on this point the Chief Justice said, that it was altogether a question of evidence; that they must be satisfied that his own security was not the sole object which the plaintiff had in view; that he must have had the design on his part to aid the debtors in defrauding their creditors; and if they were satisfied that the plaintiff had no other object in view, but his own security; if there was no fraudulent design towards creditors on his part, then the transfer was a valid one, and the plaintiff must prevail. That it was in itself no fraud to give or receive a pledge for the payment of an honest debt; especially if the pledge did not exceed in value the amount of the debt; that if this however was done collusively

while the real object was to delay or defeat other creditors, it could not be sustained; and he left this point to the jury, as a question of evidence; at the same time remarking to them, that they would consider whether the plaintiff was not looking only to his own security, and whether his suggestions to *Washburn & Fling*, that unless they secured him, the property was exposed to the attachment of others, were not made with a view to bring them into the measure. The jury returned their verdict for the plaintiff.

To require the direction from the Court to the jury, in the precise terms of the request, would be going a length that we apprehend decided cases do not warrant. The doctrine of estoppel does not apply to this case. Even in the case of a deed it does not invariably control. In *Doe*, on the demise of *Freeland* v. *Burt*, 1 *T. R.* 701, on trial of an ejectment for a cellar and wine vaults in *Westminster*; the lessor *was not estopped by his deed* from going into evidence to shew, that the cellar was not intended to be demised. "It was deemed by the Court, that considering the nature "of the property, it was proper to let in evidence to shew the "state and condition of it at the time the lease was granted. *Prima* "*facia*, indeed the property in the cellar would pass by the demise, "but that might be regulated and explained by circumstances." By much stronger reason should the circumstances be all opened to the consideration of a jury, when a contest arises, as to a transfer of property from embarrassed debtors to secure an honest debt; more especially if other honest creditors are likely to be affected by the alienation. Here it would seem there was no deficiency in quantity of evidence. The whole of it was particularly charged upon their consideration. It is possible that had we been sitting as jurors, we might have come to a different conclusion from what they did. Doubtless the circumstances appearing in the course of evidence, calculated to impeach the transaction, were powerfully urged to the jury, the proper tribunal to give to them their just estimation. The proof in all cases relating to fraudulent conveyances, to be availing, as stated in the opinion of the Court, in *Howe* v. *Ward*, cited and relied on by the defendant's counsel, "must be found suf-"ficient to convince the jury, that the conveyance was made for "the purpose of defrauding a creditor in particular, or subsequent "creditors generally, as well as those, who were creditors at the

time, if there were any such." The late Chief Justice then proceeds to deduce a number of propositions. The first is, "if a conveyance is made by a man who is insolvent upon a good and sufficient consideration advanced to him, but not *bona fide*, and the purchaser is conusant of and assenting to the fraudulent intent, it is void against creditors." On this the defendant relies as justifying his request for direction, that the plaintiff was estopped. We cannot coincide with his views. The fraudulent intent was to be found not by application of the principle of estoppel, which has been thought unfavorable to the development of truth, but by subjecting all the acts and sayings of the parties at the transfer, and before and after, in this case, situated as it is by the evidence, to the severe discrimination of an impartial tribunal. We should be rejoiced, if we could be successful in suppressing every species of fraud. Here both the debtors were called, as witnesses, and a contrariety of evidence was submitted to the jury. They had the direction of the Court "that they must be satisfied, that the plaintiff had the design on his part to aid the debtors in defrauding their creditors, and that he had no other object in view but his own security. If there was no fraudulent design toward creditors on his part, the plaintiff must prevail. That it was no fraud to give or receive a pledge for an honest debt; that if this however was done collusively, while the real object was to delay or defeat other creditors, it could not be sustained."

We do not perceive, that the jury were wrongfully instructed, and there must be judgment on the verdict.

James Locke *vs.* Barzillai Brown.

Whether the plaintiff gave credit originally to the defendant, or to a third person, is a question to be submitted to the jury, for their determination, and not for the decision of the Court on a request to order a nonsuit.

And on the trial of that issue the testimony of a witness, that such third person was then insolvent, is competent evidence for the plaintiff.

Exceptions from the Court of Common Pleas.

The action was *assumpsit*, the writ bearing date, *May* 8, 1835, in which the plaintiff claimed $76,50 for work and labor done

from *Nov.* 1, 1834 to *April* 9, 1835. The plaintiff proved by one *Stubbs*, that about the first of *Nov.* 1834, that one *R. S. Rowe* hired the plaintiff to work the winter season in the woods, at $16 per month, and at the same time *Rowe* said, he would get the defendant, who furnished his supplies, to say that he would be holden for the plaintiff's wages; that on the 22d of *Dec.* following, he was present with the plaintiff, defendant and *Rowe*, and that the defendant said to the plaintiff, that he would be accountable to him for his winter's work, and that if the plaintiff should want any goods during the winter, to send to his store in *Bangor*, and they should be furnished; and that he would pay the plaintiff his wages in *June* or whenever the lumber came down, and the witness stated that the lumber was down, *May* 3, 1835. The same witness stated that *Rowe* hired the plaintiff, witness and other hands to work that winter. Another witness, called by the plaintiff, stated that in the last of *Dec.* 1834, *Brown* was in the woods and *Locke* asked him, whether, if he sent for goods at his store towards his wages, he could get them; to which *Brown* replied, yes, there would be no difficulty. The witness on cross examination stated, that he was hired by *Rowe*, and that *Brown* was not, to his knowledge, accountable for the wages of any of the men. Another witness said, that in *March*, 1834, he heard the defendant say, that he was to pay the men, if they did a good winter's work, and he thought they had so done. To show that the plaintiff would not be likely to trust *Rowe*, the plaintiff proved, that *Rowe* was committed to prison *Jan.* 6, and took the poor debtor's oath *Jan.* 25, 1835. To the admission of this last testimony the defendant objected, and the objection was overruled. Upon this evidence, *Appleton* and *Hill*, counsel for the defendant, requested the Court, *Perham J.* presiding, to order a nonsuit, but the Court declined. The defendant then called his clerk, who testified, that in *April*, 1835, the plaintiff called at the store, and said, that he would work no longer, and would leave the woods, unless the defendant would be accountable to him for his wages, and that *Brown* agreed, that if the plaintiff would go on and work, he would pay him after that time, and that nothing was then said about *Brown's* being accountable for any thing before that time; and the witness also stated, that the plaintiff afterwards presented an order to *Brown* for the amount due,

and requested payment, that *Brown* refused, and the plaintiff said he would sue him; and that *Rowe* was indebted to *Brown* for supplies furnished for lumbering. The defendant also introduced, without objection, papers of which the following are copies.

"This may certify, that I agree to be accountable to *James Locke* for what work he may do for *Rogers S. Rowe*, in running and rafting lumber from *Madaceunk* from this date, until said *Rowe* shall get what lumber he has on the land rafted and run to *Bangor*, at the rate of $1, per day, reserving the privilege of dismissing said *Rowe*, if I please. *B. Brown.*

"*Bangor, April* 11, 1835."

"*B. Brown* to *James Locke*, *Dr.*

1835, *May* 7. To 20 days labor, from 10th of *April* to 3d of *May*, done for *Rogers S. Rowe*, at 6s. $20,00.

"Rec'd pay, *James Locke.*"

The defendant's counsel requested the Court to charge the jury, that upon this evidence, that the hiring by *Rowe*, was an original undertaking by *Rowe*, and that to render *Brown* liable, he must have promised in writing, and that by law, the plaintiff could not recover; and that it was incumbent on the plaintiff to prove, before he was entitled to recover, that the lumber had all been run to *Bangor* before the action was commenced. But *Perham J.* did not so instruct the jury, but directed them, that to make the defendant liable, they must be satisfied, that he was originally so liable, and that the credit was given to him, and to inquire, if *Rowe* had authority from *Brown* to bind him, when he hired the plaintiff; or if the defendant had subsequently ratified the contract so made by said *Rowe;* and if not, the action could not be maintained. The Judge referred the jury to the evidence, and left them to find for the plaintiff or defendant according to the facts, as they should find them. The verdict was for the plaintiff, and the counsel for the defendant excepted to the rulings and instructions of the Court.

J. Appleton, for the defendant, enforced the several positions taken at the trial, and cited, *Miller* v. *Lancaster*, 4 *Greenl.* 161; *Roberts on Frauds*, 218; *Chitty on Contracts*, 201; 8 *Johns. R.* 37; 2 *T. R.* 80; 1 *H. Black.* 120; 3 *Car. & P.* 130; 10

Barn. & C. 664; 2 *Peters' R.* 551; 6 *Pick.* 511; 13 *Wend.* 259; 2 *H. Black.* 116; 4 *Car. & P.* 295; and 15 *Mass. R.* 75.

F. H. Allen, for the plaintiff, said, that the question, whether the work was completed according to agreement, before the commencement of the suit, was solely for the consideration of the jury, and presented no question of law on the exceptions.

The main question, whether the contract was within the statute of frauds, was properly left to the jury. They were instructed to inquire, whether the defendant undertook originally, or only collaterally; whether the defendant did or did not make himself originally liable; and to return their verdict, as they should find, one way or the other. The cases cited by the counsel for the defendant, show that the Judge of the Court of Common Pleas was right. The testimony, that *Rowe* was insolvent, and had taken the poor debtor's oath, was competent to enable the jury properly to decide the question of the defendant's original liability.

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

Weston C. J. — It appeared by the deposition of *Henry Stubbs*, that when *Rowe* engaged the plaintiff, for the winter season following the first of *November*, 1834, he proposed to procure the defendant to be accountable for his wages. The testimony of *Levi Bradley*, to prove the inability and insolvency of *Rowe*, in connection with the other facts, was of a character to throw light upon the question, then before the jury, whether the plaintiff gave credit to him originally, or to the defendant, and was therefore legally admissible.

Rowe proffered the defendant's credit; and there was evidence tending to show, that the defendant acceded to it. The solicitude of the plaintiff to obtain an assurance of payment from the defendant, tended to prove that he relied upon his credit. And the promise of the defendant, more than once made, to pay his wages, was evidence proper to be left to the jury, from which to determine whether the engagement of *Rowe* in his behalf was not previously authorized, or subsequently ratified.

Whether the plaintiff gave credit originally to the defendant or *Rowe*, was a fact for the jury to settle; and the Judge very pro-

perly declined to settle it himself. It was no part of the original contract, that the plaintiff should give credit for his wages, after they had been earned. And if the hiring by *Rowe* was for the defendant, as the jury have found, he had no right subsequently to impose new conditions. But if the defendant's liability was conditional, the proof is, that the conditions were complied with. In the hearing of one witness, the defendant promised to pay the men, if they did a good winter's work, which the same witness thought they had done. At another time the defendant promised to pay the plaintiff in *June*, or when the lumber was got down; and it appeared the lumber was got down the day before the action was commenced.

Exceptions overruled.

Charles Bailey *vs.* John Butterfield.

An action of assumpsit, as implied by law, is never the proper remedy against a public officer for neglect, or misbehaviour, in his office.

Before an action can be maintained on a sheriff's, or constable's official bond, the party seeking that remedy must obtain a judgment against the officer, founded directly upon his official delinquency.

A judgment against a constable in an action of assumpsit, declaring for money had and received, or on an account annexed to the writ, on a promise implied by law, is not sufficient evidence to support an action on his official bond.

Exceptions from the Court of Common Pleas.

This was an action of debt on bond, brought in the name of the plaintiff, as treasurer of the town of *Milford*, for the use and benefit of one *Elijah Winslow*, against the defendant, as surety on a bond, made jointly and severally by one *Joseph Demeritt*, as principal, and the defendant and others, as sureties, to the plaintiff in that capacity, conditioned for the faithful performance by said *Demeritt* of his duties and trusts, as to all processes by him served or executed in his office of constable of the town of *Milford*. To show a breach of the condition of the bond, and the damages sustained thereby, the plaintiff offered in evidence an attested copy of an original writ, and of a judgment recovered thereon before a justice of the peace, in favor of said *Winslow* against said *Demeritt*,

describing him as constable of *Milford.* This action was assumpsit for money had and received, and on an account annexed to the writ, of which the following is a copy.

" *Joseph Demeritt* to *Elijah Winslow,*	*Dr.*
To debt and costs collected as constable on execution *Elijah Gordon,* for the benefit of *Elijah Winslow,* against *John Lanfist.*	$19,99
To six months interest on the same	0,60
	20,59"

This judgment remained unsatisfied. These, with a copy of the bond, were all the evidence produced in support of the action ; and the Court, *Perham J.* presiding, ruled, that the evidence offered was insufficient to prove a breach of the condition of the bond, so as to charge a surety ; and by consent of parties, with the view of saving the question, a nonsuit was ordered. To this ruling of the Court the plaintiff excepted.

J. Appleton, for the plaintiff, contended, that the refusal to pay over money collected was a breach of the bond of the officer collecting it ; and that a recovery against the officer, either in assumpsit for the money collected, or in case, for misfeasance, was evidence of a breach of the bond. Assumpsit will lie, as well as case, and being the more favorable action for the officer, as no penalty is claimed by it, he cannot object, that assumpsit is brought. 7 *Mass. R.* 464 ; 7 *Johns. R.* 470 ; 9 *Johns. R.* 96. On an express promise to pay the equitable owner, an action of assumpsit may be maintained in his name, even although the foundation of it was a specialty. 4 *Cowen,* 13 ; 4 *N. H. Rep.* 69. The facts shew official misconduct in the officer. Neglect to perform the duty enjoined upon him by law is official misconduct ; and the liability of the surety is as extensive, as that of the principal. 8 *Mass. R.* 275 ; 6 *Johns. Ch. R.* 307.

J. A. Poor, for the defendant, cited *stat.* of 1821, *ch.* 92, § 9, and *stat.* of 1821, *ch.* 91, § 6, and contended, that to maintain an action on the bond of a constable against a surety, it was necessary to produce a record of a judgment showing his official misconduct ; and insisted, that no official misconduct was shown by the record produced on the trial of this case.

1. The judgment does not show any default or misdoing of the constable. Misfeasance or nonfeasance in an officer is in law a *tort*. The only remedy for such *tort* is by action on the case. 3 *Black. Com.* 165; 4 *Burrow*, 2345; 4 *Mass. R.* 378; 1 *Com. Dig.* 408; *Oliver's Practice, Case*; 9 *Greenl.* 74.

2. Assumpsit does not lie for such *tort*, but is founded on contract. A resort to it is a waiver of all *tort* in any action. The plaintiff has a right to waive the *tort*, but he thereby waives the statute remedy. The judgment offered in evidence in this case only shews, that the officer did not pay over money according to his promise, but not a default or misdoing in his official capacity, such as the statute contemplates.

3. There must be a recovery against the principal for a *misfeasance* or *nonfeasance* to charge a surety. 18 *Johns. R.* 390; 11 *Wend.* 27.

4. The judgment before the justice was on the face of it erroneous. It is a chose in action, and cannot be so assigned as to enable the assignee to maintain a suit in his own name. 13 *Mass. R.* 290.

5. If an action can be maintained in the name of the assignee against the officer on his express promise to pay, yet such recovery furnishes the assignee with no remedy on the bond.

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

Weston C. J. — By the act, defining the powers and duties of sheriffs and constables, *statute* of 1821, *ch.* 92, § 9, it is provided, that all persons suffering through the defaults or misdoings of any constable, shall have the same remedies at law on his bond, as are provided in respect to sheriffs' bonds; and the like proceedings are to be had. And by the statute in relation to sheriffs' bonds, the remedy thereon is to be preceded by a judgment against the sheriff or his deputy, at the suit of the party aggrieved by his neglect or misdoings, ascertaining the extent of his damage. The appropriate remedy is an action on the case, setting forth the nonfeasance or misfeasance, of which the party complains.

Official delinquency is first to be established. It is the gravamen from which the action arises. It is for security against the defaults and misdoings of a constable, that a bond is required; not to sus-

tain his promises. Actions against officers for failure in duty are of frequent occurrence in our practice. No precedent, it is believed, can be found where assumpsit has been sustained, upon any promise arising by implication of law. *Blackstone*, who refines much upon the contract, which every man is presumed to have made, to do his duty in society, and to submit to the laws, states that an action on the case is the proper remedy against a sheriff, for misfeasance or nonfeasance in his office. 3 *Bl. Com.* 165. And in *McMillan* v. *Eastman*, 4 *Mass. R.* 378, *Parsons C. J.* says, that assumpsit, as implied by law, is never the proper remedy against a public officer, for neglect or misbehaviour in his office.

In *Tuttle* v. *Love*, 7 *Johns. R.* 470, the Court held, that upon an express promise, if clear and absolute, by a deputy sheriff to pay money collected on an execution, assumpsit would lie. And the counsel for the plaintiff insists, that the constable having been defaulted, the promise declared on against him must be presumed to have been express. If so, it may well be doubted, whether a breach of it would entitle the plaintiff to a remedy on his bond. If he would suffer his money to remain in the hands of the officer, upon his promise to pay it, it assumes the character of a loan, for which his sureties are not responsible. If there was any tort, it was waived, both by receiving the promise, and the form of the action. But if there was an express promise, there may have been no tort. The plaintiff may be understood to have accepted the promise, instead of the money.

We cannot entertain a doubt, that the remedy on a sheriff's or constable's bond, should be preceded by a suit and judgment against the officer, founded directly upon his official delinquency; and such has been our practice, without a single exception, which has come to our knowledge. The course pursued by the plaintiff cannot, in our opinion, be sustained.

Exceptions overruled.

JOHN W. JEWETT *et al. vs.* EPHRAIM LINCOLN *et al.*

Where different persons claim the same goods by conveyances equally valid, he who first lawfully acquires the possession has the better title.

Where goods are purchased and paid for at a stipulated price, the sale is not affected or qualified by an agreement made in the bill of sale, that the seller should receive any sum for which the goods might sell above the price paid; nor by an agreement therein, that the seller should deliver the goods at another place free of expense to the purchaser.

Proof of a purchase by bill of sale of a quantity of shingles, and that the same quantity, sold to the plaintiffs, were marked with the initial letter of the name of one of them, and that they claimed such as were thus marked as their property, was held proper evidence to be submitted to the jury to show a delivery of the shingles.

Where the jury have found facts decisive of the case in favor of the party prevailing, under legal instructions from the presiding Judge of the C. C. Pleas, a new trial will not be granted, although erroneous instructions may have been given on a distinct point in the case.

EXCEPTIONS from the Court of Common Pleas.

This was an action of *trover*, for 100 M. pine shingles, marked W. The plaintiffs, to maintain the issue on their part, claimed title under one *Temple M. Perry*, and introduced a permit or license, given by *Charles Ramsdell* to said *Perry*, of which the following is a copy.

"Permission is hereby given to *Temple M. Perry* to cut and make into shingles and clapboard cuts, and carry the same away, any down timber or such as is not suitable for board logs; and if said *Ramsdell* and *Perry* cannot agree as to the price of stumpage, the same is to be referred to *Daniel Davis* of *Oldtown*, and said *Perry* has liberty to cut saplin pine timber, for timber, any where round the shad pond, and not interfering with permits already agreed for; and payment to be made in *June* next.

"*Bangor, July* 30, 1833.

"*Chas. Ramsdell.*"

The plaintiffs also introduced a bill of sale from said *Perry*, of which the following is a copy.

"*Messrs. Jewett & Wyman*, bought of *Temple M. Perry* one hundred thousand of pine shingles now on the bank of the *Millinocket* river, in the *East Indian* township (so called) in the county

of *Penobscot*, valued at two hundred and fifty dollars, and received payment by credit on said *Jewett & Wyman's* books; and I further agree to run the above described shingles to *Bangor* as soon as there shall be a sufficient quantity of water, to run them in good order and free of expense to the said *Jewett & Wyman*, and deliver the same to them or their agent, *William C. Crosby*, and if the above described shingles sell for more than two hundred and fifty dollars, the said *Jewett & Wyman* are to allow me the overplus after taking out the expense of selling, if there should be any.

"*Sebec, Oct.* 24, 1834.

"*Temple M. Perry.*"

The plaintiffs offered no evidence of any written assignment of said permit to them, or any assignment, except it was to be inferred from the fact of their producing it on trial and having delivered it with the bill of sale and writ, to an officer in *June*, 1835. There was no direct evidence that the plaintiffs ever took possession or had a delivery made to them of the shingles, but it was proved that certain shingles on said township, were, previous to *April*, 1835, marked W. in the woods, and that the plaintiffs made claim to such shingles by directing an officer, who had a writ in their favor against said *Perry*, not to attach shingles marked W. but to take them as their property under the bill of sale, which together with the permit were delivered him with the writ. Also the fact that W. is the initial letter of the surname of one of the firm of *Jewett & Wyman;* and the witness testified that from the appearance, he should think there were as many as 100 M. with that mark.

The defendants claimed title under the same *Temple M. Perry* by purchase of *Joseph Chase* at *Bangor*, in *June*, 1835; and introduced a bill of sale from said *Perry* as follows.

"*Sept.* 9, 1834. — This day sold *Joseph Chase* one hundred thousand pine shingles, now lying on the bank of the *Millinocket* stream, up the *Penobscot* river, of which he is to hold to all intents and purposes, for collateral security for a debt he is holden to *Thomas F. Hatch* of *Bangor*, for me, of thirty-five dollars; also for two notes said *Chase* now holds against me: — viz. one of sixty-two dollars and thirty-five cents, the other for eleven dollars and fifty cents; said notes on interest.

"*Temple M. Perry.*"

And the plaintiffs proved, that in *May*, 1835, said *Chase* took possession of a part of said shingles marked W. and run them with other shingles to *Bangor*, and sold them to the defendants, who are merchants in *Bangor*. It was in evidence, that there was a large quantity of shingles on the township, made by the *Perrys*, under the permit, besides those marked W. The defendants introduced evidence to prove that the shingles were delivered the said *Chase's* agent under the bill of sale to him; and the plaintiffs produced evidence to rebut and contradict it, which were left to the jury, by *Perham J.*, with directions to inquire, and if they found the shingles marked W. had been delivered to *Chase*, under his bill of sale, before they were taken possession of by the plaintiffs, and that *Chase* had no notice of the plaintiffs' interest in them, to return their verdict for the defendants. The witness thought defendants bought of *Chase* about 190 M. shingles that were cut on the township, in the winters 1833 and 4, and 1834 and 5, and no evidence was offered to show how *Chase* obtained his title to more than 100 M. The price of shingles at *Bangor* was from $3 to $4. The defendants contended, that said permit, thus introduced, could give no right to the plaintiffs, but on this point, *Perham J.* instructed the jury, that they might infer, if they were satisfied from the evidence that said permit was delivered to said plaintiffs to secure them for the supplies which they had or might furnish said *Perry*, and if it was so assigned it would give the plaintiffs a right to hold, by a lien thereon, the shingles made of the timber taken under said permit, but he did not instruct them, that it would give the plaintiffs any lien on the timber before it had actually been cut and taken by said *Perry*. The defendants also insisted, that there was no proof of a delivery to said plaintiffs, and no evidence from which a delivery could be inferred; but the Judge instructed the jury, that they might from all the evidence infer a delivery, if they were satisfied there had been one made, or possession taken of the shingles under the plaintiffs' bill of sale. The defendants also contended, that by the terms of the plaintiffs' bill of sale, it was conditional, and that no property or right of possession in the shingles vested until a delivery to them or their agent in *Bangor*. But the Judge instructed the jury, that they might regard the bill of sale as giving the plaintiffs a right to immediate possession. The jury returned a verdict

for the plaintiffs, and gave damage $266,06. To which rulings of the Court, the defendants' counsel excepted.

Kent, argued for the defendants, enforcing the grounds taken at the Court of Common Pleas, and citing, 3 *Stark. on Ev.* 1245; *Commonwealth* v. *Parmenter*, 5 *Pick.* 279; *Flagg* v. *Dryden*, 7 *Pick.* 52; *Emerson* v. *Fiske*, 6 *Greenl.* 200; *Pease* v. *Gibson*, *ib.* 81; *Melvin* v. *Whiting*, 13 *Pick.* 184; *Brewer* v. *Smith*, 3 *Greenl.* 44; *Marston* v. *Baldwin*, 17 *Mass. R.* 610; *Gleason* v. *Drew*, 9 *Greenl.* 79; *Ward* v. *Sumner*, 5 *Pick.* 59; *Badlam* v. *Tucker*, 1 *Pick.* 389; *Reed* v. *Jewett*, 5 *Greenl.* 96.

J. Appleton argued for the plaintiffs, and cited *Meyer* v. *Sharpe*, 5 *Taunt.* 74; *Giles* v. *Nathan*, 1 *Marsh.* 226; *Shumway* v. *Rutter*, 7 *Pick.* 56; *Lanfear* v. *Sumner*, 17 *Mass. R.* 110; *Parsons* v. *Dickinson*, 11 *Pick.* 352; *Tuxworth* v. *Moore*, 9 *Pick.* 347.

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

Weston C. J. — We perceive nothing conditional, in the sale of the shingles in controversy, from *Perry* to the plaintiffs. The terms of the bill of sale are absolute, and payment is acknowledged. The transfer of the lumber thence resulting, between the parties, is not affected or qualified, by the contingency under which *Perry* was to receive an additional consideration. Nor does it appear to us to make any difference, that it was a part of the bargain, that *Perry* was to perform certain services for the plaintiffs, in the transit of the lumber. It was an agency undertaken and assumed on their account. When the lumber thus sold was designated and set apart from the mass, of which it was a part, the contract of sale was consummated, at least between the parties; and the plaintiffs had a right to take immediate possession.

The defendants also claim under *Perry*, and by an instrument bearing date near a month prior to the sale to the plaintiffs. The title of *Chase*, who sold to the defendants, was either as a pledge or a mortgage; or if he was a purchaser, he was liable to account for the proceeds, after paying himself. In determining the questions submitted to us, these transactions may be assumed to have been free from fraud. The two instruments of sale are not necessarily conflicting. There may have been lumber enough both for the

plaintiffs and *Chase*; and there is some evidence to this effect in the case. Regarding the paper given to *Chase* as evidence of a mortgage, his right would attach as mortgagee, notwithstanding *Perry* retained the possession, if the quantity expressed in it was severed, and set apart from the aggregate, of which it was a part, prior to the sale and delivery to the plaintiffs, and not otherwise; and the jury have neither found this fact, nor is there any evidence reported to prove it. But as *Chase* took possession of the lumber, it seems to have been intended that he should hold it, either by way of pledge, or as a purchaser, which some of the terms of the instrument indicate, in which case it must have been understood, that he was to account for its value, beyond what was required for his own security. It is unnecessary however to settle whether *Chase* is to be regarded as a pledgee or a purchaser. In either case, the rights of the parties, so far as they are conflicting, are to be governed by the principles decided in the case of *Lanfear* v. *Sumner*, 17 *Mass. R.* 110, that where different persons claim the same goods by conveyances equally valid, he who first lawfully acquires the possession, has the better title. And this fact the jury have found in favor of the plaintiffs.

But it is insisted that there is no evidence of delivery to the plaintiffs, or of possession taken by them, and that the Judge was not legally warranted in leaving it to the jury to infer such a fact from the evidence, if satisfied that it existed. The evidence was, that as many thousands of the shingles as were sold to the plaintiffs, were marked with the initial of the surname of one of them, and that they claimed such as were thus marked as their property. This coupled with their bill of sale, must, we think, be regarded as evidence of a delivery to them, proper to be left to the jury. There was ample time for such designation and delivery between *October*, when their bill of sale is dated, and the following *May*, when *Chase* took possession. In *Melvin* v. *Whiting*, 13 *Pick.* 184, it was holden to be altogether uncertain whether the initials engraved in the rock, were indicative of a claim to the soil or to the fishery; but in this case the mark clearly indicated a claim to the shingles. It was evidence, that those thus marked were set apart from the rest, and belonged to him, whose mark was affixed.

The jury having found, that the plaintiffs had the first delivery, their title is good, aside from any assignment of *Perry's* permit to them. He had an undoubted right to sell the shingles when made. *Ramsdell*, of whom he purchased the timber, does not interpose, if he had any right to do so. The assignment of the permit being immaterial, we cannot sustain the exceptions taken to the instructions of the Judge upon that part of the case, if their correctness was questionable, in regard to which it is unnecessary to give an opinion. From the evidence it would seem, that if judgment is rendered on the verdict, *Chase's* title to the entire quantity, mentioned in his bill of sale, will remain unaffected, having received an excess equal in value to what the plaintiffs have recovered.

Exceptions overruled.

NATHANIEL HILL, *plaintiff in error vs.* DAVID FULLER.

When a man moves with his family within the limits of a militia company, with the view of residing there until he has built a house on land of his own out of the limits of that company, he is liable to perform military duty where he so resides.

A certificate, made by the commanding officer of a company of militia upon a roll furnished by the Adjutant General, that it is the roll of such company, is sufficient evidence of its authenticity.

Where the roll does not show the precise time, when the enrolment of an individual was made thereon, it is to be considered as made at the time the roll is certified to have been corrected.

The following certificate, made upon a serjeant's warrant by the commanding officer of the company, was held to be sufficient evidence of the appointment and qualification of such serjeant as clerk: "This may certify, that I do hereby appoint D. F. to be clerk of the 8th company, &c., and that he has been duly qualified by taking the oath required by law.

"Sept. 25, 1834. "D. F."

An order from the commanding officer of the company to a private, directing him to warn the persons "set down in the list committed to him," containing a list of names on the back thereof, but none upon its face, gives sufficient authority to warn the persons thus named.

Where the commanding officer of a company has been legally ordered to appear with his company *in another town*, on a day and at a place named at 7 o'clock, for review and inspection, he has power to call his company to appear there at 5 o'clock on the same day.

Hill *v.* Fuller.

THE original action was debt, by which said *Fuller*, as clerk of a company of militia in *Carmel*, claimed to recover of the plaintiff in error a fine for not appearing at the place of parade of the company in *Hampden*, at five o'clock A. M., on the 26*th* of *September*, 1834, the commander of said company having been ordered to attend with his company at *Hampden* for regimental review and inspection, at 7 o'clock, A. M., on the same day. The limits of the company were proved; that one *John Fuller* was the commander of it; that the plaintiff was duly appointed a serjeant of said company, and that an indorsement was made on the back of his warrant, as serjeant, as follows: —

"This may certify, that I do hereby appoint *David Fuller* to be Clerk of the 8*th Company of Infantry*, in the 2*d Reg.*, 2*d Brig.*, *and* 3*d Division*, and that he has been duly qualified by taking the oath required by law, before me.

"*John Fuller.*

"*Carmel, Sept.* 25, 1834."

The Company in *Carmel* was the 8th in that Regiment. It was objected, that this furnished no evidence, that the original plaintiff was Clerk, but the objection was overruled. To show the enrolment of the plaintiff in error, the original plaintiff offered a paper in common form of a company roll, on which was the name of said *Hill*, and which paper was verified, as a roll, only by the following certificate thereon:

"Militia of *Maine*. Roll of the 8th Company of Infantry in the 2d regiment, 2d brigade, and 3d division of the militia, under the command of Capt. *John Fuller*, as corrected on the sixteenth day of *September*, 1834. Attest, *John Fuller*, Capt."

There was no evidence of any other roll. The plaintiff in error objected, that this furnished no evidence of any legal enrolment of said *Hill*, but this objection was also overruled. There was no date against the name of the plaintiff in error, showing the time when he was enrolled. The company order to one *Kimball*, who duly left a written notice with said *Hill*, directed him to warn the persons whose names were set down in the list committed to him. There were no names of any privates of said company on the face of said order, but on the back thereof were several names, and among them that of the plaintiff in error. It was objected, that

Kimball had no authority to warn, but this objection was also overruled. It was insisted, that the captain had no right to order his company to appear at *Hampden* at an earlier hour, than that fixed in the regimental order, but this objection too was overruled. The plaintiff in error did not appear at the place appointed at any time on that day. The said *Hill* then proved, that he owned land in *Newburgh*, a town adjoining *Carmel*, and hired a house and moved into *Carmel* with his family, *April* 1, 1834, to live there until he could build a house on his own land; that he worked sometime on the roads in *Newburgh* during the summer of 1834, but continued with his family to reside in *Carmel* until long after *October*, 1834. It was contended that the said *Hill* was not liable to do military duty in *Carmel*, in consequence of his residence there under such circumstances, but this objection was also overruled.

F. H. Allen, for the plaintiff in error, contended:

1. The plaintiff in error was not liable to enrolment in *Carmel*, because he went there for a temporary purpose only, until he could build a house on his land in another town. 1 *Pick.* 195; 4 *Mass. R.* 556; 3 *Greenl.* 436.

2. No legal roll was proved. The only evidence was the certificate of the captain. He is not a certifying officer, nor the proper person to keep the roll. It should have been verified by oath.

3. If a roll, it is defective in not stating the time when *Hill* was enrolled. The forms furnished by the adjutant-general require the time of the enrolment to be stated; and those are binding. 5 *Greenl.* 438.

4. The original plaintiff was not legally appointed clerk. If there was any certificate of qualification, it was before the appointment. There was none after it.

5. The company order to warn was irregular on its face, and void. It contained no names of the persons to be warned, and therefore gave no authority to warn any persons. The commander of a company has no authority of his own to order his company to appear out of town, and the order does not recite, or profess to act under, any authority from the commander of the regiment.

6. The regimental order confers no power to warn the company to appear at 5 o'clock, as that directs the appearance to be at 7 o'clock.

Kent, for the defendant in error, argued:

1. The plaintiff in error moved into the limits of the company with his family to reside and dwell there, and there he would have had a right to vote, and there he is subject to perform militia duty. 7 *Greenl.* 501.

2. The roll was sufficient in itself, and was sufficiently proved to have been a roll, to show a legal enrolment of the plaintiff in error. It is the duty of the captain of the company to enrol the members of it, and the clerk is only to assist him in this duty. The certificate on the roll is to identify and distinguish it from any other, and it is to be taken, *prima facie*, as true. No proof of it is necessary, but if it were, the certificate is enough. As there is no date of the time when the plaintiff in error was in fact enrolled, it must be taken to be when the roll was certified to have been corrected, and that was before the warning. *Stat.* of 1834, *ch.* 121, § 12; law of *U. S.* § 1.

3. The clerk was duly appointed and sworn. The design of the captain to appoint him clerk, and to qualify him for the office, distinctly appears, and that is sufficient. 1 *Fairf.* 421; 6 *Greenl.* 217.

4. The company order was sufficiently certain, and it was wholly immaterial whether the names were on the face or on the back of the order. Had this been a prosecution against the private to whom the order was directed for refusing to warn, it might have been necessary to have had the names of the privates appear on the order; but in this case, it is enough, that *Hill* was legally enrolled and legally warned, and it is wholly immaterial, whether there was any order or not.

5. *Hill* did not appear at any time, and cannot say, that he was ordered to appear at too early an hour. If the captain did wrong in ordering him to appear too soon, the captain may be punished, but it furnishes no excuse for neglect of duty in the private. But it would be impossible for the captain to have his company in a proper state to go upon the field at the time appointed for the Regiment to assemble, unless they were ordered to meet at an earlier hour, and prepare themselves for appearing, as a company. And such is the common practice.

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

WESTON C. J. — The plaintiff in error removed with his family and came to reside in *Carmel*, within the bounds of the company, in which he is alleged to have been enrolled, which brings his case within the first section of the law of the *United States*, relating to the militia. While at *Carmel*, he hired and cultivated a farm there for two successive years. It differs essentially from the case of the *Commonwealth* v. *Swan*, 1 *Pick.* 195, where the party enrolled was absent from his established domicil, on a visit to his friends, which happened to be protracted, beyond his original intentions.

The same section imposes upon the captain, or commanding officer of a company, the duty of enrolling every citizen, liable by law to enrolment. The roll itself is a document of a public nature, constituting an important part of an organization, which has for its object the public defence. It is an original, and properly proved by the authentication of the officer entrusted to make it. For where the law has appointed a person for a specific purpose, it must trust him, as far as he acts under its authority. 1 *Stark.* 173. The certificate of an officer, entrusted by law to enrol a lease or deed of bargain and sale, on the deed or lease in the margin or on the back of the instrument, is competent evidence; and it could never have been doubted that the enrolment itself was so. *Kennersly* v. *Orpe et als. Douglas*, 56. The act of Congress, the paramount law, requires that the enrolment be made by the captain. He is the officer entrusted with this service. Our law, *stat.* of 1834, *ch.* 121, § 12, has given him the clerk, as an assistant; but he may doubtless act without him. The presence or aid of the assistant is not necessary to give validity to what he does, in the discharge of this duty. When made by him, it is entitled to the credence due to a public original document. The roll in question has the form required by law, and it is authenticated by the officer who was entrusted to make it.

The precise time of the enrolment of the plaintiff in error, does not appear; but it does appear to have been done prior to his being warned to do the service, in which he was proved to have been delinquent. And this is sufficient upon this point. In *Sawtell* v.

Davis, 5 *Greenl.* 438, it was decided, that the fact of a prior enrolment could not be made out by parol proof.

There is some confusion of tenses in the certificate of the captain, on the back of the warrant of the defendant in error; but giving it a liberal and a fair construction, it must be understood to mean, that he was appointed clerk, and that he was thereupon qualified, by taking the oath required by law. And all this might properly appear in one certificate. *Abbot* v. *Crawford*, 6 *Greenl.* 214. That *John Fuller* was acting in his capacity of captain, when doing a military act appertaining to that office, is necessarily implied. The company order does refer to a list, containing the names of those to be warned, among which is the name of the plaintiff in error. The captain in his company order, did act in pursuance of a regimental order. We have been referred to no law, requiring that the company order should set forth that fact. The company were directed to assemble at an hour somewhat earlier, than was required by the regimental order. But we are satisfied, that this is in accordance with military usage. It affords an opportunity to prepare the company for an efficient appearance at the hour appointed. We cannot say that more time was taken than may have been necessary for this purpose.

Upon the whole we are of opinion, that none of the points taken in defence can be sustained.

Judgment affirmed.

GILMAN HARRIMAN *& al. vs.* FRANCIS HILL.

Where the equitable owner of a note, payable to another, recovered judgment upon it in the name of the payee, and gave the execution to an officer, who took the note of a third person for the amount, payable to the judgment creditor, and discharged the execution; *it was held*, that the equitable owner might maintain an action on the last note, in the name of the payee.

The possession of a note, payable to a third person, and not negotiated, the declaration of the holder, that it was his property, and the leaving it with an attorney for collection as such, in the absence of all opposing proof, are evidence of an equitable assignment of the note to him.

Evidence of such declarations is admissible, as part of the *res gesta*.

EXCEPTIONS from the Court of Common Pleas.

Assumpsit on a promissory note, *Jan.* 10, 1833, signed by the defendant, and payable to the plaintiffs or their order, in one month, for $32,77. The general issue was pleaded with a brief statement, alleging, that the plaintiffs have not, and never had, any interest in said note, and never authorized the suit to be commenced or prosecuted in their names. After the note had been read in evidence, the defendant produced, in proof, a certificate, signed by one of the plaintiffs, dated after the commencement of the suit, stating that the plaintiffs never had any interest in the suit, never authorized it to be commenced or prosecuted in their names, and at no time had any knowledge of or interest in the note; and proved, that the other plaintiff had acknowledged, that the certificate contained the truth, and that both the plaintiffs had acknowledged repeatedly, that about the time the note became due, the defendant offered to pay them the note, and that they informed him, they had no such note, that they knew of none, and could not inform him where to find it. The note was filed on one end, "*Harriman & al.* v. *Hill*," and on the other, "*French* v. *Hill*," and the writ was indorsed on the back thereof, "the property of *Eben'r French*," in the handwriting of the attorneys for the plaintiffs in the suit. *M. P. Norton*, one of the plaintiffs' attorneys, called by the plaintiffs, testified, that in the winter or spring of 1832, one *Kenney* brought to his office, for collection, a note signed by one *Folsom*, and payable to the plaintiffs or order, and not indorsed, and informed the witness, that the note was *Kenney's* property, that the witness sued

the note in the name of the plaintiffs, recovered judgment, took out an execution and delivered it to one *Higgins*, a deputy sheriff, for collection. The witness also stated, that *Kenney* informed him that he was indebted to *Ebenr. French*, and had drawn an order on the witness in favor of *French* for the proceeds of the *Folsom* note, but whether before or after the *Folsom* suit, the witness could not say. *Higgins*, the deputy, was also called and testified, that he wrote the note in suit, and received it in payment of the execution, being for the debt, costs, and his fees, and that neither he nor the defendant knew, that the demand was assigned, and that he informed *Folsom*, who was a neighbor of the defendant, that the note would be left at *Norton & Moody's* office. To the admission of the declarations of *Kenney*, and to the competency of this evidence to prove any assignment of the original demand to *French*, the defendant objected, but the objections were overruled by the Court, *Perham J.* presiding, and the evidence admitted. The defendant's counsel requested the Court to instruct the jury, that on the evidence, the action could not be maintained, because the plaintiffs have no interest in the note, or in the suit, and never authorized the note to be taken in their names; that the note might be considered as a note payable to fictitious payees, and as such declared on as a note payable to bearer, or given in evidence on the money counts, and that therefore *French* might have brought an action on it in his own name; that if the testimony of *Mr. Norton* shew an assignment of the note of *Folsom*, that assignment did not authorize the note in suit to be taken in the name of the present plaintiffs without express authority to do so; that it was the duty of the plaintiff in interest, or his attorney, when the execution was delivered to the officer, to inform him whose property it was; and that the plaintiffs' attorney by accepting the note in suit of the officer, thereby adopted his act, and that the note in suit must be considered in the same light, as if it had been taken by the plaintiff in interest, or by his attorney. But on all these points the presiding Judge declined instructing the jury as requested, and did instruct them, that although the present plaintiffs might have no knowledge of, or interest in, the note in suit, or of this action, yet if there was a privity between the plaintiffs on the record and the plaintiff in interest, the action could be maintained; and that there was

evidence from which such privity might be inferred, and that on the evidence, it was their duty to find for the plaintiffs, unless they should be satisfied, that in taking the note in suit there was fraud, improper concealment, a design to enhance costs, or other improper purposes. The jury found a verdict for the plaintiffs, and the defendant filed exceptions to the rulings and instructions of the Court.

Very long and learned arguments in writing were furnished to the Court by *J. B. Hill*, for the defendant, and by *G. B. Moody*, for the plaintiffs.

Hill enforced the grounds taken in the Court of Common Pleas, and cited the following authorities. *Baker* v. *Briggs*, 8 *Pick.* 122; 3 *Stark. Ev.* 1300; *Thacher* v. *Winslow*, 5 *Mason*, 55; *Gilmore* v. *Pope*, 5 *Mass. R.* 491; *Pigott* v. *Thompson*, 3 *B. & P.* 147; 13 *Petersdorf*, 528; *Dawes* v. *Peck*, 8 *T. R.* 330; *Doe* v. *Staples*, 2 *T. R.* 696; 1 *East*, 497; 4 *B. & P.* 437; 1 *Lev.* 235; 3 *Lev.* 139; 1 *Maule & Selw.* 575; 13 *Petersdorf*, 90; *Gunn* v. *Cantine*, 10 *John. R.* 387; *Niven* v. *Spickerman*, 12 *Johns.* 401; *Irish* v. *Webster*, 5 *Greenl.* 171; 1 *Dane*, 433; 5 *Greenl.* 417; *Foster* v. *Shattuck*, 2 *N. H. Rep.* 446; *Grant* v. *Vaughan*, 3 *Bur.* 1526; 3 *Salk.* 67; 1 *Ld. Raym.* 180; 3 *T. R.* 481; 1 *H. Black.* 569; *ibid*, 313; 2 *H. Bl.* 288; 4 *Petersdorf*, 270; 1 *Dane*, 435; *Webster's Quarto Dictionary, Privy, Privity*; 2 *Thomas's Coke Lit., Phil. Ed.* 1827, 597; 1 *Dane*, 95, § 2; 4 *Dane*, 143, § 23, 24, 25.

Moody cited 1 *Chitty's Pl.* 10; *Alsop* v. *Caines*, 10 *John. R.* 400; *Raymond* v. *Johnson*, 11 *Johns. R.* 488; *Amherst Acad.* v. *Cowles*, 6 *Pick.* 427; *Marr* v. *Plummer*, 3 *Greenl.* 73; *Brigham* v. *Munroe*, 7 *Pick.* 40; *Gaither* v. *F. & M. Bank of Georgetown*, 1 *Peters*, 37; *Martin* v. *Hawkes*, 15 *Johns. R.* 405; *Livingston* v. *Clinton*, 3 *Johns. Cases*, 264; *Brisban* v. *Caines*, 10 *Johns. R.* 45; *Dawson* v. *Coles*, 16 *Johns. R.* 51; *Prescott* v. *Hull*, 17 *Johns. R.* 284; *Titcomb* v. *Thomas*, 5 *Greenl.* 282; *Vose* v. *Handy*, 2 *Greenl.* 334; *Clark* v. *Rogers*, 2 *Greenl.* 143.

The case was continued for advisement, and the opinion of the Court afterwards prepared by

Weston C. J. — The transfer of a debt due from one man to another, with the evidence by which it is ascertained, is a lawful

transaction. The demand, out of which the one in controversy grew, was a note of hand given by one *Folsom* to the plaintiffs. This note was carried by *Kenney* to Mr. *Norton*, an attorney, for collection, *Kenney* declaring at the time, it was his property. This declaration we doubt not is admissible, as a part of the *res gesta;* and in the absence of all opposing proof, the possession of the note, with the claim and exercise of ownership over it, is evidence that it had been assigned to him. And being his property, he had a right to assign it over to another at his pleasure. The notice he gave his attorney, that he had exercised this right in favor of *French*, was itself an act, which it was competent for *Norton* to prove by his testimony. But whether assigned to *French*, or still remaining the property of *Kenney*, is not at all material in determining the validity of the objections, raised by the counsel for the defendant. They apply with equal force in either case.

When the assignment of a *chose* in action was recognised as lawful, it became necessary to protect the equitable interest of the assignee. The cases, which establish this doctrine, need not be cited. It is sufficient to remark, that the protection has been made effectual, against any improper interference, on the part of the original creditor, to defeat the assignee, or to impair his right to the enjoyment of what has been transferred to him. This is conceded in respect to the demand assigned; but it is insisted that it cannot be carried farther than the necessity of the case requires, and should not be extended to a succession of demands, of which that assigned formed the original consideration. The assignment carries with it an authority to use the name of the assignor, in enforcing the collection of the demand assigned. If extended to derivative claims, courts would take care that this should not be done to his injury. It is not our intention to lay down any general rule, which is to be drawn into precedent, to justify the use of the name of the assignor unnecessarily. The cases, which may require the equitable interference of the Court, are not susceptible of exact limitation. It is intended for the furtherance of right, and the suppression of wrong.

In the case before us, we are satisfied, that the defence set up is without merits, and is an attempt to escape from the obligation of a promise fairly made, upon a legal and adequate consideration. And we are further satisfied, that the course taken by the nominal plain-

tiffs, is inequitable on their part; that they are in no danger of sustaining loss or injury, and that they have nothing to gain by the suppression of this suit, or its termination in favor of the defendant. On the other hand, if the suit is not sustained, the real plaintiff in interest is without remedy; for we cannot accede to the correctness of the assumption, that this is a note given to a fictitious payee. The form of the action secures to the defendant every equitable offset.

He urges his disappointment in not finding the note in the hands of the payee. But he must be presumed to know, that it was negotiable by indorsement, and that it might be assigned, without being indorsed. He had no difficulty to encounter in finding the note at maturity, which he might not have foreseen, from the nature of the instrument.

The officer believed he was discharging his duty acceptably, by taking better security; and he took it in the name of the execution creditor. And this was approved by the real party in interest. We perceive nothing so censurable in this course of proceeding, as to forfeit all claim to the protection of the Court, against the inequitable interference of the payee of the original demand. Under the peculiar circumstances of this case, we are of opinion, that the nominal plaintiffs ought not to be permitted to defeat the suit; but that the assignee of that demand should be protected in enforcing payment against the defendant, who was substituted by his own counsel for *Folsom*, who gave the first note.

Exceptions overruled.

Benjamin Bussey *vs.* Horatio N. Page.

Where the owner of a tract of timber land had conveyed a portion thereof, and had taken back a mortgage to secure the purchase money, and had given a bond for a deed of the residue on being paid a certain sum, but nothing had been paid for the land; and an assignee of the claims under the mortgage and bond had entered into the possession with the knowledge of the original owner, and cut and took therefrom timber, and, after a demand made upon him of the timber by the original owner, sold and converted the same to his own use; it was held, that the original owner of the land was entitled to recover the value of the timber, as it stood at the time it was cut.

Trover for a quantity of timber, mill logs and wood.

The action was submitted on an agreed statement, from which it appeared, that the defendant's intestate, *S. C. Bradbury*, had cut the lumber on a tract of wild land in *Bangor*, originally belonging to the plaintiff, and with the intention of converting the woodland to tillage. The plaintiff had conveyed a portion of the land and had taken back a mortgage to secure the purchase money, and had given a bond to convey the residue on the payment of a certain sum of money, but nothing had been paid for the land. By the general rise of land in that vicinity, this land, after the cutting, was of more value, than the amount due. Before he cut the timber and wood, *Bradbury* had become assignee of the claim to the land under the mortgage and bond, and was with the knowledge of the plaintiff in quiet and peaceable possession of the premises at the time of the cutting. One third part was cut on the land described in the bond, and two thirds on that described in the mortgage. After the cutting, said *Bradbury* deceased, and the defendant was appointed his administrator and inventoried the lumber as belonging to the estate, and sold part of it at auction for $241,50. After the inventory was taken and before the sale, the plaintiff demanded of the defendant the timber, logs and wood cut by said *Bradbury*. It was agreed, that the *stumpage*, or value of the trees standing, was worth at the time of the cutting $234,20. The Court were to enter the proper judgment thereon.

T. P. Chandler and *A. W. Paine*, for the plaintiff, furnished the Court with a written argument, in which were cited *Blaney* v. *Bearce*, 2 *Greenl.* 132; 2 *Cruise*, 107; *Beach* v. *Royce*, 1 *Root*, 244; *Beacher* v. *Cook. ib.* 296; *Jackson* v. *Dubois*, 4 *Johns. R.*

216; *Jackson* v. *Hull*, 10 *Johns. R.* 481; *Robinson* v. *Litton*, 3 *Atk.* 270; *Farrant* v. *Lovel*, *ib.* 723; *Brady* v. *Waldron*, 2 *Johns. Ch. R.* 148; *Smith* v. *Goodwin*, 2 *Greenl.* 173; *Stowell* v. *Pike*, *ib.* 387; *Starr* v. *Jackson*, 11 *Mass. R.* 519; *Jesus College* v. *Bloom*, 3 *Atk.* 263; 2 *Cruise*, 109; *Keech* v. *Hall*, *Doug.* 21; *Crockford* v. *Alexander*, 15 *Vesey*, 138; *Suffern* v. *Townsend*, 9 *Johns. R.* 35; *Cooper* v. *Stower*, *ib.* 331; *Erwin* v. *Olmstead*, 7 *Cowen*, 229; 2 *Saund.* 259; 3 *Dane*, 216; *ib.* 219; *Weeks* v. *Gibbs*, 9 *Mass. R.* 74; *Stearns* v. *Stearns*, 1 *Pick.* 157; *Willoughby* v. *McClure*, 2 *Wend.* 608; 1 *Dane*, 584; and 2 *Selwyn*, 695.

McGaw, *Allen & Poor*, for the defendant.

After a continuance,

Per Curiam. — The opinion of the Court upon the facts is, that the action has been maintained; and that the plaintiff is entitled to judgment for $234,20, with interest from the date of the writ.

Henry R. Soper *vs.* Michael R. Stevens.

Where a note, given as the consideration of a quitclaim deed of land, and where there was no fraud, had been paid by the grantee, the money cannot be recovered back, although such grantee has been evicted by an elder and better title.

Exceptions from the Court of Common Pleas.

Assumpsit on the usual money counts to recover a sum paid by the plaintiff to the defendant. The plaintiff proved on the trial, that the defendant sold him a lot of land in Orono, of which he gave him a quitclaim deed, and received as consideration therefor the notes of the plaintiff, one of which was paid, and to recover back that sum this action has been brought. The plaintiff further proved, that soon after this payment he was evicted from the premises by an elder and better title; that the defendant at the time of the conveyance had no title; and that after the eviction he demanded back the money he had paid, which was refused. The action was then commenced.

Upon this evidence, *Whitman C. J.*, presiding at the trial in the Court of Common Pleas, ordered a nonsuit; and to this order the plaintiff excepted.

The case was submitted to the decision of the Court on the briefs of counsel, by *J. Appleton* and *W. T. Hilliard*, for the plaintiff, and by *McGaw, Allen & Poor*, for the defendant.

For the plaintiff were cited 2 *Greenl.* 390; 3 *Pick.* 452, and cases there cited; 11 *Johns. R.* 50; 13 *Johns. R.* 52; 6 *Cowen*, 297; 1 *Har. & John.* 405; 4 *Pick.* 228; 1 *Greenl.* 152; and 2 *N. H. Rep.* 61.

For the defendant the following were cited. *Gates* v. *Winslow*, 1 *Mass. R.* 65; *Holmes* v. *Avery*, 12 *Mass. R.* 136; *Joyce* v. *Ryan*, 4 *Greenl.* 101; *Greenleaf* v. *Cook*, 2 *Wheat.* 13; *Frost* v. *Raymond*, 2 *Caines*, 188; *Abbott* v. *Allen*, 2 *Johns. Ch. R.* 523; 2 *Kent*, 2*d Ed.* 371; and *Sug. Vend. & Pur.* 3*d Ed.* 346.

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

Emery J. — Can the action on the money counts be maintained against the defendant, to recover the consideration of a quitclaim deed, which the defendant gave to the plaintiff, of a lot of land in *Orono*, which it was proved the defendant sold to the plaintiff? The suit is instituted to recover back the amount of one of the notes of the plaintiff, which he gave to the defendant in part of the consideration, and which he has duly paid. It was proved, that soon after the payment, he was evicted by elder and better title, and that at the time of the conveyance, the defendant had no title; and that subsequently the money was demanded by the plaintiff of the defendant.

It is contended for the plaintiff, that in an action on a promissory note given for the price of land, conveyed by a plaintiff to a defendant, by deed of release and quitclaim without covenants, it is a good defence, that there is a total failure of consideration; and he cites cases from *Greenl. R.*, *Pick. R.*, and *Johns. R.* in support of the position. The cases cited certainly tend to sustain that position. He then argues, that if the facts shew a good defence, if the note was in suit, that defence, total failure of consideration, equally shews that the plaintiff should recover it back, on the gen-

eral principle, that money had and received is an equitable action, and the absurdity of deciding the case on the mere question of which side of the *vs.* the plaintiff or defendant may be; and on the same question of facts varying the decision according to that mere frivolous and unimportant circumstance. And he insists, that money had and received lies in all cases when the defendant has moneys in his hands, which *ex equo* and *bono* belongs to the plaintiff; so, too, to correct mistakes, in case of payment and failure of consideration, and in this case.

The plaintiff replies, that where money has been voluntarily and understandingly paid upon a contract made *bona fide*, although it was without consideration, the law leaves the parties as it finds them; and cites *Gates* v. *Winslow*, 1 *Mass. R.* 65; and *Holmes* v. *Avery*, 12 *Mass. R.* 136; with many other authorities from *Greenleaf's*, *Wheaton's*, *Johnson's*, and *Caines' Reports*, and *Kent's Commentaries.*

If it be an absurdity to make a distinction between the case of one resisting payment of a note given without consideration, and the case of one seeking to recover back money which he has understandingly paid, freely and without objection, the absurdity has been of long continuance. That circumstance ought not to prevent a correction, if the distinction merit such an epithet. It is not made on the mere frivolous and unimportant circumstance of which side the *vs.* the plaintiff or defendant may be, but upon principles which have heretofore been considered conformable to the practical demands of society. It is to correct the spirit of litigation. Individuals, who choose to make their contracts, and omitting any provision for reclamation, perform them to the person, who is free from any charge of fraud, ought to be discouraged from vexing in the law those who are as innocent as themselves.

Here the payment was made voluntarily. It is a rule of law, that where the parties have reduced their contract to writing, the written instrument alone is to be resorted to for the measure of their liability. *Chadwick* v. *Perkins*, 3 *Greenl.* 399. Previous to this decision, it was held in the case of *Howard* v. *Witham et al.*, 2 *Greenl.* 390, that it was no defence to a note given for the price of land conveyed by the plaintiff to the defendant by deed of release and quitclaim without covenants, that the plaintiff represented his

title to be in fee simple, when in truth it was but an estate for life or for years. And it was said that nothing short of a total failure of title was in such a case a sufficient defence to the action. As an abstract matter of right, if a defence could be made against the note for a total failure of title, why should not a defence be allowed against the note to the extent of the difference in value between an estate for life or years and an estate in fee?

But it is not every failure of title, that will warrant a recovery back of money paid, in the shape of damages. The principle on which we proceed was long ago stated in the action, *Roswell* v. *Vaughan*, *Cro. Jac.* 196. It was in the nature of deceit for selling a right to tithes for £30 on affirmance that he was *incumbent*, when he never was instituted, *and another was, and took the tithes*, and the *plaintiff lost them.* But the Court were of opinion, that there was no warranty, or affirmance, at the time of the sale, that he had any right, or title, to sell, and arrested judgment, and observed, here he had not any possession; and it was no more than if one should sell lands whereof another is in possession, or a house whereof another is possessed, without covenant or warranty for the enjoyment. *It is at the peril of him who buys, and not reason he should have an action in the law where he did not provide for himself. Whereupon it was adjudged for the defendant.*

In *Bree* v. *Holbeck*, *Doug.* 654, a personal representative found among the papers of his testator, a mortgage deed, and assigned it for the mortgage money more than six years before the suit, affirming and reciting in the deed of assignment, that it was a mortgage deed made or mentioned to be made between the mortgager and mortgagee for that sum. It was decided that the assignee could not recover back the mortgage money, though the mortgage were a forgery, and the assignee did not discover it till within the six years, unless the assignor knew it to be a forgery. The question was, whether there was any fraud. If he had discovered the forgery, and then got rid of the deed, as a true security, it would have been different. He did not covenant for the goodness of the title, but only that neither he nor the testator had encumbered the estate. It was incumbent on the plaintiff to look to the goodness of it.

In *Underwood* v. *Lord Coustown*, it was said by *Lord Redesdale*, that, "the accepting of a release is in no case an acknowl-

edgement that a right existed in the releasor. It amounts only to this, I give you so much for not seeking to disturb me." 2 *Sch. & Lef.* 67.

The action, *Gates et al.* v. *Winslow*, 1 *Mass. R.* 65, was assumpsit for money had and received, as was stated, in a speculation respecting lands in the Province of *Canada*, and the defendant having certain pretensions to land there, which he derived from one *Hathaway*, had, by a deed of quitclaim, conveyed his right therein to the plaintiffs for £100, which they had paid to the defendant. The plaintiffs not being able to hold any thing by virtue of the defendant's deed had brought this action to recover back the money paid, as the consideration of the deed. The counsel for the plaintiffs said, he did not expect to prove fraud, but that he went upon the ground of the contract being *nudum pactum*, and cited the case of *Whittemore & Waters*, decided in the Supreme Judicial Court of *Massachusetts* at the term before in the County of *Worcester*, where a note had been given for a quitclaim deed of *Canada* lands, and an action was brought to recover the contents of the note, in which case the Court held there was no consideration for the note. The whole Court were unanimous and clear, that the plaintiff could not support the action. They said the rule is, universally, where the parties are equally innocent or equally guilty, *melior est conditio defendentis.*

As no fraud or imposition is pretended to have been practised by the defendant, the Court will presume that the parties at the time of the transaction were on equal grounds. Any one who had voluntarily given away a sum of money, might as well think of recovering it back, as the plaintiff expect to maintain the present action. The case cited by the counsel for the plaintiff was decided upon the same rule which we go upon in the present, viz. *melior est, &c.* Where a promise is made without consideration, the law will not enforce a performance, but leaves the parties as it finds them. So where money has been voluntarily and understandingly paid, upon a contract made *bona fide* without fraud, imposition, or deceit, although it was paid without consideration, the law will not compel a repayment, but leaves the parties as it finds them. *Strong J.* said, that a man, who had purchased a lottery ticket which happened to come up a blank, might with equal propriety say that the

contract was *nudum pactum*, and bring his action to recover back the price of the ticket.

As Chancellor *Kent* says, the Common Law affords to every one reasonable protection against fraud in dealing, but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information. It reconciles the claims of convenience with the duties of good faith to every extent compatible with the interests of commerce. *Kent's Com. vol. 2, sec. 39, page 484-5, 2d edition.*

And it is remarked by Justice *Story*, 1 *Story's Equity*, 203, that Courts of Justice generally find themselves compelled to assign limits to the exercise of their jurisdiction, far short of the principles deducible *ex equo et bono;* and with reference to the concerns of human life, they endeavor to aim at practical good and general convenience.

In *2d Kent's Com.* 473, *2d edition*, cited by the defendant's counsel, it is asserted, as the author's apprehension, that in sales of land, the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title. We consider this to be the law in this State.

The exceptions are overruled, and the nonsuit confirmed.

Ichabod Russell *et al. vs.* Asa W. Babcock.

An agreement to delay the collection of an execution against one is a sufficient consideration for a promise by another to pay the amount thereof.

Such promise, although not in writing, is not within the statute of frauds.

This was an action of *assumpsit*, declaring specially on a promise of the defendant to pay the debt of another upon the consideration of forbearance. The facts sufficiently appear in the opinion of the Court. The action was defaulted, which default was to

be taken off, if in the opinion of the Court the action could be maintained.

The case was argued in writing by *Cutting*, for the defendant, and by *W. P. Fessenden*, for the plaintiffs.

Cutting, cited *Rob. on Frauds, Tit. Contracts; Skelton* v. *Brewster*, 8 *Johns. R.* 376; *Simpson* v. *Patten*, 4 *Johns. R.* 422; and *Slingerland* v. *Morse*, 7 *Johns. R.* 463.

Fessenden, cited *Roberts on Frauds*, 232; *Cabot* v. *Haskins*, 3 *Pick.* 93; *Lawes on Assumpsit*, 57; 1 *Saund.* 211, *a*; and *Elting* v. *Vanderlyn*, 4 *Johns. R.* 237.

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

EMERY J. — The defendant's counsel contends, that the undertaking of the defendant was collateral; and though it is somewhat difficult frequently to distinguish between an original and a collateral promise, yet he considers the rule to be, that where the original debt is not discharged by the subsequent promise, it is a collateral undertaking only, and to be binding, should be in writing.

In this case there was no note or memorandum in writing signed by the defendant. The suit is upon a promise of the defendant to pay the debt of another upon the consideration of forbearance, as set forth in the plaintiffs' declaration. The plaintiffs at *June* term, 1833, recovered *judgment* against one *Sprague* for $101,10 debt, and $22,10 costs, on which *execution* issued *June* 18, 1833, and it was fully proved by the attorney of the plaintiffs in the suit against *Sprague*, that about the time judgment was rendered in that suit, he met the defendant, who told him he was to pay it, and if the witness would keep the execution and not give it out, he would pay it. He subsequently repeated the promise. Confiding in the promise the attorney kept the execution and had never delivered it out. In *Sept.* 1833, the defendant said the amount was greater than *Sprague* had represented, but he would see *Sprague*, and have it settled immediately, and afterward said, three or four times, he would pay the whole; but in *Aug.* or *Sept.* 1834, before the suit, he said he would not pay the whole judgment. After this suit, he said he should lose nothing, as *Sprague* had made him secure, but had given him directions not to pay the whole. On this

state of facts, no one can regret to find, as we do, that the engagement of the defendant is to be deemed an original undertaking on consideration of forbearance, most liberally extended to pay the debt of *Sprague*.

Such a promise need not be in writing.

Actual damage, or a suspension or forbearance of right, or possibility of loss occasioned to one to whom the promise is made, constitute a sufficient consideration to give validity to the promise. It is not essential that any actual benefit should accrue to the party undertaking. 3 *Pick.* 93, *Cabot* v. *Haskins*.

The default is to stand, and judgment must be for the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1837.

WILLIAM POLLEYS *vs.* OCEAN INSURANCE COMPANY.

An old vessel built upon and enlarged and enrolled without intended fraud by a new name, without delivering up the old register, and thereby rendered liable to forfeiture by the laws of the *United States*, is the lawful subject of insurance against the usual perils of the seas; and the insurers cannot avoid the payment of a loss covered by the policy by reason of such liability.

If there be no stipulation in the policy, that the vessel insured is a vessel of the *United States*, such enrolment by the new name, is competent evidence to prove the property to be in the assured.

Where the national character of the vessel is not made a part of the contract of insurance, the want of the proper documents to show such character is not material, unless it appear, that the loss happened, or that the risk was increased, in consequence of the want of such documents.

The declarations of a stockholder or of a director of a corporation, are not admissible in evidence against such corporation, made at a time when he was not acting as the agent thereof.

Where one agreed to employ a vessel for a certain time, paying for her use a share of her earnings, and during the time and while under his control and while he was acting as Master, a loss of the vessel happened; his declarations, made after the loss, are not admissible in evidence against the owner.

Answers to questions put by way of explanation of the testimony called out by the other party, are not admissible in evidence, when the testimony, which they were intended to explain, is excluded.

Objections to the form of the questions and to the manner of the examination should be made before the commission issues, when testimony is taken by commission, and when on notice, before the magistrate at the time of the taking; but testimony in itself illegal cannot be admitted, because objections are not thus made.

Polleys *v.* Ocean Insurance Company.

Where a party takes a deposition he may withdraw it at any time during the first term, and in such case it is not evidence for either party; but if it be left on file after the first term, under rules 31 and 43 of this Court, the opposing party has the right to read it in evidence in his favor.

Those rules of Court do not contravene the provisions of the statutes in relation to the taking of depositions.

And if the party by whom the deposition was taken shall take the same from the files of the Court after the first term, and will not produce it, the opposing party may read a copy thereof in evidence.

The admission of improper testimony in relation to a particular fact, but which fact is wholly immaterial to the issue, furnishes no cause for a new trial.

THIS is an action of *assumpsit* on a policy of insurance, bearing date *July* 17, 1833, upon the schooner called the *Mary*, and owned by the plaintiff, for the term of one year, commencing on the 11*th* of said *July;* the sum insured being $3000. The schooner, during the year, viz. *June* 10, 1834, was totally lost.

It appeared on trial, that a sloop was built in 1816, and was enrolled by the name of the *Sophronio*, and was again enrolled in the Custom House in *Portland*, by the same name, *March* 24*th*, 1832; that the said schooner *Mary* was built upon the keel, floor-timbers, and naval-timbers of the sloop *Sophronio*, and the size enlarged nearly 12 tons, and the name of the *Mary* given to her after being so enlarged; and that this was known to the defendants at the time of executing the policy; and that the certificate of the builder of the vessel, was procured by the plaintiff and presented to the Custom House, to obtain the enrolment of the schooner *Mary*, without any intent to deceive or defraud, but with fair and honest intentions, as the jury believed; but that the enrolment of the sloop *Sophronio* was not first surrendered and delivered up at the Custom House before the issuing of the enrolment of the *Mary*, which was on the third day of *June*, 1833.

The counsel for the defendants objected to the admission in evidence of the said enrolment of *June* 3*d*, 1833, as contrary to the laws of the *United States;* but *Emery J.*, before whom the trial was, overruled the objection, and it was admitted. And the same counsel further insisted, that said schooner, on the voyage on which she was lost, was sailing under circumstances rendering her liable to forfeiture for the violation of said laws; and that therefore a policy on a vessel, pursuing such a voyage, was not valid or legal,

or binding; but the Judge also overruled this objection, as insufficient to bar said action. To prove a loss of the vessel within the terms of the policy, the plaintiff offered, in addition to other evidence, to read to the jury a copy of the deposition of *James L. Young*. The original deposition had been taken at the request of the defendants, to be used in the action prior to a former term of this Court, at which a trial took place, but was withdrawn by the defendants, though not during the term for which it was taken, and was not used at the former trial, *Young* being then present and sworn as a witness for the plaintiff.

The admission of such copy was objected to by the defendants' counsel; the plaintiff's counsel at the same time calling for the production of the original, but it was not produced. The presiding Judge overruled the objection, and admitted it in evidence.

The plaintiff also offered a witness to prove that *Benjamin Knight*, who was one of the Directors of said Insurance Company, then, and also at the time said insurance was effected, some short time after the loss of the schooner, on the tenth of *June*, 1834, stated he, said *Knight*, and the other Directors of the Insurance Company, knew, when the policy was effected, that the schooner was not a new vessel, but was the old sloop *Sophronio*, built upon; to the admission of this testimony, the counsel for the defendants objected, inasmuch as said *Knight* was living in *Portland*, and might be examined by the plaintiff, as a witness; but the Judge overruled the objection, and the evidence was admitted.

And *afterwards*, the said *Knight*, having sold out his stock, was offered and admitted a witness on the part of the defendants, and contradicted the testimony of the witness.

The defendants then offered to read to the jury the depositions of *Messrs. Parsons, Weare* and *Freeman*, which were taken upon due notice, and the counsel for the plaintiff was present at the taking of the same. These depositions contained certain declarations, testified to by them to have been made by *Joseph Bean*, who was on board said vessel just before she sunk and was lost. These declarations were contended by the defendants to have a tendency to support the charge, and warrant the conclusion of gross negligence in the management of the vessel, such as to discharge the defendants, and were comprised in the body of the depositions; and with-

out any objection made thereto at the time, in answer to questions put by the *defendants'* counsel, to which no objection was then made; and in answer to the questions put by the *plaintiff's* counsel, without any restrictions or limitations; and the defendants' counsel contended, that such declarations and answers were allowable to be read to the jury, inasmuch as no objections were made to them, or to the questions of the plaintiff at the time they were taken, and such as were in answer to questions proposed by the plaintiff. But the Judge ruled, that such declarations and answers were not admissible in the cause, and excluded them. The plaintiff read to the jury a contract between the plaintiff and *Joseph Bean* and *John Polleys*, the nature of which sufficiently appears in the opinion of the Court; and it was proved, that said *Bean* was at *Cape Neddock*, near which the vessel sunk, while efforts were made by persons employed by the Insurance Company for the purpose of raising said vessel from the place where she sunk, in about seventeen fathoms of water. And the defendants' counsel contended, that by the terms of said contract, *Bean* was the agent of the plaintiff at that time, and in such a situation, as to render his declarations admissible in evidence; and the defendants offered proof of said *Bean's* declarations, tending to show unseaworthyness of said vessel and gross negligence in the management of the vessel, and criminality of conduct in the circumstances occasioning her loss; and particularly what said *Bean* said were the wishes of the plaintiff as to having said vessel raised from the place where she was then laying; but the Judge refused to admit proof of such declarations. The cause was thereupon submitted to the jury, who returned their verdict in favor of the plaintiff. To these opinions and rulings of the Judge, the counsel of the defendants excepted.

Mellen and *Daveis*, for the defendants, in their argument, contended that the verdict should be set aside.

1. The papers showing the enrolment of this vessel, as the schooner *Mary*, were improperly admitted in evidence. Having been built on the sloop *Sophronio*, and the register of the sloop never having been delivered up, it was not the subject of enrolment under the laws of the *United States*, and not the subject of insurance. Act of Congress respecting the registering of ships and vessels, *c.* 146, § 14, 27.

2. The policy in this case gives no right of action to the plaintiff, because an insurance on a vessel, subject to forfeiture for a *violation of our own laws*, is void. And it makes no difference whether the insurers are or are not conusant of this fact. 3 *Kent's Com.* 3*d ed.* 262; *Richardson* v. *M. F. & M. Ins. Co.* 6 *Mass. R.* 102; *Cook* v. *E. F. & M. Ins. Co. ib.* 122; *Wheatland* v. *Gray, ib.* 124; *Breed* v. *Eaton,* 10 *Mass. R.* 21; *Hayward* v. *Blake,* 12 *Mass. R.* 176; *Russell* v. *De Grand,* 15 *Mass. R.* 35; 1 *Phillips on Ins.* 119, and cases there cited; *Warren* v. *Man. Ins. Co.* 13 *Pick.* 521; 2 *Phillips on Ins.* 113.

3. The testimony of the declarations of *Knight,* tending to show, that the defendants knew this to be an old vessel built upon, with a new register, was improperly admitted. He was not an agent of the defendants. The declarations of a corporator, or director, cannot be given in evidence to charge a corporation. Besides, *Knight* was a competent witness for the plaintiff. 2 *Stark. on Ev. ed. of* 1826, 41, and cases there cited; *Hartford Bank* v. *Hart,* 3 *Day,* 493; *Masters* v. *Abraham,* 1 *Esp. R.* 375; *Helyar* v. *Hawke,* 5 *Esp. R.* 72; *Peto* v. *Hague, ib.* 135; *Framingham Man. Co.* v. *Barnard,* 2 *Pick.* 532; 1 *Phil. Ev.* 74; *Langhorn* v. *Allnut,* 4 *Taunt.* 511; *Haven* v. *Brown,* 7 *Greenl.* 421; *Alexander* v. *Mahon,* 11 *Johns. R.* 185; *Woodward* v. *Payne,* 15 *Johns. R.* 493.

4. The copy of *Young's* deposition was improperly admitted in evidence. If the original had been present, the plaintiff had no right to use it. The witness had been present in Court and examined, and we could not use the deposition, nor could they. The rule of Court, too, is peremptory, that we could not make use of the deposition, if we withdrew it. *Potter* v. *Leeds,* 1 *Pick.* 309. The deposition was our property, and it never became a paper in the case. The rule of Court on this subject, does not profess to give to the other party a deposition taken by us, and would be against the statute, and not binding, if it did. The deposition is a different one from what it would be, if they took it, or he was called as a witness, by them. They could ask questions, when we took the deposition, which they could not, if they took it. In no case can a deposition be legally read, but by the party taking it.

5. The exclusion by the Judge of the portions of the deposition which related to the declarations of *Bean* was erroneous. The objections extended to questions and answers, where no objection was made before the magistrate at the time the deposition was taken, and to questions asked by the plaintiff as well as by the defendants. All these were excluded by the Judge. Certainly the answers to questions put by the plaintiff, were proper evidence to be offered by us. The testimony of the declarations of *Bean* was proper, because *Bean* was the agent of the plaintiff. *Potter* v. *Leeds*, 1 *Pick.* 309; *Talbot* v. *Clark*, 8 *Pick.* 51; *Woodman* v. *Coolbroth*, 7 *Greenl.* 181; *Alsop* v. *Com. Ins. Co.* 1 *Sumner*, 451; *Swett* v. *Poor*, 11 *Mass. R.* 549; *Denny* v. *Lincoln*, 5 *Mass. R.* 385; *Churchill* v. *Perkins*, *ib.* 541; *Wheeler* v. *Russell*, 17 *Mass. R.* 258; *Dwight* v. *Brewster*, 1 *Pick.* 50; *Little* v. *O'Brien*, 9 *Mass. R.* 423; *Waite* v. *Merrill*, 4 *Greenl.* 102.

Fessenden & Deblois, for the plaintiff, after remarking that the jury had settled, that what took place in relation to the building and enroling of the vessel was done in good faith and without fraud, and was known to the defendants, when the insurance was effected, said that the true question on the first and main point was this: does the fact that the old enrolment was not given up, *ipso facto*, make the insurance on the vessel void? and contended, that it did not. Any difficulties and disabilities in relation to the government, which might subject the vessel to forfeiture, if the government chose to interfere, do not make void a contract of insurance, or other contract in relation to the same vessel, lawful in itself. *Warren* v. *Man. Ins. Co.* 13 *Pick.* 518; *Law* v. *Hollingworth*, 7 *T. R.* 156; *Bell* v. *Bromfield*, 15 *East.* 364; *Lowell* v. *Roy*, *Ex. A. Co.* 4 *Taunt.* 589; *Dawson* v. *Atty*, 7 *East*, 367; *Bell* v. *Carstairs*, 14 *East*, 374; *Rich* v. *Parker*, 7 *Term R.* 701; *Ward* v. *Wood*, 13 *Mass. R.* 589; *Gremare* v. *Le Clerk*, 2 *Camp.* 144; *Freeman* v. *Walker*, 6 *Greenl.* 68; *Levy* v. *Merrill*, 4 *Greenl.* 180; 3 *Wash. Cir. C. R.* 138; 1 *Phil. on Ins.* 119.

The declarations of *Benjamin Knight* were rightly admitted in evidence,

1. Because he was a Director, and a Director is an agent of the corporation. 2 *Stark. Ev.* 56; 7 *Greenl.* 118; 2 *Peters*, 358; 12 *Wheat.* 468; 2 *Stark. Ev.* 60; 5 *Esp. R.* 145; 2 *Esp. R.*

511; 2 *Stark. R.* 180; 10 *Johns. R.* 38; 11 *East*, 578; 10 *East*, 395; 1 *Camp.* 22; 2 *Root*, 30; 7 *Greenl.* 76.

2. Because *Knight* was a party in interest, as a member of the corporation. 11 *East*, 578; 2 *Stark. Ev.* 41; 16 *East*, 143; 1 *Wilson*, 257; 1 *Bingham*, 45; 10 *East*, 292, and cases cited in *Day's* note; 7 *Greenl.* 51; 2 *Pick.* 345; 14 *Mass. R.* 282; 17 *Mass. R.* 503; 7 *Cranch*, 299; 5 *Mass. R.* 80; 1 *Pick.* 297.

3. And because the objections made by the defendants to the admission of *Knight's* declarations, were waived by their calling him.

The copy of *Young's* deposition was rightly admitted. By the rules of this Court, 31 and 43, the party taking a deposition must make his election, whether to use it or not, at the first term. If he leaves it on file after the first term, he has no right to withdraw it, and either party may use it, as a paper in the case.

The evidence offered of the declarations of *Bean* was rightly rejected. When the objection goes only to the form of the question, the objection should be made before the magistrate; but when the subject matter of the evidence is the cause of objection, it is rightly made in Court.

Bean was no agent of the plaintiff. He was not appointed by him, and was a mere charterer of the vessel. 4 *Greenl.* 264; 15 *Mass. R.* 370; 16 *Mass. R.* 336. *Bean* was present in Court, and the defendants might have called him; and on this ground, the rejection was right.

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

Shepley J. — One of the questions presented by this bill of exceptions is, whether the contract declared on was under the circumstances a legal contract. To enable us to come to a right conclusion, it is desirable, that the principles by which we must be guided, should be, if possible, clearly stated.

Neither the law nor the Court can degrade itself by becoming the minister of evil. The consideration of a contract, or the matter out of which it arises, must therefore be legal. The object to be accomplished, or the act required to be performed by it, must also be legal. And although by itself considered the objects or

acts required by it may be legal, yet if the design of the contract be to aid or assist in the accomplishment of an illegal purpose, it partakes of the character of the transaction, with which it thus connects itself, and becomes tainted by it and illegal. To prove property in any thing, it must be shewn, that the law allows that thing to be the subject of property in the character and under the circumstances in which the claim is asserted; otherwise one can establish no right of property in it. When a contract is formed upon a consideration legal at the time, its validity will not be impaired, though the law should afterwards declare the matter forming the consideration to be illegal. So if the act required to be performed be at the time legal, and the law afterward make the performance illegal, that does not render the contract illegal, though it prevents the performance of it.

These are principles alike valuable to the community, as they are necessary to maintain the character of the law and of judicial tribunals. But while they are by no means to be infringed, they must not be pushed to such extremes as to interrupt, or embarrass the complicated transactions of society. The principles do not, nor would it be consistent with the ordinary transactions of life that they should require all contracts to be considered illegal, which grow out of some matter, or property, in which there had been incorporated, or to which had before attached, some illegal act. The law may declare, that on account of such former illegal ingredient, the article shall no longer be considered the subject of property, and in such case, it cannot afterward form the basis of a legal contract. But if, notwithstanding the illegal act or ingredient attaches to it, the law permits it to be the subject of property, either absolutely or conditionally, until forfeited by some act yet to be performed, it may form the basis of a legal contract.

When contracts are formed upon new or collateral considerations, and when they partake of the original illegal act, was much considered, and the cases were collected, in *Armstrong* v. *Toler*, 11 *Wheat.* 258. The Chief Justice says, "how far this principle [that of illegality] is to affect subsequent or collateral contracts, the direct and immediate consideration of which is not immoral or illegal, is a question of considerable intricacy, on which many controversies have arisen and many decisions have been made." This re-

mark must be understood rather as referring to the difficulty of applying the rule of law to the complicated transactions of business, than to any difficulty in comprehending the rule itself. In that case the consignee of goods, introduced contrary to law by collusive capture, and afterward decreed forfeit, was allowed to recover the money paid on a bond, given for their appraised value. And the rule is there stated to be, that "if the promise be unconnected with the illegal act, and is founded on a new consideration, it is not tainted by the act, although it was known to the party to whom the promise was made." That case may serve to illustrate the application of the rule where the new contract does not connect itself with the illegal act. And the case of *Cannan* v. *Bryce*, 3 *Barn. & Ald.* 179, as an illustration of the application of it, when the new contract is connected with the original act. The act of 7 *Geo.* 2, *ch.* 8, relating to stock jobbing, prohibits the payment of any money on account of not transferring stocks in such cases; and it was decided, that one, who lent moneys for the purpose of enabling a person to make such unlawful payment with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object, could not recover. Here the lending of the money, by itself considered, was an independent and legal act, but being for the very purpose of assisting to do an illegal act, it became connected with it and thereby illegal.

In the law of insurance an exception to these rules has been established in the most commercial countries of modern times, by declaring those contracts to be legal, which are made with the intention to violate the laws of trade of a foreign country. Such an exception breaks in upon the morality and harmony of legal science; and since the reasonings of *Pothier*, and of *Story*, and of *Kent*, and of other eminent jurists, the exception can only be sustained by allowing private interest to overcome the sense of moral and legal right. Whether the question can be presented so as to enable a court to act upon it *de novo*, or whether it must remain a blot upon the law, may be doubtful.

The policy, in this case, was not upon any particular voyage, but for the term of one year. There is nothing in the case, which shews, that any illegal voyage was contemplated by the contract, or that any such was in fact undertaken. The contract cannot

therefore be illegal by reason of any act required by it, nor by reason of any aid intended to be given by it, to the performance of an illegal adventure. The consideration was then, the payment of the premium on the one hand for, and the assumption on the other of, the risk of the legal employment of the vessel for one year. There being nothing illegal in the consideration of the contract, or in the employment of the vessel to be aided by it; the contract can only be illegal by being in some way connected with the prior illegal act, which had by the manner of building and by the use of the enrolment, attached to the vessel. Is there any such connection shewn? By the act of Congress concerning the registering and recording of ships and vessels, *ch.* 146, *sec.* 14, it is provided, that when a vessel "shall be altered in form or burthen by being lengthened or built upon," she shall be registered anew by her former name; and that her former certificate of registry shall be delivered up, under a penalty of five hundred dollars. The twenty-seventh section of the same act provides, "that if any certificate of registry or record shall be fraudulently or knowingly used for any ship or vessel not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the *United States.*" By the act for enroling and licensing ships and vessels, *ch.* 153, *sec.* 2, vessels enrolled are put upon the same footing as to qualifications, and are subjected to the same requisites, as registered vessels. The jury found, that the enrolment by the new name was procured by the plaintiff, "without any fraudulent intent to deceive or defraud;" but that finding does not extend to the after use of it; and the vessel may be regarded as having been liable to seizure and forfeiture. This liability was for a cause in no manner connected with the contract of insurance. It had existed and its influence had been as great upon the vessel, as it could at any time be, before this contract of insurance was made. The act was complete. It neither required, nor could it receive aid from the new contract. In this respect, it was more entirely free from all connection with the new contract, than the illegal act in the case of *Armstrong* v. *Toler* was. It would be very detrimental to the commerce of the country to hold, that a vessel was not the subject of a lawful insurance because she was liable to seizure and forfeiture for a cause not connected with the policy. The laws of the *United States* contem-

plate, that vessels are thus liable for causes arising without wilful negligence or intention of fraud. Cases of that kind are not of unfrequent occurrence, and the Secretary of the Treasury is authorized by law to remit the forfeiture. It could never have been the design of the statute under such circumstances to destroy the legal title, or lawful right of employment, until the forfeiture was exacted. The risk is not increased, nor is the loss for such cause within the policy. The assurers cannot place themselves in the situation of the government, and claim to act for it. None can claim a forfeiture, but those authorized by law. Nor can this matter be properly tried collaterally, and by a Common Law Court. The jurisdiction belongs to another tribunal. It is a matter between others, in which the defendants are not interested, and with which they have no concern.

There is another aspect in which the same transactions are presented. It is insisted, that the enrolment should not have been admitted in evidence in proof of property, because an unlawful document cannot be used as proof. In considering this question, it will be necessary to bear in mind, that it does not appear in the case, that the vessel was insured as a vessel of the *United States.* Her national character does not appear to have entered into the contract. If such had been the fact, the plaintiff could not recover, because the laws of the *United States* declare, that if not registered by the former name, in case she has been built upon, "she shall cease to be deemed a ship or vessel of the *United States.*" As she was not insured as a vessel of the *United States*, and as the laws do not for such cause destroy the title to the property, their effect being only to take from that title the particular character of being a vessel of the *United States*, the document was properly admitted.

It is also contended, that not being properly and legally documented, she was not seaworthy; and that she was not the proper subject of insurance. It is necessary here, again to notice a distinction. If, for the want of legal documents, the voyage is, by the laws of the country, rendered illegal, then the policy is void on account of the illegality of the voyage. Upon this principle alone, the case of *Farmer* v. *Legg*, 7 *Term R.* 186, could have been decided. But if, as in the present case, the laws do not declare

the voyage to be illegal on account of the want of the proper documents, then the consequences are left to be determined by the mercantile law. And by that law, where the national character of the vessel is not made a part of the contract, the want of such documents is not material, unless it appears, that the risk was enhanced, or that the loss happened in consequence of the want of them; in which case, the insured cannot recover. 7 *East*, 367, *Dawson* v. *Atty*; 14 *East*, 374, *Bell* v. *Carstairs*; 2 *Johns.* 157, *Elting et al.* v. *Scott et al.* Nothing appearing in this case to bring it within this rule, these objections cannot prevail.

The next question presented, relates to the admission of the declarations of *Benjamin Knight*, a stockholder and one of the directors of the company. The declaration was not made while acting in the business of the company, but after the loss happened; and it purports to state the knowledge of the company at the time the insurance was effected. Such declarations cannot be received as coming from an agent of the company, when he was not acting in that character. *Haven* v. *Brown*, 7 *Greenl.* 421. The rights of all corporate bodies would be wholly insecure, and at the mercy of each corporator, if the admission or declarations of one corporator could charge the corporation. The principle cannot be admitted. And the testimony must be regarded as improperly received. 2 *Stark. Ev.* 580; 3 *Day*, 491, *Hartford Bank* v. *Hart.* But as these declarations related to a matter, as has already been determined, which did not affect the contract, they were immaterial to the issue; and there is no sufficient cause for setting aside the verdict on that account.

A question is also made respecting the exclusion of the declarations of *Joseph Bean*, and the depositions of *Freeman*, *Parsons*, and *Weare*. It appears in the case, that *Bean*, with another person, had agreed with the plaintiff to employ the vessel for a certain time, paying for her use a share of her earnings, and that during that period she was lost, he being on board at the time of the loss. The declarations were not made while he was on board, but after the loss had happened. By the contract, *Bean* was not acting as the agent of the plaintiff, but on his own account. He could not bind the plaintiff in any contract made with others in consequence of the agreement for the employment of the vessel. No

declarations made by him could therefore be admissible, on the ground of agency. And even if he had been an agent, his declarations, made while he was not acting in that character, but after the loss happened, could not be admitted. The questions put by the plaintiff to *Freeman*, *Parsons*, and *Weare*, appear to have been put only by way of obtaining explanations of the testimony called out by the defendants; and the answers cannot be evidence, when the testimony, which they were intended to explain is excluded. Nor can illegal testimony be admitted because it was not objected to before the magistrate taking the deposition. The proper rule upon this point can go no further, than to require, that any objection to the form of the question and to the manner of examination should be taken before the commission issues, when taken under a commission, or at the time of taking the testimony, when not so taken. The magistrate cannot judge of the legal character of testimony, which may, or may not, be rendered admissible by events which may take place during the course of the trial. There does not appear to have been any error in excluding this testimony.

Whether the copy of the deposition of *Young* was, under the circumstances properly admitted, may depend upon the right of the plaintiff to use the original deposition if it had been then on file. And a majority of the Court are of opinion, [in which I do not concur,] that the 31st rule, taken in connection with the 43d, by implication gave the plaintiff the right to use the deposition; and that such a construction of the rules does not contravene the provisions of the statute. This objection is therefore overruled; and judgment is to be entered upon the verdict.

WILLIAM WOODBURY *et al. vs.* SAMUEL G. BOWMAN.

Where one, in contemplation of immediate death, deposited cash and notes indorsed by him to a surety, with the intention that the same should be received by the surety as soon as the death should be known, accompanied with written directions addressed to the surety, that he should from the proceeds relieve himself from his liabilities, and if any thing remained, give the balance to the children of the principal; and where the surety, after the death of the principal, received and claimed the property; *it was held*, that the surety might retain so much thereof as was necessary for his indemnity.

THIS case came before the Court on the following statement.

The parties agree to the following statement of facts, viz: On the fifteenth day of *September*, 1835, *Samuel Winter* of *Portland*, the plaintiffs' intestate, then doing a large commercial business, and owing amongst other debts, several notes and drafts, amounting to nine thousand five hundred dollars, on which said *Bowman* was liable as indorser or surety, and which he has since the death of said *Winter* been obliged to pay, and about five hundred dollars to said *Bowman*, went from *Portland* to *Bath*, put up his horse at the tavern, and went professedly to spend the night to the house of a Miss *Robb*, who, by direction of said *Winter*, had nearly a year before hired a house at *Bath*, in her own name, and there boarded and took charge of said *Winter's* daughters, he agreeing to pay all the expenses of her house-keeping. Early next morning, Miss *Robb* found that *Winter* had left the house, as he had proposed doing on the previous evening; and had left on the sofa, in her parlor, an apartment which *Winter*, when there, used as his sleeping room, a bundle tied up with his pocket-handkerchief. This was supposed to have been left by mistake, and was not opened until the morning after, *Sept.* 17th, when fears being entertained by said *Bowman*, in consequence of a coat and hat being found in a boat, believed to have been *Winter's*, that some fatal accident had befallen him, Miss *Robb* delivered said bundle to said *Bowman*, and went with him to his house, near by, to have it opened and examined. It was then and there opened by said *Bowman*, in her presence, and found to contain a letter enclosing money and papers to Miss *Robb*; some linen clothing, about three dollars in loose change, said *Winter's* pocket-book, containing some papers of value, his watch, glasses, pencil-case, and penknife. Also a pack-

age folded in a newspaper with a letter on the outside, having the direction exposed to view, and fastened to it with twine wound around, and firmly binding together the letter and package. This letter was directed to

"*Col. Samuel G. Bowman,*

Bath,"

and above the direction, in paler ink, and in a smaller, tremulous hand, were written the words

"Be by yourself when this is opened."

The contents of the letter were as follows, viz.

"Keep the contents of this to yourself—'t is to relieve you from your liabilities for me. If any thing is left, let my children have it." *Sam'l Winter.*"

All being in said *Winter's* hand writing. Said package contained notes of several persons payable to said *Winter* or order, which have been paid to said *Bowman*, amounting to $2381,37; other similar notes not yet due, but believed to be good, amounting to $3605,15; others, supposed not good, of $283,00, all of which notes were indorsed on the back, in *Winter's* hand writing,

"Pay to the order of *Sam'l G. Bowman.*

Sam'l Winter."

Also current bank-notes, amounting to $3977,00; also a bank check for $1000,00, with the word "Mem." thereon; but whether available or not is unknown.

The finding of the hat, and coat, and this bundle, with the fact that his horse and chaise had not been taken from the tavern, led the friends of *Winter* to suspect he was drowned. Search was then made for his body, which was found more than two days after, to wit, on the afternoon of the 19th of said *September*, drowned in the *Kennebec* river, at *Bath.*

It is further agreed by the parties, that the estate of said *Winter* is insolvent; that he drowned himself early on the morning of the sixteenth day of said *September*; and that said package and letter directed to said *Bowman*, were put into said bundle and left in Miss *Robb's* parlor, with the intention that they might be received by said *Bowman* as soon as might be after said *Winter's* death; and that the Court may infer from *these facts*, any *further facts* which a jury might reasonably infer therefrom.

If on these facts, the Court should be of opinion, that said *Bowman* has a legal right to retain said notes and securities, so far as may be necessary to indemnify him for his said liabilities for said *Winter*, an account shall be taken under the direction of the Court, of the amount of his said liabilities; and if there be no surplus, then the plaintiffs are to become nonsuit with costs for the defendants; otherwise the defendant is to be defaulted, and judgment to be rendered against him for such amount or balance as may be in his hands.

Mellen & Randall, attorneys of defendant.
C. S. Daveis, attorney of plaintiffs.

This case was argued in writing, and the arguments though showing great resources, were extended too much for publication, and were of a character which forbid abridgment.

Daveis, for the plaintiffs, commenced with this general position.

No doubt exists of the right of an insolvent debtor to prefer his creditor by an act executed and perfected in his lifetime. But the act must be such as to take effect before his death; otherwise the property or thing which was the subject of it, falls within the scope of the provisions for the equal distribution of the estates of deceased insolvents among their general creditors. Such act, it is contended, must be completed, and consummated by delivery and acceptance, or the subject at least placed in such a condition, as not to be revocable by the debtor at any possible moment of his existence. The retaining of such a power, morally or physically, would cause the attempt to fall within the legal principle of fraud. What would be the effect, if the death of the debtor should intervene, involuntarily, whether by accident or the course of ordinary mortality, after the property or thing assigned should have passed finally and irrevocably from the hand of the debtor, might present a different question from that which is now stated for the opinion of the Court; and might possibly, under some circumstances, be susceptible of a different solution. Death would dissolve any power to a third person for such purpose, that might have been granted, but which had not been executed. *Harper* v. *Little*, 2 *Greenl.* 18.

The general question raised by the agreed statement of facts, divesting it in the first place of the intentional character of *Winter's* death, is whether an insolvent, whose death may be expected as an

approaching event, or in near contemplation of it, can make a valid disposition of his property, or of more than a just proportion of it, for the purpose of paying a particular and favored creditor after his own death. It is truly and intrinsically an attempt to make *a testamentary disposition* of property contrary to the rules and principles of Common and Statute Law. Upon such a ground, it is plain it cannot be supported. It may more properly be called *a mortuary* disposition.

In the course of his argument, he cited *Meeker* v. *Wilson*, 1 *Gallison*, 422; *Carr* v. *Hoxie*, 5 *Mason*, 60; *Jewett* v. *Barnard*, 6 *Greenl.* 381; *Bradford* v. *Tappan*, 11 *Pick.* 76; *Buffington* v. *Curtis*, 15 *Mass. R.* 533; *Russell* v. *Woodward*, 10 *Pick.* 408; *Riggs* v. *Murray*, 1 *Johns. Ch. R.* 565; 5 *Toullier*, § 95, 192, 206, 208, 209; *Dupin's Pothier, vol.* 7, *p.* 446; *Tate* v. *Hilbert*, 2 *Ves. Jr.*, 112; *Ward* v. *Turner*, 2 *Ves.* 431; 2 *Kent's Com.* 444; *Bunn* v. *Markham*, 7 *Taunt.* 224; *Hooper* v. *Goodwin*, 1 *Swanst.* 486; *St.* 13 *Eliz. c.* 5; *Bayard* v. *Hoffman*, 4 *Johns. Ch. R.* 450; 2 *Kent*, 437; *Hunt* v. *Rousmanier*, 8 *Wheat.* 174.

Mellen and *Randall*, for the defendant, controverted the various positions taken by the counsel for the plaintiffs, and commented upon the authorities cited. At the close of the argument, they drew the following conclusions as proved by it:

1. The case finds, that the package and letter were put into the bundle, and left in Miss *Robb's* parlor, with the intention that they should be received by *Bowman*, as soon as might be after *Winter's* death.

2. The Court may at once infer that *Winter* intended this as a complete abandonment of his ownership and control of the property; it being all the delivery he could make in existing circumstances with safety.

3. That it was intended, that Miss *Robb*, or some one of the family, should carry or convey the articles to *Bowman*.

4. The package and letter were so conveyed, as soon as the death of *Winter* was known, just as he had intended.

5. Such a kind of delivery would have been sufficient, had it been a mortgage deed.

6. It was also sufficient, in case of an assignment of the securities in question.

7. That the death of *Winter*, in the circumstances of this case, made no difference, any more than the death of a vender of a vessel, who sold her while she was at sea, and died before she arrived in port and could reach the possession of the vendee.

8. And as the assignment was *bona fide*, and on a valuable consideration, and could never have been impeached by the creditors of *Winter*, if he were now living:

9. Therefore, his administrators cannot defeat it, had there been no delivery:

10. Because it was like a sale by a solvent man, which is always good, as between the vender and vendee, without any delivery.

In the course of the argument, they cited the following authorities. *Drury* v. *Smith*, 1 *Peere Wms.* 404; 3 *Atk.* 214; 2 *Kent*, 3*d ed.* 447, *and note*; *Lawson* v. *Lawson*, 1 *Peere Wms.* 440; *Miller* v. *Miller*, 3 *P. Wms.* 356; *Andrews* v. *Ludlow*, 5 *Pick.* 28; *Wheeler v. Sumner*, 4 *Mason*, 183; *Porter* v. *Cole*, 4 *Greenl.* 20; *Harrison* v. *Phillips Academy*, 12 *Mass. R.* 456; *Maynard* v. *Maynard*, 10 *Mass. R.* 456; *Wheelwright* v. *Wheelwright*, 2 *Mass. R.* 447; *Perkins, title, Deed*, § 143; 6 *Modern*, 217; *Verplank* v. *Sterry*, 12 *Johns.* 536; *Comyn, Fait*, A, 4; 4 *Day*, 66; *Ruggles* v. *Lawson*, 13 *Johns.* 285; *Chadwick* v. *Webber*, 3 *Greenl.* 141; 4 *Kent*, 455; *Bayley on Bills*, 227; *Shed* v. *Brett*, 1 *Pick.* 401; *Adams* v. *Lindsell*, 1 *P. & Ald.* 681; *Hanson* v. *Meyer*, 6 *East*, 614; *Aldridge* v. *Weems*, 1 *Gill & J.* 36; *Bholen* v. *Cleaveland*, 5 *Mason*, 174; *Marr* v. *Plumer*, 3 *Greenl.* 73; *Chitty's Pl.* 71; *Hatch* v. *Hatch*, 9 *Mass. R.* 307; *Witt* v. *Franklin*, 1 *Binney*, 502; *Ward* v. *Lewis*, 4 *Pick.* 521; *Halsey* v. *Whitney*, 4 *Mason*, 206; *Jewett* v. *Barnard*, 6 *Greenl.* 381; *Copeland* v. *Weld*, 8 *Greenl.* 414.

After advisement, the opinion of the Court was drawn up by

Weston C. J.—*Winter*, although an insolvent man, had a legal right to give a preference to one creditor over another. In pursuance of this right, he indorsed certain negotiable instruments to the defendant. These, together with a bank check and certain bank notes which, being payable to bearer pass by delivery, he enclosed in a package, upon which there was fastened a letter directed to

the defendant, advising him, that they were intended for security against certain liabilities, which he had assumed on his account.

Thus far the transaction, if consummated, could not have been impeached by other creditors. But there was another direction to pay over the surplus, if there was any, to his children, which his creditors may defeat. The defendant however was in no degree privy to this unlawful appropriation, and he expressly disclaims and repudiates this part of the arrangement. If the part, which was for his benefit, can surmount other objections, which have been interposed, we are of opinion, that he ought not to be prejudiced by the attempt of the deceased to create a trust for the benefit of his children.

It is contended, that *Winter* had a power of revocation, up to the period of his decease. No such power was reserved by him in the written evidence of the transaction, nor is there reason to infer that a revocation was at all within his contemplation. Before the desperate purpose, which he meditated, was carried into effect, it might fairly have been insisted, that it was possible he might have been diverted from it, either by the sounder suggestions of his own mind, or from adventitious causes; and that if this had been the result, he had the power, and would probably have exercised it, to have withdrawn the appropriation he had made for the defendant. Whether this can now be said to have been possible, is a metaphysical question, which we do not consider ourselves called upon to decide. The firmness of his resolve has been so fully demonstrated, that we regard it as a just inference, that the transaction was not only absolute and unqualified in form, but was intended to be so in fact, no possible or contingent revocation being contemplated.

A question of a graver character is, whether the arrangement was not arrested and defeated by the death of *Winter*. And it cannot but be admitted, that it is one of no small difficulty. It must however be decided; although the preponderance in favor of the prevailing party may be less strongly marked, than could have been desired. The determination of *Winter* to give a preference warranted by law to the defendant, has been clearly manifested. When he left Miss *Robb's* house, he intentionally parted with the actual possession of the bundle he had made up, never to be resumed. Had he called her up, and confided it expressly to her

care, she would have found that it contained a package, which she was to receive in trust for the defendant. Did he not do the same thing by acts, not to be misunderstood? He left the bundle in Miss *Robb's* house, in her possession, on her sofa. What was to be done with the package, was not communicated to her orally, but it was by the written direction upon it. Is it too much to say, that it was left with Miss *Robb* in trust, to be delivered according to its destination? It was not the less confided to her care, because she remained for some time ignorant of the deposit, or of its contents.

To give effect to a transaction lawful in itself, and free from any fraud imputable to the defendant, we do not regard it as too much to hold, that when *Winter* left the house, he parted with the possession of the contents of the package, in regard to which he had made a written declaration of trust, for a lawful purpose, in favor of the defendant, and that Miss *Robb* became thereupon actually or at least constructively, the trustee and depositary, through whose intervention the trust was to take effect; as we think the postmaster at *Bath* would have been, if *Winter* had put the package into his letter box; although it might not have come to his knowledge until life had been extinguished in *Winter*. *M'Kenney* v. *Rhodes*, 5 *Watts*, 343.

Much of the argument has turned upon the peculiar doctrine of donations, *inter vivos*, and *causa mortis*, to which, in our judgment, the case bears no just resemblance.

The counsel for the defendant places his claim to the property, sought to be recovered in this action, upon the ground of a contract or transfer, and that there was a delivery to Miss *Robb*, or to some one in her house, which would enure to the defendant's benefit. And cases have been cited, where deeds delivered as escrows, or upon condition, where the condition has been performed after the death of the grantor, have been held to take effect from the first delivery, to uphold and sustain what had been done. In these and other similar cases, although the concurrence of both parties may have been essential to their validity, the requisite act or concurrence of the grantee, even after the decease of the grantor, has been deemed sufficient. In *Bowers* v. *Hurd, Adm'r*, 10 *Mass. R.* 427, the plaintiff had a strong moral, although not strictly legal, claim

upon the defendant's intestate, to satisfy which the latter made a note of hand to the plaintiff, but without her privity or knowledge, until after the decease of the intestate, and deposited it with a third person. This was held to be good, upon the subsequent assent of the plaintiff.

Whether or not, upon the authority and analogies, deducible from the cases cited for the defendant, he is entitled to hold the property upon the ground of a contract; he may be so entitled, upon the trust expressly declared in his favor. It is a well settled doctrine in equity, that where a trust is created for the benefit of a third person, without his knowledge at the time, he may afterwards affirm it, and enforce its performance. *Neilson* v. *Blight*, 1 *Johns. Cases*, 205; *Moses* v. *Murgatroyd*, 1 *Johns. Ch. R.* 119; *Duke of Cumberland* v. *Codrington*, 3 *Johns. Ch. R.* 261; *Shepherd* v. *McEvers*, 4 *Johns. Ch. R.* 136. How then does the case stand? *Winter* in his lifetime, by writing under his hand, sets apart the property in question, and declares it appropriated for the indemnity of the defendant. He deposits it with Miss *Robb*, that it may be disposed of as directed, and then takes his own life. As soon as the fact comes to the knowledge of the defendant, he affirms the trust, and receives the property to be held for his indemnity, with the assent of the trustee and depositary.

We are not aware, that the circumstance of the business having been done by *Winter* in the near, or even certain approach of death, calls for a different construction. It has never been decided, that a man may not prefer one creditor to another, so long as he is competent to transact business, or that an act done for this purpose, by one who is conscious that his end is near, may be avoided as a fraud upon the laws for the distribution and settlement of insolvent estates. No case has come to our knowledge, in which the payment or security of an honest debt, has been attempted to be defeated upon this ground. If a preference under such circumstances is lawful, the intervention of death as a matter of certainty, or even of calculation, can make no difference. If an insolvent man, apparently in full health, and in the reasonable expectation of the continuance of life, deposits with a third person a sum in bank notes, or in bills of exchange or notes of hand indorsed by him, with written directions, that they be delivered as security to a cred-

itor, to whom he owes about an equal amount, and then happens to die, either from accident or disease, and the preferred creditor subsequently claims the deposit, we are aware of no legal reason why he may not receive it, for the purpose for which it was appropriated. It is not necessary in such case, as we have seen, that the act of the one, and the assent and concurrence of the other should be simultaneous. A deed of mortgage to secure a creditor, thus delivered, although accepted after the death of the mortgagor, it is clear from the authorities, would take effect.

The counsel for the plaintiffs has cited a class of cases, where an assignment is made by a debtor to third persons, for the benefit of his creditors, upon certain terms prescribed. This has been held not to be effectual against the attachment of creditors, so as to bind the property, except in favor of those who have assented; and this principally upon the ground, that a debtor shall not be permitted by conveying to others, to put his property out of the immediate reach of his creditors, without their consent. A conveyance or mortgage directly to a creditor as payment or security, is not liable to this objection. Even in an assignment to third persons, it has been strongly intimated by more than one Judge, that the consent of preferred creditors may be presumed, although the law is not so understood in this State or in *Massachusetts*. In the conveyance of real estate, the consent of the grantee is presumed, until he expresses his dissent or refusal. And it would seem, if there ever was a case, where the consent of a creditor might be presumed, it is where his debtor deposits a sum of money and available notes of hand, indorsed to him, and intended directly for his security.

If a man unable to pay all his debts, upon the eve of dissolution, and conscious of the fact, but yet capable of transacting business, delivers a deed, conveying land to one of his creditors in payment of his debt, to some one about his bed, it is good, although accepted after his decease. If he delivers his watch to a third person to be handed to a creditor for the same purpose, shall it not be equally effectual? Is there less difficulty in the transfer of real, than of personal estate? But it is contended that death prevented the transit, that the insolvent laws operated as an appropriation of all the property of the deceased for the use of all his creditors, and

that the transfer in this case was not consummated. The argument, sustained as it is by the equitable policy of the insolvent laws, is certainly entitled to great consideration, and we have felt its force. But it must be remembered, that the insolvent laws take effect, upon the death of the insolvent. While living, to the last moment, he has a right to dispose of his property, to pay or secure his debts. The deceased made a specific appropriation of a portion of his property, to secure the defendant, declaring in writing, that it was to be for this purpose, and left it with a third person for his use; and upon the whole, we are of opinion, if the assent of the defendant is not to be presumed, that his subsequent affirmance does, by relation, give effect to the appropriation, in the lifetime of the deceased, so that the defendant may lawfully hold against the plaintiffs so much of the property, as is necessary for his indemnity.

SAMUEL MASON *et ux.* *vs.* JAMES WALKER *et al.*

An heir may maintain a *writ of right* on the seisin of his ancestor at any time within *thirty* years from the commencement of the disseisin, although the ancestor had been disseised for more than *twenty* years, at the time of his decease.

THIS was a writ of right on the seisin of *James Means*, the ancestor of the demandants, in fee and in right, within thirty years, and the issue was upon the mere right. The seisin of the said *James Means* in fee and in right, within *thirty* years from the commencement of the action, was proved by the demandants. The tenants proved, that one *Archelaus Walker*, under whom they claimed, had disseised the said *James Means* of part of the demanded premises more than twenty, but less than thirty, years before his death, and continued such disseisin. *Emery J.*, before whom the trial was, instructed the jury, that the demandants were entitled to recover, notwithstanding said *James Means* was disseised more than twenty years before his death, if he was seised within thirty years before the commencement of the action. The verdict was for the demandants, and was to be set aside, if the instruction was wrong.

Codman, for the tenants, said that our statute of limitations, *Rev. Stat. ch.* 62, § 3, limits *all actions* on the demandant's own seisin to twenty years, and there is no exception in it in favor of a writ of right on his own seisin. The ancestor of the demandants then, at the time of his death, had no right which he could enforce, in any form of action, against the tenants. The first section of the same statute limits a writ of right on the seisin of the ancestor to thirty years, but it does not give to them, as heirs, what did not belong to the ancestor, when he died. It applies only to cases, where the ancestor at the time of his decease had a right of action existing to recover the land. The ancestor having no title, the heirs can derive none from him. There is no direct decision to be found on this question, but Mr. *Stearns* seems to consider, that an action cannot be supported. *Stearns on Real Actions, 2d Ed.* 324. This description of action ought not to be extended by construction any farther, than the statute manifestly requires. It has been doubted, whether the action ought to be allowed in any case whatever. *Stearns, 2d Ed.* 318. This land belonged to the tenants, at the time of the death of the ancestor of the demandants, and were he alive now, he could not maintain this, or any other action. A fair construction of the statute does not give any greater rights to the heirs, than he possessed, and if it did, the Legislature have no power to take property from one man and give it to another.

Preble, for the demandants, contended, that at common law, the tenants were entitled to the land belonging to their ancestor without any limitation, as to the time of bringing a suit after a disseisin committed. If the right be taken from them, it must be by statute. But the *stat. Rev. St. ch.* 62, § 1, only restricts the bringing of the action to thirty years from the time of the disseisin, when brought by the heir on the seisin of the ancestor. In this case the allegation is, that the ancestor was seised within thirty years, and the proof supports the allegation. But it is contended for the tenant, that this action cannot be maintained, because the ancestor could not maintain any suit, when he died. But the time of limitation for bringing a writ of right, by the person disseised and by his heir, have been different ever since the statute of 32 *Henry* 8. The heir has had a longer time, than the ancestor himself had; and yet no case can be found, where this defence has been set up against

the express language of the statute, although very many must have occurred.

In the third of *Johns. Cases*, 128, the same defence now set up might have been made, and yet it was not done. Although the English authorities lean against writs of right, yet no case can be found in the books to sustain this defence. The statutes of limitations have not been considered as destroying the right, but as suspending or taking away the remedy by action. The words of the statute, in this case, are clearly in our favor; and a disseisor can acquire a title by wrong only on the terms the statute gives him.

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

SHEPLEY J. — The title and seisin of the ancestor having been established within the period of time prescribed by the statute, *ch.* 62, § 1, the demandants have proved the issue on their part. Yet the tenant contends, that they are not entitled to recover, because their ancestor had been disseised more than twenty years, and had thereby lost his right of entry and of action. And he insists, that such is the true construction of the statute. Such a construction requires the insertion of an additional provision, or restriction, exacting of the heir not only proof of seisin within thirty years, but also proof, that the ancestor at the time of his decease, had a right of entry. It would become necessary also, to be consistent, to give a like construction to the second section, which would require the heir in a writ of entry upon the possession of the ancestor, not only to prove that possession within twenty-five years, but that the right of entry also remained. To require of the heir thus to prove a right of entry still existing in the ancestor to enable him to maintain a writ of right, or a writ of entry, would greatly impair and restrict his rights, as they appear to exist by the language of the statute; and it would be taking great liberties to incorporate such a provision. If it had been the intention of the Legislature to put such a restriction upon the use of the writ of right, it would be reasonable to expect to find that intention clearly expressed. By the statute of 32 *Hen.* 8, *ch.* 2, the heir was permitted to bring the writ of right within threescore years, and the writ of entry within fifty years, upon the seisin of the ancestor; while the ances-

tor could bring his suit only within thirty years after he was disseised. Different periods of time, for bringing these suits respectively, have existed from that time to the present, although the time for bringing each action has been at different times shortened. A course of legislation, extending through so long a period, allowing the heir or successor a right of action, for a time so long after the ancestor or predecessor had lost all right, cannot have been undesigned. The right of action being clearly not taken from the heir by the language of the statute, until thirty years have elapsed, it is not for the courts of law to restrict it within narrower limits by connecting it with the condition of the estate as held by the ancestor. Nor is it any anomaly in the law, that one may maintain an action, or make an entry, after he, or some ancestor, or predecessor, has once lost the right to do so. This happens often under statutes of limitation upon some new occurrence, as in cases of contract upon an acknowledgment, or new promise, after the right of action was lost. Supposing one to be barred of his *formedon*, yet he may not thereby be hindered to pursue his right of entry which accrued to him by the death of tenant for life. 2 *Salk.* 422, *Hunt* v. *Burn.* It is further insisted, that the ancestor having been disseised more than twenty years before his death, no title could descend to the heir. Mr Justice *Blackstone* states, that the mere right of property may exist, without either possession, or the right of possession. And that still the person so long disseised as to lose the right of possession, *or his heir*, by proving his better right, may at length recover the lands. 2 *Com.* 197-8. The right and the possession being united, the title is perfect, but the loss of possession does not take away the right. 5 *Mass. R.* 233, *Porter* v. *Perkins.* If the right of property remains after the right of possession is gone, there is no difficulty in considering it as descending upon the heir, unless it is destroyed by the statute of limitations. The time when an action may be commenced, is a matter not relating to the contract or title. 2 *Mass. R.* 84, *Pearsall* v. *Dwight*; 4 *Wheat.* 200, *Sturgis* v. *Crowninshield.* Such is the doctrine of the common law, and of the civil law; and such is said to be the generally received doctrine of the continental jurists. *Story's Conf. of Laws*, 486. It has been decided, that the general statute of limitations, 21 *Jac.* 1, operates by way of bar to the remedy and not to the

right. *Hunt* v. *Burn*, before cited; 2 *Barn. & Ald.* 413 *Higgins* v. *Scott*. And it is upon this principle that statutes of limitation are regarded as not repugnant to the constitution. Time being given to the party to enforce his rights, they do not impair the obligation of the contract or destroy the title. Upon the same principle, suits are maintained on simple contracts, more than six years after the right of action has accrued, if brought within six years after an acknowledgment of an existing debt, or after a new promise. If the contract were destroyed at the end of the six years, no subsequent admission or promise could restore it, for want of a consideration.

It is stated to be a maxim of the law, "that whatsoever was at common law, and is not ousted or taken away by any statute, remaineth still." *Co. Lit.* 115, *b*. By the common law, the mere naked right descended, and the action is given; the statute has taken nothing from the heir, but the right to prosecute his action after the lapse of thirty years. Having brought the action within that time, and introduced the necessary proofs, the demandants are entitled to recover.

Judgment on the verdict.

KIAH B. SEWALL *& al. vs.* JOHN WILKINS.

The question, whether the acts, to be performed by the parties respectively in a covenant or agreement, are to be regarded as mutual, dependant or concurrent, or otherwise, is to be determined by their intention, apparent from the written evidence of what has been agreed, in connection with the subject matter to which it is to be applied.

Where one party gives to the other his promissory notes, payable in one, two, and three years, with interest annually, at a place distant from the domicil of either party; and the other stipulates, that upon payment of the notes according to the tenor thereof, and upon reasonable demand, to convey certain lands by a good and sufficient deed; actual payment of the notes, or an unconditional tender of payment, is a condition precedent to the conveyance.

When an act is to be performed *upon reasonable demand*, the party, on whom the demand is made, is entitled to such time as is necessary to prepare himself to perform the act.

And as it was necessary for the party, on whom such demand was made, to travel to a place two hundred miles distant, in the months of *March* and *April*, to transact business with persons there, and to procure and to make papers, before the act could be performed; *it was held*, that he was entitled to a longer time than ten days.

THE action was on a bond from the defendant to the plaintiffs, dated *April* 7, 1835. The condition of the bond recited, that *Wilkins* had agreed to sell and convey to the plaintiffs, one undivided eighth part of a tract of land described, and the same conveyed to him that day by *Hazen Mitchell;* and that the plaintiffs had on the same day given to the defendant their three several promissory notes, each for the sum of $1533,00, with interest annually, one payable *April* 7, 1836, another *April* 7, 1837, and the third *April* 7, 1838; and concluded in these words: "Now if the said *John Wilkins*, upon the payment of said notes according to the tenor thereof, by the said *Sewall* and *Thomas*, shall, upon the reasonable demand of said *Sewall* and *Thomas*, convey to them, or their assigns, the land above described, by a good and sufficient deed, then this bond to be void, otherwise the same shall remain in full force." The notes were on their face made payable at the *Suffolk* Bank, in *Boston*, although not thus described in the bond. The present action was commenced *April* 8, 1836. The plaintiffs offered in evidence a letter from the defendant to *Thomas*, one of the plaintiffs, dated *March* 13, 1836, in reply to a letter from

Thomas, in which the defendant says: "I am prepared at any time, when you comply with the conditions of my bond to you, to comply on my part, and give you a 'good and sufficient deed,' according to the terms of the bond. But it should be done as early as the first day of *April,* because the notes being payable in *Boston,* I must have time before they are due to send them up. I presume you intend to come or send here to make the payments and take the deed." The plaintiffs proved, that on *March* 29, 1836, they had in a room in *Bangor,* in which the defendant and one of the plaintiffs were, a trunk containing specie to an amount sufficient to pay all the notes, and offered to perform the conditions of the bond on their part, and demanded of the defendant "a good and sufficient deed of the premises described in the bond according to the conditions thereof." *Wilkins* offered to make, execute, and deliver a deed of warranty of the land, and the plaintiffs declined to receive such deed, stating that the title was in the Commonwealth of *Massachusetts. Wilkins* offered, if they would let him have the money and pay the notes, that he would immediately obtain an unincumbered title, and in the mean time offered the most ample security to return the money, if a perfect title was not given. The money was immediately carried back to *Portland.* The plaintiffs also proved, that the land-agent of *Massachusetts* had contracted to convey the land in question to Messrs. *W. T. & H. Pierce,* but that the title remained in the Commonwealth until after the commencement of this suit. The witness introduced by the plaintiffs to prove the execution of the bond, proved also, that *Hazen Mitchell* had a deed of the land described in the bond from the Messrs. *Pierce,* and that the notes he had given for the land to the *Pierces,* were transferred to *Wilkins;* that *Mitchell* made the bargain with the plaintiffs; that they were informed of the state of the title before the bond was given; that *Mitchell* gave a deed to *Wilkins,* and *Wilkins* a bond to the plaintiffs by mutual arrangement, and that *Mitchell* was to have all above paying the *Pierce* notes. There was much evidence in relation to the value of the land on *March* 29, 1836. The defendant proved, that he obtained a perfect title to the land, and tendered a warranty deed thereof to one of the defendants, *August* 30, 1836, on receiving payment of the notes; to which that plaintiff replied, that he had not then the money, but

would see the other plaintiff and obtain his views on the subject. The defendant also proved, that the notes mentioned in the bond were at the *Suffolk Bank* when they fell due, and that nothing had been paid on them. The defendant also offered evidence tending to show, that the offer by the plaintiffs to pay the money at *Bangor* was not made in good faith, but that the money was obtained on the special condition, that it should be brought immediately back to *Portland,* and was so brought and carried immediately back.

Emery J., before whom was the trial, instructed the jury, that it was not pretended on the part of the plaintiffs, that strict performance had been made, as to the payment of the notes, which were payable at the *Suffolk Bank* in *Boston,* but they shewed by evidence, that by consent of defendant, they were exonerated as they contend, from the strict performance, by waiver of the place of payment; that the bond required no proof of consideration, it speaks by its own power, and binds the defendant; that in suits on deeds, on covenant against incumbrances, nominal damages, only, are to be given, unless the incumbrances have been removed by the plaintiff; that before the case of *Porter* v. *Noyes*, a bond for a deed was satisfied by giving a deed of general warranty. Since that case, a question has arisen, whether a different construction should not be made. That was an action of assumpsit. But to ascertain the damages in the case, the Judge instructed the jury, that as *Wilkins* had not a perfectly clear and unincumbered title, neither at the execution of the bond, nor at the time of the offer to pay, they would consider that the offer to convey by deed of general warranty, was not a compliance with the obligation; that the conditions in this bond were *not dependent conditions.* The plaintiffs were bound to do every thing on their part first to be done, to entitle themselves to the right of requiring a deed. *Some* of the payments were to be made before *others;* the time assigned in the bond, for giving the deed, was long after the time set for the payment of the *first note.*

That where a contract of this description is rescinded, the party seeking redress is entitled to recover the whole amount paid by him, and in looking into the title, if there be no fault on his part, and there be fault on the part of the defendant.

The plaintiffs here claim the value of the land, evidence has been properly given of it, and of its prospective value. In some cases, on a breach of the condition, the value of the land would be the measure of damages. Although there is now no sale for such land, yet it is matter of consolation, that on whose hands soever it shall fall, it has not lost its value since the bargain.

That they should look carefully into the evidence as to the time of payment, to decide which party was in fault. And as to the damages, the jury were invested with the power of a court of chancery, to do, between the parties, what is agreeable to equity and good conscience, under all the circumstances of the case in evidence before them.

That generally speaking, when a man professes to *have money* to pay, he is supposed to intend paying it as he says, and inquiry is not made where he got his money. But if the plaintiffs, as is said here, did not act in good faith, and whether they did, the jury would judge, and of their intention to pay from the evidence, and whether *Wilkins* would gladly have received the money and given ample security to free the title, and offered to do so.

If they were satisfied that *Wilkins* did not intend to vary the contract on any other principle than that the money should be paid down, the jury were instructed that it had been ruled in equity, that treaty and negotiations for the variation of the terms of a contract, will not amount to a waiver, unless the circumstances show that there was an intention of the parties that there should be an absolute abandonment and dissolution of the contract. They would inquire, whether there was an absolute abandonment of the contract, in this case; if they were satisfied from the evidence, that the waiver of the place of payment was made only on the condition of payment, and *that* payment was *fraudulently* omitted, and was really never intended honestly to be made, *that waiver is waived.* And the plaintiffs should keep ready to pay when and where the payment should be properly demanded. That a tender at a different place than that appointed in the contract, if the money be received and accepted, is a discharge. This tender, not being refused, it was necessary for the plaintiffs, at the time the notes should be payable at the *Suffolk* Bank, to be ready there with the

money to pay. The plaintiffs were bound to pay that note at all events.

That if, from the evidence, they believed that *Sewall & Thomas* did know this want of title, and had consulted *Pierce* about it before they took the defendant's bond, and that the defendant did not know it, the time within which the defendant obtained the clear title and tendered his deed to the plaintiffs, was within reasonable time, considering that the title was to be obtained from the government of another State.

That the contract of the government to convey to *Pierce*, constituted a moral certainty that the land would be conveyed on payment of a certain sum, agreeably to the stipulation, and vested such an interest in *Pierce*, that it might be *attached*, and the right then still subsisting in the Commonwealth, was an *incumbrance*. And if the plaintiffs made out their right to sustain their action, nominal damages only could be given, as the plaintiffs had paid nothing to remove the incumbrance.

That if from the evidence, they were satisfied that the plaintiffs did not pay or tender the money on the note at the *Suffolk* Bank, when payable, if they were satisfied it was there demanded, the defendant had not broken the condition of the bond, and the action is prematurely brought.

If these instructions were erroneous, the verdict, which was for the defendant, was to be set aside and a new trial granted, provided the Court should be satisfied that the action was maintainable, otherwise the verdict is to stand.

The case was very fully argued on all the points raised in the report of the Judge, by *Mellen* and *Deblois*, in writing, for the plaintiffs, and by *Preble*, in a printed argument, and by *W. P. Fessenden*, in a written one, for the defendants.

For the plaintiffs, the counsel endeavored to maintain these propositions.

1. That the subsequent agreement of the parties, that the contract on both sides should be completed at the time and place appointed, was a legal waiver of objection, on account of a non-compliance with the terms of the contract, as expressed in the notes. The authorities are decisive on this point.

2. That the agreement referred to, being in writing, the construction of the contract is to be given by the *Court*, and not by the *Jury*.

3. That it is not to be explained by parol, but the intentions of the parties are to be gathered from the *contract itself*.

4. That the obligor in a bond is bound to perform its conditions, if lawful, though he has received no consideration for entering into the bond, or pay damage for the breach of the conditions.

5. That when the condition of a bond is to convey the legal title to a tract of land, and the breach of condition was occasioned by his want of title or seisin, that in such case the obligee is by law entitled to recover damages equal to the value of the land at the time of the breach.

6. In the case of mutual, dependant covenants or conditions, neither party is bound to perform, unless the other is also ready and able to perform his part; hence a tender is not necessary by either, but only a readiness and offer to perform his part of the contract, provided the other party will do the same.

7. That every man is presumed to act honestly, and to indicate his intentions by his conduct.

8. That in doing an act which he has a legal right to do, he cannot act fraudulently, and therefore fraudulent intentions cannot, in a court of justice, be imputed to him.

9. Neither have a jury in such case any authority to examine his motives, and much less to impeach them.

10. That as the defendant could not convey the title, when it was duly demanded of him, his offer to furnish ample security that the title should be acquired from *Massachusetts*, and conveyed to the plaintiffs, was no defence, nor a subject of consideration by the jury.

11. That is was competent for the defendant to waive his claim on the plaintiffs of a strict compliance of *some parts of the contract*, as expressed in the bond and notes, without an absolute abandonment and dissolution of it.

12. That the right remaining in the Commonwealth after the contract of sale made with the *Pierces*, so far from being in the nature of an incumbrance on the title or right of the *Pierces*, was the legal title itself, then belonging to the Commonwealth.

They contended, that the instructions given by the Judge to the jury were erroneous in many essential particulars, and cited the following authorities. 3 *Fairf.* 441; 12 *Mass. R.* 277; 4 *Kent,* 124; 2 *Bl. Com.* 154; *Roll. Ab.* 414; 1 *Bac. Ab.* 465; *Com. Dig. Cond. B.* 1; 15 *Mass. R.* 500; 1 *Saund.* 320, *note* 4; 5 *Pick.* 395; 2 *Pick.* 292; *ibid,* 155; 4 *T. R.* 761; 2 *Burr,* 899; 11 *Pick.* 151; 11 *Johns. R.* 525; 7 *T. R.* 125; 2 *Greenl.* 22; 10 *Johns. R.* 265; 8 *T. R.* 366; 17 *Johns. R.* 293; 2 *Johns. R.* 207; *Sug. Vend. and Pur.* 161; 13 *Pick.* 281; 10 *Mass. R.* 84; 2 *Cowper,* 684; 16 *Mass. R.* 161; 4 *Pick.* 179; 2 *B. & P.* 447; 1 *East,* 203; 2 *Caines' R.* 200; 2 *East,* 211; 6 *Wheat.* 109; 6 *Cowen,* 297; 2 *Conn.* 485; 2 *Greenl.* 266; 9 *Cowen,* 46; 6 *Cowen,* 13; 12 *Johns. R.* 190; 1 *Caines',* 47; 12 *Johns. R.* 525; *Stark on Ev.* 1503; 12 *Mass. R.* 304; 4 *Mass. R.* 627; 1 *Fairf.* 113.

W. P. Fessenden, for the defendant, contended:

1. The negotiations between the parties resulted in a conditional agreement only to have the payment made at *Bangor,* and the condition was never complied with by the plaintiffs. That such negotiations amount to a waiver of the express stipulations in the contract, would seem too plain to require authorities. But the charge of the Judge on this point, is fully sustained by them. *Robinson* v. *Page,* 3 *Russell,* 114; *Price* v. *Dyer,* 17 *Vesey,* 863.

2. The demand was not made "a reasonable time" before the bringing of the suit, as provided in the bond. All the facts in relation to the title were known to the plaintiffs, when the bond was made and the notes given. The suit was brought within ten days of the time when the demand was made, and a reasonable time for performance by the defendant had not then elapsed. *Atwood* v. *Clark,* 2 *Greenl.* 251; *Jackson* v. *Saunders,* 2 *Dow,* 444; *Ellis* v. *Paige,* 1 *Pick.* 43; *Brinley* v. *Tibbets,* 7 *Greenl.* 72; *Greenby* v. *Cheevers,* 9 *Johns. R.* 128; *Borden* v. *Borden,* 5 *Mass. R.* 78; *Hudson* v. *Swift,* 20 *Johns. R.* 24; *Fuller* v. *Hubbard,* 6 *Cowen,* 19; *Fuller* v. *Williams,* 7 *Cowen,* 54.

3. The offer by the defendant of a deed of warranty, good and sufficient in point of form, at the time of the tender, was performance of his obligation. The contract is to convey by good and

sufficient deed. 16 *Johns. R.* 297; 15 *Pick.* 552; 20 *Johns. R.* 130; 9 *Greenl.* 128.

4. The conditions on their part were to be performed by the plaintiffs, before they could have any claim upon the defendant for the performance of his covenants. 1 *Saund.* 320, and cases cited in the notes; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Kane* v. *Hood*, 13 *Pick.* 281; *Bean* v. *Atwater*, 4 *Conn.* 3; *Greenby* v. *Cheevers*, 9 *Johns. R.* 126.

5. As to the damages, the jury have equitable powers in such cases. *Province laws*, 102; 1 *Dane*, 549; *Rev. St. of Maine, c.* 50; 12 *Mass. R.* 625; *Story Eq. ch.* 1. And the plaintiffs must prove their damages. 2 *Greenl.* 13; 6 *Greenl.* 208; 4 *Pick.* 466; 8 *Pick.* 12; *ibid*, 100. Had the conveyance been actually made, but nominal damages could have been recovered. 8 *Pick.* 547; 1 *Story's Eq.* 77. Before the trial, the defendant offered the plaintiffs a perfectly good title. 5 *Mass. R.* 75; 2 *Johns. R.* 614; 3 *Cowen*, 519; 3 *Conn.* 599.

Preble, on the same side, said, that the question, emphatically *the question*, as the verdict now stands, is not whether the plaintiffs' damages ought to be a larger or a smaller sum in amount; but whether upon the facts reported by the Judge the *plaintiffs have in law maintained their action;* and that he should confine himself to this single inquiry.

In his argument he remarked: It is manifest then, that in the undertaking of the plaintiffs to pay the two first notes according to their tenor together with the annually accruing interest on the third, and in the stipulation of the defendant to convey the land, the parties did not contemplate a mutually concurrent and simultaneous performance; but the reverse. This position is strengthened by the fact that the defendant undertook to convey on two conditions. 1. "Upon payment of said notes according to the tenor thereof." 2. "Upon the reasonable demand" of the plaintiffs, payment of the notes having first been made by them.

The plaintiffs would not accept *Wilkins'* deed of warranty; they would accept no security for the removal of incumbrances; they would allow no time to complete the title. Under these circumstances a reasonable time should have been allowed to *Wilkins* to go to *Boston*, do the business and return, allowing some few days

to raise the necessary funds, as *Sewall* and *Thomas* chose to withhold their payments. Considering the distance and the season of the year, and the circumstances of the case, a fortnight would seem to be the least possible time. Yet they actually commenced their action against *Wilkins* within ten days.

We contend, that in point of fact there never was a real tender. The whole is a mere contrivance; a device to escape from their own contract, and ensnare *Wilkins*.

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

WESTON C. J. — The law is well settled, that whether the acts to be performed by the parties respectively, in a covenant or agreement, are to be regarded as mutual, dependent, concurrent, or otherwise, is to be determined by their intention, apparent from the written evidence of what has been agreed, in connection with the subject matter, to which it is to be applied.

The plaintiffs gave to the defendant their negotiable promissory notes, payable at the *Suffolk* Bank, absolutely, and without any condition whatever. This was the only evidence of the agreement of the plaintiffs, received by the defendant. It sufficiently appears, that the payment of these notes, was not made by the parties to depend upon performance on the part of the defendant, concurrently or otherwise; but that this was to be done subsequently in the order of time. And this is deducible as well from the notes, as from a just construction of the condition of the bond. The conveyance was to be made, upon payment of all the notes. These were payable in one, two and three years. Payment could not be enforced at an earlier day; although the plaintiffs reserved to themselves the option to pay them, at any prior period. But this stipulation, depending on their will, does not impair the fair inference, that it must have been understood, that payment of at least two of the notes was to precede the deed. Upon payment of the notes, the plaintiffs became entitled to a conveyance from the defendant, upon reasonable demand. They were to be paid at one place, and the domicil of the defendant, upon whom the demand was to be made, was at another, at the distance of more than two hundred miles. Without therefore adverting at this time to what is to be

understood by a reasonable demand, we are satisfied, that by the original agreement, actual payment could alone impose the duty of performance on the part of the defendant.

But it is contended, that the condition of the bond has been modified by the parties, and that the force and effect of the evidence upon this point, being in writing, is to be determined by the Court, as a question of law. *Thomas*, for himself and the other plaintiff, by his letter to the defendant, of the eleventh of *March*, 1836, desires to know, whether the defendant will be prepared to give "a good and sufficient deed," by the first of *April* then next, advising him, that they should be ready to fulfil the obligation on their part, at that time. The defendant, in his reply, on the thirteenth of *March*, states, that he is prepared at any time to give "a good and sufficient deed," according to the terms of the bond, when they comply with the conditions on their part. And he requests, that they would inform him by return of mail, whether it is their wish to complete the business at his residence at *Bangor*, or whether they would prefer that the notes and deed should be sent to *Boston*. Thereupon the plaintiff, *Thomas*, rejoins, on the fifteenth of *March*, that being disappointed in some arrangements, he did not know that he should be able to do as he wished, when he last wrote, but that in the course of a few days one of them would be at *Bangor*, and attend to the business; but he thought the notes had better remain there.

We cannot extract from this correspondence any definite agreement, changing the condition of the bond. The notice, that they should be ready to pay positively by the first of *April*, was withdrawn. They had been disappointed, and they did not know that they should be able to pay. One of them would attend to the business in a few days at *Bangor*. This could not be taken as an intimation, that the defendant was then to receive payment. He was given to understand, that this was rendered improbable, by their disappointment. The defendant expressed his willingness to receive payment at *Bangor*; but he required to be informed by return of mail, whether they would complete the business there. Their answer was vague, indefinite, uncertain, but finally left the business to be arranged at an interview, which one of them proposed to have with him at *Bangor*. The parties came to no agreement in these

letters; but the defendant manifested a spirit of accommodation, little merited by the course of proceedings, which the plaintiffs then or soon after meditated.

What took place at *Bangor*, on the twenty-ninth of *March*, is detailed in the deposition of *Albert W. Paine.* The plaintiffs did not then agree to what the defendant proposed and desired. He was willing to receive the money there; but they would not pay it, except upon a condition, with which they knew he had it not in his power to comply.

He declared to them, that the deed he proffered, which was a deed of warranty, with the usual covenants, was in his judgment a compliance with what the bond required; and there is reason to believe, that the execution of such a deed was all he contemplated in his letter to the plaintiffs. The land, which the condition of the bond recites to have been, on the day of its date conveyed to him by *Hazen Mitchell*, he was to convey to the plaintiffs or their assigns. *Mitchell's* deed did not convey the land to him, the title being then in *Massachusetts;* nor would his deed, if it had been executed, have conveyed it to the plaintiffs. We do not intend therefore to intimate, that such a deed would have been a compliance with the condition of the bond; although such may have been very honestly the impression of the defendant.

As soon, therefore, as the parties understood each other, the defendant most certainly did not agree on the twenty-ninth of *March*, to receive the money and to fulfil on his part the conditions of the bond, in the sense in which they were construed by the plaintiffs; nor did he then admit, that they had made a reasonable demand on him to do so. We have seen, that the previous correspondence resulted in no agreement, to waive or change the conditions of the bond. And upon a just construction of that instrument, and of the notes therein referred to, the plaintiffs were to pay absolutely, upon which they were entitled to make a reasonable demand upon the defendant, to convey to them the land described therein, by a good and sufficient deed. This not having been done, it has not been made to appear, that they have established any right to demand performance, on the part of the defendant.

But if an offer to pay the money was equivalent to actual payment, we are of opinion, that a reasonable demand had not been

made upon the defendant, when the action was commenced. The plaintiffs knew how the title stood, and prior to the execution of the bond, had expressed themselves satisfied with it. They knew that *Massachusetts* had extended a credit to the purchasers of land for the last payment, until the fall of 1838; although they had the option to pay earlier. And they knew, that they were not to receive a deed from that Commonwealth, until the whole purchase money had been paid.

The defendant had a right to expect, that the plaintiffs would have availed themselves of the whole period of credit given to them. He could not have enforced payment earlier. The correspondence, taken together, withdrew the notice, that the money would be paid by the first of *April*. He was under no obligation, therefore, to be prepared to fulfil on his part, on the twenty-ninth of *March*, when the money was offered. The plaintiffs knew that he had not acquired the title, and that he would not acquire it, unless hastened by payment of the whole purchase money by them.

If he obtained and conveyed the title, as soon as might be, after he was thus hastened by actual payment by the plaintiffs, or an offer to pay, if that was equivalent, it was all that could be fairly required of him. It is a perversion of the just import of language to contend, that a demand is reasonable, which denies to the party, upon whom it is made, the time necessary to do what is required, when he is in no fault for not being prepared before. The demand, to have been reasonable, considering the subject matter, and the known state of the title, should have allowed to the defendant a suitable time to do that which he had stipulated to do only upon reasonable demand. The plaintiffs neither gave nor proposed any time for this purpose; but within ten days brought their action.

Without finding it necessary to determine what would have been a reasonable time, we are very clear, having regard to the distance from *Bangor* to the office of the Land Agent of *Massachusetts*, the nature of the business to be accomplished, and the fact that other persons were interested in distinct portions of the purchase, that the defendant was entitled to a longer period than ten days; more especially, when he and others concerned, from the term of credit given, had previously every reason to believe, that the necessary conveyances would be delayed for years.

Judgment on the verdict.

ALBERT NEWHALL *et al. vs.* JOHN DUNLAP *et al.*

If one draw a bill in his own name, without stating that he acts as agent, unless when acting for the government, he is personally liable; although he directs it to be paid out of a particular fund, and although the person in whose favor it is drawn, knows the drawer was but an agent.

Where an agent draws a bill on his principal in such manner as to make himself liable, yet as between them, he may show that it was drawn for the benefit of his principal.

Although it may be otherwise in *England*, in this country the master of a vessel has a lien on the cargo for money expended, or debts necessarily incurred, in that character.

The power usually incident to the office of master of a vessel, does not authorize him to purchase a cargo.

But if his instructions constitute him an agent for that purpose, and he draw a bill making himself personally liable, and invest the proceeds in the purchase of a cargo, he has a lien thereon for his indemnity.

The death of the principal does not deprive the agent of his lien.

And if the bill be drawn at a shorter date, than his instructions permit, the principal may disclaim the transaction; but if he claim the property, he cannot deny the agency.

Where an agent has a lien on property for his security, the general owner cannot maintain replevin against him for it, until the lien be discharged.

THE action was replevin for 125 hogsheads of molasses, imported in the brig *Hope*, owned by the late *Samuel Winter*, on whose estate the plaintiffs are administrators, and of which brig one *Simon Goodrich*, under whom the defendants claim, was master. *Goodrich* drew a bill of exchange on *Winter* in favor of one *Jesse Snow*, signing the bill in his own name, but directing the amount to be charged to the cargo of the *Hope*, and the money obtained of *Snow* on the bill, was invested in the molasses replevied in this suit. The facts in the case appear sufficiently in the opinion of the Court. The verdict was for the defendants, and was to be set aside, or amended, according to the opinion of the Court.

Davcis and *Adams*, argued for the plaintiffs, and contended, that *Goodrich* was not personally liable on the bill. If this be established, then no right, or pretence, exists to detain the property. *Goodrich* drew the bill, as the agent of *Winter*, and *Snow* must have known the fact. They cited *Bayley on Bills, P. & S. edit.* 72 *to* 75; *Mann* v. *Chandler*, 9 *Mass. R.* 335; 2 *Conn. R.* 435;

2 *Strange*, 955; *Chitty on Bills*, 40; *Van Riemsdyk* v. *Kane*, 1 *Gallison*, 639; *Wallis* v. *Agry*, 4 *Mason*, 336; 4 *T. R.* 177; *Schimmelpennich* v. *Bayard*, 1 *Peters*, 264; 1 *Gall.* 342; 1 *Serg. & R.* 32; *Rathbone* v. *Budlong*, 15 *Johns. R.* 1; *Judkins v. Lancey*, 8 *Greenl.* 442; 5 *Maule & S.* 349; 11 *Mass. R.* 54; *Mott* v. *Hicks*, 1 *Cowen*, 513.

But if *Goodrich* was liable on the bill, he had no lien on the cargo in consequence thereof. *Hussey* v. *Christie*, 9 *East*, 433; *Whitaker on Liens*, 10, 44, 45, 46; *Montagu on L.* 70; *Bushforth* v. *Hadfield*, 7 *East*, 224; 16 *Vesey*, 279; *Jarvis* v. *Rogers*, 15 *Mass. R.* 395; *Ladd* v. *Billings*, *ibid*, 15; 2 *Caines*, 81; *Abbott on Shipping*, 111, 115, 248; 1 *B. & Ald.* 575. *Goodrich* drew the bill for a shorter date than was limited by his instructions, and for that cause had no lien on the cargo. 8 *Greenl.* 444, before cited.

Deblois, for the defendants.

Goodrich is liable on the bill, as drawer. *Bayley on B. ed. of P. & S.* 63; 5 *Taunt.* 749; 11 *Mass. R.* 54; 7 *Taunt.* 59; *Chitty on B.* 27, 28; 11 *Mass. R.* 27; 1 *Yeates*, 39; 4 *Mason*, 343; 7 *T. R.* 481; 2 *Caines*, 77; 8 *Greenl.* 298; 2 *Greenl.* 204; 5 *Mason*, 241; 5 *Maule & S.* 345; 9 *Pick.* 547.

Goodrich, as master, has a lien on the whole cargo to indemnify him for his liabilities. 3 *Mason*, 264; 4 *Mass. R.* 91; 11 *Mass. R.* 72; 2 *Caines*, 77; *Am. Jurist No.* 5, 26; 4 *Esp. R.* 22; 1 *Peters' Adm. Dec.* 277; 3 *Kent's Com.* 165; *Abb. on Sh.* 3*d ed.* 133; 7 *Cowen*, 670; 3 *Cranch*, 140. *Goodrich* claimed the property when first shipped, and it never was delivered, and never vested in *Winter*, or in his administrators. 12 *Mass. R.* 180; *Livermore on Ag.* 174, 193; *Paley on Ag.* 109; 3 *B. & P.* 489; 6 *T. R.* 262; 2 *East*, 227; 1 *Cowper*, 251; 6 *Greenl.* 50; 2 *Burr.* 937. His employment as master, makes him agent, and gives him a lien. *Abb. on Ship.* 113; 3 *Kent's Com.* 161; *Cowper*, 636; 8 *T. R.* 531; 15 *Mass. R.* 370; 4 *B. & Ald.* 352.

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

Shepley J. — The claim of the defendant, *Goodrich*, to detain the property replevied must depend upon the character in which he

acted, the responsibilities incurred, and the rights arising out of them. He was master of the vessel of the intestate, with a letter of instructions, giving him authority to draw a bill of exchange, and to make purchases for his principal. If he has not incurred any personal responsibility, he cannot detain the property. The bill was drawn by *Goodrich* without any statement or exhibition of agency, unless it may be inferred from the request to charge it to the account of the *Hope's* cargo. Such request affords no distinct indication of an agency. It only indicates the fund to which it was to be charged, not the character in which the drawer signed. The general rule, as stated by *Chitty*, is, if a person draw in his own name, without stating that he acts as agent, he will be personally liable, unless in the case of an agent contracting in behalf of government. *Chitty on Bills*, 40. It is said, in *Bayley on Bills*, 68, that an agent should take care, if he mean to exempt himself from personal responsibility, to use clear and explicit words to shew that intention. And he clearly does not consider a request to charge to a particular account, as affording any evidence of an agency; for he says, "if an agent for A draw upon B in favor of C though he direct B to place the amount to the account of A's debit, he will be personally liable to C if the bill be not paid, unless he use proper words to prevent such liability."

Lord Ellenborough says, not only that such is the general rule, but that "unless he says plainly, "I am the mere scribe," he becomes liable." And he does not consider the knowledge of the party taking the bill as making a difference. He says, "though the plaintiff knew the defendant to be agent of the *Durham* Bank, he might not know but that he meant to offer his own responsibility." 5 *M. & Sel.* 345, *Leadbitter* v. *Farrow*. It is a well settled rule; *Paley on Agency*, 298; 5 *Taunt.* 749; 7 *Taunt.* 159; 5 *Mason*, 241; 11 *Mass. R.* 27 and 54; 2 *Greenl.* 204. And *Goodrich* must be regarded as liable upon the bill.

It must have been drawn in the character of master, or as agent or factor; and this may be shown as between him and his principal, although he may be personally responsible to third persons.

In *England* the master of a vessel has no lien on the ship, freight, or cargo for money expended or debts necessarily incurred. 9

East, 426, *Hasey* v. *Christie*; 1 *Barn. & Adol.* 575, *Smith* v. *Plummer*.

In *Massachusetts*, the master is allowed to have a lien in such cases. 4 *Mass. R.* 91; 11 *Mass. R.* 72. So is he in *New York*. 7 *Cowen*, 670, *Ingersoll* v. *Van Bokkelin*. *Kent* observes, that the American cases have taken the most reasonable side of the question. 3 *Com.* 167, *note b*. The transaction now under consideration cannot, however be regarded as falling within the scope of his authority, as master. In the ordinary state of things, says *Lord Stowell*, he is a stranger to the cargo beyond the purposes of safe custody and conveyance; yet in cases of instant, and unforeseen, and unprovided necessity, the character of agent and supercargo is forced upon him. 3 *Rob. Ad.* 240, the *Gratitudine*. The case of *Watt* v. *Potter*, 2 *Mason*, 77, is to the same effect. The power of purchasing and selling has been regarded by this Court as not coming within the power usually incident to the office of master. 8 *Greenl.* 298. The cases of *Kemp* v. *Clough*, 11 *Johns. R.* 107, and *Emery* v. *Hersey*, 4 *Greenl.* 407, are not regarded as at variance with the other cases, as in them a customary course of business was proved, extending the powers and duties of the master beyond their ordinary limits, and the cases were decided upon that ground. It was no doubt competent to the owner in this case to enlarge the powers of the person employed as master, and to clothe him with authority to draw bills and to purchase a cargo. But such authority is not derived from his office of master, but from the letter of instructions, constituting him his agent for those purposes. And in the character of agent he must be regarded as acting in drawing the bill and making the purchases. It becomes material then to inquire, what rights he acquired by law over the property purchased by him, as agent, with the proceeds of the bill upon which he is personally liable.

It is stated in *Paley on Agency*, 109, that the general lien of a factor, first received the sanction of legal authority, in the case of *Kruger* v. *Wilcox*, *Amb.* 252, and that it has never been controverted since. And such is the settled law, as well in this country as in *England*. 1 *Burr.* 494, *Godin* v. *London Assur. Com.*; 1 *Cowp.* 251, *Drinkwater* v. *Goodwin*; 3 *B. & P.* 489, *Houghton & al.* v. *Mathews & al.*; 1 *Gall.* 360, *Burrill* v. *Phillips*; 12

Mass. R. 180, *Stevens* v. *Robbins.* The cases of *Drinkwater* v. *Goodwin* and *Stevens* v. *Robbins*, show, that one who is liable to pay, has the same lien as if he had paid. Nor does the death of the principal deprive the agent of his lien. 2 *East*, 227, *Hammonds* v. *Barclay.* But it is said, the agent did not follow his instructions in drawing the bill, and that he cannot create a lien by his own wrong. The agent having departed from the strict letter of his instructions in making the bill payable at a shorter date, than authorized, it might have been in the power of the plaintiffs to have disclaimed the whole transaction. But they cannot claim the property and yet deny the agency of *Goodrich* in the purchase of it. They have claimed the property purchased by the proceeds of the bill, and it is now too late to deny the agency.

Goodrich being entitled to a general lien upon the goods in his possession, to secure him for his liabilities, the plaintiffs cannot maintain replevin, until that lien is discharged. The facts upon which this decision is made, are proved by testimony not liable to objection; and it has not been considered necessary to decide the other points made at the argument.

There must be judgment on the verdict, and for a return of the goods; but the defendant cannot claim to hold them for more than the payment of the claim of *Goodrich*, arising out of his liability on the bill, and for all necessary subsequent expenses upon them. It will be useless to claim damages on the replevin bond, if the goods are themselves sufficient to satisfy these claims, as the defendants will hold in trust for the plaintiffs whatever comes to their hands more than sufficient for these purposes.

ALFRED J. STONE *et al. vs.* WILLIAM BRADBURY.

The word *bond* does not necessarily imply an instrument under seal, or with a penalty, or forfeiture.

Parol evidence is admissible to show, that in a certain description of contracts, any instrument in writing is considered a bond by the parties.

THIS was an action of *assumpsit* on two notes of hand, dated 12th *March*, 1833, each for $125,00, signed by defendant to the plaintiffs, one payable in six months, the other in nine months, both on interest. The report of the case, shows the following proceedings at the trial.

Elijah P. Pike, the subscribing witness to the notes, was called and testified, he presumed he saw those notes signed by *William Bradbury*, the defendant, and declared that he witnessed them. The notes were then read to the jury. The defendant's counsel then stated, that he did not mean to deny the defendant's handwriting, but intended to say, that he did not give them as notes of hand, but left them as escrows with Mr. *Pike*; and that the contingency never occurred, and they were delivered up without Mr. *Bradbury's* consent, before the contingency happened, and were without consideration. To sustain this defence, the defendant's counsel then proceeded in his cross-examination of said *Pike*, the witness, who further stated, that he received duplicate notices from the defendant's counsel, to produce the original agreement between the parties of the 12th of *March*, 1833, and gave one of them to Mr. *Stone* on the 19th of this month; that the witness looked for it, but had never seen it since he gave the notes to Mr. *Stone*; that he never gave it to Mr. *Bradbury*; that he had a paper indicating on what conditions the notes were to be given up, could not say whether signed by *Stone & Morse*; *Stone* did the business, Mr. *Morse* was not present; that the witness did not hear the bargain; the paper was left with the witness with the notes, witness saw it at his house; thinks he did not see it since the day he gave the notes to Mr. *Stone*. The paper and notes were left with the witness together. The witness had no distinct recollection of what became of one paper separate from the others, and could not say whether he put them together or not. They were left with the

witness for safe keeping, till a certain contingency was performed; that he had made diligent search and could not find it, and it is lost, so that the witness does not know where it is.

The plaintiffs' counsel objected to any communication of the contents of that written agreement from the witness' recollection, on the ground that the defendant had not proved the loss. But *Emery J.*, who tried the action, overruled the objection. And the witness further testified, that *Stone* was to obtain a bond of Gen. *Veazie* of his real estate at *Oldtown*, including his mills; that *Stone* should obtain a survey and plan of the property, and he should assign one quarter part of the bond to Mr. *Bradbury*, and when he had done that, the witness was to give Mr. *Stone* the notes; that was the substance of the agreement; he thought Mr. *Stone* signed it, and believed that he, *Pike*, did not witness it; that Mr. *Stone* made an assignment on the back of the bond, of one quarter part of his interest in the bond of the real estate and mills in *Oldtown*, to *Bradbury*, subsequent to the 12th of *March*, not a great while after he exhibited a plan and survey. The witness considered it imperfect. *Robert D. Dunning* made a small sketch of it which Mr. *Stone* exhibited to witness. He did not deliver to witness an assignment for the benefit of Mr. *Bradbury*, nor deliver any thing to witness shewing that *Bradbury* was interested in that tract of land, nor notify Mr. *Bradbury* that he was ready to assign it to him to the witness' knowledge. Mr. *Stone* produced Gen. *Veazie's* bond and plan by *Dunning*. Witness considered it imperfect. It was not lotted into house lots. The plan embraced 150 acres, a sketch shewing some house lots on the general sheet, and what belonged to *Veazie*; then the outline of the whole tract. Witness had no recollection that the survey should be made into house lots. Mr. *Stone* took away the bond after the quarter part had been assigned, and witness could not say where it is now. Mr. *Bradbury* never called on witness for the notes, but afterwards asked witness for the memorandum of *Stone*, when the papers were left with witness. The witness testified that he had an interest in the bond; and an assignment was made to witness in the same manner, and he carried it to *Bangor* with the assignment to *Bradbury* on it. It was satisfactory to the witness and he tried to sell it. He afterwards returned it to Col. *Stone*, and had not seen it since; did not recollect

any seal to the assignment; he could not say whether the bond was sealed by Gen. *Veazie;* should think there was no penal sum; it was a memorandum of an agreement, and could not say positively whether under seal; thinks it was signed by Gen. *Veazie;* did not feel confident of its being a bond in usual form. It was without penalty. Witness recollected the price, and that there was no forfeiture. The sum of the purchase was $100,000.

The bond expired between the 20th and 30th of *May,* and the assignment was made within 10 days. *Dunning* went down and made the survey and plan, at *Stone's* request. Witness' impression is, that the agreement had been complied with, and he should not have given up the notes if it had not been. The witness did not recollect that he was in a hurry. Col. *Stone* looked for the memorandum three quarters of an hour. The bond expired after the witness returned from *Bangor,* and nothing was done with it. Mr. *Bradbury* applied to witness sometime before the expiration of the bond, at witness' house, for the memorandum. *Bradbury* was frequently passing there, and *Stone* boarded with witness.

Hereupon the defendant contended, — 1. That said notes were void for want of consideration.— 2. That they were deposited with said witness as escrows to be given up to the plaintiff only on performance of certain conditions precedent, which it was the duty of the plaintiffs to prove clearly had been performed, and that having failed on this evidence to prove performance, they were not entitled to recover. The plaintiffs contended, that having proved the signature of the notes to be the defendant's, they had made out their whole case and were entitled to a verdict; that it was not incumbent on them to show any consideration, the notes being written for value received; that if the defendant would avoid their payment, he must satisfy the jury, and that the burthen of proof was on him to show such matter of defence, and that if they were escrows, that the conditions had not been performed, but the defendant had failed to do so; and that if it was competent for him to prove by parol the contents of any paper not produced, there was abundant evidence to show the terms of any such writing complied with, and the notes properly delivered to the plaintiffs; but that the burthen of proof to show the contrary was altogether on the defendant. The plaintiffs also contended, that the term *bond,* as used by the

parties, did not necessarily import a writing under seal, with a penalty, but must be taken according to the nature of such transactions, which it was well understood did not require such formalities, but such an obligation only was necessary as would compel a performance on the part of *Veazie*, and that this the witness, *Pike*, testified had been produced to him to his satisfaction. And the plaintiffs further contended, that from the testimony of *Pike*, it was not the agreement or intention of the parties, that any separate assignment of said fourth part should be made and delivered to *Bradbury* personally, or to the witness, for said *Bradbury*, but said witness was to be furnished with the evidence that an assignment of said quarter had been made to said *Bradbury;* that said bond from *Veazie* had been obtained, and said plan had been procured, and produced. And he further contended, that from the evidence, the defendant had entirely failed to shew the bond obtained was not under seal, even had that been necessary, the said *Pike* being entirely uncertain on the subject and unable to testify, except negatively, that he had no recollection of any seal, or of any penal sum, and that of this uncertainty the defendant was to suffer the consequence. He also contended, that the expense incurred in obtaining the bond and survey was sufficient consideration for said notes. *Emery J.*, instructed the jury, that the notes purporting to be for value received, and proved to be signed by defendant, it rested on him to satisfy them, that they were given without any consideration; that the expenses of procuring the bond, survey and plan constituted a sufficient consideration for the notes; that they were not rendered void merely because no notice was given to *Bradbury*, that a quarter part of the bond was assigned to him, nor was it necessary that the bond or assignment should be delivered to him; that if the jury were satisfied from the evidence, that the bargain was a fair one, and that the intention of the parties, by the use of the term bond was to show they meant to obtain from *Veazie* an engagement to convey the land, which could be enforced, such an one made in writing and signed by *Veazie* would be sufficient; inasmuch as it would sustain a suit for damages, or a bill in equity might be supported to compel a specific performance, if the party in whose favor the writing was made performed his part; the engagement would be good to bind *Veazie* without penalty or forfeiture and without

being under seal; that still, however, if the conditions on which the notes were to be given up to the plaintiffs, were not proved to have been substantially complied with, by the plaintiffs, they were not entitled to recover; that the assignment made by *Stone* to *Bradbury* of a quarter part in the writing of *Veazie*, was sufficient to rest in *Bradbury* an interest to that amount; that if they believed *Pike*, that assignment was proved to have been made on the back of the paper; it would necessarily be known to *Veazie*, on presentation of the bond, that *Bradbury* was so much interested in the matter; it had been carried by *Pike* to *Bangor*, and he had tried to sell the bond; the assignment need not be under seal; that *Pike* was made the agent of the parties, and was satisfied, that the conditions had been complied with, or he should not have given up the notes; that the notes having been made, as a *bonus* for procuring the bond, survey, and plan, to be exhibited by *Stone* to *Pike*, and for the right of being interested one quarter part in the speculation, the subsequent omission of *Bradbury* to carry the contract into effect, by complying in season with the terms of the bond, would not exonerate him from liability to pay the notes, if no fraud, artifice, or deception in relation to the business were practised on him by the plaintiffs, of which, from the evidence, the jury would judge. And if such fraud, artifice, or deception were practised, they would return a verdict for the defendant.

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

Codman, for the defendant, enforced the positions taken at the trial, contended that the instructions of the Judge to the jury were erroneous, and cited the following authorities. *Sumner* v. *Williams*, 8 *Mass. R.* 200; *Page* v. *Trufant*, 2 *Mass. R.* 159; *Hatch* v. *Hatch*, 9 *Mass. R.* 307; *Maynard* v. *Maynard*, 10 *Mass. R.* 456; *Appleton* v. *Crowninshield*, 3 *Mass. R.* 443; *Johnson* v. *Reed*, 9 *Mass. R.* 78; *Newcomb* v. *Brackett*, 16 *Mass. R.* 161; *Willington* v. *West Boylston*, 4 *Pick.* 101; *Chitty on Con.* 274; *Wheelwright* v. *Wheelwright*, 2 *Mass. R.* 447; *Marine Ins. Co.* v. *Hodgson*, 6 *Cranch*, 219.

Fessenden & Deblois, for the plaintiffs, argued in support of the several grounds taken by them at the trial, and cited *Thatcher* v.

Dinsmore, 5 *Mass. R.* 299; *Jerome* v. *Whitney*, 7 *Johns. R.* 321; *Jackson* v. *Alexander*, 3 *Johns. R.* 481; *Hanson* v. *Stetson*, 5 *Pick.* 506; *Talman* v. *Gibson*, 1 *Hall's R.* 308; *Sumner* v. *Williams*, 8 *Mass. R.* 214; *Fowle* v. *Bigelow*, 10 *Mass. R.* 379; *Hopkins* v. *Young*, 11 *Mass. R.* 302; *Walker* v. *Webber*, not yet published, (3 *Fairf.* 60); *Davis* v. *Boardman*, 12 *Mass. R.* 80; *Eastman* v. *Wright*, 6 *Pick.* 316; *Ensign* v. *Kellogg*, 4 *Pick.* 1; *Cutts* v. *Perkins*, 12 *Mass. R.* 206; *Amherst Academy*, v. *Cowls*, 6 *Pick.* 427; *Forster* v. *Fuller*, 6 *Mass. R.* 58; and *Dunn* v. *Snell*, 15 *Mass. R.* 481.

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

Emery J. — This is one of those cases with which, there is a prospect, we may be frequently occupied, in consequence of the late very extensive speculation in land. It would hardly do to denounce them at once as a species of gambling transactions; though the infatuation in some instances appears but little short of what seems to have its influence over the minds of those, who have entered into a course of gaming. In this case the jury have found that there was no fraud, artifice, or deception, in relation to the business, practised on the defendant by the plaintiffs. The acknowledged worth of the defendant, protects him from imputation. Between deserving citizens, differing in opinion as to their rights, we are now called on to decide.

The defendant gave to the plaintiffs the two notes of hand in suit for $125 each, dated *March* 12, 1833, payable with interest, one in 6 months, the other in 9 months, as a bonus for the privilege or right of buying a quarter part of the real estate of *General Vezie*, at *Oldtown*, at the price of $100,000 for the whole, within a certain period, or of selling a bond or contract for it. The plaintiff, *Stone*, was to obtain a bond, a survey and plan of the property, and assign one quarter part of the bond to Mr. *Bradbury*, the defendant; and when he had done that, the witness, with whom the notes were left for safe keeping, till that contingency was performed, was to give Mr. *Stone* the notes. They were left with the witness to be so delivered, because Mr. *Bradbury* might not be at *Brunswick* when Mr. *Stone* should obtain the bond, survey and plan.

Not a great while after, *Stone* produced Gen. *Veazie's* bond, and a plan by *Dunning* to the witness, who considered it imperfect, as not being lotted into house lots. The plan and survey embraced 150 acres, with a sketch showing some house lots on the general street and what belonged to *Veazie*, and the outline of the whole tract. It was not in the witness' recollection, that the survey should be into house lots. He stated, that *Dunning* went down and made the survey and plan at the plaintiff's, *Stone's*, request. The witness' impression was that the agreement had been complied with. Mr. *Stone* made an assignment on the back of the bond of one quarter part of his interest in the bond of the real estate and mills in *Oldtown* to *Bradbury*, subsequent to the 12th of *March*, and before the expiration of the time limited in the bond for completing the purchase, which was between the 20th and 30th of *May*. The assignment was made within ten days. The witness testified, that he should not have given up the notes, if the agreement had not been complied with.

Mr. *Stone* took away the bond after the quarter part had been assigned. Mr. *Bradbury* never called on the witness for the notes, but before the expiration of the bond, applied to the witness for the memorandum which had been left with the witness with the notes.

The witness had an interest in the bond, and an assignment was made to him, in the same manner, and he carried it to *Bangor* with the assignment to *Bradbury* on it. It was satisfactory to the witness, and he tried to sell it. The bond expired after the witness returned from *Bangor*. Nothing was done with it, and no complaint has been shown by the defendant as to the faithfulness of *Pike's* exertions to effect a sale.

The defendant has objected that the notes were without consideration; that the assignment was not under seal; nor the contract of *Veazie* a bond. He complains also of the instructions of the Judge to the jury.

A negotiable note expressed to be for value received is a promise for a legal consideration, although as between the original parties, the promissor may shew that there was no value received.

But on the evidence in this case, a valuable consideration is proved, in the services of the plaintiff, *Stone*, in obtaining the bond, the survey, and plan, and in the assignment of the quarter part of

the plaintiff's, *Stone's*, interest therein to the defendant. *Eastman et al.* v. *Wright et al.* 6 *Pick.* 316, and cases there cited. 15 *Mass. R.* 481, *Dunn* v. *Snell.*

The jury have decided, that the conditions on which the notes were to be given up to the plaintiffs, were proved to have been substantially complied with by the plaintiffs, and that the bargain was a fair one.

It has been strenuously urged that the Judge erred in his direction, that if the jury were satisfied from the evidence that the intention of the parties, by the use of the term bond, was to show they meant to obtain from *Veazie* an engagement to convey the land, which could be enforced, because it was a question of law, and should have been determined by the Court.

In the case *Fowle* v. *Bigelow*, 10 *Mass. R.* 379, in 1813, cited by the plaintiffs' counsel, Judge *Sewall* observed, that the construction of written instruments is with the Court, and even when extraneous evidence is admissible to aid the construction, as it may be in some cases, so far as to ascertain the circumstances under which the writing was made, and the subject matter to be regulated by it, yet the Court is to direct the effect of that evidence, and what shall be the construction, if certain facts be proved.

In that case, the jury, it was said, was left too much at large. The trial was had before the late Chief Justice *Parker*, before his advancement to the office of Chief Justice. He had instructed the jury, that, the meaning of the parties in the memorandum, being uncertain from the words used, and it being out of his power to ascertain their meaning by reference to the body of the instrument, evidence of the facts and doings of the parties contemporaneously with and immediately subsequent to the execution of the instrument, was proper for their consideration; and if by these they were satisfied, that in the understanding of the parties, only a temporary maintenance of the gate was intended, until they should agree upon a time to take it down, their verdict ought to be for the defendant, otherwise for the plaintiff. One of the grounds of the motion for a new trial was, that the jury ought to have been permitted to judge of the construction of the instrument.

A new trial was granted because the written evidence, and the facts proved for the defendant, of which the evidence was properly

admitted at the trial, lead to an opposite conclusion from that which the jury have drawn, and their error is in a matter of law, the construction of the written agreement in which they are to be directed by the opinion of the Court. It is fairly inferable from this decision, that if the jury had drawn the right conclusion, no new trial would have been granted.

It is to be recollected that in the present action, the witness, *Pike*, calls the instrument a bond over and over again; he could not say whether it was sealed by General *Veazie;* should think there was no penal sum; a memorandum of agreement; could not say positively whether under seal; thinks it was signed by General *Veazie;* did not feel confident of its being a bond in usual form; it was without penalty; witness recollected the price, and no forfeiture; the sum of the purchase was $100,000; and he tells when the bond expired.

The terms *bind, bound, binding effect, obligation,* are used often by the most respectable jurists without meaning to have them applied to *bond,* in the technical language of the law.

A case decided in the Supreme Court of the *United States* in 1821, reported in 6 *Wheat.* 572, *Union Bank* v. *Hyde,* is an instance. The case turned upon the construction of a written instrument. "I do request that hereafter any notes that may fall due in "the *Union Bank,* on which I am or may be indorser, shall not "be protested, as I will consider myself *bound* in the same manner "as if the said notes had been or should be legally protested. "*Thomas Hyde.*" Two constructions were contended for, one literal, formal, vernacular, the other resting on the spirit and meaning, as a mercantile transaction. The Court speak of the nullity of a protest on the *legal obligations* of the parties to an inland bill, and ask, "what are we to understand him to intend, when he says, I will consider myself *bound* in the same manner as if said notes had been or should be legally protested. Except as to foreign bills, a protest has no *legal binding effect.* What effect is to be given to the word *bound?* It must be to pay the debt, or it means nothing. But to cast on the indorser of a foreign bill, *an obligation* to take it up, protest alone is not sufficient. He is still entitled to a reasonable notice in addition to the technical notice communicated in the protest. To *bind him* to pay the debt, all these incidents were in-

dispensable, and may therefore be well supposed to have been in contemplation of the parties when entering into this contract. In that case the evidence proved, that by the understanding of both parties, this writing did dispense with demand and refusal. The company discontinued putting the notes indorsed by the defendant in the usual course for rendering his assumption absolute, and the defendant continued to renew his indorsements without ever requiring demand or notice." The admission of the parol evidence to explain the ambiguity, was thus sanctioned. If such language may be used in our highest judicial tribunal, in application to an instrument not in truth a technical bond under seal, it is not surprising that some latitude should be indulged in, between one, as the plaintiff, *Stone*, is not a professional man, and one who is of the legal profession, as the defendant is, about a contract to convey land.

In 2 *Bingham, N. C.* 668, *Powell* v. *Horton*, in 29 *Eng. Com. Law R.* 452, a contract to sell mess pork of *Scott & Co.*, was held to mean mess pork *manufactured by Scott & Co.*, and also that evidence was admissible to shew what meaning that language bore in market.

Tindall Chief Justice, observes, that "in all mercantile contracts on which doubts arise, it is usual to call persons conversant with the trade to state what is understood by the disputed expression." *Park* Justice, says, "assuming that there is an ambiguity, and it was proper to receive evidence as to the acceptation of such terms in the market, the defendant's counsel, by objecting to the admissibility of such evidence, and rejecting the construction put on the contract by the Judge, refuses in effect the decision of both Judge and jury."

In the equivocal description of the instrument executed by *Veazie*, and the avowed satisfaction with it by the witness, who dealt in the land trade, we do not perceive any error in the Judge in placing the matter, as he did, before the jury, as he did give them decided direction, that the instrument, whether sealed or not, if in writing, containing an engagement to convey the land, would be sufficient without penalty or forfeiture.

We do not perceive that the jury have drawn a wrong conclusion, and there must be judgment on the verdict.

STEPHEN M. MARBLE *vs.* REUBEN SNOW.

The plaintiff in error is not entitled to costs, where a judgment of the Court of Common Pleas is reversed for *error in law*.

THIS was a writ of error. The action was originally brought before a Justice of the Peace, where the defendant in error prevailed, and the other party appealed. At the Court of Common Pleas, the defendant in error again recovered judgment, and the then defendant, now plaintiff in error, filed exceptions and brought his writ of error. At a former term of this Court, the judgment was reversed, because the Court of Common Pleas had admitted illegal evidence. The plaintiff in error claimed costs, but the clerk refused to allow them, from which an appeal was taken, and the claim was renewed at this term.

J. C. Woodman, for the plaintiff in error, cited and relied upon the *stat.* of 1821, *ch.* 59, § 17, which provides, that "in all actions, as well those of *qui tam*, as others, the party prevailing shall be entitled to his legal costs." *Woodman* contended, that the decisions on this subject were opposed to the plain, unequivocal, and decided language of the statute, and operated as a repeal of it by judicial construction, and without giving any reasons for their decisions. He said, the Courts have admitted, that there was no reason why costs in such cases should not be allowed. *Brown* v. *Chase*, 4 *Mass. R.* 436. Where judgment is arrested, costs follow. *Gibson* v. *Waterhouse*, 5 *Greenl.* 24; *Little* v. *Thompson*, 2 *Greenl.* 228. And there is quite as much law and reason for allowing costs in this case, as in that. The true principle is, that where judgment is reversed, the same judgment ought to be rendered here, which the Common Pleas should have rendered. He cited and commented upon *Howe* v. *Gregory*, 1 *Mass. R.* 81; *Berry* v. *Ripley*, 1 *Mass. R.* 167; *Durell* v. *Merrill*, 1 *Mass. R.* 411; *Mountfort* v. *Hall*, 1 *Mass. R.* 443; *Smith* v. *Franklin*, 1 *Mass. R.* 480; *Nelson* v. *Andrews*, 2 *Mass. R.* 164; *Johnson* v. *Wetherbee*, 3 *Pick.* 247; *Kavanagh* v. *Askins*, 2 *Greenl.* 397; *Bruce* v. *Learned*, 4 *Mass. R.* 614, and *Jarvis* v. *Blanchard*, 6 *Mass. R.* 4.

Haines, for the defendant in error, said, that the principle on which the decisions might fairly rest was, that a party ought not to be made responsible for judicial errors. Where there are very numerous decisions on the construction of the same statute, the *authority* is equally binding, whether the *reasons* leading to such conclusions be given or omitted The authorities cited on the other side, with *Knapp* v. *Crosby*, 1 *Mass. R.* 479, and *Dean* v. *Dean*, 2 *Pick.* 25, are entirely conclusive, as far as any decisions can make any question. The case of *Bullard* v. *Brackett*, 2 *Pick.* 85, where costs were allowed on a writ of error, was where the reversal of the judgment was for error in fact, and not for error in law. This is a discretionary power, and does not come within the provision of the statute, but is settled by the rules of the Court.

The opinion of the Court was afterwards drawn up by

SHEPLEY J. — Costs are claimed in this case for the plaintiff in error, the judgment having been reversed for error in law. It is not denied that the practice has been to refuse costs both in *Massachusetts* and in this State, in such cases. The plaintiff relies for his costs upon the unqualified language of the statute, in the following words, "and in all actions, as well those of *qui tam* as others, the party prevailing shall be entitled to his legal costs." *Rev. Stat. ch.* 59, *sec.* 17. This language was copied from the statute of *Massachusetts* of the thirtieth of *October*, 1784, § 9. While this State was a part of *Massachusetts*, the statute had received a judicial construction, which was uniform and well known, having been the same for more than thirty years. The reason for excepting the case of a plaintiff in error, prevailing for error in law, from the operation of the statute, does not seem to have been given. It may have been, that the courts regarded the statute as imposing costs upon the party in fault. And when judgments are reversed for error in law, the fault being in the Court, not in the party, the reason ceasing, the costs were not allowed. There is some analogy between such a construction, and the one given to the statute in *Ryder* v. *Robinson*, 2 *Greenl.* 127, where the demandants in a real action died, and the action abated, the Court denied costs to the tenant, "the writ being abated by the act of *God*." Yet it is said, in *Brown* v. *Chase*, 4 *Mass. R.* 436, that "the Chief Justice ob-

served, that he saw no sufficient reason why costs should not be given. But the practice having been uniform not to grant them, where the judgment is reversed for error in law, it cannot be shaken without great consideration." And the costs were refused. The defendant in error, in *Massachusetts* as well as in this State, is allowed his costs, and it may be for the reason before stated, that the plaintiff would be the party in fault, because the result has proved the decision of the tribunal complained of to have been correct. If this were a question of construction established only by long practice and judicial decisions, no reasons being given for such decisions, and it having been stated in one of them, that no sufficient reason could be given, this Court might not feel itself bound by such construction, and might decide, that the plaintiff should be allowed his costs. But the Court must regard such construction as established by the legislative department; and it cannot now be departed from without assuming legislative power, consistently with principles already declared by this Court, in several cases, to be binding upon it.

The principles alluded to are, that when a statute of *Massachusetts* has received a well known, judicial construction, and has been re-enacted in this State, "the legislature of this State have sanctioned that construction by the adoption of language in conformity with it." 1 *Greenl.* 186, *Bailey* v. *Rogers et al.*; 5 *Greenl.* 19, *Gibson* v. *Waterhouse*; 5 *Greenl.* 74, *Hathorne* v. *Cate.*

If any alteration of the law respecting costs in cases like the present, is desirable, such alteration should be made by the legislative power.

No costs allowed.

THOMAS COBB *vs. Inhabitants of* STANDISH.

Permitting a *woman* to drive a horse is not conclusive evidence of such want of ordinary care, as will excuse a town from their liability to pay for an injury sustained by the horse from defects in the highway.

Where an open and well beaten path led from the travelled part of the road to an apparently safe and convenient watering place, by the side of the way, and within the limits of the road as laid out, but which was in fact a deep and miry pit covered with water; and the horse of a traveller was turned to it to drink, and fell into it and was drowned; the town was held liable to pay for the horse, under the provisions of the *Rev. Stat. ch.* 118.

THIS was an action for an injury sustained by the plaintiff in the loss of a horse through a defect in a highway within the town of *Standish*, which the defendants were bound to keep in repair. A question of law was reserved for the opinion of the whole Court, and a motion for a new trial was made, because the verdict was against evidence, and the whole testimony was reported in full, from which such facts are gathered, as will present the question of law. The plaintiff's wife with a Mrs. *Drake* were passing from *Westbrook* through *Standish*, with the horse in a wagon, and when opposite the place where the horse was lost, they perceived by the side of the path an apparently suitable place to water the horse, and thinking it proper that he should there be permitted to drink, they unloosed the check-rein, and the horse walked quietly and gently down to the water upon a beaten path leading to it, and stepped one step into it. While drinking the horse took a second step, was thrown a little forward, and immediately settled down into the water, so that his body disappeared. Mrs. *Drake* soon obtained assistance but the horse died before he could be relieved. The place where the horse was lost was a deep mud hole, then filled with water, partly within and partly without the limits of the located highway, and to a common observer, had the appearance of being a convenient watering place for cattle and horses, and there was a well beaten path from the commonly travelled part of the highway down to the water. There was no fence, railing, or guard to give notice of danger. The usual travelled path in the centre of the road was well made, safe and convenient, and the loss of the horse was occasioned solely by turning him to the water for the purpose of drinking.

The counsel for the defendants objected, that trusting a horse to be driven by a *woman* was conclusive evidence of want of ordinary care, which would go to excuse the defendants. It was also objected, that as the person, who drove the horse, voluntarily turned aside from the travelled path, although for the purpose of watering the horse, and although the place had the appearance of being a safe and convenient watering place, the town was not liable to satisfy any loss occasioned thereby. The trial was before *Emery J.*, who overruled both objections, and instructed the jury, that they should determine upon the evidence, in connection with their knowledge of the common practice in the country of trusting women to drive horses, whether they were satisfied, that the plaintiff in thus trusting his wife with the care of his horse had conducted with that want of ordinary care, which would go to excuse the defendants; that if the accident happened without the bounds of the located road, or for want of ordinary care of the driver, the inhabitants of the town clearly would not be liable; but that if they were satisfied, that the horse first began to sink in the miry place within the bounds of the located road, by which accident he lost his life, though, in struggling to escape, his last breath might have been drawn in the part of the hole which might be out of the bounds of the located highway; and that the driver conducted with ordinary care and prudence; and that in consequence of the place being left unguarded within the bounds of the located road; and that the appearance, as a safe watering place, was calculated to deceive the traveller; then they would find a verdict for the plaintiff for the value of the horse.

The verdict was for the plaintiff, and was to be set aside, if the instructions were erroneous.

Codman and *S. Longfellow, jr.* for the defendants, contended — 1. That the plaintiff was wanting in that ordinary care, prudence, and discretion which should entitle him to recover. 2. That this accident happened from a cause for which the town was not liable. They cited *Mower* v. *Leicester*, 9 *Mass. R.* 247; *Rev. Stat. c.* 118, § 17; *Dane, c.* 79, *Art.* 3, § 12; *Estes* v. *Troy*, 5 *Greenl.* 368; *Todd* v. *Rome*, 2 *Greenl.* 55; *Rowell* v. *Montville*, 4 *Greenl.* 270; *Smith* v. *Smith*, 2 *Pick.* 621; *Thompson* v. *Bridgwater*, 7 *Pick.* 188; *Springer* v. *Bowdoinham*, 7 *Greenl.* 442;

Farnum v. *Concord*, 2 *N. H. Rep.* 392; *Carthew*, 191; *Hart* v. *Bassett*, *T. Jones*, 156; *Butterfield* v. *Forrester*, 11 *East*, 60; *Russell* v. *Devon*, 2 *T. R.* 667; and *Clark* v. *Commonwealth*, 4 *Pick.* 125.

S. Fessenden and *F. O. J. Smith*, argued for the plaintiff, and cited *Bigelow* v. *Weston*, 3 *Pick.* 627; and *Springer* v. *Bowdoinham*, and *Thompson* v. *Bridgwater*, before cited, in behalf of the defendants.

At a subsequent day, in the same term, the opinion of the Court was drawn up and delivered by

Weston C. J. — There is no doubt but a woman may be permitted to drive a well broken horse, without any violation of common prudence. The character of the horse, and the capacity of the driver, were left to the jury, with proper directions upon this point.

The travelled part of the road was of sufficient width, and well made, for ordinary accommodation. But a portion of the space, in which the public have an easement, was unsafe; and the danger being concealed, was calculated to deceive and entrap a traveller. Towns are not obliged to provide watering places, for the public convenience; but when they are provided by nature in the highway, they ought not to be suffered to become pitfalls, first to allure and then to destroy horses or other animals, turned aside to partake the refreshment, to which they are thus invited. A traveller, aware of the snare, might have escaped it, but there was nothing provided to point out or indicate the danger. The road was so far from being safe, that a trap was suffered to remain within its limits, into which, it ought to have been foreseen, that animals, attracted by the water, might fall. The jury have found, that there was no want of ordinary care; and we perceive nothing erroneous in the instructions they received from the Judge.

Judgment on the verdict.

STEPHEN WATSON *vs. Proprietors of* LISBON BRIDGE.

Where a corporation, established with power to erect a bridge across a river and take toll of passengers, adopted as part of their bridge a way made by individuals, of a few rods extent, being the only entrance from the public highway to the bridge; and a traveller on passing over this way to the bridge where he paid toll, had his horse injured from a defect in such way; *it was held*, that the traveller was entitled to recover of such corporation the damage sustained thereby.

And if the traveller expend money in a prudent, but ineffectual, attempt to cure the horse, which finally died in consequence of the injury, he may recover it of the corporation in addition to the value of the horse.

A party may prove what a deceased witness had testified to, at a former trial of the same action.

A verdict will not be set aside merely because immaterial testimony has been erroneously admitted at the trial.

A stockholder in a toll bridge corporation is not a competent witness for that corporation on the ground of interest; and the provisions of the *Rev. Stat., ch.* 87, "for admitting *inhabitants* of towns, and *certain other corporations* as witnesses," do not render such stockholder a competent witness for the corporation.

THIS was an action of the case, alleging that a horse of the plaintiff through a defect in the bridge was wounded; that an attempt was made to cure the horse, but that it finally died in consequence of the injury. The defendants erected their bridge in *September*, 1832, and as the end of the planked bridge did not adjoin on any road regularly laid out, in the following *November* a convenient passage way from the public highway to the bridge, a distance of about twenty rods, was made by sundry persons, among whom were several members of the bridge corporation. This was the only way of approaching that end of the bridge, and next to the bridge the way was wharfed up against the bridge, and adjoined to it. The defendants adopted this as their passage to the bridge, and had repaired it. In *December*, 1833, the plaintiff was passing with his horse along this way to go over the bridge, and at the distance of four or five rods from the water of the river, through a defect in the way, the horse fell and was badly injured, but the plaintiff proceeded and passed the bridge paying his toll there. After some dollars had been expended in attempting a cure, the horse died by reason of the injury thus sustained. In the course of the trial, the

plaintiff proposed to prove what a witness, now deceased, had testified on a former trial, to which the counsel for the defendants objected; but the objection was overruled by *Emery J.*, presiding at the trial, and the evidence was admitted. The defendants also objected to shewing what individual members of the corporation did, or proving by them that they were acting in behalf of the corporation, and offered to exhibit their books. This objection was also overruled. The defendants also moved for a nonsuit, inasmuch as the plaintiff by his own showing had not sustained any injury upon the bridge, but upon a way leading to it. The Judge declined to order a nonsuit. The defendants read in evidence a copy of a warrant signed by the selectmen of *Durham*, within the limits of which this way was, containing an article to see whether the town would lay out this way, as a town road, and a petition to the County Commissioners to have it laid out, as a county road; but it did not appear, that any proceedings were had thereon. The defendants offered individuals, owning shares in the corporation, as witnesses to prove, that the way was made and maintained by individual subscription, and not by the corporation. This was objected to, and rejected by the Judge. The bridge itself was well made and safe. The jury found a verdict for the plaintiff, and included in the damages found the sum of fifteen dollars for expenses, proved to have been paid by the plaintiff in the attempted cure of the horse. The verdict was to be set aside, if the rulings of the Judge were erroneous.

Codman and *H. Belcher*, for the defendants, cited the *Massachusetts* act incorporating the defendants, *Feb.* 27, 1813, and said, that this authorized only the building of a bridge from shore to shore, and denied, that the corporation itself, much less individual corporators, could make any road leading to it, or adopt any road made by others, which could make the corporation liable for any accident happening where this did, either by any statute, or at common law. They enforced the several positions taken at the trial, and cited 4 *Pick.* 341; *Mass. Stat.* of 1804, *ch.* 125; 9 *Mass. R.* 247; *Stat.* of this State, of 1821, *ch.* 118, *sec.* 17; 1 *Fairf.* 447; 7 *Mass. R.* 393; 8 *Greenl.* 365; 2 *Greenl.* 55; 4 *Greenl.* 270; 5 *Greenl.* 368; 3 *Pick.* 408; 2 *Pick.* 51; 7 *Pick.* 225; 6 *Pick.* 59; 14 *Mass. R.* 282; 4 *Greenl.* 44; 7 *Greenl.* 118; 4 *Greenl.* 508; 2

Fairf. 227; 1 *Pick.* 297; 2 *Johns. R.* 109; 14 *Mass. R.* 234; 5 *Burrow*, 2594; 2 *N. H. Rep.* 513; 2 *Fairf.* 278; 7 *Greenl.* 273; 7 *Greenl.* 63; 1 *Chitty on Pl.* 349; *Rev. Stat. ch.* 87; 1 *Pick.* 109; 8 *Mass. R.* 292; 12 *Wheat.* 40; 2 *Kent's Com.* 292; 3 *Mass. R.* 276.

Mitchell, for the plaintiff, said, that a bridge is defined to be "a building of stone or wood," or earth "erected across a river for the common ease and benefit of travellers." *Jac. L. Dic. tit. Bridge.* And it is contended, that the entire distance from where the right of public travel ceases at one end of the bridge, and begins at the other, comes within the term bridge, as erected by the corporation, and that whatever distance they appropriate to corporate purposes they are bound to keep in repair. And that if the defendants legally appropriated this way as an avenue to the bridge, it is a part of it, and they are as much bound to keep it in repair, as any other part of the bridge. And if they have even illegally appropriated this way as part of their bridge, and an individual suffer from such appropriation, they are bound to pay his damage. *Goodenow* v. *Inhabitants of Cincinnati*, 4 *Hammond*, 513. If they opened their bridge, received tolls, and are acting as a corporation in thus doing, and the avenues provided to the bridge are not safe, it is a neglect of corporate duty, and the individual suffering from it has his remedy against them. *Riddle* v. *L. & C. on Merrimack River*, 7 *Mass. R.* 187; *Mower* v. *Leicester*, 9 *Mass. R.* 247. And if the proprietors of the bridge are only tenants at will of the land over which the road is kept by them they are bound to repair it, and are liable for the consequences of their neglect. *Ld. Raymond*, 858.

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

WESTON C. J.—The statute, by which the defendants were created a corporation, and authorized to build the bridge in question, and from which also they derive their right to claim and receive toll, imposes upon them the duty to keep the same "in good, safe, and passable repair." If the plaintiff has sustained an injury, from the failure of the defendants to fulfil this duty, we doubt not he may sustain an action therefor. This results from the principles of natural justice, which are to be applied as well to corporations

as to individuals. The case of *Riddle* v. *Proprietors of locks and canals on Merrimack river*, 7 *Mass. R.* 169, is an authority in point, to which we refer.

The declaration sets forth the liability of the defendants, to keep the bridge in safe and convenient repair, for the accommodation of all the citizens, "paying a reasonable and stated toll therefor," and avers "the readiness of the plaintiff to pay said toll, when he arrived at the toll-house." But we are not called upon, in the case before us, to decide upon the sufficiency of the declaration, which is not drawn in question, either upon demurrer, or upon a motion in arrest of judgment. Nor is the title of the defendants to the land, upon or over which their bridge passes, properly in controversy. Whatever it may be, or whether it commenced or is continued by right or by wrong, the measure of their liability is the same.

We doubt not it was competent for the plaintiff to prove, what a deceased witness had testified to at a former trial of this cause. It is liable to no legal objection; and is well sustained by authority, and the practice of our courts.

The plaintiff was permitted to prove, that members of the corporation had worked upon that part of the passage way, where the injury happened. It is quite immaterial by whom this was done, or whether there was or was not a proper deduction of authority from the corporation. If it was adopted by them, and it does in fact form a part of the bridge, it was the duty of the defendants to keep it in repair. That it was adopted as a part of the bridge, is in no degree deducible from the fact, that it was worked upon by some of the members of the corporation. That evidence, then, we regard as immaterial, and therefore its admission does not, in our judgment, constitute a sufficient objection to the verdict.

The members of the corporation, offered as witnesses for the defendants, had a direct interest in the event of the suit. This does not belong to the class of corporations, the members of which are made competent witnesses by statute.

The main question is, whether from the facts, the place of the injury constituted a part of the bridge. And we are of opinion that it did. It was on or near ground, which had been wharfed up, where that end of the bridge landed. It was properly the entrance

to the bridge, from the public travelled way; and the only way of ingress and egress, of which travellers, passing the bridge, could avail themselves. If an access like this might be left in a dangerous state, without liability on the part of the defendants, the bridge, for the passing of which they receive a compensation, would become a trap, instead of an accommodation, for travellers. It is too narrow a construction to hold, that a bridge over a river ceases at the point where it rests upon the land, and that those, who are charged with the duty of making it passable, are not bound to make it accessible from the bank on either side, or having done so, that they are not bound to keep it safe and convenient.

The liability of the defendants being established, the only remaining question is, as to the measure of damages. The plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood, that it was an expense prudently incurred, in the reasonable expectation, that it would prove beneficial. It was incurred, not to aggravate, but to lessen, the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our judgment, that they should sustain the loss.

Judgment on the verdict.

William Cox *vs.* Leonard Stevens.

In the militia act, *stat.* of 1834, *ch.* 121, *correcting* and *revising* the roll, have the same meaning.

That act does not prescribe what terms shall be used in the caption of a company roll.

A company roll in the form issued by the Adjutant General, when such form does not depart from the requirements of law, is sufficient evidence of the enrolment of a private, whose name is borne thereon.

This was a writ of error, brought to reverse a judgment before a Justice of the Peace, in an action for a fine for neglect to appear at a company training, by the then plaintiff, as well as now plaintiff

in error, as clerk of a militia company in *Westbrook*. To show the enrolment of the defendant, the plaintiff produced a roll of the company, with the name of the defendant thereon, in the form provided by the Adjutant General of the State. The caption, or title of the roll, above the names, concluded thus, "as *corrected* on the first *Tuesday* of *May*, 1835," but the word revised, appeared only in the certificate of the clerk at the bottom, which was thus: — "The foregoing is the roll of the A. company, &c. as *revised* on the first *Tuesday* of *May*, 1835. Attest, *William Cox*, Clerk." The defendant proved, that the certificate of the clerk, on said roll, was not made until after the commencement of the suit. This roll was relied on, as evidence of the enrolment of the defendant in the company at that time. The Justice refused to admit said roll in evidence, because the word *revised* was not in the caption, and because the certificate of the clerk was not seasonably made, if under other circumstances it would have been evidence of the enrolment; and rendered judgment for the defendant. This refusal of the Justice, with the general error, was assigned, as cause for the reversal of the judgment.

Deblois, for the plaintiff in error, cited the Militia law of 1834, *c.* 121, § 12, 21, and 50. After reading the language of these sections, he contended, that the paper produced and offered in evidence, being in conformity with the form issued by the Adjutant General, and in fact actually issued by him, is a good and sufficient roll; and in the language of this Court, in *Sawtel* v. *Davis*, 5 *Greenl.* 438, "that forms thus furnished are to be considered as binding, as though they had been contained in the act itself; and it is the duty of all concerned to conform to them." The form thus furnished is all therefore that is required, and is conclusive evidence of the enrolment. He also argued, that the word corrected, as used in the statute, implies and contains the term revise; and that the words of the statute, requiring the roll to be revised, are merely directory, and not necessary to be inserted in the caption, or any other part of the roll.

Codman, for the defendant in error, contended, that the only proof of the roll was from the clerk's certificate, and that a certificate made by the plaintiff, after he had commenced his suit, could

not enable him to maintain his action thereby. He said, there was a difference between correcting and revising a roll; the former being the act of the captain and clerk, the latter of the clerk alone. This cannot be both, and therefore not sufficient, as both are required by the statute. The Adjutant General is directed to furnish forms, but the forms are to be such, as are conformable to law, and not such as supersede and repeal it. The case cited, *Sawtel* v. *Davis*, applies only to the forms then before the Court, which were according to law. The roll must be according to law, and is preliminary to the support of the action. Every thing required by law must be performed strictly. *Whitmore* v. *Sanborn*, 8 *Greenl.* 310; *Abbott* v. *Crawford*, 6 *Greenl.* 214; *Tripp* v. *Garey*, 7 *Greenl.* 266.

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

Weston C. J. — The twelfth section of the militia act of 1834, directs, that the roll of the company shall be annually revised on the first *Tuesday* of *May*, and corrected from time to time, as the state of the company may require. The twenty-first section provides, that the company shall be paraded annually on the first *Tuesday* of *May*, among other things for the purpose of correcting the company roll; and the fiftieth section authorizes the Adjutant General to furnish for the use of the officers of the militia, blank forms, which are to be uniform throughout the State.

The case finds, that the roll produced at the trial, corresponded with the form furnished by the Adjutant General. It purported to have been corrected on the first *Tuesday* of *May*. Comparing the twelfth and twenty-first sections together, it is manifest, that correcting and revising the roll on the first *Tuesday* of *May*, mean the same thing, in the sense in which these terms are used by the Legislature. The act does not prescribe what terms shall be used in the caption of a company roll. It charges the Adjutant General with the duty of issuing forms, which are to be uniform, with this limitation implied, that they do not depart from the requirements of law. And we are of opinion, that the form of a company roll, issued by him, is not liable to this objection. It was then competent evidence; and should have been received by the Justice at

the trial. The error, therefore, founded upon its rejection by him, is well assigned.

Judgment reversed.

Robert Leighton *et al. vs.* Nicholas W. Manson.

Where account-books, kept in the handwriting of one of several partners, *with his supplementary oath*, would have been evidence for the plaintiffs, had he been alive; the same *books* are competent evidence after his death.

Although it is difficult to fix on any definite and clear rule of general application, to determine how large the quantity of articles delivered at one time must be, from whence the presumption arises, that there exists better proof, in order to exclude the books of the party; the best rule seems to be, for the Judge to decide upon inspection of the items of the account, whether the articles charged could ordinarily have been delivered without the assistance of other persons, and admit or reject the testimony, as he may conclude the articles could, or could not, have been so delivered.

Where the only items in the account were 355 pounds of beef and 360 pounds of beef, bearing the same date, and standing together without any other charges intervening; *it was held*, that the books were not competent evidence of the delivery of the beef.

Where a nonsuit has been once properly ordered by a Judge of the Court; whether the nonsuit shall, or shall not, be taken off *by him on motion* of the plaintiff, because he had discovered new evidence, unknown when the nonsuit was ordered, is an *exercise of discretion*, and not subject to the revision of the whole Court *by way of exceptions* to the refusal of the Judge.

Assumpsit on an account annexed to the writ, a copy of which follows: —

" *Nicholas W. Manson*

" to *Robert Leighton*, 3*d*, and *Joshua Gowen, jr.* *Dr.*

" 1831, *Dec.* 20,	To 355lb. beef,	at	$4½	pr. cwt.	$15,97
"	" " 360	"	4½	"	16,20
					$32,17

The plaintiffs were surviving partners of one *Prince*. The co-partnership of the plaintiffs and *Prince* was admitted, and the death of *Prince*, before the commencement of the suit, was proved. To prove the items in the account, the plaintiffs offered in evidence a book of original entries in the handwriting of *Prince*. *Emery J.*,

before whom was the trial, refused to admit the evidence on the ground, that the articles were of a bulky nature, and the delivery of them might and should be proved by other testimony. The plaintiffs thereupon became nonsuit with leave to set it aside, if the ruling of the Judge was incorrect.

At a subsequent day, in the same term, the plaintiffs moved to set aside the nonsuit, because they had discovered evidence of the delivery of the articles to the defendant by *Prince*, which was not known to them at the time the nonsuit was directed. But the defendant not consenting, that the nonsuit should be removed, *Emery J.* refused to set it aside. If the ruling and decision of the Judge was erroneous, the nonsuit was to be set aside.

Codman, for the plaintiffs, contended, that the evidence offered was legally admissible, and cited 3 *Dane*, *c.* 81, *art.* 1, § 4; *ibid*, *c.* 81, *art.* 4, § 1; *Cogswell* v. *Dolliver*, 2 *Mass. R.* 217; *Shillaber* v. *Bingham*, 3 *Dane*, 321. No presumption can arise in this case from the dealings, that the plaintiffs kept clerks, who could testify. *M'Coul* v. *LeKamp*, 2 *Wheat.* 111; *McLellan* v. *Crofton*, 6 *Greenl.* 307. Where the party has deceased, the books are evidence, as they would be with the oath of the party making the entry, were he alive. 1 *Salkeld*, 285. The nonsuit should have been removed. It is like granting a new trial on petition. The refusal to take off a nonsuit is not an act of discretion, but a ruling in matter of law. *Purple* v. *Clark*, 5 *Pick.* 206.

The discovery of new testimony is a sufficient cause for taking off a nonsuit or granting a new trial. *Clapp* v. *Balch*, 3 *Greenl.* 216; *Frothingham* v. *Dutton*, 2 *Greenl.* 255.

W. Goodenow, for the defendant, contended, that the book was not in any case evidence, without the oath of the person making the entry in support of it. The death of such person is no exception. *Frye* v. *Barker*, 2 *Pick.* 65.

But the books could not be admitted in evidence, if *Prince* was alive and ready to make oath to them. Both items are of the same date, and are to be considered, as delivered at the same time. The articles are of a character to show, that other persons were present at the time. There is the same law, and as much reason, for charging the cow, when alive, as the whole carcase, when killed.

Dunn v. *Whitney*, 1 *Fairf.* 9; *McLellan* v. *Crofton*, 6 *Greenl.* 307.

The taking off a nonsuit, or refusing it, is merely an act of discretion, and not subject to exceptions. But if exceptions would lie, no new trial ought to be granted for the cause set forth in the report. *Bond* v. *Cutler*, 7 *Mass. R.* 205.

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

Shepley J. — The plaintiffs at the trial, proposed to introduce their books to prove the sale and delivery of three hundred and fifty-five pounds of beef, in one item, and three hundred and sixty pounds of beef in another item, after proving that the original entries were made in the handwriting of a deceased partner.

The judge who presided at the trial, refused to permit the books, under these circumstances, to go to the jury, on the ground that the delivery of these articles should have been proved by other testimony. In the argument, two objections were taken to the admissibility of the books.

First, That the books could only be admitted when accompanied by the oath of the person making the entries; and that could not be had in this case, the person not being alive.

Secondly, That the articles themselves were of too bulky a nature to permit the delivery to be thus proved, because from the nature of the transactions there must be other and better proof of the delivery.

In the earliest reported cases, the books seem to have been admitted only "as a foundation for the suppletory evidence of the oath of the party." 2 *Mass. R.* 217, *Cogswell v. Dolliver.*

It soon became evident, that there would be much difficulty in collecting the debts due to mechanics and traders after their decease, unless the books were regarded as competent testimony, after proof that the original entries were made in the handwriting of the person purporting to deliver the articles, or perform the services, and that such person had deceased.

In the case of *Prince, administratrix,* v. *Smith,* 4 *Mass. R.* 455, a paper, containing items of account, and alleged to have been transcribed from the books of the intestate, was offered and rejected on the ground, that there was no evidence, that it had been truly

transcribed from the books; the books themselves having been destroyed. *Sewall J.*, in delivering the opinion of the Court, says, "if the proof in this case had extended to shew, that the items of this account had actually existed in the intestate's shop-book, where his daily transactions were minuted, and that the transcript offered, had been truly taken therefrom, I should have no doubt of the admissibility of a transcript thus compared and proved, upon the ground of necessity; and that it was the best evidence which the case admitted, under all the circumstances." It cannot be doubted, that the books themselves, upon these principles, would have been admitted, after proof of the original entries, in the handwriting of the deceased, if they had been in existence.

In *England*, where the books of the party are not generally admitted as evidence, they have been from necessity admitted, when the person delivering the articles and making the entries in the books had deceased. 2 *Ld. Raym.* 873, *Price* v. *Torrington.* Proof of no higher character was regarded as competent in the case in 2 *Wheat.* 111, *M'Coul* v. *LeKamp.* Books were admitted as competent testimony when the original entries were made in the handwriting of a deceased clerk. 3 *Pick.* 96, *the Union Bank* v. *Knapp.* The party's own books, the original entries being in his own handwriting, were admitted after his decease as proof, in 6 *Greenl.* 307, *McLellan* v. *Crofton.*

If the books were without other objection, than that they could not be accompanied by the oath of the party making the entries, there would be no valid objection to them, as testimony in the cause. The second objection presents more difficulties.

Speaking of the admission of the party's books, accompanied by his own oath, *Sewall J.*, in *Prince* v. *Smith*, says: "It is a practice which has been long established, and seems to have arisen upon the most reasonable grounds, out of the necessity of the case, and a conformity to the actual state of things."

In the case of *Shillaber* v. *Bingham*, 3 *Dane's Abr.* 321, the Court held, that no distinction in regard to quantities had been made in the proof of the delivery of articles of merchandize, by the books and suppletory oath of the party.

In the case of *Dunn* v. *Whitney*, 1 *Fairf.* 9, that case was commented upon, and a doubt was expressed whether it could now be

regarded as affording a safe rule, and the reasons were stated for entertaining such doubts.

And in that case, it is said, such evidence "is never to be received in support of such demands, as in their nature afford a presumption, that better evidence existed." And it is also said, "if sold and delivered in large quantities, the presumption is, that persons other than the party making the sale, would be likely to have knowledge of it, and therefore the books of the seller are inadmissible."

The question remains undecided, how large must the quantities be, before the presumption arises of better proof, so as to exclude the books and oath of the party? It may be very difficult to fix upon any rule so definite and clear, as to be of easy application in the administration of justice.

The books of a party have been, it is believed, more extensively received as evidence, than has been at times supposed. The practice has not been confined to *New England*. They have been received, with certain restrictions, as testimony in the State of *New York*. 12 *Johns. R.* 461, *Vosburgh* v. *Thayer*. So are they received in the State of *Pennsylvania*. 1 *Dallas*, 238, *Poulteney* v. *Ross*.

And in a note to *M'Coul* v. *LeKamp*, 2 *Wheat.* 118, it is said to be certain, that the books of merchants, traders, and mechanics, are admitted by the codes of the European continent, founded upon the civil law, "the oath of the party being added to this imperfect evidence afforded by the books."

While the necessities of business have, in modern times, since books have become more extensively the evidence of dealings, induced the Courts to admit the books of the party, it is very desirable, that no limitation should be placed upon their competency as testimony, which will embarrass men in their daily business. On the other hand, the Courts have always perceived, that there were "obvious difficulties and hazards, attending this mode of proof; and that it ought not to be extended by any new precedents."

And in the case of *Dunn* v. *Whitney*, it was said, "the situation and circumstances of trade are gradually becoming such, as very much to diminish the reason of the relaxation of the common law rule; and as the reason for the exception ceases, Courts will rather

restrain, than enlarge the exception itself." The object to be attained, by the admission of the books with the party's oath, is to prove the service performed, or the articles delivered. The party must be able to state, that he actually delivered the articles, or was knowing to their delivery, as well as that he made the entries.

The necessity, then, for the oath of the party in aid of his books, seems to exist only where he delivered the articles himself. If the articles are of such bulk or weight, that the person making the entries could not reasonably be supposed to have delivered them without assistance, the presumption would arise, that better evidence of delivery might be produced; and the reason for admitting his own testimony would cease.

Perhaps no better rule for the guidance of judicial tribunals will be found, than for the Judge to decide upon inspection of the items of the account, whether the articles charged could ordinarily have been delivered without the assistance of other persons; and admit or reject the testimony according, as he may conclude, that the articles could or could not have been so delivered.

Acting upon this rule, the Court must conclude, that it could not ordinarily be expected, that one person should have delivered the articles charged in the account; and the ruling of the Judge must be regarded as correct.

On a subsequent day of the term, the plaintiffs moved to set aside the nonsuit, alleging that they had discovered evidence of the delivery of the articles, not known to them when the nonsuit was directed; but the Judge refused to set it aside.

If a nonsuit be ordered against the *legal rights* of the plaintiff, it forms a just cause of complaint, and a bill of exceptions may be taken to such direction. The nonsuit in this case is admitted to have been properly ordered; and the question, whether the action should be afterwards restored to the docket, and remain there, or be continued until the newly discovered evidence could be produced, addressed itself to the discretion of the Judge. It is not a matter of right. The party can have no strictly *legal right* to have an action once disposed of, restored for that cause, simply upon motion. This Court may exercise such a legal discretion upon a proper application for a *new trial;* but the party might as properly except to the refusal of the Judge to continue the action to the next term

to enable him to obtain his testimony, as to except to the refusal to restore it upon motion, after it had been properly disposed of. It has been decided, that the decision of a question submitted to the discretion of the Judge is not the proper subject for exceptions. 3 *Greenl.* 216, *Clapp* v. *Balch.* The nonsuit having been properly directed, and this Court having no legal power to control a Judge in the *exercise of a discretion* by law entrusted to him; the nonsuit is confirmed.

Benjamin Weymouth *vs.* William McLellan.

Where money has been paid in part performance of the conditions of a bond for the conveyance of land; and where the party paying it suffered the bond to expire without fulfilling the other stipulations contained in it, and thereby forfeited all claim to have a conveyance of the land; he cannot recover back the money thus paid.

Assumpsit for money paid, laid out and expended, and for money had and received. The defendant had an interest in a tract of land owned by an association, of whom *J. W. Appleton* was one, called the *Languedoc* tract, under said *Appleton*, with the privilege of being interested in any other lands the association might purchase on paying his share. This interest the defendant assigned to one *Locke*, on certain conditions, and *Locke* assigned to the plaintiff. Before any breach of the conditions on the part of the plaintiff, the association agreed to purchase another tract, called the *Sunderland* tract; and the plaintiff on being called on by *Appleton* to make his election and pay his share of the advance money, if he elected to be concerned in the purchase, paid *Appleton* for this purpose $225,00, which sum *Appleton* credited to the *defendant* towards his share so assigned to *Locke*. The plaintiff suffered the bond to expire without fulfilling the same on his part, and brought this action against the *defendant* to recover of him the $225 paid to *Appleton*. The trial was before *Parris J.*, who charged the jury, that if they found, that the plaintiff paid the money to *Appleton* for the purpose of securing to himself the interest in the *Sunderland* tract, in case he should perfect his title to the *Languedoc* tract, which he then had a right to do, he had no legal claim against

the defendant for the money. The verdict was for the defendant, and was to be set aside, if the instruction was wrong.

Codman, for the plaintiff, contended, that this was not like the case of *Rounds* v. *Baxter*, 4 *Greenl.* 454, but a case where the consideration had failed, like those in 10 *Mass. R.* 31; 13 *Mass. R.* 216; and 5 *Mass. R.* 199. He also contended, that this money went to the use of the defendant, and that the plaintiff was entitled to recover it from him, because it was unconscionable in him to retain it; and cited 12 *Mass. R.* 365; 8 *Mass. R.* 257; *ib.* 266.

Preble, for the defendant, said, that the defendant had neither received the money, nor derived any benefit from the payment of it; and he could not conceive on what principle the suit could be maintained. If the money had been received by the defendant in part fulfilment of the stipulations in the bond, the law was very well settled, that it could not be recovered back, as the plaintiff had wholly failed to comply with the conditions on his part. *Ketchum* v. *Evertson*, 13 *Johns. R.* 359.

The opinion of the Court was, after a continuance, delivered by

Weston C. J. — We cannot distinguish this case in principle from that of *Rounds* v. *Baxter*, 4 *Greenl.* 454. The plaintiff had become the assignee in part of the right to purchase lands, upon certain specified conditions. He paid the money he seeks to reclaim in this action, with a view to perfect and avail himself of the purchase. He ultimately came to the conclusion, that the bargain might be a losing one, and went no farther.

Although the plaintiff may have been disappointed in the result, there has been no failure of consideration. That consisted in the chance of gain from the contract, a portion of which was assigned to him. It was also a prejudice to the defendant to forego this chance, and to deprive himself of the right, for the period limited in the bond, to sell the same interest to others. The jury have found, that the plaintiff paid the money, to secure an interest of his own. If it has enured to the benefit of the defendant, it is because the plaintiff has elected to abandon that payment, rather than to encounter the peril of greater loss. He may have decided wisely. In our judgment, he must abide by this result. We do not per-

ceive that he has any legal or equitable claim to recover of the defendant the amount he has paid.

Judgment on the verdict.

Benjamin Richardson *vs.* Isaac York *& als.*

Where land is granted "reserving to the grantor the use and control of the lands granted during his natural life," the reservation gives to the grantor but a life estate in the land; and he has no right thereby to cut and take timber trees therefrom for sale.

And if timber trees be thus cut, they become the personal property of the reversioner, and he may maintain replevin for them.

This was an action of *replevin* for a quantity of mill-logs, and came before the Court upon a statement of facts agreed by the parties, in substance, as follows. *Isaac York*, one of the defendants, owned a small farm in *Standish*, of about thirty-five acres, about half of which was woodland, with some timber upon it, and the residue improved land, with the buildings and fences thereon much out of repair; and on the 14th of *Oct.* 1831, by deed of warranty conveyed the same to his son *Joseph*. This deed was in common form, except that immediately following the description of the land, and preceding the *habendum*, were these words, "reserving to myself the use and control of the above described lands during my natural life." *Joseph York*, the grantee, on *Nov.* 24, 1834, conveyed all the pine and hemlock trees upon said land to the plaintiff, "reserving so much of said trees and timber for the benefit of *Isaac York*, who has a life estate in the premises, as shall be necessary, convenient and indispensable to the enjoyment of the premises aforesaid during his lifetime, the quantity reserved and left to be ascertained and designated by *Isaac Spring*." At this time *Isaac York* was poor and unable to support himself, and the income of the real estate was wholly insufficient for that purpose, and in *Dec.* 1834, he agreed to sell a quantity of timber from this land to be

delivered on the bank of *Saco River*, "intending to appropriate the proceeds of the sale to his own support, and had he been permitted so to apply it, he would have had no more, than a comfortable provision thereunto." He with the other defendant proceeded to cut the timber, but before it reached the river it was replevied in this suit.

Deblois, argued for the plaintiff, and insisted that the greatest estate *Isaac York* could possibly have, was a life estate; that tenant for life had no right to cut down timber, that being the first thing noticed in the books, as waste; that the restriction was carried so far, that even the tenant for life could not sell firewood to be carried from the land, or clear up woodland for cultivation, much less to cut timber for sale; that when the timber was severed, it belonged to the reversioner under whom the plaintiff claims, and whose rights he has, and that replevin was the proper action in this case. He cited 5 *Greenl.* 232; 1 *Cruise*, 130; 1 *Coke Lit.* 52, *a*; 7 *Johns. R.* 233; 7 *Pick.* 152; 5 *Mason*, 13; 1 *Greenl.* 6; 15 *Mass. R.* 164; 10 *Mass. R.* 303; 3 *Atkins*, 216; *Hob.* 234; 2 *Peere Wms.* 141; 3 *Peere Wms.* 266; 8 *Pick.* 309; 1 *Cruise*, 138; 4 *Mass. R.* 266; 5 *Mass. R.* 341; 3 *Dane*, 187; 5 *Mass. R.* 280; *ib.* 303; 15 *Mass. R.* 362; 16 *Mass. R.* 147; 4 *Greenl.* 306; 1 *Coke Lit.* 53, *a*; 2 *Cro. Eliz.* 533; 1 *Vern.* 23; 2 *Vern.* 738; *Rev. Stat. ch.* 34.

Codman, for the defendant, contended, that the action could not be maintained, because the sale to the plaintiff gave him no right to the trees, it being a mere injury to the freehold; that if any person could maintain the suit, it must be the tenant of the freehold, and not the plaintiff; that if the trees were sold, as personal property, and could otherwise pass, that a delivery was necessary; that the true construction of the deed was, that the reservation gave to *Isaac York* all the rights over the real estate during his life, that he would have had, if the deed had not been given, *Joseph* being to have it only, as it was left at *Isaac's* death; that the smallest estate *Isaac* could take was a tenancy for life without impeachment of waste; and that if there was any remedy, it was by bill in equity, and not by this action. He cited 1 *Chitty on Pl.* 146; 9 *Mass. R.* 112; 15 *Mass. R.* 310; 4 *Greenl.* 376; 5 *Greenl.*

277; 12 *East*, 221; 1 *Vesey, jr.* 484; 2 *Peere Wms.* 241; 4 *Coke*, 62.

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

EMERY J. — The great question in this case is, whether the logs replevied are the property of the plaintiff, so as to draw to him the right of maintaining the action. For it is certain, he could not rightfully have entered to cut them himself without the assent of *Isaac York*, one of the defendants.

In the language of *Heath J.*, in *Attersoll* v. *Stevens*, 1 *Taunt.* 183, at *p.* 198, it is stated, as common learning, that every lessee of land, whether for life or years, is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed. If a general or a partial permission be given to the lessee in the instrument creating the estate, to commit waste, he is so far a tenant without impeachment of waste. Such a permission vests the property of what is the subject of waste, in the lessee, so that he avails himself of it during the continuance of his interest. It is so with respect to trees and minerals.

From the statement of facts we learn, that the land conveyed by *Isaac York* to *Joseph York*, on which the trees were cut, consisted of about thirty-five acres, from fifteen to twenty acres of which is partially wooded, the residue consists of mowing and pasture, about five acres of that mowing is interval, and of a good quality; and the income of the land is insufficient for the support of said *Isaac*; and that said *Isaac* has not sufficient income from every source for his comfortable support; that he intended to apply the proceeds of the sale of the logs to his own support, and that if so applied, it would not have been more than a comfortable provision thereunto; that the house occupied by said *Isaac* was, and is, greatly out of repair as well as the fences; that the said *Isaac* is very poor, nearly 80 years of age, and very decrepid.

In no part of the statement of facts, or in the deeds, is it made known whether this was an arrangement made by father and son for the support and maintenance of the father, though it is strongly to be suspected.

The deed of *Isaac York*, dated the 14th *Oct.* 1831, conveys to *Joseph York* "the north-west half of the homestead farm, whereon I now live, reserving to myself the use and control of the above described lands, during my natural life." The deed of *Joseph York* to the plaintiff, dated 24th *November*, 1834, for $175, sells and conveys to him all the pine trees and hemlock trees standing growing, and being on the northwest half of the homestead farm on which *Isaac York*, now of *Standish*, in the County of *Cumberland*, lives, with license to go on and cut and carry away the same; the said north-west half, being the same land described in a deed of *Isaac York* to *Joseph York*, dated *October* 14th, 1831, reserving so much of said trees and timber for the benefit of *Isaac York*, who has a life estate in the premises, as shall be necessary, convenient, and indispensable to the enjoyment of the premises aforesaid during his lifetime, the quantity reserved and to be left as aforesaid, to be ascertained and designated by *Isaac Spring*.

In *Paget's* case, 5 *Coke's Rep.* 77, it was resolved that when trees are cut down by tenant for life, the property thereof belongeth to him in remainder in fee.

Afterward, and contrary to the adjudication in *Herlakenden's* case, 4 *Coke's Rep.* 62, it was adjudged by all the Judges in the *King's Bench*, 11 *Coke's Rep.* 79, in *Lewis Bowles'* case, which was trover and conversion, that the lessee without impeachment of waste shall have trees which he cuts, for without impeachment of waste, is as much as without demand for waste done; otherwise, it is, if it be without impeachment, &c., by writ of waste. It was also resolved, that if trees are blown down with the wind, the lessee, without impeachment of waste, shall have them.

After this determination, it was a necessary consequence, that in general, unless on particular circumstances, the lessee for life, without impeachment of waste, was not to be restrained in equity.

But it is said, that the clause was never extended to allow the destruction of the estate itself, and would not give leave to fell or cut down trees ornamental or sheltering of a house; much less to destroy or demolish a house. *Packington* v. *Packington*, 3 *Atk.* 215. In that case, the Lord Chancellor declared, that Courts of Equity had in this respect established rules much more restrictive than those of the common law, which gave tenant for life without

impeachment of waste, as large a power over the timber, as tenant in fee simple, that timber might be had for public use. 7 *Bac. Abr. Waste,* 289. It was malicious, extravagant, humorous waste, which the Courts of Equity would restrain.

The parties here have disregarded the provision of our own statute, passed *Feb.* 28th, 1821, *ch.* 34, which provides, "that any person seised of a freehold estate, or of a remainder or reversion in fee simple or fee tail in a lot of woodland or timberland in this State, whereon the trees shall have come to an age and growth fit to be cut, may petition to this Court to have them felled and sold, and the proceeds invested for the use of those interested in such woodlands."

It is not to be questioned, that conformably to the strict construction adopted in *Massachusetts,* that for a tenant in dower to cut timber for sale would be waste, and produce a forfeiture of the place wasted. And so in this State.

But upon the deeds and facts agreed, is the defendant, *Isaac York,* to be subjected to the unmitigated consequences of his acts, as if he was a mere tenant for life without any excuse?

Almost the whole of the cases have arisen under leases, or devises, &c. Here he was original owner, conveying the land in fee, reserving to himself the use and control of the lands during his natural life. It may well be doubted whether this alone would protect him, though the terms are very broad. But though the second deed, under which the plaintiff claims, as purchaser of the trees, might seem to extend to defendant a greater latitude, yet the terms use and control of the land, do not necessarily include destruction of the timber.

In *Davis* v. *Uphill,* 1 *Swanston,* 129, an estate had been limited to *Ann Uphill* for life, remainder to her children, by her deceased husband, as she should appoint; in default of that appointment, to the children in common. They agreed with her, that on her joining in a recovery, the first use should be to her for life, without impeachment of waste. Some difficulty occurred in the conveyance. She commenced cutting, and an injunction was obtained. But the Court refused to continue it to restrain her from cutting timber, unless security was given to her for the full value of all she might cut in her lifetime. This was in 1818.

The expressions in the deed of *Joseph York* to the plaintiff, reserving so much of said trees and timber for the benefit of *Isaac York* as shall be necessary, convenient, and indispensable to the enjoyment of the premises during his natural life, might possibly have misled the defendants to a supposition that they were equivalent to the expressions, without impeachment of waste. But besides this, they may have supposed that the plaintiff has no exclusive property in the trees and timber, till what should be left was ascertained and designated by *Isaac Spring*.

It does not appear, but what the trees cut were of suitable growth, and fit to be cut. *See* 8 *Term Rep.* 145, *Martin* v. *Knowlys*. It is not stated, that they were intended to be applied to the repairs of the fences, or buildings, but the poverty and age of the defendant shows that the supply would be *convenient*, if not necessary for his enjoyment of the premises.

In *Virginia* it is held, by *Roane J.*, *Findley* v. *Smith*, 6 *Munf.* 134, that in considering waste in this country, the common law, by which it is regulated, adapts itself in this, as in other cases, to the varied situations and circumstances of the country. That cannot be waste, for example, in an entire woodland country, which would be so in a cleared one. The contrary doctrine would starve a widow, for example, who could not subsist without cultivating her dower land, nor cultivate it without felling the timber. A clearing of the land in such circumstances, would not be a lasting damage to the inheritance, nor a disherison of him in remainder, which is the true definition of waste. Here the widow is not dowable of wild lands, and so is not put in temptation to fell the trees.

In the case under consideration, it is not among the facts agreed, that what was done was to the prejudice of the plaintiff's inheritance. *The whole is left on the allegation of a cutting of pine and hemlock timber.*

We must gather the intention of the parties from their deeds, as well as we can on the words in the deed. And though we may conjecture, that the grantor, *Isaac*, intended not to be limited by the terms *use and control* to any thing, but the employment of the property during his life as he did before ; and though this conjecture is strengthened by *Joseph's* explanation or enlargement in his deed to the plaintiff; and though it does not appear, but there is a suffi-

ciency of such timber left for the remainder man, yet upon the facts agreed, the plaintiff, according to the rules of law, *upon the severance by the defendants of the pine and hemlock timber from the freehold, became the owner of it.* We may lament the carelessness with which parties have instruments drawn relating to the relative rights of tenant for life and persons in reversion or remainder. But in this case, in the opinion of the Court, the defendant, *Isaac York*, by his reservation, remained liable to impeachment of waste; and therefore the defendant must be defaulted.

Samuel Lombard & *al.* *vs.* David Cobb.

Where several sureties pay the debt of their principal, and there is no evidence of a partnership, or joint interest, or of payment from a joint fund, the presumption of law is, that each paid his proportion of the same; and a joint action cannot be maintained.

Exceptions from the Court of Common Pleas.

Assumpsit for money paid for the defendant as his sureties, as collector of taxes in the town of *Gorham.* The plaintiffs proved that they were sureties of the defendant on his bond to the town. They also proved, that they gave a note to the town, the amount of which was indorsed on the bond, and that the note was afterwards paid by them. One of the Selectmen of the town, being called by the plaintiffs, testified, that the plaintiffs and defendant were present with the Selectmen, and that the Selectmen requested the plaintiffs to give the town a note for the defendant's default, as collector of taxes, and that the defendant was present when the note was given, and at the settlement of the amount, and made no objection. There was no evidence by whom the payment of the note was made, nor from what fund. The counsel for the defendant contended, that a nonsuit should be ordered, because the plaintiffs could not join in the action, they not being partners, and not having paid the note out of a joint fund, and there being no evidence of any express promise to them jointly. There was another objection made, but as it was not considered by the Court, it is not stated, nor the arguments bearing upon it given. *Whitman C. J.*, before

whom the trial was had, was of opinion, that the plaintiffs were rightly joined in the action, and instructed the jury to return their verdict for the plaintiffs, which they did, and the defendant filed exceptions.

Adams, for the defendant, argued that the rule of law was, that several sureties who had paid the debt of their principal, could not join in an action against him, but each must seek his separate remedy. The exceptions to the rule are, that they are partners, or have paid the note out of a joint fund, or there has been an express joint promise to pay, or indemnify them. The present case does not come within either of the exceptions. *Chitty on Pl.* 8; *Graham* v. *Robertson*, 2 *T. R.* 282; *Beman* v. *Blanchard*, 4 *Wend.* 432; *Foster* v. *Johnson*, 5 *Vermont R.* 60; *Scott* v. *Goodwin*, 1 *B. & P.* 67.

J. Pierce, for the plaintiffs, said, that the defendant was present when the plaintiffs gave their joint note, and that in fact it was paid by their jointly supporting the poor of the town. Although the witness could not state, how the note was paid, yet as they gave a joint note, the presumption is, that its payment was joint. Where there is a joint damage all may join in bringing the suit. 1 *Chitty on Pl.* 54; 2 *Mason*, 181; 3 *Taunt.* 87; 12 *Johns. R.* 1; 14 *Johns. R.* 358; 17 *Johns. R.* 113; 13 *Petersdorf's Ab.* 90.

The opinion of the Court was drawn up by

Shepley J. — The plaintiffs were sureties for the defendant on a bond given by him to the treasurer of the town of *Gorham*, to secure the faithful discharge of his duties as collector of taxes. The defendant having failed to collect, and pay as required, and the plaintiffs having been called upon, they made and signed a note payable to the treasurer for the amount said to be due from the collector. The case states, "and it was further proved, that the plaintiffs had duly paid said note before the bringing of the action. The defendant's counsel objected, that the action could not be maintained, because the plaintiffs could not join in the action, they not being partners, nor having paid said note out of any joint fund; and there being no evidence of any express promise to them jointly by the defendant to pay or indemnify them against said note or

their liabilities." The jury were instructed, "that the plaintiffs were rightly joined in the action."

In simple contracts where the consideration is joint, as payment from a joint fund; or where there is an express joint promise; or where the consideration has moved separately from each and the benefit to be derived from the contract is joint; the action should be in the name of all. 1 *Roll. Ab.* 31, *pl.* 9; 5 *East*, 225, *Osborne et al.* v. *Harper;* 1 *Taunt.* 7, *Hill* v. *Tucker.* But where two, or more, are liable to pay for others, and pay separately they cannot join. 2 *T. R.* 282, *Graham et als.* v. *Robertson;* 3 *Bos. & Pull.* 235, *Brand et al.* v. *Boulcot.* In this case there is no evidence, whether the payment was made from a joint fund, or separately by each. There being no evidence of a partnership, or joint interest, the presumption is, that each fulfilled his duty by paying his own share. If one were to sue the other for contribution, the presumption would be, that each paid the share which the law exacted of him, and that presumption must be removed by proof. The case of *Osborne et al.* v. *Harper*, as first presented to the Court, was like this case in that respect, the proof being, that the attorney paid the money, at the request of the plaintiffs. After argument, the Court directed the attorney to make affidavit, and it so being made to appear, that the money had been partly advanced on their joint credit, and partly borrowed on their joint note, the action was sustained. And such proof seems to have been considered as necessary to sustain it.

Where the assessors of a town had paid money for which they were liable, it was held to be the presumption of law, that the assessors had individually paid their proportions of the same. 7 *Pick.* 18, *Nelson* v. *Milford.*

The plaintiff's counsel in argument asserts, that the payment in this case was in fact made out of a joint fund, obtained by their performing a joint contract for the support of the poor. If such testimony had appeared in the case, it would have been sufficient to enable them to maintain the action jointly, but as it does not, this Court cannot so consider it. It has not become necessary to consider the other point in the case, as a new trial must be granted, and any defect of testimony may be supplied.

Exceptions sustained and new trial granted.

JAMES L. FARMER *vs.* JOHN RAND.

If a note be altered in a material part, without the consent of the party to be affected by it, it is void as to such party.

This principle applies to an alteration, changing the liability of an indorser from a conditional to an absolute engagement.

The words, we waive demand on the promisor and notice to ourselves, written over the names of several indorsers, and appearing on the note when offered to be read to the jury, are *prima facie* evidence of a waiver of demand and notice.

Where a note payable to order was indorsed in blank by four individuals, and afterwards the second indorser, being then the holder of the note, wrote above all the names the words, "*we waive all notice on the promisor and ourselves, and guaranty the payment at all events,*" without the assent or knowledge of an after indorser; *it was held*, that such after indorser was thereby discharged.

EXCEPTIONS from the Court of Common Pleas.

Assumpsit by the plaintiff, as indorsee, against the defendant, as indorser, of a promissory note, of which the following is a copy.

"$350. *Boston, Oct.* 31, 1835.

"Eight months after date, I promise to pay to the order of *J. Fairbank*, at *Tremont* Bank, in *Boston*, three hundred and fifty dollars, value received with interest. *J. Fairbank.*"

On the back of the note, there was written crosswise, and near the top of the paper, these words: "We waive all notice on the promisor and ourselves, and guaranty the payment at all events." Directly below were written the names "*J. Fairbank*," "*K. B. Sewall*," "Pay to order of *E. P. Clark*, Cashr., *C. C. Tobie*, Cashr.," "*Edward H. Thomas*," "*John Rand*," "*Jas. L. Farmer.*" When the note was left in the *Cumberland* Bank, the name of *Thomas* followed immediately after that of *Sewall*, but with a larger space intervening than between the others, the name of *Farmer* being written near the bottom; and the Cashier of the Bank wrote the words "Pay to order of *E. P. Clark*, Cash. *C. C. Tobie*, Cash.", for the purpose of sending it to a bank in *Boston* for collection, on the blank space between those signatures. After the introduction of certain evidence in relation to a demand and notice, which were objected to and their sufficiency contested, the defendant proved, that the waiver of notice and guaranty of pay-

ment at all events were written over the names by said *Sewall*, the second indorser, who then held the note, after it had been indorsed by the defendant, when he was not present, and without his knowledge, privity, or consent. The defendant thereupon contended, that the writing of such waiver and guaranty, under the circumstances proved, was a material alteration of the note, and rendered it void, as against the defendant. *Whitman C. J.*, who presided at the trial, instructed the jury, that the writing such waiver after the note had been indorsed by the defendant, and when the defendant was not present, and without his knowledge, privity, or consent, was not a material alteration of the note, and did not discharge the defendant. And that such waiver affected only the person making it; that the contract of each indorser was several, and created a several contract as to him, as much as if each contract had been written on a separate piece of paper; and that no agreement as to one inserted over his name, could alter the liability of any other, unless inserted by his consent immediately over his name. The verdict was for the plaintiff, and the defendant excepted to the instructions of the Judge.

Rand, pro se, contended, that the writing of the waiver of demand and notice, and of the guaranty at all events, was a material alteration, changing his liability from a conditional to an absolute one. This having been done without any assent, or knowledge, on his part, destroyed all right of action on the paper against him. He cited *Bayley on Bills, Ed. of P. & S.* 58; *Masters* v. *Miller*, 4 *T. R.* 320; *Cowie* v. *Halsall*, 4 *Barn. & Ald.* 197; *Wheelock* v. *Freeman*, 13 *Pick.* 165; *Clawson* v. *Dustin*, 2 *Southard*, 821; *Bank of America* v. *Woodworth*, 18 *Johns. R.* 315; *U. States* v. *Barker*, 12 *Wheat.* 559.

W. Goodenow, for the plaintiff, insisted, that the charge of the Judge of the Court of Common Pleas put the case on its true grounds. The defendant is not sought to be charged by reason of any thing written on the back of the note, other than his own signature, but on the ground of his being an indorser, and of a regular demand and notice. No liabilities or remedies of the defendant are changed by the words written upon the note. They apply only to the first signature under them. Each indorser undertakes for

himself, and not jointly with others. The cases cited are where there was an alteration of the note, and not to writing words over the name of an indorser. *Nevins* v. *Degrand*, 15 *Mass. R.* 436; *Bayley on Bills*, 90; *Gore* v. *Boardman*, 15 *Mass. R.* 331.

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

WESTON C. J. — The authorities are very clear, that if a note or other instrument be altered in a material part, without the consent of the party to be affected by it, it is void. *Masters* v. *Miller*, 4 *T. R.* 320; *Powell* v. *Divett*, 15 *East*, 29; *Hatch et al.* v. *Hatch et al.* 9 *Mass. R.* 311; *Homer* v. *Wallis*, 11 *Mass. R.* 309. *Cowie et al.* v. *Halsall*, 4 *Barn. & Ald.* 197; *Wheelock* v. *Freeman*, 13 *Pick.* 165; *Clawson* v. *Dustin*, 2 *Southard*, 821.

The case finds, that after the note was made and indorsed as it now is, with the exception of the indorsement of "*C. C. Tobie* to *E. P. Clark*," the waiver of demand and notice was written over the signatures of all the indorsers, by *Sewall*, the second indorser, without the knowledge or consent of the defendant. If this waiver does, as the instrument stands, apply to the defendant, it is a material alteration, which discharges him. His contract made him liable upon demand and notice; by the alteration, he was liable without either. Suppose the indorsers had all assented to the waiver, in what terms could their assent be more intelligibly expressed. They are severally bound by their respective indorsements, but they might all agree to waive demand and notice; and such agreement would be taken distributively, and applied to each. "We waive," is equivalent to the words, "we severally waive," as the contract of each was several upon his indorsement.

Waiver of demand and notice is not so unusual, as justly to excite a suspicion, that its insertion was a fraudulent alteration. The signatures of all following the waiver, is, we doubt not, *prima facie* evidence against each, that he assented to it. *Sewall* certainly cannot be understood, from the terms used, to have intended to confine the waiver to himself; nor is there reason to believe, that the plaintiff, who discounted the note, received it with that limitation.

The jury were correctly instructed, that *Sewall* could not, by what he had written, bind the others who had not assented; and

that it was not in his power, without authority, to alter their liability. And that is true of all unauthorized alterations of instruments, which yet however, if material, destroy their legal obligation. After the alteration, the defendant was subjected to the hazard of being charged, without demand or notice; for such is apparently his undertaking, aside from the counter proof, by him introduced. In *Cowie* v. *Halsall*, the holder altered a general acceptance of a bill of exchange, by subjoining a certain house, as the place of payment. This was held such a material alteration, as discharged the acceptor. It subjected him to the hazard of being sued and arrested, without notice. The acceptor there had made himself liable, as such, to pay absolutely. Here the defendant had undertaken conditionally; but the alteration dispensed with the condition, and converted his promise into an absolute guaranty. And in our opinion, the Judge, who presided at the trial, should have instructed the jury, that the alteration was material, and the defendant discharged. The exceptions are accordingly sustained, the verdict set aside, and a new trial granted.

Francis Kelley *vs.* Thomas Merrill.

If a party chooses to hazard a general interrogatory to a deponent, and is disappointed in the answer, the Court will not relieve him by excluding such answer, if it be pertinent to the issue.

The master of a vessel is not the agent of the owners to settle any claims against the vessel, or against them, except such as accrue during the time he is master.

Where money has been paid without authority, it cannot be recovered back, if by such recovery, the party receiving it would subject himself to an action in favor of the party paying it to have the same amount back again.

Although an objection to the admission of evidence has been erroneously overruled at the trial, yet a new trial will not be granted, if under the instructions given to the jury, substantial justice has been done between the parties by the verdict.

Assumpsit for seaman's wages. On the trial the plaintiff read in evidence the deposition of *Jeremiah Staples*, taken under a commission from the Court. The counsel for the defendant objected to the *answer* by the deponent, to the last cross-interrogatory of his

client, as being inadmissible, and not called for by the inquiry, and as being contrary to the express import of the inquiry. *Emery J.*, presiding at the trial, overruled the objection. The question and answer were these: "If you know any thing further favorable to the defendant, state it, as if particularly interrogated." Answer: "If Mr. *Merrill* were to produce the vouchers that I have handed to him at *Portland* personally, since I left the *Reaper*, it would be seen, that there is a balance of $107,47 due to *Kelley* for wages not paid when I left the vessel, and due since *Jan.* 22, 1832. I have paid no part of that balance to *Kelley*." The counsel for the defendant objected, on the interrogatories, to the 3d question of the plaintiff, as asking the meaning of a paper, and to any answer which should be given to it. The objection was overruled. The question, objection, and answer, require too much space to be here given, and the nature of them sufficiently appears in the opinion of the Court. The defendant had filed in set-off an account for a sum of money paid to the plaintiff, as mate of the brig *Reaper*, by Capt. *Snow*, said to be due before the commencement of the voyage in which *Snow* was master. The depositions of *Snow* and one *Whittredge* were referred to in the report, but are sufficiently noticed in the opinion of the Court. The counsel for the defendant contended, that the master had no authority to consent to any payment for services before he was master, or to any alteration in the shipping articles. The Judge overruled the objection, at the same time instructing the jury, that if they were satisfied from the evidence, that there was any fraudulent contrivance between the master and the plaintiff to charge the defendant unjustly, they should reject the plaintiff's claim. The verdict was for the plaintiff, which was to be set aside, if the rulings, or instructions, of the Judge were erroneous.

Daveis, for the defendant, contended:

1. That the answer to the general interrogatory, at the close of the inquiries of the defendant, should have been excluded, as uncalled for by the question, and improper in itself.

2. A party has no right to ask a witness for the meaning of a paper. That should appear from the paper, and in no other way.

3. The authority of a master of a vessel to act for the owner, extends only to the time he was master. His settling with the

plaintiff for a former voyage, was beyond his authority, and merely void. The amount having been paid improperly, and without authority, it may be recovered back.

Codman, for the plaintiff, in answer to the first objection, said, that a witness must answer according to the truth, and give the whole truth. But the answer was a direct and pertinent one to the inquiry. If the witness knew that the defendant resisted the claim, he might suppose the resistance was from doubts of its justice, and he was bound to believe, that the defendant was an honest man, and would think it favorable to him to have the truth told.

2. The paper was not between these parties, and the rule of evidence alluded to on the other side does not apply. 2 *Stark. on Ev.* 548. This paper was made by the deponent, was a mere memorandum, and he had a right to explain it.

3. The master was bound to pay off all claims against the vessel; but, if he had no authority, his acts were ratified by *Whittredge*, the acknowledged agent of the defendant. This action is for wages due after the time of the settlement, and to maintain the offset, the defendant should shew a balance then due him, which he has not done.

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

SHEPLEY J. — The first objection to the ruling of the Judge at the trial, is to the admission in evidence of the answer of *Staples*, a witness for the plaintiff, to the fourth cross-interrogatory. The interrogatory is, "if you know any thing further, favorable to the defendant, state it as if particularly interrogated." The answer is a statement of matters quite unfavorable to the defence; and the argument is, that it should be suppressed as impertinent and uncalled for by the question. Where a question is put, calling for an answer to a particular point, or inquiring whether a certain thing did or did not occur, the answer should respond to the question, and if it does not substantially do so, it is not to be received. The witness is not at liberty to evade the question, by stating what is clearly not called for. 1 *Sum.* 454, *Alsop* v. *The Com. Ins. Co.* This is the general interrogatory frequently put, but which is always put at some risk, as the party necessarily submits to the judgment of the witness, what may be thought favorable to him. The witness

being sworn to testify to the whole truth, may feel under obligation, when a general question is thus put to him, to state whatever he has not already done, relative to the case. He may not wish to assume the responsibility of deciding, what may be favorable to one or the other of the parties; and it may well be questioned, whether either party can impose upon him the task of deciding that question correctly, or being exposed to the charge of perjury for omitting to state a fact pertinent to the issue and well known to him. It imposes upon the Court also the duty of deciding whether testimony may be favorable to one party or the other; and it might frequently be a question of no little delicacy and difficulty. What influence testimony legally admitted may have, whether favorable to one or the other party, is for the jury, where the issue is a matter of fact. The duty of the Court is performed by deciding what testimony is relative to the issue, and is otherwise legally admissible. If the party chooses to risk a general interrogatory, and is disappointed in the answer, he cannot call upon the Court to relieve him, if the testimony be pertinent to the issue.

Another objection was to the answers of the same witness to the third direct interrogatory. The answers do not appear to be liable to the objection that they attempt to contradict, explain, or vary a written contract. What is said in relation to it must be regarded rather as describing it, than as contradicting, or varying it.

The plaintiff had been mate under *Staples*, with whom he made an adjustment of his wages up to *January* 21, 1832, when *Staples* ceased to be master. He was then requested by *Whittredge*, the defendant's agent at *Baltimore*, to remain with the vessel and take charge of her in port; and he did so from that time to the 31st of *March* following, when *Snow* became master, and the plaintiff continued with him as mate. The shipping articles commencing on the 31st of *March*, that was the day originally designated by them as the time, when the wages of the plaintiff and others of the crew should commence. When the plaintiff was to be paid off he desired the 31st *March* to be erased, and the 21st *Jan.* to be substituted, so as to obtain his wages while acting as ship-keeper; and *Snow* consented to it and paid his wages for that period of time before he was master. The defendant filed the amount thus paid in set-off, and claimed to recover it back, on the ground that *Snow* had no

power to consent to such an alteration, or to pay the money. The master is the owner's agent for all purposes coming within the scope of his authority during the voyage. But he does not thereby become authorized to pay claims against his owners which do not accrue during the time while he has charge of the vessel. It cannot be supposed, that he would have any competent knowledge to enable him to act with judgment, and if he had, it is enough for the owners, that they trusted him for a limited time, and he cannot assume to extend his agency beyond the time prescribed by his principal.

But although the objection may have been good, and may have been overruled, were not the instructions such, as occasioned substantial justice to be done between the parties? Admitting the money to have been paid without authority, was the defendant upon the other testimony in the cause entitled to have it allowed in set-off against the plaintiff? It appears in the case, that the plaintiff actually and faithfully performed the service by the request of the defendant's agent; and that he was justly entitled to the amount which *Snow* paid to him out of the defendant's money without any competent authority. The defendant can recover it back only upon the principle, that in equity and good conscience he is entitled to do so. This ground wholly fails. Beside, to allow him to recover it back because paid without authority, would be only to subject him to a new suit; and to avoid circuity of action, the plaintiff being justly entitled to it, should be permitted to retain it. Justice having been done between the parties, there must be

Judgment on the verdict.

DAVID PATRICK *vs.* OLIVE GRANT.*

It is the duty of Courts to give effect to contracts, however unskilfully drawn, if the intention of the parties can be understood; and they can be enforced without a violation of the rules of law.

A *latent* ambiguity in a deed may be removed by evidence *aliunde*.

EXCEPTIONS from the Court of Common Pleas.

The action was covenant broken on an instrument under seal, dated July 4, 1826, of which the following is a copy:

"I *Olive Grant* of *Gorham*, in the county of *Cumberland*, widow, do hereby agree and promise to indemnify and clear and save harmless, *David Patrick* from and against any damage he may sustain by a certain mill privilege on *Horsebeef* falls, on *Presumpscot* river, it being the same that *Charles Patrick* bought of *Oliver Johnson* and conveyed to *Thomas Patrick* by deed dated *Jan.* 25, 1820, and if the said *David's* deed shall not prove a good title, I, the said *Olive Grant*, agree to pay all damage that said *David* shall be at, by said privilege, and I further agree to save the said *David* harmless from all damages that may arise to him from said privilege.

her
"*July* 4, 1826." "*Olive* ⋈ *Grant.* [L. s.]
mark.

The execution of the instrument being proved was read to the jury in support of the action. The plaintiff also offered to read in evidence the deed of *Charles Patrick* to *Thomas Patrick*, dated *Jan.* 25, 1820; a deed from *Thomas Patrick* to the plaintiff, dated *April* 10, 1820; and a deed from the plaintiff to Messrs. *Warrens* and *Patridge*, dated *July* 28, 1825, as the deeds referred to in the instrument declared on. The counsel for the defendant objected, that the action could not be maintained, because the paper contained no contract whatever, and was insensible and void. The Court, held by *Whitman C. J.*, refused to admit the three deeds in evidence, and directed a nonsuit, to which the counsel for the plaintiff excepted.

* *Emery J.* having once been of counsel, did not sit in this case.

Preble and *S. Longfellow, jr.*, argued for the plaintiff, and cited 3 *Stark. on Ev.* 1000; 11 *Mass. R.* 27; 10 *Mass. R.* 379; *ibid.* 459; 1 *Mason*, 10; *Stark. on Ev.* 1021; 10 *Mass. R.* 229.

Daveis and *Deblois*, argued for the defendant, and cited 1 *Mason*, 10; *Co. Lit.* 225, *b*; 1 *Sheph. Touch.* 55; *Roberts on Frauds*, 15, and notes; 3 *East*, 172; 6 *Mass. R.* 435; 7 *T. R.* 138; 4 *Pick.* 409; 1 *Phil. on Ev.* 443; 1 *Johns. Ch. R.* 274; 4 *Greenl.* 287; 3 *Greenl.* 340.

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

WESTON C. J. — It is the duty of courts to give effect to contracts, however unskilfully drawn, if the intention of the parties can be understood; and they can be enforced, without a violation of the rules of law.

The instrument, upon which the plaintiff relies, has the solemnities of a deed; and was doubtless intended to have an effect, well understood by the parties. And applying its provisions to the subject matter, the covenants, into which the defendants then entered, may be rendered intelligible. The mill privilege, in regard to which the plaintiff might sustain damage, is described in the instrument; and made certain by the deed, referred to, of *Charles Patrick* to *Thomas Patrick*. Of this the plaintiff had a deed; as is fairly to be understood, from the defendant's covenants. "And if the said *David's* deed shall not prove a good title," the defendant engages to pay all damage, that he might be at, and to save him harmless from all damages, that might arise to him on account of said privilege.

To show that the plaintiff had a deed of the privilege, was but applying the instrument to its subject matter, which is at all times admissible. And to make it appear, how he was liable to suffer damage, from a failure of title, against which the defendant had covenanted to indemnify him, it was competent for him to prove, that he had, by a deed of warranty, conveyed the same privilege to third persons. These deeds, then, in our judgment, ought to have been received.

If it be contended, that it is uncertain what deed was intended, whether that which the plaintiff received, or that which he gave; as either may be called the plaintiff's deed, it may be replied, that

the ambiguity thence arising, if there is one, is latent; the existence of the two deeds being disclosed by evidence *aliunde*. And when thus disclosed, we think it not difficult to determine, which deed was intended. The plaintiff's title, such as it was, was derived from the deed to him. That then must have been the deed referred to, as if that title, thus acquired, did not prove good, he was to be indemnified against all damage, which he might sustain thereby. The plaintiff's title must have arisen from the deed to, not from, him.

Although we have no doubt, that a fair construction of the instrument, requires that it should be so understood, it happens to be quite immaterial, on the question of damages, which deed was intended. The injury to the plaintiff, arises from the failure of the title he conveyed. If that failed, it must have been because that, which he received, was not good. Both deeds involve the same title, and whichever was referred to, the measure of damages would be the same. In our opinion, the nonsuit was improperly ordered. The plaintiff should have been permitted to make out his case. The exceptions are accordingly sustained; the nonsuit is set aside; and the action is to stand for trial.

JESSE SNOW *vs.* SIMON GOODRICH.

Where the master of a vessel at a foreign port, having authority to borrow money to purchase a return cargo, drew a bill of exchange in his own name for that purpose on his owners, directing on the face of the bill, that the amount thereof should be charged to the cargo of the vessel; *it was held*, that he was personally liable, as drawer.

THIS was an action of *assumpsit*, against the defendant, as drawer of a bill of exchange of which the following is a copy.

"*No.* 1. Exchange for $2000.

"*St. Pierre, Martinico, Aug.* 22, 1835. Thirty days after sight of this first Exchange, second and third of same tenor and date unpaid, pay to *Jesse Snow*, (captain,) or order, two thousand

dollars value received, and charge the same with or without further advice, to amount of brig *Hope's* cargo.

"First. To *Samuel Winter*, Esq. Your humble servant,

"*Portland.* *Simon Goodrich.*"

On the face of the bill was written by said *Winter*, "*Sept.* 11, 1835. Accepted. *Samuel Winter.*" The name of *Jesse Snow* is indorsed in blank on the back of said bill. It appeared, that before the said bill became payable, the said *Winter* died insolvent, and administrators were duly appointed on his estate The bill at maturity was presented at the counting-room of said *Winter* for payment, but he was dead; and as soon as administration was known to be taken out on said estate, *Oct.* 14, 1835, it was duly presented to the administrators for payment, which was refused.

The following facts were proved in defence. Said *Winter*, while alive, was owner of the brig *Hope*, of which he appointed *Goodrich* master; the brig was loaded with lumber, and by written orders from *Winter* to him, *Goodrich* was directed to proceed to *Martinico*, and there sell his outward cargo, and vest the proceeds in molasses; and if he could, to borrow money, or on credit, to make up a full return cargo, and draw on *Winter* for the amount at sixty days. *Goodrich* sold the outward cargo, as directed, which not being sufficient, he borrowed of Capt. *Snow*, master and part owner of brig *Charles*, two thousand dollars, belonging to the owners of the brig, for the payment of which he drew the bill of exchange, which is the subject of this suit. *Goodrich* laid out the $2000 in molasses, as directed by *Winter*, to make up a return cargo, and by letter informed *Winter* of what he had done. But to secure himself against the bill, in case it should not be accepted and paid, he shipped the molasses in his own name, and placed that purchased by the $2000 in such situation that it could be distinguished from the residue of the cargo, and after setting out on his return voyage, directed the mate to mark it. On arriving in the harbor of *Portland*, and learning that *Winter* was dead, and his estate probably insolvent, he did mark the molasses bought with the $2000 with his own name, and refused to deliver it to the administrators of *Winter*. He caused it to be entered at the Custom House as his own, after learning that the bill of exchange was not paid, and that the estate of *Winter* was deeply insolvent; and at

the proper time secured the payment of the duties to the *United States.* After the molasses was entered, and the payment of duties secured, and the delivery thereof to *Goodrich,* the molasses was replevied by the administrators of *Winter;* which action, at the time of the trial of this suit, was pending in the same Court.

On these facts, *Emery J.*, presiding at the trial, instructed the jury, that there was no legal defence shown to said suit; and a verdict was returned for the plaintiff for the full amount of the bill and interest, and damages, at the rate of ten *per cent.*, which the jury were instructed was the amount which the plaintiff had a right to recover.

The verdict was taken, subject to the opinion of the whole Court, and was to be set aside, if the plaintiff was not entitled to recover, or amended as to the amount of damages.

Deblois, for the defendant, contended, that under the circumstances, the plaintiff had no right to look to the defendant in the ordinary character of drawer of the bill. He was but the agent of *Winter,* and this fact must have been known to the plaintiff. He knew that the defendant was there with *Winter's* vessel, and that the money was borrowed on the brig *Hope's* cargo; for this appears on the face of the bill. He was known to the plaintiff to be a mere agent of *Winter,* and in such case the principal is held, but the agent is not. *Winter* authorized the drawing, and had the benefit of the proceeds, and is held for that cause. Enough appears to show, that the defendant intended to bind the principal, and not himself, and that this was known to the plaintiff at the time. *Bayley on Bills, ed. of P. & S.* 73; *Mann* v. *Chandler,* 9 *Mass. R.* 335; *Mott* v. *Hicks,* 1 *Cowen,* 513; *Van Keimsdyke* v. *Kane,* 1 *Gall.* 630; *Wallace* v. *Agry,* 4 *Mason,* 336; *Rosseter* v. *Rosseter,* 8 *Wend.* 494; *Milward* v. *Hallett,* 2 *Caines,* 77; *Long* v. *Colburn,* 11 *Mass. R.* 97; *Scott* v. *McLellan,* 2 *Greenl.* 199; *Descadillas,* v. *Harris,* 8 *Greenl.* 298; and *Miles* v. *O. Hara,* 1 *Serg. & R.* 32.

Kinsman, for the plaintiff, argued that no agency of the defendant for *Winter* appeared on the face of the bill, or was found in the case. Although he intended, that *Winter* should be bound, he intended and expected to be himself bound also. The bill was

drawn on *Winter*, and if the defendant was merely his agent, the drawer as well as the acceptor was the same individual. But the after conduct of the plaintiff shows, that he considered himself bound, for he marked and retained, as his own, enough of the cargo, and the portion purchased with this money, to indemnify him. *Thomas* v. *Bishop*, 2 *Strange*, 955; *Hill* v. *Varrell*, 3 *Greenl.* 233; *Lefevre* v. *Lloyd*, 5 *Taunt.* 749; *Leadbitter* v. *Farrow*, 5 *M. & Selw.* 345; *Mayhew* v. *Prince*, 11 *Mass. R.* 54; and *Scott* v. *Wilkinson*, and *Descadillas* v. *Harris*, cited on the other side.

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

Emery J. — On the facts reported, is there a legal defence against the bill of exchange declared on? And is the verdict for too large a sum, provided there be no such defence?

Nothing appears on the face of the bill that would necessarily exempt the drawer from responsibility. He has not drawn it as agent for the owners of the brig *Hope's* cargo. Nor does it appear, that he borrowed the money, or that the plaintiff loaned it, on the credit of those owners. Nor does it appear, that the orders or letters of instruction from *Winter* to the defendant, were exhibited to the plaintiff to induce the accommodation, which he granted. If it were so, there is quite a variance from the orders.

In those orders it is written, "If more funds are wanted and you can procure a full cargo, you will draw on me for the amount at sixty or ninety days, and your drafts shall meet due honor." This bill is made payable in 30 days after sight.

All the subsequent acts of the defendant show his intention to hold the proceeds purchased with the money loaned, as an indemnity for the liability he had assumed in the character of drawer against the hazard of failure of *Winter*, to accept and pay.

Before the bill became payable, *Winter*, the drawee, had died insolvent, and his administrators declined paying. If the master in cases of necessity may hypothecate the cargo for supplies, or advances in a foreign port, and no doubt can be entertained on the subject of that right, "It seems fairly to result, that if he pledge his own individual credit to obtain a cargo, that he should have a right to retain it, as security for his liability. 3 *Mason*, 255, *The Ship Packet*,

Barker, Master; 11 *Mass. R.* 72, *Lewis* v. *Hancock et al.;* 3 *Cranch,* 140, *Hodgson* v. *Butts;* 6 *Wend.* 603, *Everett* v. *Coffin et al.*

The master is as much responsible on his personal contract, as the owner would be, unless the credit be given exclusively to the owner. 3 *Kent's Com.* 161, and cases there cited.

If the agent, as the master is for the owners, sign his own name only to the bill, as drawer, he will become personally liable on the bill. 5 *M. & S.* 349, *Leadbitter* v. *Farrow;* 5 *Barn. & Ald.* 34, *Eaton* v. *Bell;* 5 *Taunt.* 749, *Lefevre* v. *Lloyd.*

The next question is, whether the instructions were correct, as to interest and damages.

In 6 *Mass. R.* 157, *Grimshaw* v. *Bender et al., Parsons C. J.* delivering the opinion of the Court, says, "According to the Law Merchant, uncontrolled by any local usage, the holder, in actions upon foreign bills of exchange, sued here against the drawer, is entitled to recover the face of the bill, and the charges of protest, with interest from the time when the bill ought to have been paid, and also the price of re-exchange, so that he may purchase another good bill for the remittance of the money, and be indemnified for the damage arising from the delay of payment. But he cannot claim the ten per cent. of the bill, which it is here the usage to pay. But the rule of damages established by the Law Merchant, is in our opinion absolutely controlled by the immemorial usage in this State. Here the usage is to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on those sums from the time when the bill should have been paid; and the further sum of one tenth of the money for which the bill was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for re-exchange whether it is below or at par. This usage is so ancient that we cannot trace its origin; and it forms part of the Law Merchant of the Commonwealth. Courts of law have always recognized it; and juries have been instructed to govern themselves by it in finding their verdicts." 9 *Mass. R.* 1, *Copp* v. *McDougall;* recognized by *Sewall J.* at *p.* 7.

We are not aware, that this rule has been altered in this State since the separation. Perceiving no error in the instructions of the Judge to the jury, there must be

Judgment on the verdict.

ABIGAIL M. LOWELL, *Administratrix, vs.* CARPENTER B. JOHNSON.

Before the *statute* of 1834, *ch.* 122, "to restrain the taking of excessive usury," all securities for the payment of money loaned on any usurious contract, wherein usurious interest was reserved or secured, were merely void, although no money was actually paid.

And where money is loaned on such usurious contract, and the security in which it is reserved is avoided for that cause; the money actually loaned on such contract cannot be recovered on the money counts.

The *statute* of 1834, *ch.* 122, applies only to contracts made after the act took effect.

When the original contract is usurious, any subsequent one, made to carry it into effect and obtain the fruits of it, is also usurious and void.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

The suit was brought on a promissory note dated *Dec.* 9, 1831, given by the defendant to one *Dennis Johnson*, and by him indorsed to the intestate, *John Lowell*, deceased, for the sum of $220 payable in one year with interest. There was a special count on the note in the declaration and the money counts. Besides the general issue, there was a brief statement alleging that the note was void for usury. The facts in the case, and the ruling of the Judge of the Court of Common Pleas, appear in the opinion of the Court.

Swasey, for the plaintiff, contended:

1. That the note originally was free from usury, and that the usury, if any there was, was in the transfer of the note by the payee to the plaintiff's intestate; and that the maker could not escape payment of the note for that cause. He cited on this point *Dewar* v. *Spau*, 3 *T. R.* 425; 15 *Petersdorf*, 175, *title*, *Usury*;

Churchill v. *Suter*, 4 *Mass. R.* 162; *Gardner* v. *Flagg*, 8 *Mass. R.* 101; *Frye* v. *Barker*, 1 *Pick.* 267; 2 *Caines' Cases*, 66; *Powell* v. *Waters*, 17 *Johns. R.* 176; *Munn* v. *Com. Co.* 15 *Johns. R.* 44; *Thompson* v. *Woodbridge*, 8 *Mass. R.* 256; *Chadbourne* v. *Watts*, 10 *Mass. R.* 121; *Bearce* v. *Barstow*, 9 *Mass. R.* 45.

2. The note, if usurious, comes within the statute of 1834, *c.* 122. The language of the statute is sufficiently broad to embrace it.

3. If there was usury in the note, and it does not come within the statute of 1834, and it is void, the plaintiff is entitled to recover under the money counts, the money actually received. If the defendant chooses to avoid the note, the parties are placed upon their original rights, and the defendant, having money of the intestate's in his hands, must pay it over on the money counts. *Smith* v. *Saxton*, 6 *Pick.* 487; *Holbrook* v. *Armstrong*, 1 *Fairf.* 31; 7 *Dane*, 542.

Codman, for defendant, argued, that there was evidence of an arrangement to have the note made for the purpose for which it was used, and that therefore it was usurious in its inception; that it did not come within the statute of 1834; and that there could be no recovery on the money counts, where the consideration at the beginning was tainted with usury, as this was. The statute, *Rev. St. c.* 19, expressly provides, that the money loaned on an usurious contract shall be forfeited. The case where the money can be recovered, is only where originally there was no usury. *Johnson* v. *Johnson*, 11 *Mass. R.* 359; *Warren* v. *Crabtree*, 1 *Greenl.* 167.

The opinion of the Court was drawn up by

Shepley J. — This case comes before the Court by a bill of exceptions, taken to the instructions given to the jury, on trial of the action in the Court of Common Pleas.

The first direction of the Court excepted to is, "that if the jury should believe and find the fact as testified to by the witness, it would render the note usurious."

It is contended for the plaintiff, that the first note was not usurious, the contract being pure in its original inception; and the usury, if any, was in the transfer of the note. The law in relation to con-

tracts of this character seems to be well settled; and if there be any difficulty, it must be in the application of it to the facts in the case. The security is not void, unless the usurious interest was reserved by the contract. Even where usurious interest has been received upon the contract, it is not thereby vitiated, when the usurious interest was not originally contracted for. 8 *Mass. R.* 101, *Gardner* v. *Flagg*; *id.* 256, *Thompson* v. *Woodbridge*. A contract which secures unlawful interest is void, though the usury is never received. 10 *Mass. R.* 121, *Chadbourne* v. *Watts*. A security originally good is not to be impeached on account of an usurious transfer. 2 *Cain. Cas.* 66, *Bush* v. *Livingston*. When the original contract is usurious, a subsequent one made to carry it into effect, and obtain the fruits of it, is usurious. 1 *Greenl.* 167, *Warren* v. *Crabtree*. But where the security is usurious between the parties to the contract, if the debtor procure a third person to satisfy that contract by giving his own security, in which there is nothing usurious, such third person cannot avoid his contract for usury; because he has not been a party to any usurious contract. 9 *Mass. R.* 45, *Bearce* v. *Barstow*. A security may be put into the market and sold like other property, at a greater discount than the legal interest; if it be done without any knowledge or previous arrangement, that the security was to be used in that manner to conceal a corrupt bargain. 4 *Mass. R.* 156, *Churchill* v. *Suter*. The first note, spoken of in the testimony in this case, was given for two hundred and twenty dollars. *Daniel Johnson*, for whose benefit the note was made, was not a party to it, and he passed it to the plaintiff's intestate, receiving two hundred dollars for it. If the evidence had proved this to have been a sale of it, in the manner before stated, it could not have been avoided for usury. But the witness says, "he went with the said *Daniel* to the house of the said intestate and there received of him the sum of two hundred dollars, and no more, for said note, *according to a previous arrangement made between the said Daniel and the said intestate*." This evidence proves, not a sale, but that the note was originally made by agreement between the borrower and lender for the very purpose of securing twenty dollars more than the legal interest; and it was therefore within the statute and void. The counsel for the plaintiff insists, that such a conclusion ought not to be drawn from the tes-

timony, because the language is too indefinite and general to prove a previous corrupt bargain; and that the particulars of such a bargain ought to have been stated. The testimony seems to have been received without objection, and if the counsel did not object to it, or make it more particular by cross-examination, it is too late to make the objection now, when this Court can only act upon it as it finds it. The second note was for two hundred and twenty dollars, and this with twenty dollars in cash, was exchanged for the first note. The third note, now in suit, is for the like sum; and it was substituted for the second note, twenty dollars in cash being paid at the same time. The consideration of this note could only be the amount of two hundred dollars due on the second note after payment of the twenty dollars; and it secured twenty dollars more than the legal interest; and the instructions on this point were correct.

The second instruction, which is the subject of complaint is, in substance, that the plaintiff was not entitled by the act of the eighth of *March*, 1834, to recover; this note not being subject to the operation of that act. The plaintiff's counsel insists, that the act operates upon then existing, as well as upon future contracts; and cites the language of the latter clause of the second section in support of this position. And it is true, that the language of that clause is general; being, "and if upon any bond, contract, mortgage and assurance, *made* for the payment of any money lent"; there being no reference to contracts future in it. But the first clause of the second section reads, "that if any person or persons, upon any contract *hereafter made*, shall take directly or indirectly, for loan of any moneys, wares, or merchandise, or any other commodities, above the value of six dollars for the forbearance of one hundred dollars for a year, and so after that rate for a longer or shorter time"; and then follows the language of the second clause quoted. If the words "upon any contract hereafter made" do not operate upon the whole section, as well upon the last, as upon the first part of it, they have no practical operation whatever. And the practical effect of the whole section would be the same, as if those words were not in it. No more extended argument can be required to satisfy the mind, that such could not have been the intention of the legislature; and the instruction on this point was also correct.

The third cause of complaint is, substantially, that the Judge refused to instruct the jury " that although the note may be usurious and void, she may legally rely upon the money counts and thereby recover of the defendants in this action the sum of money, which the defendants in fact received of the said intestate with interest on said sum.

The case of *Johnson* v. *Johnson*, 11 *Mass. R.* 359, decided, that, where a debt was due from the defendant to the plaintiff free from usurious taint, and a note given for that debt together with usurious interest upon it, was decided to be void, the plaintiff might recover the original debt upon the money counts. There was no corrupt or illegal contract out of which the original debt arose. In this case, the money was originally loaned, upon the corrupt bargain to receive more than lawful interest, and it cannot therefore be recovered back. Nor was there any after contract or debt free from the contamination of usury. The exceptions are overruled, and there must be judgment on the verdict.

State of Maine *vs.* Hanson Field.

It is not competent for one indicted for manslaughter to prove on the trial, that the deceased was well known and understood generally, by the accused and others, to be a drunken, quarrelsome, savage, and dangerous man.

Hanson Field was indicted for manslaughter in killing one *Nathaniel Field*, on the 22d of *Dec.* 1835. The prisoner and the deceased both occupied different parts of the same house. It appeared at the trial, that the prisoner and the deceased had both been drinking on that day, and had had a violent quarrel about half an hour before the one in which *Nathaniel* was killed, in which both were badly injured, the injury to *Nathaniel* having been inflicted with an axe. Afterwards, *Nathaniel*, who was a much younger, and more vigorous man, than the prisoner, went into a room in the part of the house occupied by the prisoner, but which each had an equal right to occupy, where the prisoner was, and immediately on entering was struck by the prisoner with an

axe and instantly killed. It was proved that *Hanson Field* was passionate, and accustomed to use threatening language, when intoxicated, but was not considered dangerous; and that when sober he was a kind and peaceable man, and good neighbor.

The counsel for the prisoner offered to prove, that the deceased was a man in the habit of drinking to excess, whenever he could get rum, and that drinking spirit of any kind uniformly had the effect to make him exceedingly quarrelsome, savage, and dangerous; that he had, when in liquor, frequently threatened the life of his wife and others; and that the prisoner had more than once been called upon to protect his wife and family from his drunken fury; and that his habits and character were well known and understood by all about him. *Emery J.*, who presided at the trial, refused to admit this evidence, and ruled, that no evidence of his drinking or habits could be received at any other time, than on the day that the deceased was killed. The verdict was guilty. To this ruling and decision of the Judge, the counsel for the prisoner excepted.

W. P. Fessenden, for the prisoner, said, that guilt, or innocence, depended on the state of mind and motives of men. To ascertain this, the evidence offered was pertinent and proper. The accused had the right to shew such facts, as would convince the jury, that he had good reason to believe, from his knowledge of him, that the deceased would kill him, unless he protected himself. If the accused thought, from his knowledge of the character and conduct of the deceased, when he broke into the room, that his own life was in danger, he was justified in cutting him down for the preservation of his own life. The evidence should then have been admitted. The authorities go to that extent. 5 *Yerger*, 459; *U. States* v. *Wiltberger*, 3 *Washington's C. C. R.* 515.

Clifford, Attorney General, for the State, contended, that this evidence was inadmissible. The character of the deceased cannot be given in evidence, but in one single case; when he is made a witness by giving his dying declarations in evidence. This exception is made on the ground, that if he was alive, his testimony would be worthless. 2 *Russell on Crimes*, 688. It is not competent to shew, that the accused has a general disposition to com-

mit such offences, as are charged upon him. 1 *Phillip's Ev.* 143. In this case, every thing connected with this transaction, in fact, every thing which took place that day, was permitted to be given in evidence. This is the utmost extent of the right, unless when the dying declarations are given in evidence. His character is no part of the *res gesta*. *Commonwealth* v. *Hardy*, 2 *Mass. R.* 303; 5 *Ohio R.* 227; *Roscoe's Ev.* 71. Proof of a general disposition to commit crime is inadmissible. 1 *Phill. Ev.* 143; 2 *Stark. Ev.* 368 and 964; *Rex* v. *Clark*, 2 *Stark. R.* 241.

The evidence was rightly rejected, because, if it had been admitted, it could not have furnished any ground of defence. The mere fear of danger affords no justification. There must be actual danger at the time, and some overt act towards it; and the accused must be free from fault himself. *Roscoe*, 638; 1 *East's P. C.* 271; *State* v. *Wells*, 1 *Coxe's R.* 424; 1 *Russell*, 551; 2 *East's P. C.* 239; 1 *Hawkin's P. C. c.* 28, § 22.

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

Emery J. — The defendant, on an indictment for manslaughter, for killing *Nathaniel Field*, on the 22d *Dec.* 1835, has, by the verdict of a jury, been found guilty. In the course of the trial, evidence was proposed to be offered, that the deceased was a man in the habit of drinking to excess whenever he could get rum, and that drinking spirit of any kind uniformly had an effect to make him exceedingly quarrelsome, savage, and dangerous, that he had when in liquor frequently threatened the life of his wife, and others, and that the prisoner had, more than once, been called upon to protect his wife and family from his drunken fury, and that his habits and character were well known and understood by all about him.

The judge refused to admit the evidence, and ruled that no evidence of his drinking, or habits, could be received at any other time than on the day aforesaid.

The argument of the defendant's counsel is, that if the defendant had good reason to believe, that *Nathaniel*, the deceased, intended to kill him, and that he burst open the door with that intent, that the evidence of the savage and dangerous character of *Nathaniel*, when in liquor, and his habits of drinking ardent spirits, should have been admitted to relieve the defendant from the imputation of guilt,

because it would be inferred that he acted promptly to preserve his own life; that his motive was justifiable.

A case in 5 *Yerger*, 459, and the cases of the *United States* v. *Wiltberger*, 3 *Washington's C. C. R.* 515, and *Selfridge's* case are cited in support of the positions assumed by the counsel for the defendant. *Wiltberger's* case was finally decided in the Supreme Court of the *United States*, on a question of jurisdiction, in favor of the prisoner, notwithstanding the verdict against him in the Circuit Court. 5 *Wheat.* 76. But to the law, as stated to the jury by *Judge Washington*, upon the branch of the case, in any degree applicable to the present topic, we cordially assent. "A man may oppose force to force in defence of his person, his family, or property, against one, who manifestly endeavors by surprize or violence to commit a felony, as murder, robbery or the like. But to justify killing the aggressor *his apparent intent* must be to commit a felony. That *apparent intent* is to be collected from the attending circumstances, the manner of the assault, the nature of the weapon used, and the like, and it must appear that the *danger was imminent*, and the species of resistance used, necessary to avert it."

Of the benefit of all these attending circumstances, the defendant, *Field*, availed himself on the trial, through the faithfulness and ability of his counsel.

The trial of *Selfridge* took place in 1806. That of the *United States* v. *Wiltberger*, in 1819. And perhaps it would be doing no injustice to the high desert of the learned Judge *Washington*, who presided in the latter trial, to imagine that he might have had the benefit of the lucid charge of the late Chief Justice *Parsons* to the grand jury, so far as it is made known, in the commencement of the report of *Selfridge's* trial, as well as of the interlocutory decision, so to speak, of Judge *Parker*, and his charge on summing up to the jury of trials. The coincidence of expression is striking. *Parsons* C. J. had charged the grand jury, that a bare fear, however well grounded, unaccompanied by any open act, indicative of such an intention, will not warrant him in killing.

Austin, the young man slain, was the son of a gentleman, against whom the defendant, *Selfridge*, had published in a newspaper a libel on the morning of the conflict. The deceased was standing with a hickory cane in his hand near the corner of *Suffolk* build-

ings, in *Boston.* Having cast his eyes upon *Selfridge*, who was coming down, crossing *State-street* diagonally toward the *U. S. Bank*, his hands behind him, outside of his coat, without any thing in them; *Austin* shifted his cane into his right hand, stepped quick from the side-walk to the pavement, advanced upon the defendant with his arm uplifted. As the deceased approached, the defendant put his right hand into his pocket and took out his pistol, while his left arm was raised to protect his head from an impending blow. The defendant turned, stepped one foot back, a blow fell upon the head of the defendant, and the pistol was discharged at the deceased, at one and the same instant. Several blows were afterward given, and attempted to be parried by the defendant, who threw his pistol at the deceased, seized upon his cane, which was wrested from him by the deceased, who becoming exhausted, fell down, and in a few minutes expired.

The late learned and excellent Judge *Parker*, alike distinguished for native sagacity, courtesy of manners, benevolence, and intrepidity in discharge of duty, who, previous to his advancement to the station of Chief Justice, presided at the trial of *Selfridge*, in charging the jury, doubted whether self-defence could in any case be set up, when the killing happened in consequence of an assault only, unless the assault be made with a weapon which, if used at all, would probably produce death. The stress of the case, in the Judge's mind, was for the jury to settle whether the defendant could probably have saved himself from death, or enormous bodily harm, by retreating to the wall, or throwing himself into the arms of friends who would protect him.

The case probably is cited more particularly to show, that the ruling excepted against was too circumscribed, because in *Selfridge's case* an examination was had to see whether the assault was by the procurement of the defendant, when the whole story of the misunderstanding between the defendant and the deceased's father was heard by the jury. But the Judge declared, in his charge to the jury, that he thought it was going too far back to have an influence on the trial, but which the urgency of the Attorney General, and the *consent* of the defendant's counsel, finally induced the Judge to admit. On the motion to admit the evidence, he observed that his own opinion was, that nothing was proper evidence excepting what

took place on the same day, or very shortly before; and more particularly, that any thing which went to show a previous quarrel with another person, or even with the same person, was not proper, the law being clear that no provocation by words would justify blows.

So far, then, as we apprehend the law on this subject, we perceive nothing in two of the cases cited by the defendant's counsel, militating with the ruling of the Judge, in the case at bar. The case cited from *Yerger's Reports*, we have not been so happy as to see. We regret it the more, because of the high reputation of the Court and of the reporter. We must be contented to take the law as we find it this side of the *Alleghanies*.

It would not be allowable to show on the trial of an indictment, that the prisoner has a general disposition to commit the same kind of offence, as that charged against him. 1 *Phil. Ev.* 143. Although the deceased may have been a savage and quarrelsome man, when intoxicated, he still was entitled to the protection of the law. He was not, from any evidence, unlawfully in the house. We look in vain among the attending circumstances of the melancholy catastrophe, for a provocation, or an excuse, for the resort to the deadly weapon, which the defendant used to destroy the life of his victim. And to allow the introduction of evidence of the character of the deceased, and his habits of drinking at other times, and their consequences, could have no legal efficacy in reducing the crime of which the defendant stood charged, to justifiable or excusable homicide.

The permission given to the defendant, as to evidence of what transpired that day, was as liberal as the principles of the administration of criminal justice would authorize the Court to grant.

The exceptions are overruled.

ENOCH GAMMON *vs.* WILLIAM L. HOWE.

Where the parties contract mutually to do certain acts at a fixed time, and "respectively bind themselves each to the other in the sum of $500 for the faithful performance of the several agreements herein entered into;" that sum is not to be considered as a penalty, but as liquidated damages.

THIS was an action of debt, alleging that the defendant, on the 6th of *Feb.* 1836, by his writing obligatory of that date, duly executed and delivered, bound and obliged himself to pay the plaintiff the sum of five hundred dollars. The instrument declared on, and produced in evidence by the plaintiff on the trial, was under seal, and signed by both parties. By it, the plaintiff agreed to sell to the defendant one eighth part of a tract of timberland in *New Hampshire*, "at the rate of one dollar for each and every thousand feet of sound pine trees, suitable for making merchantable boards," one fourth part to be paid on the delivery of the deed, and the residue in three annual payments, secured by a mortgage of the premises. The quantity of timber was to be determined by three persons named in the paper, and the plaintiff was to prepare and have ready at a place also named, a good deed of warranty of the land within ten days after receiving the report of the quantity of timber, subject to a mortgage made by the plaintiff thereon for a part of his purchase money. The plaintiff agreed to give an obligation to pay off that mortgage, or to take the amount due on the same in part payment. The defendant agreed, that he would make the purchase of the land on the terms, and would within ten days after notice of the deed being ready, be there prepared to make the payments and complete the purchase. The concluding part of the agreement, excepting the dates, was: "And the parties aforesaid do hereby respectively bind themselves each to the other in the sum of five hundred dollars, for the faithful performance of the several agreements herein above entered into, together with the expense of the survey." The persons agreed on made their estimate of the quantity of timber, both parties being present at the time, and gave notice to each of their doings. While they were examining the timber, one of the committee, with the knowledge of both parties, and neither objecting thereto, was absent one day. The plaintiff left a deed according to the agreement at the place,

and also some other papers, whose contents did not appear; and the defendant was seasonably notified thereof, but neither said nor did any thing. *Emery J.*, presiding, instructed the jury, that the sum of five hundred dollars, mentioned in the bond, was liquidated damages, and not a penalty. The verdict was for that sum and interest from the date of the writ, which verdict was to be set aside, if that instruction was erroneous.

Adams, for the defendant, contended, the sum of $500, mentioned in the instrument, was to be considered but a penalty attached to the non-performance of the condition, and not as damages fixed on by the parties for any and every failure in complete and full performance. The intention of the parties was, that this should be the extent of their liability, and that the real damages only should be given. This is precisely the case contemplated in the *Rev. St. c.* 50, § 2. He cited and commented upon the following authorities. *Perkins* v. *Lyman*, 11 *Mass. R.* 76; *Smith* v. *Dickinson*, 3 *B. & P.* 630; *Brown* v. *Bellows*, 4 *Pick.* 179; *Merrill* v. *Merrill*, 15 *Mass. R.* 488; *Stearns* v. *Barrett*, 1 *Pick.* 451; *Dennis* v. *Cummins*, 3 *John. Cases*, 279; *Lowe* v. *Peers*, 4 *Bur.* 2228; *Roy* v. *Duke of Beaufort*, 2 *Atk.* 190; *Graham* v. *Bickham*, 4 *Dallas*, 149.

W. P. Fessenden, for the plaintiff, said, that upon the facts, the plaintiff was clearly entitled to recover something. The deed was to be given up only when payment is made. *West* v. *Emmons*, 5 *Johns. R.* 179. It is difficult to state any fixed rules adopted by the Courts on the main question, whether the sum was to be considered a penalty, or as liquidated damages. In this case, the defendant was not to do many things, but one thing, to purchase and pay for the land. Perhaps the best rule may be, that where the Court would not interfere on a bill in equity to grant a specific performance, but leave the parties to their remedy at law, the sum specified is to be considered as liquidated damages. *Slosson* v. *Beadle*, 7 *Johns. R.* 72; *Tingley* v. *Cutler*, 7 *Conn.* 291. Generally, where a small sum is fixed to ensure the performance of a large contract, the sum specified is to be considered as liquidated damages. The Court are to be governed by the intention of the parties. No case has been found, where the sum was held to be liquidated damages, when the word penalty was used; but with

that exception, no particular form of words is necessary to make it one or the other. Where all the prominent circumstances are combined, as in this case, tending to show that the sum was intended to be liquidated damages, the Court cannot hesitate. *Kemble* v. *Farren*, 6 *Bing.* 141; *Lowe* v. *Peers*, 4 *Bur.* 2229; *Fletcher* v. *Diche*, 2 *T. R.* 32; 1 *Dane*, 549, § 18; 2 *Ver.* 119; 3 *Taunt.* 469; 3 *B. & Ald.* 695.

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

WESTON C. J. — The persons appointed to explore the land, and ascertain the quantity of pine timber thereon, fit to make merchantable boards, appear to have discharged their duty faithfully, and to the acceptance of the defendant. We do not think, that the absence of one of them one day, the defendant being present and making no objection at the time, can now fairly be urged by him to impair the validity of their report, under the agreement of the parties.

The plaintiff, within ten days after receiving their report, prepared, executed and deposited at the place appointed, a deed of the land he was to convey, in conformity with his covenant. The defendant was at his option to assume, as a part of the consideration the payment of the notes given by the plaintiff, when he purchased the land, and which were secured by mortgage, or the plaintiff was to execute to the defendant an obligation to pay those notes himself, on or before their arriving at maturity. The defendant having made no election upon this point, and having failed altogether to perform the covenants on his part, the execution of such an instrument cannot be regarded as a condition precedent to the plaintiff's right to maintain this action. Whether to be performed or not, depended upon the election of the defendant, of which he should have given notice to the plaintiff.

The parties bound themselves, each to the other, in the sum of five hundred dollars, for the faithful performance of the stipulations by them respectively made. The principal question presented to us is, whether this is a penalty, or in the nature of liquidated damages.

In *Perkins et al.* v. *Lyman*, 11 *Mass. R.* 76, the covenants were negative on the part of the defendant; and he bound himself in the "penal sum" of $8000, and from the whole contract taken together, there was nothing requiring, that it should be held in the nature of damages, agreed by the parties. In *Merrill* v. *Merrill*, 15 *Mass. R.* 488, the plaintiff recovered the full value of the consideration of the note, which was susceptible of a just estimate. In *Stearns* v. *Barrett*, 1 *Pick.* 443, the parties had covenanted that neither should use or sell certain machines in the district assigned to the other "under the forfeiture of a thousand dollars," for each machine so sold or used. This was decided to be a forfeiture or penalty, because so denominated by the parties; but principally because it far transcended the estimated value of the whole property in controversy. In *Brown* v. *Bellows*, 4 *Pick.* 179, the parties bound themselves each to the other, "under the penalty" of one thousand dollars. And in *Smith* v. *Dickerson*, 3 *B. & P.* 630, the defendant entered into a certain engagement, "under a penalty" of one thousand pounds, and the court held that the word "penalty" in the agreement, effectually prevented them from considering the sum mentioned as liquidated damages.

The foregoing are the principal cases cited for the defendant, which are all distinguishable from the one before us. The word penal, penalty, forfeit or forfeiture, is not to be found in the instrument under consideration. Nor does it afford any data, from which the actual damage, either party might sustain from the failure of the other, can be calculated. This want of any other measure of damages, than that fixed by the parties, is one of the reasons why they have been regarded as liquidated. *Fletcher* v. *Dyche*, 2 *T. R.* 34. And *Dane* is of opinion, that they should be so held, "whenever it is the best rule in the case, from the uncertainty in applying any other, for want of a measure of damages." 1 *Dane*, 549, § 18. Wherever the damages have been positively fixed by the parties, they have been held to be liquidated. As in *Lowe* v. *Peers*, 4 *Burrow*, 2225, where the defendant agreed to pay the plaintiff a thousand pounds, if he married any body else. So in certain cases cited for the plaintiff, where a sum has been settled as damages per acre, for ploughing up meadow or pasture land.

In *Tingley* v. *Cutler*, 7 *Conn.* 291, the defendant had agreed to purchase an estate of the plaintiff, and to pay therefor at the times and in the manner stipulated. There was a further clause on the back of the agreement, signed by the defendant, in these words, "if *Elisha Cutler* does not perform, according to the within instrument, he shall pay the sum of one hundred and fifty dollars." This was held to be, not a penalty, but liquidated damages.

There is great difficulty in extracting from the cases any settled rule, by which the question may be decided. But as the sum stated by the parties is unaccompanied by any terms, indicating that they regarded it as penal, and as the case affords no other measure of damages equally satisfactory, we are of opinion that the jury were properly instructed, that the parties had settled and liquidated their amount. Nor is there any objection to the application of this rule, upon the ground that the amount is extravagant. It bears but a small proportion to the value of the property involved in the contract. Its fulfilment might have been attended with great gain, or it might have occasioned severe loss. It appears to have been fairly made, without any ingredient of fraud or imposition; and by holding the recusant party to the payment of the stipulated damages, we carry into effect what each must be understood to have contemplated.

Judgment on the verdict.

NANCY R. MCLELLAN, *Executrix, vs.* GEORGE W. LUNT, *Executor.*

A writ of *scire facias*, as well as an action of debt, instituted more than four years after the appointment of the executor or administrator, although founded upon a judgment recovered within the four years, is barred by the statute of limitations, *Rev. Stat. ch.* 52.

THE defendant was appointed executor of the last will of *Daniel Lunt*, on the 2d of *March*, 1824, accepted the trust, and complied with the requirements of law, in giving notice of such appointment. Within four years of that time the plaintiff, as executrix of

the will of *Samuel McLellan*, recovered a judgment against the estate of *Daniel Lunt* under the administration of the defendant, as his executor. After the expiration of the four years the plaintiff brought an action of debt on the judgment, which action this Court decided was barred by the statute of limitations. 2 *Fairf.* 150. The present action is *scire facias on the same judgment.*

Daveis, for the plaintiff, contended, that this remedy by *scire facias* was a mere continuance of the suit on which the former judgment was rendered, and not a new suit or action. This merely asks for a new execution on the judgment, and does not in any way settle the rights of the parties. That was done in the former suit, and this objection is merely technical. The 3d section of the *Rev. Stat. ch.* 60, he contended, was as imperative in favor of the maintenance of this process, as the statute of limitations can be against it, if the latter statute applied to the case. It is peremptory in our favor. On the rendition of the judgment it became the duty of the executor to pay the debt, and his refusal would subject him to an action of waste. He cited 6 *Dane*, 463; *Sellon's Pr.* 187; *Dearborn* v. *Dearborn*, 15 *Mass. R.* 316; *Clark* v. *Paine*, 11 *Pick.* 66; *Cony* v. *Williams*, 9 *Mass. R.* 115; *Richmond, Admr. Petr.* 2 *Pick.* 567; *Wolf* v. *Pounsford*, 4 *Hammond*, 397.

Megquier, for the defendant, said, that the statute cited in behalf of the plaintiff, *ch.* 60, *sec.* 3, merely gave the right to have an execution, where he was entitled to it, and not where he was not. The same argument would enable him to obtain an execution, where the judgment was satisfied within the year and no execution had ever issued. The defendant relies upon the *Rev. Stat. c.* 52, § 26, as an effectual bar to this action. This process was commenced long after the four years had elapsed, and the only inquiry is, whether it is a *suit* within the meaning, as it certainly is within the letter of that statute. When was this suit commenced? The writ in that case was in 1826, for the judgment was rendered *October Term*, 1826, and the process on which we are now brought into Court, was dated *Feb.* 11, 1835. Is this and that the same suit? If it be, then this suit was commenced before that judgment was rendered, on which it is based. The word suit is the most comprehensive term in our language, to express every kind of process whatever, even more so than action. This is an attempt

to evade the statute, and the former decision of the Court between these parties, by mere technical words used by the Legislature on another subject. *Megquier* cited 1 *Tidd's Pr.* 1; 2 *Wilson*, 251; 2 *Ld. Raymond*, 1048; 2 *Tidd's Pr.* 982; *Co. Lit.* 290, *b*; 9 *Conn. R.* 390; 2 *Saund.* 6, *note a*; *ibid.* 71; *Fenner* v. *Evans*, 1 *T. R.* 267; *Co. Lit.* 291, *a*; 3 *Bl. Com.* 421; 6 *Bac. Ab.* 125; *Wright* v. *Nutt*, 1 *T. R.* 388; *Gonnigal* v. *Smith*, 6 *Johns. R.* 106; *Stat. of* 1830, *c.* 463, § 2; 14 *Petersdorff*, 514; 13 *Mass. R.* 163; *ibid.* 201; 16 *Mass. R.* 172; 3 *Greenl.* 17; 1 *Greenl.* 156; 15 *Mass. R.* 58; 5 *Pick.* 140; 6 *Greenl.* 127; 8 *Greenl.* 220; 12 *Mass. R.* 570; 15 *Mass. R.* 322; 8 *Johns. R.* 126; 2 *Saund.* 265; 7 *Cranch*, 307. No damages are recoverable in *scire facias*. 3 *Burr.* 1791; 2 *Stra.* 807; 4 *Greenl.* 79.

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

SHEPLEY J. — It is provided by *stat. ch.* 60, *sec.* 3, that "if the party shall neglect for the space of one year next after obtaining judgment to take out his execution, or shall not within one year next after his execution shall be returned not satisfied, take out his *alias* or *pluries*, he shall sue out his writ of *scire facias* against the adverse party to shew cause, if any he hath, why execution ought not to be done; and upon his not shewing sufficient cause, the Court shall award execution for what remaineth with additional costs." And *ch.* 52, *sec.* 26, provides, "that no executor or administrator shall be held to answer to any suit, that shall be commenced against him in that capacity, unless the same shall be commenced within the term of four years from the time of his accepting that trust," if he perform certain duties required of him.

This is a *scire facias* upon the same judgment upon which the action of debt was brought, reported 2 *Fairf.* 150, where it was decided, that the action was barred by the statute.

It is now insisted, that *scire facias* can be maintained after the four years, because it is not a new suit, but is a continuation merely of the former suit. In the case of *Wright* v. *Nutt*, 1 *Term. R.* 388, it was held not to be a new action, but a continuation of a former one. And in the case of *Obrian* v. *Ram*, 3 *Mod.* 187, it was held, that a *scire facias* was suspended by a writ of error on

the original judgment, and that a reversal of that judgment operated as a reversal of the judgment of the *scire facias*.

Dane says, "It is sometimes a new action, and sometimes a mere continuation of a former action; on a judgment it is always a continuation;" *ch.* 190, *art.* 1, *sec.* 3. In the case of *Wolf* v. *Pounsford*, 4 *Ham. R.* 397, it is said, "a *scire facias* to revive a judgment, is only a continuation of a former suit, and it is not an original proceeding." And in 15 *Mass. R.* 316, it was decided, that a *scire facias* against bail was not a new suit.

On the contrary, there are cases where *scire facias* has been held to be a new suit, requiring a new warrant of attorney to commence it. *Cro. Eliz.* 177, *Herd* v. *Burstowe*; 2 *Ld. Raym.* 1252, *Atwood* v. *Burr*; 6 *Johns. R.* 106, *Gonnigal* v. *Smith*.

Without undertaking to reconcile these differences, or to decide whether it be a new action, or an action in continuation of a former action, it is sufficient for the present purpose to say, that it is regarded by all as a suit or action. *Littleton, sec.* 505, says, it may be well said to be an action; and in *sec.* 506, that a release of all actions is a good plea in bar. Lord *Coke* says, although it be a judicial writ, yet because the defendant may plead to it, it is accounted in law to be an action; and that a release of actions, or a release of suits, is a good bar. *Co. Lit.* 291, *a.* To the same effect are *William's notes on Saunders, vol.* 2, 6, *note* (1); *idem*, 72, *note* (4).

The act of the 17 *Geo.* 3, *ch.* 26, provided, "that before any execution shall be sued out, or action brought on any such judgment already entered, a memorial of the deed, bond, or instrument," &c., "shall be enrolled in chancery;" and a *scire facias* issued to revive a judgment, entered before the act for securing the payment of an annuity, was set aside for want of such a memorial, because it was an *action* upon the judgment, and within the statute. 1 *Term. R.* 267, *Fenner* v. *Evans*. So to a *scire facias* to have execution on a judgment the defendant pleaded, that the plaintiff ought not to have his action, instead of ought not to have his execution, and the plea was adjudged good because *scire facias* is an action. 2 *Wil.* 251, *Grey* v. *Jones*.

A suit in law is defined by *Jacobs* to be all one with an action; and an action to be the form of a suit given by law. While *Coke*

notices a diversity, and concludes, that a release of all suits is more extensive, than a release of all actions. *Co. Lit.* 291, *a.* The term suit seems to have been employed in some of the statutes of limitation, as comprehending also process in admiralty, in equity, and in the ecclesiastical courts. 4 and 5 *Anne, ch.* 16, *sec.* 17 ; 53 *Geo.* 3, *ch.* 127, *sec.* 5.

The legislature must be supposed to employ language relating to legal proceedings, in its well known legal acceptation ; and there can be no doubt that *scire facias* has been regarded in law as an action or suit.

It is insisted, that the statute gives an absolute right, the language being, that he shall sue out his writ of *scire facias.* But the statute contemplates, that the defendant may shew cause against it, and that upon his not shewing sufficient cause, the Court should award execution. The statute of limitations may be shewn as a good cause, as well as any other legal bar or discharge.

It is said to be the duty of the administrator to satisfy a judgment against the estate, and that a neglect to do so subjects him to a suit, but then he is subjected to such suit only in favor of those injured, who having taken all previous steps are in a condition to maintain it.

The presumption of law, after such a lapse of time, is, that the judgment has been executed, satisfied, or released ; and upon this presumption the legislature has established a perpetual bar, which the Court cannot disregard.

Plaintiff nonsuit, and costs for defendant.

WILLIAM REED *vs.* JOHN B. CROSS *et al.*

Where a bill in equity against three defendants, alleges, that two of them are indebted to the plaintiff, and had contracted in writing, to convey certain land to him, and that they had, for the purpose of defrauding the plaintiff, conveyed the land and their other property to the other defendant, who had full knowledge of all the facts; he cannot refuse to make a full answer to the bill, because the plaintiff has not previously established his claim against the other two by a judgment at law.

THIS was a bill in equity, against *Cross*, *Wyer*, and *Noble*, alleging, among other things, that *Cross* and *Wyer* were indebted to the plaintiff, and had agreed to convey to him a certain tract of land, described in the bill, in part payment, and that *Cross* and *Wyer* had conveyed their property, including this land, to *Noble* for the purpose of defrauding the plaintiff; and seeking a discovery, as well as alleging a fraudulent combination of the three defendants, and asking for a conveyance of the land from *Noble*. To this bill the defendant, *Noble*, demurred for want of equity, and specially, and also made an answer denying the fraud and combination. To this answer the plaintiff filed exceptions. The facts sufficiently appear in the opinion of the Court.

Daveis, for *Noble*, contended, that before *Noble* could be called on to enter into a controversy about property of *Cross* and *Wyer*, that the plaintiff should have first obtained a judgment at law against them, and have exhausted his remedy at law. A judgment creditor only can resort to a court of equity to obtain property of his debtor from the hands of a trustee. *McDermutt* v. *Strong*, 4 *Johns. Ch. R.* 687. The proper mode of taking advantage of this deficiency in the plaintiff's case on the face of the bill is by demurrer, and a short answer denying the fraud and combination. 2 *Mad. Ch.* 342; *ibid.* 285; 16 *Vesey*, 75.

Preble, for the plaintiff, remarked, that the bill alleged, that *Cross* and *Wyer* had agreed to convey the land to the plaintiff, and that *Noble* knew it, and with that knowledge, took the conveyance of that and other property for the purpose of defrauding the plaintiff. He argued, that the cases cited, did not apply to cases of fraud, like the present; and that the plaintiff, being a prior creditor, had a right to treat the transaction, as fraudulent, if it was merely without consideration; and in either case was entitled to a full answer.

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

EMERY J. — In this case, *Noble*, one of the defendants, appears, and with protestation, not confessing any of the matters alleged in the bill, demurs to it, because there is no equity, and because it is exhibited against *John B. Cross* and *Eleazer Wyer*, as well as the defendant, for several and distinct matters, which have no relation to or dependence upon each other, and wherein it appears, the defendant is not in any manner interested, but are multifarious and tend to prolixity and expense; and because the object is to recover money due from *Cross*, as principal, and *Wyer*, as surety, for non-performance of the condition of the bond, set forth, as damages on account of the alleged fraudulent transfer of estate by *Cross* and *Wyer*, to *Noble*, and for conveyance of estate in *Dorchester;* and the complainant has adequate remedy at law against *Cross* and *Wyer*, upon the obligation against *Cross* and *Wyer*, and as there is no privity or contract in writing between the defendant and complainant set forth therein, whereby the complainant can claim specific performance in the conveyance of the *Dorchester* estate, and the complainant has not alleged, that he has commenced a suit at law on the bond, or recovered judgment and sued out execution, and has not entitled himself to proceed immediately against this defendant.

This special demurrer for want of equity, because several and distinct matters which have no relation to or dependence upon each other, and in which it is said the defendant is not interested, and for multifariousness, and that there is no contract in writing shewing privity between the plaintiff and defendant, whereby the plaintiff can claim specific performance, and that the plaintiff has not obtained judgment and execution, is intended to stop the plaintiff at the threshold in his appeal to the equitable jurisdiction of the Court.

In *Barton's* treatise of a suit in equity, page 107, it is said, "As it is imagined that a defendant would in no case endeavor to evade the plaintiff's bill by demurrer, when he could venture *bona fide* to deny the truth of its allegations upon oath, it has become an established rule of judgment in Courts of Equity, that every thing to which a demurrer extends is true. Hence arose the practice of introducing the demurrer by a protestation against the truth of any

of the facts alleged by the bill; but it has no weight with the Court, and is entirely useless." And at page 113, it is said, that "Courts of Equity are apt, and with reason, to look with a suspicious eye upon defendants, who, by availing themselves of every cause of demurrer, or plea, shew an unwillingness fairly to meet the plaintiff's case; it is seldom therefore advisable to have recourse to these modes of defence, unless to prevent the expense of an examination of witnesses, or to avoid a discovery, which might be detrimental to the defendant's just and rightful interests." And upon this principle of discountenancing these dilatory pleas, and encouraging an open and manly defence, have proceeded many of the cases to which Mr. *Barton*, as he says, had occasion to refer in his notes to his treatise, and he refers to 3 *Brow. Ch. ca.* 38.

In this case, the defendant, *Noble*, professes his readiness to make full answer, if thereto required by the Court. He has therefore a right to ask our judgment on his objection, because there are authorities countenancing an appeal to us for the reasons alleged as causes of demurrer.

But we apprehend that in order "to determine whether a suit is multifarious, or contains distinct matters, the inquiry is not whether each defendant is connected with every branch of the cause, but whether the plaintiff's bill seeks relief in respect of matters which are in their nature separate and distinct." *Story Eq. Plead.* 227, *note.*

We consider it as a rule to procure relief in equity by a bill brought to assist the execution of a judgment at law, that the creditor must show, that he has proceeded at law to the extent necessary to give him a complete title. And if aid be sought as to real estate, he must shew a judgment creating a lien upon that estate. But in those cases the plaintiff had acquired no lien or claim to the specific property. In this case, the contract gives the plaintiff a claim to have a conveyance of real estate, and the allegation of the bill is, that the defendant took the title with the knowledge and in fraud of the contract. The case does not fall within the principle of the class of cases requiring a creditor to obtain judgment and exhaust his remedy at law. Upon the present state of the case, on the demurrer, the defendant admits himself to have taken a conveyance of that estate with the fraudulent design of defrauding the

plaintiff of his right, and has taken all the property of *Cross* and *Wyer* with the same injurious design of defeating the plaintiff of his just claim. We are constrained to overrule the demurrer. *See* 4 *Johns. Ch. R.* 294, *Livingston* v. *Livingston*; 5 *Johns. Ch. R.* 186, *Higginbotham* v. *Burnet*; 9 *Wend.* 511, *Livingston* v. *Peru Iron Co.*; 3 *Vesey*, 253, *Brooke* v. *Hewitt.*

An exception also is taken to the defendant's answer, "because said *Noble* hath not set forth in his said answer according to the best and utmost of his knowledge, remembrance, information, and belief, whether any of the allegations in said complainant's bill are true, nor hath he in any way or manner answered the several interrogatories to him put in and by said bill."

If a bill state a fact, which is not denied by the answer, and by the answer it appears that the defendant has the means of answering as to his belief, by making an inquiry as to that fact, he must answer as to the result of that inquiry; and his stating that he is unable to set forth, &c. is not sufficient. 2 *Y. & Coll.* 3. And if a defendant is interrogated in equity in aid of a suit at law, as to the consideration given for a bill of exchange, the defendant in equity is bound to state, not only the consideration, which he gave for the bill itself, but that which he knows another to have given. *Glengall* v. *Edwards*, 2 *Y. & Coll.* 125; *Story's Equity Pleadings*, 657.

The exceptions are sustained, and the defendant is directed to make full answer.

WILLIAM SPEAR *vs.* EPHRAIM STURDIVANT.

Where an officer's deed of an equity of redemption was seasonably made, delivered and recorded, particularly reciting the performance of every act which the law requires to make the sale legal, and where afterwards, the officer, by permission of the Court of Common Pleas, in which Court the record was, amended his return on the execution, by striking out the names of certain towns, distant from the land described in the deed, and inserting in the place thereof the name of the town wherein the land was, and of two adjoining towns, thus making the return consistent with the deed; *it was held*, that the title thus acquired should prevail against a deed from the same debtor, made after the attachment of the equity, and before the sale thereof.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

The action was *trespass* for breaking and entering the close of the plaintiff, being lot No. 65, in the town of *Cumberland*. The plaintiff claimed title to the land under a deed from *David Spear*, dated and executed *Sept.* 20, 1828, and recorded the 22d of the same month.

The defendant, to prove the issue on his part, read to the jury the copy of a writ in favor of *Royal Lincoln*, against *David Spear*, dated *July* 18, 1828, and returnable to the Court of Common Pleas, *October Term*, 1828, with the officer's return thereon, dated *July* 18, *A. D.* 1828, by which it appeared that he had attached the same land as the property of the said *David Spear*. Said writ was duly returned and entered at the Court of Common Pleas, *October Term*, 1828, and at *March Term*, 1829, *Lincoln* recovered judgment against *David Spear* for $648,37, damages, and $10,96, costs of suit, and execution issued on said judgment, *March* 23, 1829. The execution was directed to the sheriff or either of his deputies, or to either of the coroners in said county, the office of sheriff being vacant. The defendant then offered an office copy of the coroner's return on said execution, to prove the levy upon and sale of the equity of redemption of the same lot No. 65, it being under mortgage at the time of the attachment; but the plaintiff's counsel objected to the admission of this evidence, it appearing, as they contended, by the return, that the officer having the execution did not notify the debtor in writing of the time and

place of the sale of the equity of redemption, but that it was done by *Zachariah B. Stevens*, another coroner, who had not the execution. The following is the extract from said return, which is material, viz. "first having given notice to the judgment debtor in writing, of the time and place of said sale by *Zachariah B. Stevens*, coroner, leaving a true copy of the advertisement, which was inserted in the *Eastern Argus*, at his dwellinghouse." The plaintiff's counsel then suggested, that there had been an alteration of the officer's return, and called into Court the said coroner who was sworn, and from whose testimony it appeared, that said return had been amended by leave of Court. Whereupon the plaintiff caused to be produced from the files of the Court the original petition of said coroner for leave to amend the said return. The petition was entered at the *March Term* of the Court of Common Pleas, 1835, the prayer of which said petition was granted, without notice to the plaintiff. And he also caused to be produced the original return of said levy, and it appeared how it was originally made, but since erased. The original return stated that notifications of the time and place of sale were posted up in two public places in the town of *Portland*, and in the towns of *Cape Elizabeth* and *Westbrook*; neither of which is the town in which the land lies; nor are either of said towns adjoining that in which said land lies; and that *Wescott*, the coroner, by leave of Court, but without any knowledge or consent of the plaintiff, and about six years after the return was made, and after the plaintiff had taken his deed from *David Spear*, altered and amended said return on said execution in the clerk's office by erasing the names of the towns of *Portland* and *Cape Elizabeth* and *Westbrook*, and by inserting the names of the towns of *Cumberland* and *Falmouth* and *North Yarmouth*, which he testified was according to the truth; so that it now appears by said return that the said notices were posted in two places in the town of *Cumberland*, and in the adjoining towns of *North Yarmouth* and *Falmouth*, which evidence was admitted.

The defendant also offered in evidence the deed from the officer to him made and dated *May* 20, 1829, and recorded on the 29th of said *May*, corresponding with the amended return; which was objected to, but admitted, and the jury were instructed that they must return their verdict for the defendant. And they afterwards

returned their verdict for the defendant accordingly. To which ruling and direction the plaintiff's counsel excepted.

Deblois and *S. Longfellow, jr.*, for the plaintiff, contended, that the plaintiff's title by deed could be defeated only by a sale in which all the requirements of the statute were complied with. And the record must show, that every thing was done essential to the perfection of the title. The duty of the officer is pointed out in *Rev. Stat. c.* 60, § 17. There must be a full and strict compliance. *Mitchell* v. *Kirkland*, 7 *Conn. R.* 229; *Booth* v. *Booth*, *ibid.* 350; *Means* v. *Osgood*, 7 *Greenl.* 146; *Grosvenor* v. *Little*, *ibid.* 376.

The notice could be given only by the officer having the execution, and therefore the statement in the return, that another officer left it, is but in substance saying, that no legal notice was given. *Grosvenor* v. *Little*, and *Means* v. *Osgood*, before cited.

The supposed amendment does not aid the defendant, for no amendments can be made, when they affect the interest of third persons. The return, as originally made, shows that the notices were posted in the wrong towns. The Court had no right to permit the amendment. *Williams* v. *Brackett*, 8 *Mass. R.* 240; *Freeman* v. *Paul*, 3 *Greenl.* 260; *Means* v. *Osgood*, 7 *Greenl.* 146; *Howard* v. *Turner*, 6 *Greenl.* 106; *Porter* v. *Haskell*, 2 *Fairf.* 177. No notice was given to the other party, and he cannot be bound by it.

Daveis, for the defendant, said, that every thing necessary to the title of the defendant must appear on record, but that in this case it did so appear. The amendment was properly permitted by the Court of Common Pleas, where the record was; and even if it was not a proper exercise of the power of the Court, yet it was the exercise of a discretionary act, and is not subject to revision. *Clark* v. *Foxcroft*, 6 *Greenl.* 302; *Ingersol* v. *Sawyer*, 2 *Pick.* 276; *Purple* v. *Clark*, 5 *Pick.* 206; *Reynard* v. *Brecknell*, 4 *Pick.* 302; *Welsh* v. *Joy*, 13 *Pick.* 477. The materials were most abundant from which to make the amendment without resorting to parol evidence. The deed stated particularly every thing required by the statute, and the return states, that the notices were posted in the town where the land lies and in two adjoining towns,

and the land is described in the return, as lying in *Cumberland.* But the deed alone is sufficient, as it recites every fact necessary for a complete return, and may be considered as such. The notice is given by record of the deed, and it is not even necessary, that the execution should be returned into the clerk's office. *Emerson* v. *Towle,* 5 *Greenl.* 197; *Welsh* v. *Joy,* 13 *Pick.* 477. The deed gives a good title; but if it did not, and if the amendment permitted by the Court of Common Pleas be subject to revision, the amendment was properly allowed and made. *Welles* v. *Battelle,* 11 *Mass. R.* 481; *Adams* v. *Robinson,* 1 *Pick.* 461; *Thacher* v. *Miller,* 11 *Mass. R.* 413; *Shove* v. *Dow,* 13 *Mass. R.* 529; *Avery* v. *Butters,* 9 *Greenl.* 16; *Sawyer* v. *Baker,* 3 *Greenl.* 29; *Commonwealth* v. *Parker,* 2 *Pick.* 550. Nor can either the lapse of time, or the fact, that *Spear,* the debtor, had conveyed to the plaintiff, make any difference, as to the right to amend with the permission of the Court. *Buck* v. *Hardy,* 6 *Greenl.* 162; *Howard* v. *Turner, ib.* 106; *Welsh* v. *Joy,* 13 *Pick.* 477; *Hall* v. *Williams,* 1 *Fairf.* 278; *Haven* v. *Snow,* 14 *Pick.* 28. Some of the same cases show, that no notice to the other party is necessary, and indeed, it could not be ascertained in many cases, who the opposing claimants were.

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

Emery J. — In this action both parties claim title under *David Spear.* One of the great objects of the administration of justice in civil cases is, to give the fruits of judgments by supporting the executions which issue upon them. Clerical errors in preliminary proceedings may be corrected; and according to the principles of the common law, the returns of officers may be amended on final process, with certain limitations and exceptions, so as to conform to the truth of the case. This indulgence to human error is not intended to throw out temptations to officers at great intervals of time, to vary on the mere strength of memory only, their returns, so as to affect the vested rights of others. The amendments which officers may be permitted to make, must necessarily depend on the sound discretion of the court to which the application may be made. In the present case, no exception is raised against the regularity of

the return of the attachment of the premises on the original writ of *Lincoln* v. *David Spear*, on the 18th of *July*, 1828; nor against the judgment or execution issued in that suit.

The plaintiff's deed from *David Spear*, was executed the 20th day of *September*, 1828, and recorded the 22d day of the same month. Whether the plaintiff knew of the attachment, when he took his deed, is not in evidence. The writ was duly returned to, and entered at the *October* term of the court to which it was returnable, and at the *March Term*, 1829, judgment was recovered, on which the execution issued. The return thereon is the subject of the present controversy. An amendment of the return having been made under the authority of the Court of Common Pleas, where the precept was returnable, it is argued that the amendment ought not to have been made; that even when made, it cannot affect the rights of the plaintiff; and that there is manifest departure from the requisition of law, as to the notice said to have been given to the debtor.

In *North Carolina*, it is held, that the sheriff may be permitted to make a return to an execution or amend it according to the truth of the case, at any time after the return day, even where important consequences to the rights of the parties may be produced by such amendment. 3 *Murphy's N. C. R.* 128, *Smith* v. *Daniel et al.* In *Rucker* v. *Harrison*, 6 *Munf. Virg. Rep.* 181, a sheriff was permitted by the Court to amend his return after a lapse of seven years from its date; and in fact to change a return where an execution was levied and a forthcoming bond taken, that "the within bond was forfeited on the 4th of *July*, 1803," to this, "to the within judgment a supersedeas issued from the District Court of *Charlotteville*, dated *July* 1, 1803, which writ of supersedeas the sheriff *thinks* was delivered to him on the day of sale. The property within named was not delivered at the day and place of sale. *James C. Moorman, D. S.* for *William Scott*, sheriff, *Campbell County.*"

In *Massachusetts*, in *Wellington* v. *Gale*, 13 *Mass. R.* 483, where the return of the officer was general, that he proceeded to sell after giving public notice of the time and place of sale, agreeably to law in such cases made and provided, it was held defective. The late Chief Justice *Parker*, says, "whether it could be amended

by the officer under the direction of the Court, were the officer now living and ready to certify the essential facts omitted in the return, we are not prepared to say." But the Court were satisfied, that no parol evidence could be properly admitted in lieu of the return of the officer.

After this, in the same Court, came the case of *Ingersol* v. *Sawyer*, 2 *Pick.* 276. The deputy set out all the facts of a sale of an equity of redemption in the deed, which he executed to the purchaser and which was recorded, but the deputy died before the return day of the execution, not having made any return thereon; but the return, conformable to the recital in the deed, was after the deputy's death made by the sheriff. The Court sustained the proceeding, declaring that parol evidence was not wanted for any purpose relating to the sale. The sale was on the 31st *March*, 1819, the deputy died on the 29th *May*, 1819, and the bill in equity in that case was filed the 22d of *April*, 1822. At what time the sheriff made his return does not appear in the report, nor whether any notice was given on the subject. The opinion was delivered in *March*, 1824.

In an old case, *Dean* v. *Coward*, in *Comyn's R.* 386, a motion was made to amend a common recovery. By indentures of 8 and 9 *June*, 1696, lands in several villas, naming them, were conveyed to make a tenant to the precipe for a common recovery, that is, the deed to lead the uses. At Trinity term, 8 *Wm.* 3, a recovery was suffered, but the vills *Wargrave* and *Wallingford*, two of the vills named in that deed, were omitted in all the proceedings of the recovery. In *June*, 1723, an heir claimed the lands in *Wargrave* and *Wallingford*, by virtue of the entail in the settlement, and in 1726, nearly thirty years after the recovery was suffered, this motion was made, that the recovery should be amended by the deed of *June*, 1696. After a rule to shew cause, the rule was made absolute. And many precedents were cited. This, therefore, must have involved an amendment not only of the record of the recovery, but also what was equivalent to an amendment of the return of the sheriff, that he had caused the plaintiff to have full seisin of the tenements demanded with the appurtenances.

As suggested, in *Emerson* v. *Upton*, 9 *Pick.* 167, we do not interfere with the right of the Court of Common Pleas, to allow the

officer to alter his return; but the whole matter appearing to us, the deed, the return, and the subsequent amendment, we must decide on the legal effect of the whole upon the plaintiff's title.

It is observable, that the defendant was a stranger to the judgment and execution in favor of *Lincoln* v. *David Spear*, till he became a purchaser. The general rule of the common law is, that a purchaser at a sheriff's sale is only bound to inquire, whether the sheriff has authority to sell, and is not bound to look into the regularity of the proceedings.

And it has been held, that if the sheriff sell a term of years on a *fieri facias* to a stranger, and the judgment is afterward reversed, the defendant will be restored to the money for which the term sold, not to the term itself; because the purchaser, a stranger, comes duly thereto by act of law. *Cro. Eliz.* 278; *Cro. Jac.* 246. Not so the sale and delivery of a lease to the party himself upon an *elegit;* that is, no sale by force of the writ delivered in extent, which being reversed, the party shall be restored to the term itself. 2 *Serg. & Rawle*, 426, *Vastine* v. *Fury, opinion of Yeates J.*

The course of our decisions has been to require a return by the officer of his proceedings in order to sustain the sale. The return here was made, under the direction of the Court, conformable to the deed, by which the amendment could with perfect propriety and justice be made; and we think, that notwithstanding the reasoning in *Means* v. *Osgood*, the legal effect of this proceeding is to sustain the title of the defendant. Here was *something to amend by;* the notice of the registry of deeds was communicating the truth to all concerned. All the right of the plaintiff was subsequent to the attachment on the writ, and he took his deed necessarily subject to that incumbrance, which has been followed up seasonably by the sale of the equity of redemption, and the deed thereof put on record on the 29th of *May*, 1829.

It is, however, objected, that the notice in writing to the debtor of the time and place of sale, was made by *Zachariah B. Stevens*, coroner. We cannot consider that the sale is void for that cause, because the officer who had the execution, certifies that he had first given notice in writing of the time and place of sale, to the judgment debtor in the execution, by causing an advertisement thereof to be left at his dwellinghouse, by *Zachariah B. Stevens*, coroner for

said county. Thus much is stated in the deed, and it is more particularly stated in the return.

The instant that the deed from the coroner, *Wescott*, was executed and delivered to the defendant, reciting the compliance with the requisitions of the statute for the sale of rights in equity, the defendant's title was perfect, subject to the debtor's right of redemption. It had relation back to the attachment. The money was paid. The judgment and execution so far satisfied. The 18th section of the *statute, ch.* 60, says, that "all deeds made and executed as aforesaid, shall be as effectual to all intents and purposes to convey the debtor's right in equity aforesaid to the purchaser, his heirs and assigns, as if the same had been made and executed by such debtor or debtors."

Suppose the coroner had died immediately afterward, not having completed his return, can it be, that under such circumstances, a stranger coming to the possession of his deed duly by act of law, and having paid his money to discharge so far the demand against the debtor, should lose his title? Would it not be more appropriate, in such a case, that the deed should be considered as a return to the execution? It is not prescribed, that a deed should set forth the circumstances preceding the sale, but if it professed to be in general terms a sale by virtue of the execution, and a correct return of the officer's doings were made upon the execution, it is apprehended that the deed would be supported by the return.

If no collusion or oppression be practised, no one can doubt, that it is of the utmost importance to give countenance to official public sales, and not to suffer immaterial considerations to defeat them. It is best calculated to make the property produce more by exciting competition, and will tend to "prevent odious speculations upon the distress of the debtor."

By this we do not by any means intend to impugn the decision in *Means* v. *Osgood*, further than it has been affected by subsequent decisions. In that case, the defect was palpably fatal, as the Court were then impressed. There was nothing but mere memory, by which the amendment was to be made. But a different conclusion has since been adopted as to what is implied notice to a debtor named in an execution. And a return that he neglected to choose an appraiser, is now deemed as implying that he had notice to

choose one. *Sturdivant* v. *Sweetser*, 3 *Fairf.* 520; *Bugnon* v. *Howes*, 13 *Maine Rep.* 154. We mean not to intimate an intention to overrule decisions against amendments proposed to be made by officers after great intervals of time, merely on the supposed strength of the officer's recollection.

Exceptions overruled.

CHARLES O. EMERSON *vs.* PELATIAH HARMON *& al.*

Where a general partnership exists, and a note is indorsed in the name of the firm, by one partner, and is sold in the market, and the money received by him, all the partners are liable as indorsers to a *bona fide* holder.

And if such partner, without the knowledge of the holder of the note, convert the money to his individual use, still all the partners are liable.

Declarations in his own favor, made by the indorser of a note, at the time when notice of its dishonor was given to him, but when the holder of the note was not present, and having no relation to such notice, are not admissible in evidence.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

Assumpsit against the defendants, as indorsers of a promissory note, made by *Hanson & Hale* to *Pelatiah Harmon*, one of the defendants, or his order, dated *Nov.* 27, 1835, and payable in four months and grace. On the back thereof was indorsed, in the handwriting of *Harmon, P. Harmon, Harmon & Silsby*, in blank. *Harmon* was defaulted, and the defence made by *Silsby*. Due demand and notice were proved by a witness, of whom the counsel for *Silsby* proposed to inquire, what declarations were made by *Silsby* at the time the notice was given to him as indorser. Objection was made, and the Judge ruled, that, as the plaintiff was not present, that the declarations were not admissible. The plaintiff proved a publication of partnership between the two defendants, "under the firm of *Harmon & Silsby*," published by their order, on the 24th of *Dec.* 1835, and a notice similarly published on the 15th of *April*, 1836, of the dissolution of the partnership by mutual consent, and a direction to all indebted to the firm to make

payment to *Harmon*, who was authorised to settle the partnership concerns. The plaintiff then proved, by a broker in *Portland*, where the defendants lived, that *Harmon*, after the copartnership was formed, brought the note to him and wished to raise money on it; that the witness suggested, that there was more strength wanted on the note, and that if the firm of *Harmon & Silsby* was indorsed upon it, he thought he could get the money, and that *Harmon* thereupon, in presence of the witness, wrote the name of the firm *Harmon & Silsby*, *Silsby* not being present, and that the witness then took the note to the plaintiff who gave him a certain sum of money for it, and less than the face, but the precise sum he did not remember, which sum he paid to *Harmon*, after deducting his commissions for doing the business. He did not communicate to the plaintiff in what manner the names, "*Harmon & Silsby*" came upon the note. *Silsby* then offered to prove, that the note was made in pursuance of an agreement between the makers and payee for the purpose of raising money, which when obtained was to be divided between them for their individual purposes; but as no knowledge thereof was communicated to the plaintiff, the Judge rejected the evidence. He then offered the cash book and other books of the firm, to show that the money was never received by the firm, to which the plaintiff objected, and they were excluded by the Judge. *Silsby* contended, that the plaintiff was not entitled to recover, but the Judge ruled otherwise. The verdict was for the plaintiff, and *Silsby* excepted.

Codman, for *Silsby*, contended, that the indorsement of the partnership name by *Harmon* was a fraud upon *Silsby*, and void. Fraud vitiates all contracts. To charge both partners, the business must be done in the usual course of partnership transactions, which was not the case here. 15 *Mass. R.* 232; 14 *Mass. R.* 260; 5 *Greenl.* 295; 1 *East*, 48; 6 *Mass. R.* 245; 4 *Greenl.* 84. Selling notes is no part of the partnership business. This was a private note of *Harmon's*, and an indorsement on a note in the partnership name for the private debt of one is not binding. *Watson on Part.* 195; *Ld. Raym.* 176; 2 *Caines*, 246; 3 *Pick.* 495; *Com. on Con.* 488; 15 *Mass. R.* 75.

The evidence rejected should have been admitted, as part of the *res gesta*. 16 *Johns. R.* 34; 1 *Wend.* 529; 4 *Johns. R.* 251;

2 *Esp. R.* 526; 7 *East*, 212; 4 *Mass. R.* 270; 7 *Mass. R.* 58; 5 *Pick.* 11; *ibid.* 413; 6 *Pick.* 259; 19 *Johns. R.* 154. Enough appears to show this to have been an usurious transaction. *Com. on Con.* 2*d Amer. Ed.* 99, and cases cited; 12 *Johns. R.* 102; *Chitty on Con.* 73; 2 *Pick.* 285; 3 *Pick.* 5.

W. Goodenow, for the plaintiff, contended, that this was an ordinary partnership transaction, and binding on both the partners. The note belonged to the firm, as part of *Harmon's* stock put in, or such was the inference the plaintiff would naturally draw from an inspection of the paper, being entirely ignorant of the manner in which the indorsement was made. *Gow on Part.* 54.

But if the indorsement by one partner of the partnership name had been a fraud on the other, it would not affect the plaintiff's rights, as he knew nothing of it. *Gow*, 52, and cases there cited; *Bayley on Bills*, 52; 13 *Petersdorff's Ab.* 110; *Boardman* v. *Gore*, 15 *Mass. R.* 331. The case finds no facts on which to ground the defence of usury. It was a purchase in the market of a person, whose name was not upon the note, and without any previous knowledge by the plaintiff of its existence. No argument can be required to show, that the evidence offered was rightly rejected.

The opinion of the Court was drawn up by

Weston C. J. — The note, although dated before the advertisement, announcing a partnership between the defendants, was indorsed after it was formed. It does not appear, that the broker knew for what purpose or for whom the money was raised, or that it was not wanted on account of the partnership, or to what uses it was applied. Besides, it is not in proof, that he was employed by the plaintiff to purchase the note. He was constituted the agent of *Harmon*, one of the defendants, to procure the note discounted, for which he received a commission.

The plaintiff purchased it, upon the credit of the makers and indorsers, without any intimation, or any reason to suspect, from any evidence in the case, that the name of the firm was not properly and fairly indorsed upon the note. If one of the firm has abused the confidence, reposed in him by his copartner, third persons, who receive the name of the firm, without notice of any fraud practised

or meditated, are not to be deprived of their security. The cases cited for the defendant show, that knowledge of such fraud must be carried home to him who receives the security, or the partnership is liable. *Arden* v. *Sharpe*, 2 *Esp.* 523; *Swan et al.* v. *Steele*, 7 *East*, 210.

The declarations of *Silsby*, one of the defendants, when notified of the dishonor of the note, the plaintiff not being present, were not legal evidence, and were properly excluded. The *res gesta* was the notice. What was said by the defendant, was in no proper sense a part of it; although it might have been occasioned by it. To receive it, would be to make the declarations of a party evidence in his own favor. If *Harmon*, who received the money, misapplied it, or withheld it from the firm, it does not impair the plaintiff's right to recover, unless he was privy to such misapplication. Nor could his rights be affected by any agreement of which he had no notice, between the makers and *Harmon*, to divide the money between them, instead of applying it to the use of the firm.

The Judge was not requested by the counsel for the defendant to instruct the jury upon the point of usury, if it was a ground taken at the trial. He contended generally upon the evidence, that the plaintiff was not entitled to recover; but the Judge instructed otherwise. If the note was tainted with usury, and the defendant was entitled to take advantage of the objection against the plaintiff, he would, by the *statute* of 1834, *c.* 122, be entitled to recover all but the excess. That the defendant might in that case have avoided, if he had pleaded or relied upon the statute, and claimed a special instruction upon this point. But this was not done, nor was the excess ascertained, by any evidence adduced in the case.

In our judgment, the ruling and directions of the Judge, who presided at the trial, were warranted by law.

Exceptions overruled.

HENRY WARD *et al. vs.* WILLIAM B. ABBOTT *et al.*

If account books, accompanied by the oath of the party making the charges, be improperly admitted in evidence; yet if the opposing party request, that the books may go to the jury to prove a fact favorable to himself, he cannot after the trial, object to their admission.

EXCEPTIONS from the Court of Common Pleas.

The action was against *Abbott* and *Brown*, on a note of hand, and on an account for goods sold, amounting to the same sum as the note. The note was signed by *Abbott*, and *Brown's* name also was signed by *Abbott* professing to act for him. *Abbott* was defaulted, and *Brown* defended. The plaintiffs introduced evidence to show, that there was a general partnership existing at the time, between *Abbott* and *Brown*, and contended, that if the jury believed that fact, that it gave *Abbott* authority to sign *Brown's* name to the note. But *Whitman C. J.* ruled, that the plaintiffs must prove by other evidence, that the note was given for merchandize or other property, which went into the partnership funds. The plaintiffs then offered their books with the oath of one of them, which evidence was objected to by the defendant, but admitted by the Judge. The books exhibited an account against *Abbott* only, and the testimony from one of the plaintiffs was, that the books were balanced by the note, and also that articles of merchandize to the amount of the note, suitable for such store as the defendants kept were delivered to *Abbott*. When the evidence was all out, the counsel for the defendant requested, that the books might go to the jury for their inspection, as they shew the charges to be made against *Abbott* alone. The Judge instructed the jury, that it was incumbent on the plaintiffs to prove, that the defendants were partners, and also, that the note was given for merchandize, such as the defendants were then dealing in; and that if they were satisfied of both these facts, they would find their verdict for the plaintiffs. They did find for the plaintiffs, and the defendant, *Brown*, excepted to the ruling and instruction of the Court.

Dunn, for the defendants.

Willis & Fessenden, for the plaintiffs.

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

EMERY J. — It is insisted upon by the defendant's counsel that a fatal objection is apparent in the exceptions, that the plaintiffs were permitted to shew their books, and that one of them was permitted to testify, that they were balanced by the note. It appears that other satisfactory evidence was given, that the defendants were partners. Whatever objection might have arisen to the introduction of the books and suppletory oath, when we find in addition to this, that the books were permitted to go to the jury at the request of one of the defendants, in the hope doubtless that some benefit might result to him from the inspection and examination of them by the jury, it was equivalent to waiving all exceptions on account of their introduction. And we consider, that it would be wrong to permit the defendants now, after making the experiment, to be benefited by complaining of it, when it did not serve their purpose. There must be

Judgment on the verdict.

EPHRAIM BROWN *vs.* ENOCH GAMMON.

Where two acts are to be performed at the same time, neither party can maintain an action against the other, without performance or tender of performance on his part, unless it be expressly waived by the defendant, or excused by his disability.

If one be bound to convey land, "the title to be a good and sufficient deed," a good title by deed should be conveyed.

Where the parties entered into mutual covenants whereby one agreed to convey land to the other on payment of a certain sum at a fixed time and place, and the other agreed then and there to pay the price for the land, "the title to be a good and sufficient deed;" and where both parties met at the time and place, and the one demanded a deed, but tendered no money, and the other said he was willing to give a deed, but made no tender of it, he having no title to the land, either at the time the contract was made, or was to be carried into execution, but with the knowledge of the other party having the owner of the land present, and ready to convey on payment of the money; *it was held*, that no action could be maintained.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

The action was debt on an instrument under the hands and seals of *both parties*, dated *Dec.* 26, 1835; and commences, "Know all men by these presents, that I, *Enoch Gammon*, am bound unto *Ephraim Brown* in the sum of one thousand dollars, to convey to him, his heirs, or assigns, 3600 acres of land," described, and then continues, "the title *to be a good and sufficient deed;* the condition of payment to be one half down or on the conveyance, at one dollar and fifty cents per acre, and the residue in one year. And the said *Brown* agrees on his part to pay to the said *Gammon* the sum of one thousand dollars in case of failure to fulfil his part of the contract. The writings to be made at" a place named "on *Wednesday* next."

At the time fixed, the parties met, and *Brown*, having the bond, said to *Gammon*, that he was ready to comply with it, and demanded a deed; *Gammon* replied, that he had a deed ready for him, and showed a paper having the form of one, but it did not appear what was written therein. Nothing further was done by either party, and they separated. The plaintiff then proposed to prove in excuse for not tendering money or securities, that the defendant did not in fact then own the land in fee, and had not since the bond was made; and the defendant urged, that this was immaterial, as the plaintiff could not recover without offering to perform on his part. The Judge ruled, that if the defendant was not owner in fee at the time he had contracted to convey, and when tendering a deed according thereto, this fact excused the plaintiff from any further tender of performance on his part, and that the defendant was liable. The plaintiff then proved, that the defendant did not own the land. The defendant then offered to prove, that when the obligation was entered into, the plaintiff was informed by the defendant, and well knew, that the defendant was not the owner of the land, and that at the time when the bond was out and the parties met, the defendant had made such arrangements with the owner, that he was then and there prepared to furnish a good title to the land, if the plaintiff had offered performance on his part, and that the owner was present at the time and place for that purpose, and that the plaintiff had full knowledge of this at the time. This testimony was rejected by the Judge, as furnishing no defence. The defendant then offered the same testimony in

reduction of the damages the plaintiff might recover. But it was ruled to be inadmissible for that purpose. The plaintiff contended, that if he was entitled to recover any thing, it was the sum of one thousand dollars mentioned in the bond, as liquidated damages. But the Judge ruled, that this sum was to be considered as a penalty, and subject to chancery; that the plaintiff was entitled to recover nominal damages, and such further damages, as he could prove he had sustained. The jury returned a verdict for the plaintiff for the sum of seventy-four dollars. The plaintiff excepted to the ruling of the Judge in relation to the amount of damages, and the defendant excepted to the ruling in all other particulars. The question arising on the plaintiff's exceptions, was argued by the counsel, but as a new trial was granted on the exceptions by the defendant, without noticing those of the plaintiff, these arguments are omitted.

Codman, for the plaintiff, contended, that the defendant had incapacitated himself to convey, and that therefore the plaintiff need not make any tender. *Newcomb* v. *Brackett*, 16 *Mass. R.* 161; *Fairfield* v. *Williams*, 4 *Mass. R.* 427. The evidence to prove, that the plaintiff knew the defendant had no title, when the contract was made, is inadmissible, both as varying a written instrument, and as immaterial, because the defendant should within the time have placed himself in a condition to make the conveyance. *Wells* v. *Baldwin*, 18 *Johns. R.* 45; *Boston Glass Man. Co.* v. *Binney*, 4 *Pick.* 425. The testimony, that the owner was there and would have conveyed on a certain contingency, is liable to the same objection; and besides, that the plaintiff was not obliged to take a deed from any one, but the defendant.

W. P. Fessenden, for the defendant.

The defendant agrees to convey to the plaintiff a certain quantity of land on certain conditions by "a good and sufficient deed." The plaintiff has no right to insist on the deed of the defendant, if he can obtain a good title to the land. The question must be determined, according to the intent of the parties, from the instrument itself, upon a common sense view of the contract. *Johnson* v. *Reed*, 9 *Mass. R.* 78; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Campbell* v. *Jones*, 6 *T. R.* 571.

The rule is well settled, that where two acts are to be done at the same time, neither party can maintain an action against the other, without shewing performance or tender of performance, on his part. *Goodison* v. *Nunn*, 4 *T. R.* 761; 1 *Saund.* 320, *c.*; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Porter* v. *Rose*, 12 *Johns. R.* 212; *Green* v. *Green*, 9 *Cowen*, 46. And this must be an absolute *tender* of performance. A mere allegation of readiness to perform will not do. *St. Albans* v. *Shore*, 2 *H. Black.* 278; *West* v. *Emmons*, 5 *Johns. R.* 181; *Douglas*, 690; *Noy*, 74; 1 *Salk.* 113; *Chitty on Pl.* 310 *to* 325; *Green* v. *Reynolds*, 2 *Johns. R.* 209; *Brown* v. *Bellows*, 4 *Pick.* 179. An averment of "ready and willing" is only sufficient when accompanied by an allegation, that he was hindered by the other party. 2 *Saund.* 350; 1 *Roll. Ab.* 465. The cases relied on by the plaintiff go no farther, than this: that where a party makes a contract, and then voluntarily disables himself from performing it, and thus shows his intention not to perform, that the other party is excused from tendering performance. Here no act was done by the defendant to disable himself from performing his contract, and the plaintiff knew it, and in fact knew of his readiness to perform.

He argued, that the testimony offered by the defendant was clearly admissible, as showing the state of facts with reference to which the parties contracted, and not affecting the written contract, and on the question of damages.

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

Weston C. J. — If we give a literal construction to the bond, upon which the plaintiff declares, the title which he was to receive, was a good and sufficient deed. When the demand was made upon the defendant, he said he had a deed ready, which was shown, but not delivered. He was under no obligation to deliver it, without a concurrent performance of the conditions, stipulated on the part of the plaintiff. If the good and sufficient deed from the defendant, was the title the plaintiff was to have, the defendant had not disabled himself from executing such a deed, and for any thing which appears, such was the deed he had ready; and a tender from the plaintiff, upon this construction, was not excused.

But if the defendant had no title to the land, we do not think that the plaintiff, upon a fair and just construction of the instrument was bound to receive a deed from him, with whatever formality executed, or by whatever covenants secured. The plaintiff had a right to claim a good title. On the other hand, if the defendant, had it in his power, to cause a good title to be made to the plaintiff, and had the owner there ready and willing to make a valid and effectual conveyance to him, we cannot but think, that this would have been such a substantial performance on his part, as ought to relieve him from the payment of damages, whether they are to be regarded as liquidated, or such as might be fixed by the jury. The plaintiff would have received a good title, which is all he had a just right to require under the contract. If the defendant caused such a title to be conveyed, it is a performance to all substantial and valuable purposes.

The plaintiff now insists, that he is entitled to recover a thousand dollars of the defendant, because he neither performed, nor was able, as the title then stood, to perform. This, in our opinion, would not comport with the justice of the case. The defendant had, ready at hand, the power of substantial fulfilment on his part. And we are further of opinion, that upon the facts offered to be proved, a tender by the plaintiff was not excused. If it had been made, for any thing which appears, the owner was as ready to convey to the defendant, as to the plaintiff, and the defendant might thereupon have conveyed to the plaintiff, if the latter had insisted upon this circuitous mode, and would not have been satisfied with a direct conveyance from the owner. The defendant, having made his arrangements with him, had the means of fulfilment in his power, even literally, if such was the obligation of his contract. And as performance on both sides was to be concurrent, the authorities cited clearly show, that the plaintiff cannot maintain his action, without a tender on his part, unless it is expressly waived by the defendant, or excused by his disability. We sustain, therefore, the exceptions taken by the defendant, which renders it unnecessary to consider those of the plaintiff.

New trial granted.

SECOND UNITARIAN SOCIETY IN PORTLAND *et al. vs.* WILLIAM WOODBURY *et al.*

It is a principle well settled in equity, that a trust need not be created in writing. It is sufficient if it be proved under the hand of the party to be charged.

Where a party invokes the aid of a Court of Equity to enforce a trust in his favor, it will be awarded only on the condition, that he shall do equity.

BILL in equity, by the *2d Unitarian Society in Portland*, and *Charles Mussey* and *Enoch Paine*. Certain persons associated together, prior to *March* 2, 1835, to form a society for public worship, and were desirous of purchasing a house for that purpose already erected and for sale. Three of the number, *Charles Mussey*, *Enoch Paine*, and *Sam'l Winter*, who is now deceased and insolvent, and on whose estate the defendants, *Woodbury* and *Newhall*, are administrators, by the request of the associates, on that day purchased the house before the society could be legally formed and organized, and paid therefor, by giving their joint note, the sum of eleven thousand dollars, and took a conveyance thereof to themselves. There was no trust on the face of the deed, but there was parol evidence, that the purchase was made in trust for the society. The society was afterwards incorporated, and occupied the house with the concurrence of *Mussey*, *Paine*, and *Winter*. During *Winter's* life, a considerable portion of the note was paid by the society by sale of their pews, and since his death the residue has been paid by *Mussey* and *Paine*. The bill alleged, that *Winter* paid no part of the note. The answer of the administrators admits the intention of holding in trust, but states, that they believe, *Winter* paid one thousand dollars in money towards the purchase of the property, and know not that he paid the money with any other expectation, than that it should be reimbursed.

There was a demurrer to the bill at the same time the answer was filed. The case was argued at *April* term, 1836, and the Court granted leave to amend the bill by inserting the names of the heirs at law of *Winter*, and the action was continued. At *April* term, 1837, the heirs at law of *Winter* were defaulted. As the Court was not then composed of the same persons, as in the

preceding year, the counsel agreed to submit the case on the minutes of the Chief Justice, of the former argument.

Fessenden, sen'r, argued for the plaintiffs, and cited *st. of* 1830, *c.* 462; *Jeremy's Eq. c.* 1, § 3; *Livingston* v. *Livingston*, 2 *Johns. Ch. R.* 537; 5 *Vesey*, 722; 4 *Vesey*, 592; 1 *Mad.* 458; *Rev. St. c.* 52, § 13; also *st. c.* 342, § 2.

Daveis argued for the defendants, and to show, that the demurrer and answer were both rightly put in together, cited 1 *Fowler's Exch. Pr.* 359; 1 *Hoffman's Ch. Pr.* 214; 1 *Grant's Ch. Pr.* 134; 1 *Atkins*, 291.

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

WESTON C. J. — The bill avers, that the meeting-house in question, was purchased by *Winter*, *Mussey*, and *Paine*, in trust for the society, to whom it was to be conveyed when the trustees were relieved from the liability they had assumed on their account. That, for reasons assigned in the bill, no trust was expressed in the deed. That the society was formed, proceeded to exercise acts of ownership over the house, and paid a considerable part of the purchase money, with the concurrence of the trustees.

Without adverting to the doctrine of resulting trusts, it is a principle well established in equity, that a trust need not be created by writing. It is sufficient if it be proved in writing, under the hand of the party to be charged. *Steere* v. *Steere*, 5 *Johns. Ch.* 1. Whether there did or did not exist written evidence of the trust charged, does not appear by the bill. Before the heirs at law of *Winter*, in whom the fee of the part of the property conveyed to him vested by law, were made parties to the bill, it might be questionable, whether it could be sustained against the administrators alone; but there can be no question but they are properly made parties with the heirs at law. *Winter* being deeply insolvent when he deceased, his administrators have a contingent interest in the real estate, of which he died seised, to be sold and administered, for the benefit of his creditors.

The heirs at law, having been made parties, under leave to amend, and having been defaulted, the question presented for our consideration, on the demurrer interposed by the administrators, is,

whether the plaintiffs have set forth any case, entitling them to relief under their amended bill. By the demurrer, the averments in the bill are admitted to be true. No question arises as to the nature or competency of the proof, which the plaintiffs might have had in their power to adduce. The bill charges a trust. The demurrer admits it. A case then is presented within the jurisdiction of the Court, entitling the *cestuis que trust* to equitable relief; and the demurrer is therefore overruled.

The heirs at law having been defaulted, as against them the bill is to be taken as true. In the answer, put in by the administrators, they do not deny the trust charged, but distinctly admit it. Upon this part of the case therefore, the plaintiffs are relieved from the necessity of exhibiting proof, and the Court from considering the nature and competency of such as might have been furnished. The answer avers, that one thousand dollars, part of the purchase money, was advanced by *Winter*, in his lifetime. This is admitted, or is not controverted; but it is insisted, that it may have been a gratuity, for the use of the society, in which *Winter* took a deep interest; and that this may well be presumed. We do not regard this fact of essential importance in deciding upon the equity of the case. *Winter* being deeply insolvent, if he advanced the thousand dollars as a gratuity, it was out of the funds of his creditors. Aside from the trust set up by the plaintiffs, the creditors have a right to require, that this property should be sold for their benefit. The plaintiffs invoke the aid of this Court, to enforce a trust in their favor. Claiming relief in equity, it can be awarded them only upon the condition, that they do equity. And we are satisfied, that equity requires, that they should refund to the creditors of *Winter*, to be paid to the administrators in trust for them, the thousand dollars, which was abstracted from means to which they were justly entitled.

Upon the whole case, the Court order and decree, that the plaintiffs causing the administrators of *Winter*, as such, to be discharged from the note, signed by him for the purchase of the meeting-house, and paying also to the administrators the sum of one thousand dollars, to be administered according to law, that thereupon the heirs at law of *Samuel Winter*, deceased, convey to the second *Unitarian Society* in *Portland*, by good and sufficient deed, all the right, title and interest in and to the meeting-house in question, of which the said *Winter* died seised.

JONATHAN BUCK *vs.* JAMES APPLETON *et al.*

Notes made payable at a particular bank, but not discounted by any bank, or left therein for collection, are not entitled to grace by the *st.* of 1824, *c.* 272.

The words, we waive notice, written over the names of several indorsers of a note, are *prima facie* evidence of a waiver of notice by such indorser; and the burden of proof is on him to show, that the words were placed there under such circumstances, that they are not binding upon him.

The rule, which excludes parol testimony, offered to explain or vary that which is in writing, does not apply to proof of a fraudulent or unauthorized alteration of a written instrument, varying the liability of one or more of the contracting parties.

The objection, that a party to a negotiable instrument cannot be admitted as a witness to prove it void, extends only to proof, that it was void when originally made.

The indorser of a note, if without interest, is a competent witness to prove any fact, which does not show the note void in its inception.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

Assumpsit against *James Appleton* and *James Appleton, Jr.*, as partners in trade in the name of *J. & J. Appleton*, and as third indorsers of a promissory note of which a copy follows:

"$2493. *Bangor, June* 11, 1835.

"One year after date, I promise to pay to the order of *Selden Huntington*, twenty-four hundred ninety-three dollars with interest, at the *People's* Bank, *Bangor*, value received.

"*James Bell.*"

On the back of the note were the following indorsements:

"*Selden Huntington.*
"We waive notice.
"*J. W. Appleton.*
"*J. & J. Appleton.*
"*F. Tinkham.*"

The note was not left at any bank for collection, but was carried to the *People's* Bank on the day it was supposed to fall due, and protested for non-payment. After proof of the signatures, the plaintiff offered to read the note to the jury. The counsel for the defendants objected, stating that the words, "we waive notice," were put on the note after the indorsement by the defendants, and

without their assent or knowledge; and insisting that it was incumbent on the plaintiff to prove, that the words were on the note when indorsed by the defendants, or put there with their assent. The Judge overruled this objection, and permitted the note to be read to the jury. The defendants offered *John W. Appleton*, one of the indorsers of the note, after having released him from all claim they had on him, as indorser, who testified, that the words, "we waive notice," were on the note before it went into the hands of the plaintiff; and the defendants proposed further to prove by said *J. W. Appleton*, that those words were not on the note when it was indorsed by the defendants, but were placed there subsequently, and without their knowledge or consent, and that those words were placed there by himself at the request of the broker who purchased the note of him, and that he intended to waive notice only to himself and *Huntington*, who was the owner of the note, and for whom the witness acted; and that the witness indorsed the note for the accommodation of *Huntington*. To the admission of this testimony the plaintiff objected, and the Judge ruled, that it was inadmissible; *the witness being an indorser of the note, and the testimony tending to explain a written contract.* The verdict was for the plaintiff, and the defendant excepted to the ruling of the Judge. There were several other questions raised on the exceptions, unnecessary to be stated, as they were not embraced in the opinion of the Court.

The case was argued in writing with much force by *Fessenden & Deblois*, for the defendants, and by *W. P. Fessenden*, for the plaintiff.

For the defendants, it was insisted:

1. The note, being made payable at the *People's* Bank in one year after date, is a note entitled to grace, and in effect was payable *June* 14, and not *June* 11. On this point were cited *st.* 1824, *c.* 272; *Smith* v. *Whiting*, 12 *Mass. R.* 6.

2. The inserting or writing over the signature the words "we waive notice," was such a material alteration of the contract as rendered the note void, as against the defendants. 9 *Mass. R.* 1; *ibid*, 155; 8 *Greenl.* 213; 2 *Pick.* 125; 9 *Mass. R.* 205; *Bayley on Bills*, 105, *P. & S. Ed.*, and cases there cited; 2 *Fairf.*

115; 11 *Mass. R.* 309; 8 *Pick.* 246; 4 *T. R.* 320; 5 *T. R.* 537; 4 *Camp.* 180; 2 *South.* 821.

3. If the alteration was material and vacated the note, it was competent to prove it by *J. W. Appleton*, one of the indorsers. The indorser, if without interest, is admissible to prove a fact which does not go to show the note *void in its inception.* The law may be now perfectly well settled, that a party to a negotiable note cannot be received, as a witness to prove it originally void; but is certainly well settled, that it is limited to that extent. *Adams v. Carver*, 6 *Greenl.* 392; *Hartford Bank* v. *Barry*, 17 *Mass. R.* 94; *Parker* v. *Hanson*, 7 *Mass. R.* 471; *Spring* v. *Lovett*, 11 *Pick.* 417; *Van Schaick* v. *Stafford*, 12 *Pick.* 565; *Baker* v. *Arnold*, 1 *Caines*, 258; *Bryant* v. *Rittenbush*, 2 *N. H. Rep.* 212; *Townsend* v. *Bush*, 1 *Conn.* 260; *Ringold* v. *Tyson*, 3 *Har. & John.* 172; *Chase* v. *Taylor*, 4 *Har. & John.* 54; *Powell* v. *Waters*, 8 *Cowen*, 673; *Stafford* v. *Rice*, 5 *Cowen*, 23; *Bank of Utica* v. *Hillard*, *ibid.* 153; *Williams* v. *Walbridge*, 3 *Wend.* 415; *Bayley on Bills*, 586, and notes; *Woodhull* v. *Holmes*, 10 *Johns. R.* 230; *White* v. *Kibling*, 11 *Johns. R.* 128.

For the plaintiff, it was urged:

1. The note in suit was not entitled to grace, or necessarily payable with grace.

It has long been settled, that a note of hand is not, by the law of *Massachusetts*, entitled to grace, unless it be expressly made payable with grace. *Jones* v. *Fales*, 4 *Mass. R.* 251. The law of this State is the same unless altered by statute. The *st.* of *Feb.* 23, 1824, *c.* 272, changes the law in this respect only when the note "shall be discounted at any bank, or left therein for collection." The note in suit was neither discounted at any bank, or left therein for collection. *Berkshire Bank* v. *Jones*, 6 *Mass. R.* 524; *Woodbridge* v. *Brigham*, 13 *Mass. R.* 556; *Shaw* v. *Reed*, 12 *Pick.* 132.

2. There has been no such alteration of the paper, as to take away the defendant's liability. A demand and notice are proved, on which we rely, and not on the waiver of them. But as a preliminary to the inquiry, the burthen of proof is on the defendant. He takes the affirmative, and contends there is an alteration, which avoids the note, and he must prove it, and not force us to prove

the negative. If an alteration of a deed be apparent on its face, and there is no evidence to show how it was done, the presumption is, that it was done before the execution. 12 *Viner's Ab.* 58. In case of a bill or note, the rule seems to be, that if there be an apparent alteration, the holder must explain it. *Johnson* v. *Duke of Marlboro'*, 2 *Stark. Cases*, 313; *Henman* v. *Dickerson*, 5 *Bing.* 183. Here there was no apparent alteration, and the plaintiff is not bound to show how the writing came there. But if the words were written at the time and under the circumstances supposed by the counsel for the defendants, they do not prove such alteration, as avoids the note in the hands of an innocent holder. He commented upon the cases cited by the defendant's counsel, and contended that they did not apply to this case, but only to such alterations as go to increase or injuriously to change its effect.

3. But if the testimony of *J. W. Appleton*, the indorser, be admissible, it shows the words were placed there through mere mistake and without any intention to defraud any one, and therefore are wholly immaterial, and cannot avoid the note. *Smith* v. *Dunham*, 8 *Pick.* 246; *Boyd* v. *Brotherson*, 10 *Wend.* 93; *Nevins* v. *De-Grand*, 15 *Mass. R.* 438; *McLellan* v. *Crofton*, 6 *Greenl.* 307.

4. But if the alteration be a material one, and such as would avoid the liability of the defendants, were it proved by proper evidence, still such evidence is not rightly in the case here, because the witness offered, an indorser of the note, is inadmissible to testify to those facts. *J. W. Appleton* was therefore rightly rejected. We conceive the true principle to be that no one, who has given sanction by his name to a negotiable instrument, shall be permitted to testify to any facts impairing the credit and character which he has given to it, in the hands of an innocent holder. All the cases are reconcilable with this principle. The counsel commented on the cases cited for the defendant, and cited *Churchill* v. *Suter*, 4 *Mass. R.* 156; *Adams* v. *Carver*, 6 *Greenl.* 392; *Fox* v. *Whitney*, 16 *Mass. R.* 121; *Warren* v. *Merry*, 3 *Mass. R.* 28; *Chandler* v. *Morton*, 5 *Greenl.* 374; *U. S. Bank* v. *Dunn*, 6 *Peters*, 51; *Bank of Metropolis* v. *Jones*, 8 *Peters*, 12; *Manning* v. *Wheatland*, 10 *Mass. R.* 504. He considered, that the decided cases sustained him in the position, that the rule of exclusion ex-

tends to all cases, where a witness is offered to allege *his own legal turpitude* for the purpose of invalidating *his own act.*

5. The note is to be considered as made, at the time it was presented to be discounted. It was then first put into circulation by *J. W. Appleton,* and he is excluded from being a witness on the law, as admitted by the defendants. *Hartford Bank* v. *Barry,* 17 *Mass. R.* 97.

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

WESTON C. J. — Notes are entitled to grace by the *statute* of 1824, *c.* 272, when discounted at any bank, or left therein for collection. Such was not the condition of the note in question. It was only made payable at the *People's* Bank; and it is not by the general law entitled to grace.

The alteration, if made, was material, as this Court has decided in the case of *Farmer* v. *Rand, ante, p.* 225, to which we refer. We there held, that a waiver of demand and notice, written over the signatures, was *prima facie* evidence, that it was done with their privity and assent; and therefore binding upon them. Such waiver by indorsers, being often required by holders, is not unusual; and its insertion is not justly to be regarded as such an apparent alteration, as to render proof necessary on the part of the holder, that it was authorized. Such an entry on the back of a note is not in itself evidence of fraud or forgery, which is in no case to be presumed. If it was on before the defendants indorsed the note, they adopted and authorized it. If made afterwards, without their knowledge or consent, it was an unauthorized alteration. It becomes important therefore to determine, whether the testimony offered, to prove this fact, was legally admissible.

It does not appear, but the note in question was good and valid in the hands of *Huntington,* the payee, and no proof is proposed or offered in the defence, tending to show, either that it was made and signed for the accommodation of the payee, or that it was originally void, or liable to be impeached, before it was indorsed, upon any ground whatever.

The testimony of *John W. Appleton,* one of the indorsers, after his liability had been released, was rejected in the Court below, on the ground, that it went to explain a written instrument. But the

rule, which excludes parol testimony, offered to vary or explain that which is in writing, does not apply to proof of a fraudulent, or unauthorized alteration of a written instrument, varying the liability of one or more of the contracting parties. It may be received to show, that the written evidence is not entitled to the respect, which belongs to that species of testimony, by reason of its having been tampered with, violated or changed. The rejection of the witness, however, has been attempted to be maintained in argument upon another ground, that the witness being a party to the note, cannot be received to impeach, by his testimony, a negotiable instrument, to which he has given currency by the sanction of his name. And this objection is deduced from the rule, established and confirmed in *Massachusetts* by the case of *Churchill* v. *Suter*, 4 *Mass. R.* 156.

It is well known, that the principle, upon which that case was based, has been repudiated in the country from which it was derived, and that neither this Court, nor the Courts in *Massachusetts*, have been disposed to extend it. That rule is, that a party to a negotiable instrument shall not be received to prove, that it was originally void; and this was regarded as the extent and limit of the rule, in *Adams et al.* v. *Carver et als.* 6 *Greenl.* 392. In that case the indorser was admitted to testify, that the note was overdue when it was indorsed; and that certain payments had been previously received.

In *Manning* v. *Wheatland*, 10 *Mass. R.* 502, the rule was understood to extend further; but that case was manifestly not well considered, as usury between the indorser and indorsee affords no defence to the maker; and its authority is justly questioned in *Knights* v. *Putnam*, 3 *Pick.* 185.

Without extending the discussion further, a majority of the Court are of opinion, that *J. W. Appleton*, the indorser, being released, was competent to testify, that the waiver of notice was inserted by him, without the knowledge or consent of the defendants. The testimony offered did not show the note originally void; and it left it unimpaired against the maker and the two first indorsers. As he was excluded altogether, the exceptions are sustained, and a new trial granted upon that ground.

If the defendants were entitled to notice, they were not liable to an action, until due diligence was used to give it to them, as this Court has decided in *Green* v. *Darling*, in the county of *Washington*. At a further trial, the facts bearing upon this point, will be again examined.

New trial granted.

Mem.—*Emery J.* dissented from the opinion of the majority of the Court.

The usual manner of publication has been to arrange the cases in the order in which the Courts are holden in the respective counties. By such arrangement, *Buck* v. *Appleton* in *Cumberland* precedes *Greene* v. *Darling*, in *Washington*, although the opinion in the latter case was *delivered first*, both cases having been continued for advisement.

CAROLINE P. STANWOOD *vs.* THOMAS S. DUNNING *et al.*

If the husband be seised of land for his own use for any portion of time, even if it be but for a moment, the wife by such seisin becomes entitled to dower therein.

THIS was an action of *dower*, and was submitted to the opinion of the Court from an agreed statement of facts. From this it appeared, that *David Stanwood*, the husband of the demandant, was the son of *William Stanwood*, and they had both died before the demand of dower in this action. A deed of the premises in which dower is claimed was made from *William* to *David*, dated *March* 1, 1824, and acknowledged, *March* 6, 1824. *David Stanwood* conveyed the same premises to *Charles Stanwood* by deed dated *March* 6, 1824, and acknowledged the same day, both of which deeds were executed at the same time and place, although bearing different dates. The marriage before the time the deed was made to *David*, and demand of dower, were admitted. The defendants claim under conveyances from *Charles Stanwood*. It was agreed, that the object of the father was to divide the estate between the sons; that *Charles* gave *David* his notes for the farm at the same time, and that *David* was notoriously insolvent, and that all appeared to be done according to previous arrangement be-

tween the parties. If admissible, on objection made by defendants, the plaintiff can prove by parol, that this arrangement was made merely to protect the property from *David's* creditors, so that it might be held for his benefit, and that of his family; that the witness knew this fact from conversations with *William*, *David* and *Charles;* that the farm was once in the hands of the witness, and that when he sold it he tried to obtain a release from the plaintiff of her right of dower, but could not, and in consequence thereof sold the premises for $1200 less, than he otherwise should have had, and that he sold subject to her right. It was also agreed, if the paper is admissible in evidence, that on the same 6th of *March*, 1824, *Charles Stanwood* gave a life lease in the same premises to the said *William Stanwood*. The only question raised, was whether the plaintiff was entitled to dower in the premises.

The case was argued in writing.

Willis & Fessenden, for the demandant, contended, that here was a seisin for such time, as would give the demandant a right to dower; and cited *Bac. Abr.* 371, *note a;* 2 *Bl. Com.* 132; *Preston on Estates*, *Tit. Dower;* *Cro. Eliz.* 503; *Holbrook* v. *Finney*, 4 *Mass. R.* 569; 1 *Caines' R.* 185; *Kimball* v. *Kimball*, 2 *Greenl.* 226.

Mitchell, for the defendants, contended, that there was no seisin of the husband of the demandant, *David Stanwood*, unless for an instant, and that all the authorities agreed, that such seisin gives the wife no right to dower. *Stearns on Real Actions*, 280; *Holbrook* v. *Finney*, 4 *Mass. R.* 568; *Clark* v. *Munroe*, 14 *Mass. R.* 351; 4 *Kent's Com.* 45; *Cruise Dig. Title* 6, § 3 and 32.

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

Emery J. — The only question in this case is, whether on the facts legally and properly proved, *David Stanwood* had such seisin of the premises as could entitle the demandant to dower. Premising, that family settlements made without fraud, are justly entitled to the favorable consideration of Courts, we proceed to suggest our ideas of the merits of the case, as disclosed in the agreed statement of facts. The claim of dower, it has long been said, is to be favored. Still, unless the husband were legally and beneficially

seised of the estate during the coverture, the wife is not entitled to dower. But if the land vests in the husband but for a single moment beneficially for his own use, the wife shall be endowed.

It is said, that the case cited by plaintiff from *Cro. Eliz.*, 503, which is *Broughton* v. *Randall*, is differently reported in *Noy*, 64. In *Cro. Eliz.* it is said, the title of the *feme* to recover dower was, that the father and son were joint tenants to them, and the heirs of the son; and they were both hanged in one cart; but because the son, as was deposed by witnesses, survived, as appeared by some tokens, viz. his shaking his legs, his *feme* thereupon demanded dower, and upon this issue, *nunques seizu dowers*, this matter was found for the demandant.

In *Roper on Property*, 1*st. vol.* 369, the case of *Broughton* v. *Randall* is thus stated. A father was tenant for life, remainder to his son in tail, remainder to the right heirs of the father. Both of them were attainted of felony and executed together. The son had no issue, and the father left a widow. Evidence was given of the father having moved or struggled after the son, and the father's widow claimed dower of the estate, and it was adjudged to her. The principle appears to be this: that the instant the father survived the son, the estate for life of the father, united with the remainder in fee limited to him upon the determination of the vested estate tail in the son, so that the less estate having merged in the greater, the father became seised of the freehold and inheritance for a moment during the marriage, to which dower attached itself.

But if the instantaneous seisin be merely transitory, that is, when the very same act by which the husband acquires the fee, takes it out of him, so that he is merely the conduit for passing it, and takes no interest, such a momentary seisin will not entitle his widow to dower.

An illustration is given in the *English* books, that if lands be granted to the husband and his heirs by a fine, who immediately by the same fine renders it back to the conusor, the husband's widow will not be entitled to dower of such an instantaneous seisin. *Dixon* v. *Harrison*, *Vaughan*, 41; *Cro. Car.* 191; *Co. Lit.* 31.

In this case, the marriage, death of the husband, and demand of dower are admitted, but his seisin is denied.

Without going into an examination of the law relating to the four species of fines used in *England*, we may remark, that it is considered there as one of the most valuable of the common assurances of that realm, being in fact a fictitious proceeding, to transfer, or secure, real property, by a mode more efficacious than ordinary conveyances. 1 *Co. Lit.* 121, *a.*

But to show how this mode of passing property bears on the seisin of the husband, so far as instantaneous in the case of a fine, compared with it in case of bargain and sale, the case of *Nash* v. *Preston, Cro. Car.* 191, is not inappropriate. It was a bill in chancery. "*J. S.* being seised in fee, by indenture enrolled, bargains and sells to the husband for £120, in consideration, that he shall redemise it to him and his wife for their lives, rendering a pepper corn; and with a condition, that if he paid the £120 at the end of 20 years, the bargain and sale shall be void. He redemiseth it accordingly and dies; his wife brings dower. The question was, whether the plaintiff shall be relieved against this title of dower. *Jones J.*, and *Croke*, to whom the bill was referred, conceived it to be against equity, and the agreement of the husband at the time of the purchase, that she should have it against the lessees, for it was intended that they should have it redemised immediately to them, as soon as they parted with it; and it is but in nature of a mortgage; and upon a mortgage, if land be redemised, the wife of the mortgagee shall not have dower. And if a husband take a fine *sur cognizance de droit comme ceo*, and render arrear, although it was once the husband's, yet his wife shall not have dower, for it is in him and out of him, *quasi uno flatu*, and by one and the same act. Yet in this case, they conceived, that by the law she is to have dower; for by the bargain and sale, the land is vested in the husband, and thereby his wife entitled to have dower; and when he redemises it upon the former agreement, yet the lessees are to receive it subject to this title of dower; and it was his folly, that he did not conjoin another with the bargainee, as is the ancient course in mortgages. And when she is dowable by act or rule in law, a Court of Equity shall not bar her to claim her dower, for it is against the rule of law, viz. "where no fraud or covin is, a Court of Equity will not relieve." And upon conference with other the Justices at *Sergeant's Inn*, upon this question,

who were of the same judgment, *Jones* and *Croke* certified their opinion to the Court of Chancery, " that the wife of the bargainee was to have dower, and that a Court of Equity ought not to preclude her thereof."

The case of *Holbrook* v. *Finney*, 4 *Mass. R.* 566, recognizes that which we have just recited as sound law.

In the case now under discussion, the deed from *William Stanwood* to *David Stanwood* bears date the 1st of *March*, 1824, is acknowledged on the 6th of the same month, and recorded *March* 16th, 1824. It is a deed of bargain and sale to said *David* in fee for the consideration of love and affection with general warranty.

The deed from *David Stanwood* to *Charles Stanwood* is dated the 6th of *March*, 1824, acknowledged the same day, and recorded *March* 11th, 1824. But if requisite so to examine in order to help to a decision, it is manifest from inspecting the deed from *William* to *Charles Stanwood*, that in the order of time the deed to *David* from *William* was made first, and then it is apparent that *David* became rightfully seised in fee, and beneficially so, though for a short time.

The fee was not rendered back by *David* to *William, quasi uno flatu*, and therefore the demandant is entitled to dower. It is agreed that the object of the father was to divide his estate among his sons. Nothing could more strongly evince the propriety of leaving the law to raise the future benefit to the wife of *David* in dower after his decease, if his notorious insolvency might put at hazard, the beneficial continuance of the property in him during his life.

The questions about the admissibility of any other evidence of former or subsequent agreements and conversations, it is unnecessary to examine further than to say, that those which preceded the deed of *William* to *David* were merged in that conveyance. And the subsequent agreements and conversations do not abridge the plaintiff's right. But we reject them. The purchasers under *Charles Stanwood* are estopped to deny the seisin of *David*. *Kimball* v. *Kimball*, 2 *Greenl.* 226.

Upon every view of which the case is legally susceptible, on the facts legally and properly proved, we are satisfied, that *David Stanwood* had such seisin of the premises, as would entitle the demandant to dower.

The defendants must be defaulted.

GEORGE B. MOODY *et al. vs.* KIAH B. SEWALL.

When the contract is made with several jointly, they should all sue for a breach of it, unless the case exhibits some good reason why they should not.

The mere facts, that one pays his proportion, and the other pays nothing, furnish no such reason.

THE action was *assumpsit*, for money paid, laid out and expended, and for labor done. Certain individuals, being owners of building lots lying on the public street in *Bangor*, agreed to appropriate a certain portion of the lots for the purpose of extending a mall, and also agreed to pay their respective proportions of the expense of constructing it. Subsequently the owner of one of these lots sold it to the plaintiffs, *George B. Moody* and *Edmund L. Le Breton*, and one *Ransom Clark*, and the three agreed to assume the liability of the seller for that expense, the plaintiffs to pay one half, and *Clark* one half, according to their respective interests, as tenants in common. After this the plaintiffs and *Clark* sold the same lot to the defendant, and he gave them a paper, a copy of which follows.

"*Bangor, June* 26, 1835.

"For a valuable consideration, I agree with *Ransom Clark*, and *Moody & Le Breton*, that I will pay the expense of extending *Broadway* mall by the front of the *Warren* and *Brown* lot, so called, this day conveyed to me by *Henry Warren* and *Edmund L. Le Breton*, and will save said *Clark* and *Moody & Le Breton*, harmless from said expense. And also indemnify them against their bond to the city of *Bangor*, given to secure said city against any claim for damages to arise in consequence of extending said mall.

"*K. B. Sewall.*"

The mall was completed, and the plaintiffs were called upon to pay one half of the amount chargeable to said lot, according to their agreement, and did pay it. *Clark*, who had agreed to pay the other half of the expense, has paid no part of it. A note had been given by the defendant to the plaintiffs and *Ransom Clark*, which had been indorsed by them to a Mr. *Gardner*. The note was sent to *Bangor* for collection, and the plaintiffs, as indorsers, paid thereon $60,21, being the amount of interest then due. It did not ap-

pear whether the indorsers were or were not made legally liable, by demand and notice.

W. P. Fessenden, for the plaintiffs, argued, that the terms of the paper show, that it was not intended by the parties to be a contract between the defendant and three jointly, but with the plaintiffs, as to one half, and with *Clark* as to the other. He cited 5 *Rep.* 8, *Wyndham's Case; Dyer*, 337; 1 *Saund.* 154 *n.*; 5 *Price*, 829; 2 *Moore*, 195. Whether a contract is joint or several depends on the interest and cause of action; and these control the language of the parties. *Nelson* v. *Milford*, 7 *Pick.* 18; *Carter* v. *Carter*, 14 *Pick.* 224; *Teed* v. *Elworthy*, 14 *East*, 210; *Hammond on Parties*, 21; *Bro. Joint tenants, pl.* 72. He also urged, that the plaintiffs were entitled to recover the amount paid on the note. The presumption is, that they were made liable by law to pay the note as indorsers. But if they were not notified, this is a personal right, which they may waive. The defendant is liable to pay at all events, and the plaintiffs may consider themselves so, and are not obliged to litigate the question, before they can pay and call on the maker. 9 *Mass. R.* 1; 12 *Mass. R.* 52; 5 *Pick.* 436. Money paid by an indorser may be recovered under the money counts. 6 *B. & C.* 437; 20 *Johns. R.* 367; 2 *Wend.* 369; 6 *Wend.* 284.

Mellen, for the defendant.

The action, as to the money paid for widening the street, is necessarily founded on the agreement; and by the agreement, it appears, that *Clark* is one of the promisees, and should have been made a co-plaintiff. 1 *Saund.* 154, *note; Marshall* v. *Jones*, 2 *Fairf.* 54; 1 *Chitty Pl.* 6, 7. The same authorities show, that this may be taken advantage of on the general issue. There can be no severence of a joint contract, unless by the consent of the contractors and contractees. *Austin* v. *Walsh*, 2 *Mass. R.* 401; *Baker* v. *Jewell*, 6 *Mass. R.* 460; *Holland* v. *Weld*, 4 *Greenl.* 255; 2 *Inst.* 673; *Bac. Ab.* 696; *Yelv.* 177. The special contract of the defendant is either joint or several. The whole three should be joined, or each should bring a several action. But here two of the three join.

As to the sum paid on the note, there is the same objections, and the additional one, that no one has a right to make another his

debtor against his consent. As the plaintiffs do not appear to be liable as indorsers, it was a mere voluntary payment, and furnishes them no cause of action.

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

SHEPLEY J. — When the contract is made with several jointly, they should all sue for a breach of it, unless the case exhibits some good reason why they should not. The contract of the 26th of *June*, 1835, relied upon as proof in the case, though not declared upon, was made with the plaintiffs and *Ransom Clark*, who is not joined in the suit. To avoid the operation of this principle the plaintiffs' counsel contends, that the beneficial interest and cause of action are several. But the contract affords no proof of a separate interest; the promise is to them jointly to pay the expenses of extending a mall, and to save them harmless "against their bond." In both those contracts they all three appear to be jointly liable; and in no other part of the case is there any evidence of a separate interest, except it appears, that after the defendant made his contract with them, the plaintiffs paid one half of the amount to be paid, and that *Clark* did not pay the other half. This affords no such evidence of a separate interest in the original contract made with the defendant, as authorizes separate suits. And if it did, the suit is brought neither jointly nor severally, and it cannot for that reason be sustained, unless, as the counsel for the plaintiffs contends, they must be regarded as one. The case does not furnish any proof of a joint interest, or of a partnership in those two, other than what is common to joint contractors.

The other claim arises out of a payment made to the holder by the two plaintiffs upon a note signed by the defendant and payable to them and *Clark*, or order, and indorsed by them. There being no proof, that the payment was made out of a joint fund of the plaintiffs, the presumption is, if not made on the joint account of the promisees, that it was made by each severally according to their respective legal obligations. *Lombard et al.* v. *Cobb, ante. p.* 222. The action not being brought on the ground of a joint, or several, contract, cannot upon the proof in the case be sustained, and according to the agreement, there must be

Judgment for defendant.

Samuel Whittier *vs.* Alfred Dow.

A mortgagee may maintain a writ of entry on the mortgage against the owner of the equity of redemption, although a third person was in the actual occupation of the demanded premises, both at the time when the mortgage was made and when the action was commenced, by title paramount to that of either demandant or defendant, under a lease for a term of years.

This was a writ of entry on a mortgage, given by one *Enoch Gammon* to the demandant. The general issue was pleaded. The parties agreed upon a statement, from which the following facts appear. *Whittier*, the demandant, *October* 30, 1834, then sole owner of the demanded premises, leased the same for the term of five years to *Fabyan & Wight*, and their assigns; and *Feb.* 2, 1836, *F. & W.* assigned their interest in the lease to *O. P. Thorp*, who was in the actual occupation of the premises under the lease, when this action was commenced. On *June* 6, 1835, the demandant conveyed the premises to *Enoch Gammon* by deed of warranty, reserving the right of the lessees under the lease, and assigning his right thereby to *Gammon;* and at the same time *Gammon* gave back to *Whittier* a mortgage of the same premises to secure the payment of sundry notes, given as part of the purchase money, one of which was payable when the action was commenced. *Gammon*, on the fifteenth of *June*, 1836, conveyed the same premises to the defendant, *Alfred Dow, subject to the mortgage and lease.* The question submitted on the statement was, whether the demandant could maintain *this action against Dow*, the same having been instituted after *Gammon's* deed to him.

The case was submitted without argument.

Codman, for the demandant.

W. P. Fessenden, for defendant.

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

Emery J. — What were the meaning and intentions of the parties in the several conveyances mentioned in the statement of facts, and what is their legal operation? If we can effectuate those intentions in accordance with the rules of law, it is the right of the plaintiff to have the benefit of the proper application of legal principles for his relief. Having leased the premises for five years, it

may, at first, seem inconsistent that he should, within that period, seek to obtain a judgment in his favor for the very property, which he had, for that time, transferred to other persons; especially as the deed conveying the property to *Gammon* recognizes the lease, and reserves it. But upon considering the object of the mortgage of the property, which is to secure the payment of the purchase money, and that money has not been paid agreeably to the stipulation, we do not apprehend that, under the conditional judgment, any injustice can be done to the defendant, the assignee of the original lessees. The defendant knew all the circumstances of responsibility to which he was exposed, and took his deed from *Gammon* subject to the mortgage. By pleading the general issue, he admits himself in possession, so far at least as to justify the suit for such purposes as by law it can avail the plaintiff. The matter of the brief statement is not disclosed, and it is immaterial, because the judgment is to follow the opinion of the Court on the statement of facts agreed.

That *Thorp* is in the actual occupancy of the premises under the lease, does not serve to prevent the plaintiff from pursuing the remedy he has adopted, for making progress toward foreclosure. By the result of this suit, the plaintiff would not be authorized to disturb the possession of *Thorp* under the lease. If he would take advantage of any delinquency, as to compliance with pecuniary duties secured by that instrument, it may become necessary for him to enter specially for non-payment of the rent. 13 *Mass. R.* 429, *Penniman* v. *Hollis;* 15 *Pick.* 147, *Smith* v. *Shepard.* The plaintiff may, however, prefer resorting to his personal remedy against the assignee for recovering the rent, rather than enter for the non-payment of it. But whatever redress he may pursue as to the subject of rent, we are satisfied upon the facts agreed, that the plaintiff is entitled to maintain his action, and to the conditional judgment as in other cases of mortgage.

Elijah Thayer *& al. vs.* William H. Mills.

Proof that when a demand of payment was made, the defendant "did not deny the note; he said, he could not pay it; he said, he was poor, and could not pay it," is not sufficient to take the note out of the operation of the statute of limitations.

Assumpsit on a note of hand, dated *Nov.* 10, 1828, for $50,57 in six months and grace, payable to *J. B. Osborne*, and by him indorsed to the plaintiffs without recourse to him. The action was commenced *August* 30, 1836. The general issue was pleaded with a brief statement of the statute of limitations. The plaintiffs relied on a promise within six years, and to prove it, produced a deposition, in which the deponent stated, that he called on the defendant within the six years and requested him to pay the note, and that "Mr. *Mills* did not deny the note. He said, he could not pay it. He said, he was poor and could not pay it." *Emery J.*, presiding at the trial, directed a nonsuit, which was to be set aside and a default entered, if the Court should be of opinion, that the plaintiffs had sufficient testimony to take the note out of the statute.

Willis and *Fessenden*, for the plaintiffs, cited *Clementson* v. *Williams*, 8 *Cranch*, 74; *Perley* v. *Little*, 3 *Greenl.* 97; *Porter* v. *Hill*, 4 *Greenl.* 41; 2 *Stark. Ev.* 892; *Bangs* v. *Hall*, 2 *Pick.* 368.

Smith and *Bradford*, for the defendant, cited *Porter* v. *Hill*, 4 *Greenl.* 41; *Deshon* v. *Eaton*, 4 *Greenl.* 413; *Perley* v. *Little*, 3 *Greenl.* 97; *Miller* v. *Lancaster*, 4 *Greenl.* 159; 3 *Bing.* 329; 10 *Pick.* 232.

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

Emery J. — The suit is upon a note of hand, dated *November* 10, 1828, for $50,57, payable to *John B. Osborne*, or order, in six months and grace. It purports to be indorsed by said *Osborne* without recourse. It is without a witness. On its face it would seem, that in *May*, 1835, the statute of limitations had protected the defendant from liability upon it. But a suit for recovery of it was instituted on the 30th day of *August*, 1836, in the names of

the plaintiffs, against the defendant, and the indorser of the note is produced as a witness to revive the note from the realms of death; and he says, he called on *William H. Mills* within six years past and requested him to pay the annexed note. Mr. *Mills* did not deny the note. He said he could not pay it. He said he was poor and could not pay it. The note had not been due six years when he called for its payment. Upon being inquired of whether he presented this note to said *Mills*, when he called on him for its payment, he says, I feel very confident that I did. I am not positive that I took it out and showed it to him, but am certain, that the note was in my possession at the time. The witness cannot state when it was. It was in *Portland*, and does not recollect who was present, nor can he tell when it was indorsed. He says, he called on the defendant at the request of the plaintiff, but cannot state whether he received instructions by letter or otherwise; he was in *Boston* frequently. To the question, was Mr. *Mills* indebted to you at the time you requested payment of the annexed note? he replies, I cannot say whether he was at that time or not, but since that note was given, said *Mills* owed me about $500. To the interrogatory, how do you recollect it was within six years past you called on Mr. *Mills* to pay the annexed note? he replies, all I can say in answer is, that I know it is as much as three years *or more* since I made the request. To the question, did he use the words stated in the body of the deposition, that he did not deny the note when you called on him? Answer, I cannot state that *Mills* so stated. To the question, could Mr. *Mills*, in the conversation you have mentioned, have mistaken the note of which you requested payment? Answer, *I do not think he possibly could.*

In all this want of precision in the evidence offered, we search in vain for an unequivocal admission of present indebtedness or a promise to pay. And though the defendant declared he was poor and could not pay it, that was insufficient to revive the plaintiff's claim.

It is not to us satisfactory, that the defendant might not possibly have mistaken the demand about which the witness speaks, though he says he does not think he possibly could. There is great room to suppose he might contemplate the $500 note, which he owed the witness, which at some time after the note was given, the wit-

ness says *Mills* owed him and he cannot say whether he owed him at the time he called. This $500 claim was the most recent. From the testimony, there is nothing like certainty that this note was shown to him, though the witness had it in his possession. It does not appear that it was communicated to him that the note was the property of the plaintiffs. An acknowledgement must clearly refer to the very debt in question between the parties. 9 *Cowen*, 674; 15 *Johns. R.* 511. We should not be disposed to go the length of saying, that long dormant claims in all cases have more of cruelty than of justice in them. Nor would we withhold our concurrence with the sentiment, that christianity forbids us to attempt the enforcing of a debt which time and misfortune have rendered the debtor unable to discharge. Leaving Chief Justice *Best* the pleasure of thinking, that if he were sitting in the Exchequer Chamber, he should say, that an acknowledgement of a debt, however distinct, and unqualified, would not take from the party who makes it the protection of the statute of limitations, 3*d Bing.* 329, we should readily say, that according to adjudged cases which we hold in high consideration, there ought to be a revival of the demand by payment of part within six years, or unambiguous admission of present indebtedness, or promise to pay absolute, or conditional, and performance of the condition. 10 *Pick.* 332; 2 *Pick.* 368; 3 *Greenl.* 97, *Perley* v. *Little*; 4 *Greenl.* 159, *Miller* v. *Lancaster*; 4 *Greenl.* 413, *Deshon* v. *Eaton*; 4 *Greenl.* 41, *Porter* v. *Hill.*

Finding nothing of the kind in this evidence, we consider that the nonsuit was rightly directed.

Nonsuit confirmed.

WILLIAM R. COBB *vs.* RUFUS HASKELL.

Where a bill of sale was made of a quantity of boards to secure a debt due, and the vendor, pointing towards the boards then lying in several piles in a lumber-yard at a distance but within sight, said to the vendee, there are your boards, take care of them, and make the most of them; and the vendee thereupon went away, and suffered them to remain in the same place, without any other act on his part, for two months, when they were attached as the property of the vendor; *it was held*, that there was no such delivery, as would enable the vendee to hold the boards against the attaching officer.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

Trespass for taking and carrying away a quantity of pine boards, alleged to be the property of the plaintiff. The defence was, that the property was attached by a deputy sheriff, whose servant the defendant was, as the property of one *Haley*, the owner. The plaintiff claimed under a bill of sale from *Haley*, dated *Nov.* 3, 1835, made to secure a just debt then due, and the defendant under an attachment, made *Jan.* 4, 1836, on a writ in favor of a *bona fide* creditor. The officer removed the property, when it was attached by him, and the case turned on the question, whether there was such a *delivery* of the boards to the plaintiff, as the law requires to hold them against an after attachment. On the third of *November*, the day the bill of sale was made, the plaintiff, with another person, who was a witness in the case, went to the store of *Haley* to obtain security, and the defendant offered to convey the boards to him. The bill of sale was then made in the store. At this time, the boards were lying in piles about a lumber-yard, scattered over a considerable space of ground about the mill, one pile being very near the store. The witness stated, that the road they passed to the store led through the lumber-yard; "that after the bill of sale was executed, the plaintiff, *Haley*, and the witness, went out of the store, and that *Haley* then pointed with his hand from the door of his store towards the mill-yard, where part of the boards were, and told the plaintiff, *that there was the lumber he billed to him*, and said, that H was the mark, and that he wished him to take them, and do as he pleased with them; said, that he wished the plaintiff to take them into his own hands, and appropriate them

towards the payment of his debt." The witness further stated, "that a considerable part of the mill-yard, where the boards were, was in sight of the store; that it was not an inclosure, but occupied a considerable space around the mill; that on their leaving the store, *Haley* went with them some rods, passing along in the mill-yard, where the boards were, when *Haley* turned into another road and went to his house, and plaintiff and witness went the other way to their chaise; that *Haley* did not go with them to any of the piles in particular, but they were talking of the amount and quality, as they passed along, but no account of the quantity was taken at that time; that no mark was put on the boards by the plaintiff, and no survey of them had; that the plaintiff left them, as they were, and went away, requesting the witness to keep his eye on them, and see how *Haley* got along; but that the plaintiff did not leave the lumber particularly in his charge, and had no recollection of going there afterwards until they were attached." The store of *Haley* was in *Minot*, the witness lived two miles from that place, and the plaintiff lived in *Portland*. The boards remained in the same situation from the time the bill of sale was given until the time of the attachment. It was also proved, that after the bill of sale and before the attachment, *Haley* stated to a third person, that the boards were the property of the plaintiff. The Judge ruled, that the plaintiff had not proved such a delivery of the boards by *Haley* to him, as would enable him to hold them against an after attaching creditor; to which the plaintiff excepted.

The case was submitted to the opinion of the Court on the briefs of the counsel.

W. P. Fessenden, for the plaintiffs, contended, that there was a sufficient delivery of the boards to enable the plaintiff to hold them, as a security for his debt. To show that the bill of sale alone was sufficient for that purpose, as between the parties, he cited *Buffington* v. *Curtis*, 15 *Mass. R.* 528. To show, that enough was done to take the sale out of the operation of the statute of frauds, and to fortify his views of the principle on which a delivery was originally required, he cited *Chaplin* v. *Rogers*, 1 *East*, 192; *Phillips* v. *Hunnewell*, 4 *Greenl.* 376; *Edwards* v. *Harben*, 2 *T. R.* 507; *Brooks* v. *Powers*, 15 *Mass. R.* 244; *note to Big. Digest*, 687. To show, that here was a sufficient delivery

to vest the property in the vendee against every one; that what was done was a sufficient compliance with the form required by the decisions, he cited and commented on *Shumway* v. *Rutter*, 8 *Pick.* 446; *Searle* v. *Keeves*, 2 *Esp. R.* 598; *Chaplin* v. *Rogers*, 1 *East*, 192; *Elmore* v. *Stone*, 1 *Taunt. R.* 458; *Bailey* v. *Ogden*, 3 *Johns. R.* 399; *Hunn* v. *Bowne*, 2 *Caines*, 38; *Rice* v. *Austin*, 17 *Mass. R.* 197; *Jewett* v. *Warren*, 12 *Mass. R.* 300; *Haskell* v. *Greely*, 3 *Greenl.* 425; *Lansing* v. *Turner*, 2 *Johns. R.* 16.

Codman, for the defendant, contended, that a delivery was necessary to complete the sale of a chattel, so that the vendee may hold it against a subsequent purchaser, or attaching creditor, ignorant of the sale; and that no delivery, such as the law requires, was made in this case. He cited *Gardner* v. *Howland*, 2 *Pick.* 599; *Flagg* v. *Dryden*, 7 *Pick.* 52; *Butterfield* v. *Baker*, 5 *Pick.* 522; *Quincy* v. *Tilton*, 5 *Greenl.* 277; *Phillips* v. *Hunnewell*, 4 *Greenl.* 376; *Jewett* v. *Warren*, 12 *Mass. R.* 300; *Rice* v. *Austin* 17 *Mass. R.* 197; *Lanfear* v. *Sumner*, *ibid.* 110.

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

Weston C. J. — By a series of decisions, cited for the defendant, a delivery from *Haley*, the debtor, to the plaintiff, was necessary to give him a title against an attaching creditor. And the argument for the plaintiff is, that there was a sufficient delivery. The lumber was pointed out to the plaintiff, and he was informed by what mark it might be known. From the testimony it appears, that the plaintiff was requested to take it away, and make the best of it. But the plaintiff took no part of the lumber, nor exercised any act of ownership over it, but left it in the debtor's possession as before, up to the time of the attachment, a period of two months. Considering, however, the nature and position of the property, it comes very nearly up to what has been required, to put it out of the reach of other creditors; but upon the whole, in our judgment, there was not quite enough done to produce this effect; and these transactions are so likely to occasion false credit and fraud upon creditors, that the doctrine of constructive delivery ought not to be extended.

In *Searle et al.* v. *Keeves*, 2 *Esp. R.* 598, when the warehouse man received the order, he became the depositary for the vendee, and there was thus a change of possession. In *Chaplin* v. *Rogers*, 1 *East*, 192, the vendee had sold part of the hay, and the second purchaser had actually taken it away. In *Elmore* v. *Stone*, 1 *Taunt.* 458, the plaintiff, the vendor of the horses, was a livery stable keeper, and the defendant had ordered them to be there kept at livery for him. *Bayley J.*, in *Howe* v. *Palmer*, 3 *B. & Ald.* 321, says, that case goes as far as any one should, and that the Court ought not to go one step beyond it, and that it turned upon the fact, that expense was incurred by direction of the buyer.

In *Hunn* v. *Bowne*, 2 *Caines*, 38, one *Foley* had purchased a quantity of cotton of one *Rodman*, and had given his note for it, but left it in *Rodman's* store. *Foley* employed *Huchinson*, a broker, to sell it. *Huchinson* called on *Rodman*, desiring to see *Foley's* cotton. *Rodman* directed one of his clerks to show it, which he did in a fire proof store. *Huchinson* then bought the cotton of *Foley*, who gave an order for it on *Rodman*. Before presentment, *Foley* failed, and *Rodman* refused to deliver, and sold it to the defendant. The plaintiff, having title under *Huchinson*, prevailed, the jury being of opinion that the defendant purchased, with a full knowledge of these facts. *Lansing* v. *Turner*, 2 *Johns.* 16, was a case between the original parties, for a quantity of beef, which had been bought and paid for.

In *Bailey* v. *Ogden*, 3 *Johns.* 394, an agreement with the vendor, about the storage of the goods, and the delivery of the export entry to the agent of the vendee, were held not to be sufficiently certain, to amount to a constructive delivery, or to afford an indicium of ownership. In *Rice* v. *Austin*, 17 *Mass. R.* 197, the timber in question, was shipped to the plaintiff with an invoice and bill of lading, on his account and risk, and when it arrived, he ordered it to the navy yard in *Charlestown*. This was held sufficient evidence of possession in him, considering the nature of the property. In *Shumway et al.* v. *Rutter*, 8 *Pick.* 443, there had been a mixed possession, the vendee having taken a part of his purchase for his own use.

The strongest case, and that most nearly resembling the one before us, is that of *Jewett* v. *Warren*, 12 *Mass. R.* 300. A bill of

sale was there made of a quantity of logs. The vendor directed an agent to deliver them to the plaintiff. The agent showed them to him, they being then rafted and lying in a boom. This was held to be a sufficient delivery; the plaintiff doing as others did with similar property, suffering it to remain in the boom, until he should have occasion to use it. The boom was a common place of security, which the plaintiff was as much entitled to use as the vendor; and there was all the change of possession, of which the property was susceptible.

In the case under consideration, there was not the slightest indication of a transfer of the property. It remained as before in the debtor's mill-yard, still bearing the mark it then had, being the initial letter of the debtor's surname. And thus it continued, without a single movement on the part of the plaintiff, to avail himself of the property. To sustain his title, under these circumstances, against an attaching creditor, would be going farther than can be justified by the principles, by which cases of this sort have been governed.

Exceptions overruled.

Moses Moody *vs.* Sewall Moody.

Where one has bound himself to another by bond to furnish him with support, but neglects to perform his duty in that respect; and the support is furnished by a third person at the request of the obligee; the law will imply no promise in favor of such third person to recover the value of such support against the obligor.

Exceptions from the Court of Common Pleas, *Whitman C. J.* presiding.

Assumpsit for the board of one *William Jones*, with the usual money counts in the declaration. To maintain his action the plaintiff offered to prove, that on *March* 29, 1830, the defendant had given a bond to said *Jones*, stipulating therein to maintain him during life in a comfortable manner; that in the summer of 1833 *Jones* applied to the plaintiff to board him, that he did board him with the knowledge of the defendant; and that the defendant had neglected and refused to furnish *Jones* with such comfortable main-

tenance. And the plaintiff contended, that he was entitled to recover on such proof; but the Judge was of opinion that on this evidence, there was no privity of contract, and directed a non-suit; to which the plaintiff excepted.

The case was submitted without argument.

Codman, for the plaintiff.

Megquier, for the defendant.

The opinion of the Court was afterwards drawn up by

SHEPLEY J. — To maintain this action there must be a contract between the parties either express or implied. The evidence reported does not prove any express contract; and the only evidence from which one can be implied in law is, that the defendant was bound for the support of one *Jones;* that he neglected and refused to afford him such support; and that *Jones* applied to the plaintiff to board him, and the plaintiff did board him with the knowledge of the defendant.

The defendant's neglect to fulfil his contract with *Jones* did not authorize another person to assume the performance of it, and substitute himself as the creditor of the defendant. The law never implies a contract to substitute one creditor for another. The defendant has a right to say, "*non in haec foedera veni.*"

It may have been supposed, that there existed some analogy between this case, and that of a wife forced by the ill usage of the husband to leave his dwelling, and carrying with her a right to charge him with her support, by obtaining it from another person. There is no such analogy of legal rights. The case of the wife depends upon the peculiar relations of husband and wife. She is entitled by law to a support, and if unable to obtain it from the husband, she can maintain no suit against him to recover damages, or to obtain the means of compensating another for necessaries supplied. Considering that for many purposes husband and wife are to be regarded as one person, the law, under such circumstances, implies that her contracts are the contracts of the husband, for the purpose of affording her, in the only way in which it can be done, the necessaries of life at the charge of the person by law obliged to afford them.

There is no such relation, nor any such necessity in this case; and the law will imply no such contract. The person entitled to support may, in his own name, enforce his rights, and obtain the means of fulfilling his own contracts with others. The exceptions are overruled and the nonsuit is confirmed.

BENJAMIN QUINBY *vs.* TIMOTHY HIGGINS.

The right by representation to inherit the estate of an intestate, dying without issue, father, or mother living, does not extend, by the provisions of the *Rev. St. ch.* 38, *sec.* 17, beyond brothers and sister's children.

Therefore the *children of a deceased child* of a deceased brother of the intestate are not entitled to a distributive share of the estate; there being a *child* of such deceased brother alive, when the intestate died.

THIS was an action of *assumpsit*, brought on a note or memorandum, signed by the defendant, in the following words:

"*Westbrook*, *June* 8, 1830.

"Received of *Benjamin Quinby*, administrator on the estate of *Miles Winslow*, fifty-one dollars, and twenty-five cents.

"*Timothy Higgins*,
"Guardian to *Winslow F. Higgins*."

The case was submitted on the following agreed statement of facts.

Miles Winslow of *Westbrook*, died on the 12th day of *March*, 1824, intestate and without children, leaving three brothers, and the children of three deceased brothers. The defendant married one of the daughters of *Nathaniel Winslow*, one of said deceased brothers. This daughter, being the wife of defendant, died before said *Miles Winslow*, her uncle, leaving a son, who is the ward of the defendant; also leaving a sister, who is still living.

The plaintiff was duly appointed administrator on said *Miles Winslow's* estate, *February* 1, 1825, and the defendant was duly appointed guardian of said *Winslow F. Higgins*, his said son, *Feb.* 3, 1830.

The sum demanded in this writ was, at the request of defendant, advanced to him by the plaintiff, as a part of the supposed share of said ward in the estate of said *Miles Winslow*, before any order of distribution was made by the Judge of Probate. The whole share of *Nathaniel Winslow* aforesaid was decreed by the Judge of Probate to the surviving daughter of said *Nathaniel*, and was thereupon paid over by the plaintiff to said surviving daughter; and the defendant thereupon promised the plaintiff to re-pay to him said sum, if on taking legal advice, it should appear that said ward was not an heir of the estate of said *Miles Winslow*.

Now if in the opinion of the Court, said ward was an heir, and entitled to a part of the estate of said *Miles Winslow*, then the plaintiff is to become nonsuit, and the defendant to have his costs; but if in the opinion of the Court, said ward was not an heir, and not entitled to a part of the estate of said *Miles Winslow*, then the defendant is to be defaulted and judgment entered against him for said sum with interest and costs.

The case was submitted without argument, by *Anderson*, for the plaintiff, and by *Fessenden & Deblois*, for the defendant.

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

Emery J. — By our statute, *c.* 38, *sec.* 17, respecting wills and testaments, and regulating the descent of intestate estates, it is enacted, that when any person shall die seised of any lands, tenements, or hereditaments, or any right thereto, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, the same shall descend in equal shares to his children and to the lawful issue of any deceased child by right of representation. When there shall be no issue, nor father, the same shall descend in equal shares to the intestate's mother, if any, and to his brothers and sisters, and the children of any deceased brother or sister by right of representation, the collateral kindred claiming through the nearest ancestor to be preferred to the collateral kindred claiming through a common ancestor more remote. And when the issue or next of kin to the intestate, who may be entitled to his estate by virtue of the said act, are all in the same degree of kindred to him, they shall share the same estate

equally, otherwise they shall take according to the right of representation. By the 19th section, as to personal estate not disposed of by last will, after allowance to the widow, paying funeral charges, debts, and charges of administration, the residue, if any, shall be distributed among the same persons in the same proportion to whom the real estate shall by law descend.

The question to be decided in this case, is whether the right of heirship by representation extends beyond brothers' and sisters' children. Had the mother of the defendant's ward survived her uncle, *Miles Winslow*, the benefit to the ward might have been different, not indeed as an heir to *Miles*, but to the ward's mother. But on her death occurring in the lifetime of *Miles Winslow*, living her sister, who survived said *Miles*, this sister became by right of representation, sole heir of the proportion, which was coming to her father, *Nathaniel*.

Our statute does not, as in *New Hampshire*, declare "no person is to be admitted as a legal representative of collaterals, beyond the degree of brothers' and sisters' children." In some other States of the Union, a similar provision is made. It would be superfluous here to make the limitation, because when the estate is directed to descend to a brother or sister, it is not to their legal representatives, but to their children by right of representation, using the word in its appropriate sense.

The rightful claimant of the estate, must be one who claims not only through the nearest ancestor, but also as the next of kin. If brothers and sisters be all dead, leaving children, they take as next of kin; but if some of those children of a brother should be dead, while others are living, such children cannot take, for they are not next of kin as long as any of the brother's children be living.

This provision, therefore, has the same effect, and produces the same result, as is produced by those statutes, which direct the estate to be distributed to the next of kin and their legal representatives, restraining representation to brothers' and sisters' children. *Reeves on Descents*, 115, 116. A case not unlike this occurs in *Comyn's R.* 87, *Pett* v. *Pett*. It was a motion for a *mandamus* to the spiritual court to make distribution according to the statute, 22 and 23, *Car.* 2. *c.* 10. The libel against the administrator set forth the case, that the intestate had two brothers who had issue and died;

the issue of one of the brothers had issue, a son and a daughter, and then the intestate dies; and his grand-nephew and grand-neice, the son and daughter of the issue of one of the brothers, wanted to have distribution with his neice, the issue of the other brother. But it was denied. 1 *Ld. Raym.* 571, *Rex* v. *Raines,* or *Pett* v. *Pett*; 1 *Peere Wms.* 25, *Pett's case.* This construction has been uniform for a very long period. The opinion of the Court is, therefore, that said ward was not an heir, and not entitled to a part of the estate of said *Miles Winslow.* And conformably to the agreement of the parties, the defendant must be defaulted, and judgment be entered against him for the sum sued for, interest, and costs.

Thomas D. Foss *vs.* Asa Stewart.

If an officer attach property not liable to attachment, or seise it on execution, he is a trespasser.

A debtor is not entitled to have hay exempted from attachment for the use of sheep, by the *stat.* of 1821, *ch.* 95, unless at the time of the attachment he has the sheep.

Where property, exempted from attachment, is attached as the property of A and replevied by B as his property, and the officer defends the suit of B successfully by showing that such property belonged to A, and thereupon receives the value of it of B, instead of the property replevied; such officer cannot, in an action against him by A, for the same property, deny his title thereto.

This was an action of *trespass* for taking three and one half tons of hay, of the alleged value of thirty-five dollars. The defendant justified the taking as a constable of the town of *Scarborough,* by virtue of a writ of attachment, in favor of one *Henry H. Googins,* against the plaintiff, returnable to the Court of Common Pleas for the county of *York,* at the *October Term,* 1833, as the property of the plaintiff, which the plaintiff contended he had no legal right to do, because the said hay was by law exempt from attachment.

The parties agreed to the following statement of facts. At the time of the attachment aforesaid, the defendant attached about five

tons of hay, being all which the plaintiff had in his possession. Afterwards, on the 14th day of *September*, 1833, one *Joseph Foss, jr.*, the brother of the present plaintiff, sued out a writ of replevin, against the defendant, for the said five tons of hay and other property, returnable to the Court of Common Pleas for the county of *Cumberland*, on the first *Tuesday* of *October*, 1833. On the trial of this action of replevin, it was proved, that to secure the said *Joseph Foss, jr.* for certain sums of money for which the said *Thomas D. Foss* was indebted to him, the said *Thomas* had bargained and agreed with the said *Joseph* to sell him the said five tons of hay, being all which he had; and the said *Thomas* being called as a witness, on the trial of said action, testified to these facts, and that he considered the hay to be the property of his brother; but it being proved, that no delivery of the hay had been made by *Thomas* to *Joseph*, it was adjudged that the property of the same had not passed from the said *Thomas*, and that the attaching officer could hold the same as the property of the said *Thomas*, and judgment for a return of the said five tons of hay to the said *Stewart* was accordingly rendered against the said *Joseph*, which judgment the said *Joseph* has since fully satisfied.

It is admitted, that the action of replevin aforesaid, was commenced with the knowledge of the said *Thomas D. Foss*, and that said *Thomas* had hired a small farm of about 20 acres, and tavern-house thereon, in *Scarborough*, of one *Fogg*, and that the said *Joseph* was surety for the said *Thomas* on the lease, under which the said *Thomas* occupied at the time the attachment of the hay was made. The hay was not actually removed by the attaching officer, but was receipted for by one *Andrews*, and after it was replevied, it was left in the possession of the said *Thomas*, who used a part of it, by permission of the said *Joseph*. The said *Thomas* then kept a cow, but had no sheep.

The writ of return was issued upon the judgment for return, but was never put into the hands of an officer, pursuant to an agreement made by the counsel of the respective parties, and consequently a demand for a return was never made upon the said *Joseph*, but said *Joseph* paid the adjudged value of the said hay, which was ten dollars per ton, together with the damages and costs awarded to the defendant in said suit of replevin. Judgment has

never been rendered in the original action, *Googins* against the plaintiff.

If, upon the foregoing statement of facts, the plaintiff in this suit shall be entitled to recover, judgment is to be entered for such sum as the Court may award in damages and costs; otherwise the plaintiff is to become nonsuit and the defendant is to have judgment for his costs.

Codman, for the plaintiff, cited the *statute* of 1821, *c.* 95, exempting from attachment, execution, and distress, one cow and ten sheep, and "thirty hundred of hay for the use of said cow, and two tons for the use of said sheep."

Although the plaintiff had no sheep at the time the attachment was made, still he might purchase them the next day, and he must have hay to keep them, when he takes them home. The statute should be construed liberally, and most beneficially for the purposes of the intended remedy. *Gibson* v. *Jenney*, 15 *Mass. R.* 205; *Howard* v. *Williams*, 2 *Pick.* 80; *Richards* v. *Daggett*, 4 *Mass. R.* 534. But the case shows, that when the hay was attached the plaintiff had one cow, and for that cause was entitled to retain one and an half tons of hay. The payment of the value of the hay to the officer by the person who took it out of his possession by the writ of replevin, makes him accountable to the plaintiff in the same manner as if the hay had remained in his hands. If he had not taken the property out of the plaintiff's hands, he would have had it, and if he loses it, the loss will be occasioned by the acts of the defendant. The provisions of the statute will be evaded, if the action does not lie.

F. O. J. Smith, for the defendant, said, that the plaintiff had been once paid for the hay by his brother, had made use of it himself, and now claims to have the value of it from the defendant. When the defendant attached the property, the plaintiff disclaimed all ownership in himself, another claimed it with the knowledge of the plaintiff, and the defendant contended with him successfully and held it. As the property was not removed from the possession of the plaintiff the action of trespass cannot be maintained. But the property was legally attached. The statute exempts certain articles from attachment, when necessary for the use of the debtor. But the sale of this hay to his brother is evidence, that it was not

necessary for his own use. He must appropriate the property for the use intended by the statute, or he will not be protected by it. The ground of the decision, in *Buckingham* v. *Billings*, 13 *Mass. R.* 82, was, that the property was not necessary for the use of the debtor.

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

WESTON C. J. — The defendant, in the attachment made by him, under which he justifies, and in defending the action of replevin, brought against him by *Joseph Foss, jr.*, acted in behalf of the attaching creditor. As he represented him, he succeeded in defeating the title of the plaintiff in replevin, to whom no formal delivery had been made, to give effect to the mortgage or pledge intended by the plaintiff for his security.

The defendant, having received from *Joseph Foss, jr.* who failed in his suit, the whole value of the hay replevied, as the property of the plaintiff, should not, in our judgment, be now received to deny the plaintiff's title, and to set up property in *Joseph*. He took it as the plaintiff's, and defended successfully against the claims of *Joseph*, from whom he received the value of the whole. What took place between the plaintiff and *Joseph*, either before the attachment or afterwards, affords no protection to the defendant. If his proceedings were not warranted by law, they derived no justification from the subsequent use of a part of the hay by the plaintiff. That was by the permission of *Joseph*, who made the hay his own by his subsequent payment to the defendant. By receiving an equivalent in money, after judgment for a return, the defendant became answerable both to the creditor and to the debtor, as much as if the hay had been returned to him. To the creditor, on the lien, lawfully created by the attachment; and to the debtor, so far as he had transcended the law to his prejudice.

If an officer attaches property, not liable to attachment, or seises it on execution, he is a trespasser. This position is established by the cases cited for the plaintiff; and is not controverted. The plaintiff had at the time a cow, but no sheep. If he had had ten sheep, he would have been entitled to have held two tons of hay exempted from attachment, to keep them; but not otherwise. The

statute exempts two tons of hay, for "the use of said sheep." As he had no sheep, one ton and an half only was exempted, for the use of his cow. The defendant must be held answerable in this action, for taking that quantity. The attachment of the residue was justified by his precept. Judgment is to be rendered for the plaintiff, for the sum of fifteen dollars, being the value of the hay, with interest thereon from the date of the attachment.

CHARLES THOMPSON *vs.* STEPHEN C. WATSON.

The production and proof of a mortgage deed, in the absence of all other evidence, is sufficient to maintain a writ of entry.

Evidence that the demandant had conveyed the same premises to the tenant at the same time, and had made one mortgage thereof prior thereto, and another after the action was commenced, furnishes no defence to the action.

EXCEPTIONS from the Court of Common Pleas.

This was a writ of entry on the demandant's own seisin. On the trial the demandant produced in evidence a mortgage deed of the demanded premises, dated *April* 28, 1832, from the defendant to the demandant, and there rested his case. The defendant objected, that this evidence was insufficient to entitle the demandant to recover; but *Whitman C. J.*, who presided at the trial, overruled the objection.

The defendant then offered to prove, that the same premises were conveyed to him by the demandant by deed of the same date of the mortgage, and that the demandant had made one mortgage of the premises prior to the execution of said deeds, and another after the commencement of this suit. The Judge ruled, that this was insufficient to maintain the defence, and the verdict was returned for the demandant. To these rulings of the Judge, the defendant excepted.

The case was submitted without argument, by *Swasey*, for the demandant, and by *R. A. L. Codman*, for the defendant.

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

EMERY J. — In this suit, a writ of entry on the plaintiff's own seisin, and disseisin by the tenant, on the general issue pleaded, the plaintiff opened and rested his case with reading a mortgage deed from the defendant to the plaintiff, dated *April* 28, 1832.

This was deemed by the Judge sufficient to entitle the plaintiff to recover; and we think the decision was right.

The offer then by the defendant to shew, that the plaintiff had before conveyed the premises to *Joseph S. Thompson* in fee and in mortgage by deed, *Sept.* 30, 1829, and another conveyance in fee and in mortgage by the plaintiff to *Samuel Dennet*, by deed dated *March* 23, 1826, previous to the conveyance of the plaintiff to the defendant on the 28th *April*, 1832, were insufficient to maintain the defence; and the Judge was justified in rejecting the evidence.

The defendant admitted himself in possession, and was attempting to resist the operation of his own deed.

Exceptions overruled.

DANIEL BROWN *vs.* JACOB D. BROWN.

The words, "Uncle Daniel must settle for some of my logs he has made away with," do not of themselves import a charge of larceny.

The words, "thereby accusing the plaintiff of stealing," immediately *following* such words alleged to have been spoken, without any *previous* colloquium, or averment, showing such to have been the intention, are not sufficient to make the declaration good.

Words in a declaration in slander, not in themselves importing a crime, are not enlarged, or extended, by an inuendo.

THIS was an action of slander; the defendant demurred to the declaration and the plaintiff joined in demurrer. In the first count the words alleged to have been spoken are thus stated. "Uncle *Daniel* (meaning the plaintiff) must settle for some of my logs he has made away with, thereby accusing the plaintiff of stealing." In the second count thus. "I (meaning the said *Jacob*) will take

the money, (meaning five dollars then offered by *Benjamin Garland* for and in behalf of the plaintiff,) if you (meaning said *Benjamin Garland,)* will settle a bill I have against uncle *Daniel,* (meaning the plaintiff) for my logs he (meaning the plaintiff) took last winter. For uncle *Daniel,* (meaning the plaintiff) did take some of my logs last winter, and I can prove it, for I was told of it at the time and I (meaning the said *Jacob)* shall prosecute him (meaning the plaintiff) for it, unless he (meaning the plaintiff) settles it; thereby accusing the plaintiff of stealing his logs." And in the other count thus. "I (meaning the said *Jacob)* will take the money, if you (meaning one *Benjamin Garland)* will settle a bill I have against uncle *Daniel,* (meaning the plaintiff) for my logs he (meaning the plaintiff) took last winter, for uncle *Daniel* (meaning the plaintiff) did take some of my logs last winter, and I can prove it, for I was told of it at the time, and I shall prosecute him for it, unless he settles it, thereby accusing the plaintiff of stealing."

The action, at the close of the term, was submitted without argument, by *Dunn,* for the plaintiff, and by *Fessenden & Deblois,* for the defendant.

The opinion of the Court was afterwards drawn up by

Weston C. J. — There is no count in the declaration, averring in general terms, that the defendant charged the plaintiff with the crime of larceny. If there had been, and such a charge maliciously made, was fairly to be extracted from the language of the defendant taken together, and was intended so to be understood, by those who heard it, the plaintiff's case might have been made out, upon a count thus drawn and thus supported, according to the cases of *Nye* v. *Otis,* 8 *Mass. R.* 122, and *Whiting* v. *Smith,* 13 *Pick.* 364. There are, however, opposing authorities; and the principle upon which these cases rest, has not been adopted by any judicial decision in this State.

Three sets of words are set forth in the declaration; neither of which do in themselves import a charge of larceny. To take logs, or to make away with logs, does not come up to that offence at common law, unless done with intent to steal. By the *statute* of 1831, *c.* 510, § 8, any person, who shall, fraudulently and secretly, take and convert to his own use logs, not his own, shall be ad-

judged guilty of stealing. But the words, set forth in the declaration, are not that the logs were fraudulently and secretly taken.

If the words used, were intended to fix upon the plaintiff the charge of larceny, they should have been preceded in the declaration by a colloquium, showing that intention. *Holt* v. *Scholefield*, 6 *T. R.* 691 ; *Hawkes* v. *Hawkey*, 8 *East*, 427. It is true, it is stated in the declaration, by way of inuendo, that the defendant meant to charge the plaintiff with the crime of stealing. The office of an inuendo is to apply the slander to the precedent matter ; but it cannot add to or enlarge, extend or change the sense of the previous words. 1 *Saunders*, 243, *note* 4. The words in the declaration, not in themselves importing a crime, are not enlarged or extended by the inuendo. The declaration, being therefore insufficient by the settled rules of law, applied to cases of this kind, is adjudged bad.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF YORK, APRIL TERM, 1837.

MARY NOWELL *vs.* ELIHU BRAGDON.

Mem. — *Shepley J.*, having been of counsel in this and in the four following cases, did not sit in the hearing or determination.

A judgment against the goods and estate of a deceased intestate in the hands of his administrator is conclusive evidence that he was indebted, unless such judgment can be impeached on the ground of fraud, or collusion, or culpable negligence amounting to fraud, in the administrator.

An execution issued on such judgment may be legally extended on any lands of which the deceased died seised, although a partition of them among his heirs may have been made by order of a Probate Court, and although the suit in which such judgment was rendered may have been commenced after four years from the time administration was first taken out.

Where an administrator pays the debts of the intestate within four years, and dies without obtaining repayment, a suit may be maintained therefor against the administrator *de bonis non*, and the statute of limitations will be no bar.

WRIT of entry demanding a tract of land in *York*. The demandant was an heir at law of *John Nowell, sen.*, who died in 1810, intestate. Administration on his estate was committed to a son, *James Nowell*, in *July* of the same year, who died in *May*, 1820, and administration of the remaining estate of *John Nowell, sen.*, was committed to another son, *John Nowell*, in *July* of that year, who settled two administration accounts, one in 1825, and the other in 1829, but gave no credits, and all the charges were for expenses of administration and expenses of lawsuits. *Sally*

Nowell, as administratrix of the estate of *James Nowell*, at the *April* term of the Supreme Judicial Court, 1826, in a suit commenced *Dec.* 23, 1823, recovered judgment against the goods and estate of said *John Nowell*, deceased, in the hands and under the administration of said *John Nowell*, the younger, for the sum of $2399,34. The declaration was on a judgment, or decree, of the Court of Probate, rendered *Feb.* 17, 1823, upon the settlement of an administration account presented by the administratrix of the estate of *James Nowell*. See *Nowell* v. *Nowell*, 2 *Greenl.* 75. An execution duly issued on the said judgment at *April* term, 1826, was, *June* 30, 1826, duly levied on a part of the real estate of which said *John Nowell, sen.* died seised. The estate so levied upon was sold by the said *Sally Nowell* under a license from Court, and the demanded premises purchased at public vendue by the tenant, *Jan.* 26, 1829, and a deed from the administratrix made to him. After the commencement of said suit, and before judgment was rendered, *Sept.* 25, 1825, the real estate of said *John Nowell, sen.* was, by authority from the Probate Court, divided among his heirs, and the premises demanded were thus assigned to the demandant. All the proceedings in the levy of the execution, the sale by the administratrix, and the division among the heirs, were in due form of law. On the assignment, the demandant entered into the possession of the demanded premises, and so continued until the levy, when the administratrix took possession and retained it until the sale to the defendant, who has retained the possession since. The verdict was for the tenant.

The case was argued in writing.

Hayes, for the demandant, relied principally upon the *Rev. St. c.* 52, § 26, which provides, that "No executor or administrator shall be held to answer to any suit that shall be commenced against him in that capacity, unless the same shall be commenced within the term of four years from the time of accepting that trust." This statute was made for the benefit of all interested in an estate, as well as for the convenience and safety of the executors and administrators. *Dawes J.* v. *Shed*, 15 *Mass. R.* 6. If executors and administrators suffer judgment to go against them by default in a case barred by the statute, their sureties are not bound by such judgment; nor will a promise by the administrator take a demand out of the statute. 15

Mass. R. 6, before cited; 13 *Mass. R.* 201. The Court will not grant license to sell real estate after four years. 15 *Mass. R.* 58; *Nowell* v. *Nowell*, 8 *Greenl.* 220. This is the rule, though in a few instances the rule has been departed from. And a license granted to sell real estate to pay a debt barred by the statute is void. *Heath* v. *Wells*, 5 *Pick.* 140. The creditor's claim on the real estate being extinguished, it could not revive on the appointment of an administrator *de bonis non*. *Thompson* v. *Brown*, 16 *Mass. R.* 172; *Heath* v. *Wells*, before cited; 8 *Greenl.* 223, before cited. The judgment may have been rightfully recovered, and take effect so far as it relates to the personal estate, and still no valid levy could be made upon the real estate under it, situated like this, having been partitioned among the heirs. *Rev. St. ch.* 51, *sec.* 35; *O'Dee* v. *McCrate*, 7 *Greenl.* 467. It is the duty of the Court so to construe a statute, that it may have a reasonable effect, agreeably to the intent of the legislature. If the Court would refuse to grant a license to sell the real estate when this levy was made, the law ought not to be evaded by making a levy, instead of applying for license to sell.

J. Shepley, for the tenant, argued:

1. That the judgment in the case, *Sally Nowell*, administratrix of *James Nowell*, against "the goods and estate of the said *John Nowell*, in the hands and under the administration of the said *John Nowell*, the younger," was conclusive evidence of a then existing debt against the estate of *John Nowell, sen.* The record shows, that this was an adversary suit, and decided by the full Court on several questions of law, one of which was the identical one now relied on by the demandant's counsel. *Nowell* v. *Nowell*, *S. J. C. York*, *April Term*, 1826, not reported. The judgment is in full force, and not reversed, and no fraud, collusion, or negligence is pretended. This judgment is to be regarded, as correct and true upon the facts which it finds, as between all parties. It certainly binds the demandant who claims as heir of *Nowell, sen.* *Emerson* v. *Thompson*, 16 *Mass. R.* 429, in which the case *Thompson* v. *Brown*, cited for the demandant, is explained; *Minot* v. *Walter*, 17 *Mass. R.* 237.

2. The execution issuing on such judgment could be rightly levied on any of the real estate of *Nowell, sen.* in the hands of any

person whatever, deriving title in any way under him, except by levy or sale for payment of debts. *Rev. St. ch.* 52, *sec.* 19, 24, being a transcript of the *Massachusetts* statute on that subject; 3 *Mass. R.* 523; 4 *Mass. R.* 150; 10 *Mass. R.* 170; 13 *Mass. R.* 162. In this case, however, the division took place during the pendency of the suit and on the application of an heir, where the creditor could not interfere, and is conclusive only among the heirs. Were the law otherwise, the provisions for the payment of the debts of intestates would be useless. 17 *Mass. R.* 91.

3. But if the consideration of the judgment can be gone into, the record of the Probate Court, on which the decree was founded, shows, that the consideration was for debts paid before the expiration of four years, excluding all payments made after that time had elapsed. The probate decree establishes both value and the legal character of the demand. *Laughton* v. *Atkins*, 1 *Pick.* 535.

4. Where the administrator pays debts, he is rightly and equitably substituted in place of the creditor, and has the same remedies. *Walker* v. *Hill*, 17 *Mass. R.* 380; *Hancock* v. *Minot*, 8 *Pick.* 29. And in such case the statute of limitations is no bar. *Nowell* v. *Nowell*, *S. J. C. York*, 1826, before referred to.

5. The right to take the estate on execution is a legal right; the license to sell is a mere discretionary power to be exercised or withheld at pleasure. The cases cited for the demandant are all cases of license to sell, and not of levies under a judgment of Court; and some of them show, that this power is exercised after the expiration of the four years. *Richmond, pet.* 2 *Pick.* 567.

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

WESTON C. J. — The authorities, bearing upon the questions raised, have been fully presented by counsel. In several of the cases cited for the demandant, the Court speak of the lien in favor of creditors, upon the estates of deceased debtors, and the liability of such estates, as discharged and gone after the lapse of four years. This immunity is not based upon any direct or express provision of law. It results, as it is stated, from the limitation of that period in favor of executors and administrators, in suits brought against them as such, which is regarded as interposed for the bene-

fit of heirs, devisees and purchasers, and to facilitate the final settlement of estates.

In pursuance of the same policy, courts in their discretion, generally refuse to grant license to sell the real estate of persons deceased, unless application for this purpose be made as soon as may be, after the expiration of the four years. The generality of the language used by the Court, must be restricted to the ground upon which it was placed, namely the limitation of suits against executors and administrators, and the rule established by the courts, to guide their own discretion. It does not apply to cases, where the limitation could not be successfully interposed. As for instance, where the administrator had not given notice of his appointment, and that he had taken upon himself that trust, which was the case in *Emerson* v. *Thompson et al.* 16 *Mass. R.* 429. This is admitted to be an exception, directly within the statute. And if other exceptions to the operation of the statute arise, upon a fair and just construction, the lien upon the estates of persons deceased, and their liability to be taken for the payment of debts, may be extended and continued.

The same effect is produced, where the courts, for just cause, relax the rule, by which they have limited their discretion; as in the case of *Richmond, adm'r, pet'r,* 2 *Pick.* 567. There the petition was presented and license granted, two years after the limitation of four years had expired. And although his account, against the estate of the deceased, was not presented, until five years after he had taken upon himself the trust, and consisted in part of moneys paid, on account of the debts of his intestate, the statute limitation was held not to apply to the case.

The statute was pleaded in the suit, which preceded the judgment and levy, under which the tenant holds; but it was not sustained by the Court. The execution, which issued upon that judgment, did by law run against the goods and estate of the deceased. *Statute* of 1821, *ch.* 52, § 19. It was no longer under the control, or subject to the discretion of the Court. In *Emerson* v. *Thompson et al., Jackson J.* says, the Court may, for just cause, refuse to grant a license to sell the land of a person deceased, for the payment of his debts; but they cannot prevent the creditor from taking it in execution, according to the right secured to him

by statute. And this right may be exercised, notwithstanding there may have been a division of the land, among the heirs, or a conveyance made to third persons, as has been settled by the authorities, cited for the tenant.

The judgment against the goods and estate of the deceased, must be regarded as evidence that he was indebted, unless it can be impeached on the ground of fraud or collusion, or perhaps of culpable omission or negligence in his administrator, which is of the same character. Thus where the administrator neglected to interpose the statute limitation of four years, where it would have been a good bar, his sureties were permitted to do so, in an action against them, upon the administration bond. *Dawes Judge* v. *Shed et al.* 15 *Mass. R.* 6.

In the case under consideration, there is no evidence of collusion or negligence in the administrator *de bonis non*, of the goods and estate of the elder *Nowell*. It is not suggested, that any defence existed, of which he could have availed himself. The statute limitation, upon which he relied, was overruled by this Court, sitting in full bench.

If there was no fraud or negligence in the administrator, which does not appear, we are aware of no reason why the estate of the deceased, levied upon, was not as liable to be taken, according to the precept in the execution, as in other suits. In all such cases, the heirs at law are disinherited, by the paramount claim of the creditors, although no parties to the actions, in which these claims are established. The administrator represents the estate, which is bound by judgments in suits defended by him, unless where he acts collusively or fraudulently.

The opinion of the Court is, upon the facts reported, that the tenant is entitled to judgment.

Dominicus Cutts *vs.* The York Manufacturing Company.

Where a mortgage is assigned as security for the payment of a debt, and the assignee afterwards, with the knowledge of the assignor, enters to foreclose against both him and the mortgagor, the assignee has the right to waive and release to the mortgagor the entry to foreclose against him without the assent of the assignor; and such waiver is no fraud upon the assignor.

This was a writ of entry demanding a tract of land in *Saco*. The defence was, that *Oct.* 27, 1819, one *Richard Cutts*, then seised of the demanded premises, conveyed the same to the demandant by deed of mortgage, to secure the performance of the conditions of a certain bond; that the defendants had become the owners of the equity of redemption of *R. Cutts*, and were lawfully entitled to redeem the same; and that if any judgment should be rendered, it should be as upon a mortgage only. The demandant replied, that the right to redeem had been foreclosed, and that neither *R. Cutts*, or any one claiming under him, had any right to redeem. It appeared in evidence, that the condition of the mortgage had been broken, the demandant having been compelled, as a surety of *Richard*, to pay the debt against which the mortgage and bond were made to indemnify him, *Dec.* 24, 1823. In 1828, the equity of redemption was sold to Mrs. *Thornton*, a sister of the demandant, to pay a debt due from *R. Cutts* to the estate of her late husband. The demandant, *Jan.* 9, 1830, assigned to the *Atlantic* Bank, doing business in *Boston*, the mortgage and bond, given by *Richard Cutts* to him, to secure a debt due from the demandant to that Bank. On *Dec.* 18, 1830, *G. Thacher*, Esq., as attorney of the Bank, and under a power of attorney, entered upon the demanded premises, in the presence of two witnesses, for the purpose of foreclosing the mortgage made by *R. Cutts* to *D. Cutts*, and also the assignment thereof in mortgage by *D. Cutts* to the Bank, the demand having become payable, and notified *D. Cutts*, and the *Thornton* heirs, then owning the equity of redemption, of his doings. The demandant was not present, when possession was taken, but Mr. *Thacher* had told him previously what he should do, and he made no objection. Mr. *Thacher*, by direc-

tion, and as attorney of the Bank, commenced an action against the demandant on the notes due from him to the Bank, all his real estate having been attached but his interest in this, at the *May* term of the Court of Common Pleas, 1832, which was continued in Court until the *Feb.* term, 1834, when it was dismissed, neither party. On *July* 1, 1832, the Company, having become the purchasers of the equity of redemption of the *Thornton* heirs, by an agreement of that date, but in fact not executed until *Dec.* 14, 1833, made an arrangement with the Bank, by which that corporation was, after that time, to hold the mortgage for the benefit of the Company, and the Company, on the 7th of *August*, 1832, paid to the Bank, in pursuance of said agreement, the amount due them from the demandant. On the 14th of *December*, 1833, the Bank, by a writing of that date, under their seal, reciting the entry to foreclose, and stating that it had not been their intention to foreclose the original mortgage against the Company, as owners of the equity, declared that they did not hold possession of the premises to foreclose against said Company, or the owners of the equity of *Richard Cutts*, and released to the Company all right acquired by their entry to foreclose the original mortgage, so far as it respected any acts of the Bank or their agents for that purpose. On *Dec.* 17, 1833, the demandant paid to the Bank the amount of his debt secured by said assignment of the mortgage, and the Bank reassigned to him the mortgage and bond. In adjusting the amount due, the Bank charged to the demandant, and the demandant paid to the Bank, the expense of taking possession, both under the assignment and under the original mortgage, including the expense of notifying the *Thornton* heirs, then owning the equity.

The counsel for the defendants requested the Court to instruct the jury, that the Bank had the lawful right to release, acquit, or yield up to the owners of the equity of redemption any right, claim, or power to foreclose said mortgage, acquired by their own acts, or the acts of their agent or agents, after the assignment thereof by said *Cutts* to said Bank, at any time before the said tender to said Bank. But *Emery J.*, before whom was the trial, declined to give such instruction; and did instruct the jury, that any release or discharge of an entry made by said Bank for the purpose of foreclosing said mortgage, could only be good against

said Bank, and would not be valid and effectual against said *Cutts* without his consent and approbation, if he chose to adopt and ratify the entry made by the Bank, or their agent or agents, for the purpose of foreclosing said mortgage, after the re-assignment by the Bank to said *Cutts*. The verdict was for the demandant, and the defendants excepted both for withholding the instruction requested, and for the incorrectness of that given. Other questions were made and argued; but as a new trial was granted on the consideration of this point alone, the facts and arguments in relation to the others are omitted.

J. Shepley, for the tenants, in arguing that the instruction requested should not have been withheld, endeavored to support this general proposition. The mortgagee or his assignee, having once made an entry, or taken possession, to foreclose the mortgage, may at his pleasure relinquish, release, or yield up such entry or possession to the owner of the equity; or even abandon it without his assent. He cited, *Quint* v. *Little*, 4 *Greenl.* 495; *Dexter* v. *Arnold*, 1 *Sumner*, 118; *Fay* v. *Valentine*, 5 *Pick.* 418; *Batchelder* v. *Robinson*, 6 *N. H. Rep.* 12. The acts of the Bank were a relinquishment and waiver of all claim to foreclose the original mortgage. 1 *Cov. & R. Powell on Mort.* 389; *Coventry's* note and cases cited; *Fay* v. *Valentine*, before cited.

In arguing that the instruction actually given was wrong, he contended, that the first part of it necessarily carried with it this consequence; that one acting for himself and in his own right can convey to another a greater interest in land than he has himself, or the waiver must be good against every person claiming under the Bank, if it was good against the Bank.

He argued, that the second principle advanced in this instruction to the jury was clearly wrong for the following causes.

1. After his assignment of the mortgage to the Bank, *D. Cutts* ceased to have any rights whatever in relation to the management of it. He had a mere naked right of preemption, and until he exercised it he was as any other stranger. He could not force the Bank to foreclose, and could not prevent them from doing it, or from commencing it, and again waiving it. The mortgage was a mere chattel interest. The mortgagee was the Bank, and the rights of the mortgagor were in the *Thornton* heirs and in the com-

pany. *Wilson* v. *Troup*, 2 *Cowen*, 195; *Baylies* v. *Bussey*, 5 *Greenl.* 161; 2 *Cov. & R. Powell on Mort.* 903, *Note O.*

2. Where the payment of the money secured, by the mortgage and the reconveyance are concurrent acts, as in this case between the Bank and the demandant, the mortgagee is never the trustee of the mortgagor. 2 *Story's Eq.* 280, *and note*; *Vose* v. *Handy*, 2 *Greenl.* 222; *Clark* v. *Wentworth*, 6 *Greenl.* 260; *Wade* v. *Howard*, 6 *Pick.* 492; *Gray* v. *Jenks*, 3 *Mason*, 520; *Jackson* v. *Davis*, 18 *Johns.* 7; *Jackson* v. *Blodget*, 5 *Cowen*, 122.

3. If the Court can consider the Bank as the agent of *Cutts* in any respect, yet the doctrine that the principal may ratify the acts of his agent, does not apply, where the agent acts professedly on his own account and in his own name. *Paley on Agency*, 49, 252; 2 *Kent's Com.* 629, 630.

4. If the demandant had the power to ratify or reject, to confirm or dissent from, the acts of the *Bank* in relation to the foreclosure, he must ratify the whole or none. He cannot select and ratify such portions, as he chooses, and reject the remainder. *Paley on Agency*, 145, 249, and cases cited; *Peters* v. *Balistier*, 3 *Pick.* 505; 1 *Cov. & R. Powell on Mort.* 390, and cases cited in the note, and particularly, *Chalmers* v. *Bradley*, 1 *Jac. & Walker*, 505. The same authorities show, that the ratification of any part of the acts of an agent is the ratification of the whole.

5. The demandant could not by any ratification of his, set aside the rights of the company previously acquired. *Cutler* v. *Haven*, 8 *Pick.* 490; *Crane* v. *March*, 4 *Pick.* 131.

6. Even had the waiver of the entry to foreclose been a wrongful act as against *Cutts*, it is a matter wholly between him and the Bank, and cannot affect the rights of third persons.

7. Had there been reason to believe, that fraud had been practised, that question should have been determined by the jury, and not by the Court. *Sherwood* v. *Marwick*. 5 *Greenl.* 295.

A. G. Goodwin, for the demandant, argued in support of the following propositions, and cited the following authorities.

1. The Bank, as mortgagee of the demandant, by entering and taking possession of the mortgaged property for condition broken, held the property in trust for the demandant. *Amherst* v. *Dawling*, 2 *Ver.* 401; 1 *Com. R.* 343; 1 *Strange*, 403; 2 *Cruise*

Dig. Mort. ch. 2, § 11; 1 *Mad. Ch.* 512; 4 *Kent's Com.* 3*d Ed.* 167; 2 *Story's Eq.* 244, 278, 283; *Jackson* v. *Delancy*, 13 *Johns.* 537; *Parsons* v. *Welles*, 17 *Mass. R.* 423; *Angell on Lim.* 123; *Conard* v. *Atlantic Ins. Co.* 1 *Peters*, 441.

2. The Bank, by selling and assigning the notes given by the demandant to them, which were secured by the mortgage, became also the trustees of the company to the extent of their lien upon the mortgaged property, subject to the rights of said *Dominicus Cutts.* 1 *Chitty's Eq. Dig.* 689; 2 *Cruise, Tit.* 15, *ch.* 2, § 11; 4 *Kent's Com.* 193, 194; 7 *Wheeler's Ab. Mort.* 6*th div.*; *Hatch* v. *White*, 2 *Gall.* 155; 2 *Story's Eq.* § 1016, 1023; *Parsons* v. *Welles*, 17 *Mass. R.* 425; *Crosby* v. *Brownson*, 2 *Day*, 425; *Crane* v. *March*, 4 *Pick*, 136; *Jones* v. *Witter*, 13 *Mass. R.* 304; *Dunn* v. *Snell*, 15 *Mass. R.* 481; *Cutler* v. *Haven*, 8 *Pick.* 490; *Vose* v. *Handy*, 2 *Greenl.* 322.

3. The Bank could not impair the rights of *Dominicus Cutts* without his consent, nor do any thing to prejudice his interest in the premises. *Blennerhassett* v. *Day*, 2 *Ball & B.* 133; *Wilkinson* v. *Stafford*, 1 *Ves. Jr.* 42; *Whelpdale* v. *Cookson*, 1 *Ves.* 9, & 1 *Salk.* 155; *Witter* v. *Witter*, 3 *Peere Wms.* 100; 2 *Cruise, Mort. ch.* 2, § 19, 22, 23, 31; 1 *Mad. Ch.* 455, 534; *Holdridge* v. *Gillespie*, 2 *Johns. Ch.* 30; 2 *Ver.* 84; 3 *Dow*, 128; 4 *Kent*, 165; 2 *Story's Eq.* § 1016; *Stat.* of 1831, *ch.* 39, § 9; *Smith* v. *Dyer*, 16 *Mass. R.* 18.

4. The acts and doings of the Bank, as disclosed in the release or discharge of the entry to foreclose, of *December* 18, 1830, are a gross fraud upon the rights of *Dominicus Cutts*, and are inoperative and void, so far as said acts respect him, unless sanctioned and approved by him, either at the time or since. 1 *Story's Eq.* 261, 305, 319, 320, 326; *Jones* v. *Witter*, 13 *Mass. R.* 304; *Dunn* v. *Snell*, 15 *Mass. R.* 485; *Cutler* v. *Haven*, 8 *Pick.* 490; *Vose* v. *Handy*, 2 *Greenl.* 322; *Wade* v. *Howard*, 6 *Pick.* 492.

5. The justice and equity of this case is opposed to the discharge of the entry to foreclose; and is in favor of the transfer of that entry to *D. Cutts* by the deed of the Bank to him of *December* 17, 1833.

P. Sprague, for the Company, enforced the positions taken in the opening, and contended for the pertinency of the authorities cited

to the questions before the Court; replied to the argument for the demandant; and controverted the relevancy of the grounds taken, and authorities cited in his behalf, to the facts in the case.

The case was continued, for advisement, and the opinion of the Court was afterwards prepared by

WESTON C. J. — While the President, Directors and Company of the *Atlantic* Bank, were the assignees of the mortgage, given by *Richard Cutts* to the plaintiff, if the defendants, the owners of the equity, would redeem, payment was to be made to the Bank; and all negotiations in relation to that mortgage, were to be made with them. In *July* or *August*, 1832, the defendants, having paid the money due to the Bank, acquired virtually and substantially the interest of the latter. They did not apply the moneys paid to the extinguishment of the mortgage, made by *Richard Cutts*, nor did they in point of form become the assignees of the mortgage, made by the plaintiff; but the Bank became the trustees of that title for their benefit, by the express terms of the instrument of *July*, 1832. The Bank ceased to have any beneficial interest in the principal debt, or the collateral security.

It would seem from the case, as it is presented to us, that from some community of interest, between the defendants and certain of the stockholders and influential directors of the Bank, the latter were disposed to mould their remedies and proceedings, in a manner best calculated to promote the views and interest of the former. The defendants were disposed to make the most of the liabilities of the plaintiff, in the hope, probably, of collecting part of the money due from him to the Bank, keeping on foot for this purpose the suit brought, and the attachment made in their name, and intending also to hold the land, against any claim he might set up, by a foreclosure of the mortgage, executed by him. How far these measures might have been successful, it is unnecessary to inquire; for they were defeated by the payment made by the plaintiff, before the foreclosure against him had been perfected.

From the character of the controversy between these parties, the land must be understood to be of greater value, than the amount due upon the mortgage made by *Richard Cutts*, or than the amount for which the plaintiff was liable to the *Atlantic* Bank.

If then, the defendants, upon the suit in the name of the Bank, had collected part of the sum due to them from the plaintiff, and had also foreclosed the mortgage against him, he would have been subjected to the loss of all, that might have been thus obtained in the action upon his personal security. Having baffled them in this attempt, the plaintiff now turns round upon the defendants, and endeavors to defeat their equity under *Richard Cutts*, which he insists he has a right to do, from the manner in which the business was transacted by the defendants and the Bank. And if such should be the legal result, although the defendants now claim the favor due to mortgagors, who would redeem their pledge, upon a proffer of full payment, there is nothing in their case, which calls for special sympathy.

At any time, prior to the eighteenth of *December*, 1833, they had an undoubted right to have made the land their own, by paying to the Bank the amount due on the mortgage, made by *Richard Cutts;* and this sum thus received, the Bank were bound to apply to the extinguishment of the debt due to them from the plaintiff; and thus both would have been discharged, being about equal in amount. But there is much reason to believe that the defendants and their allies in these transactions, the Bank, combined to collect from him a sum of money for the use of the defendants, and in addition thereto to make the land mortgaged their own, by a foreclosure against him.

The parties stand upon their legal and equitable rights; and we are called upon to determine whether the mortgage of *Richard Cutts* has been foreclosed. Until foreclosure, the mortgagee holds the pledge first, for himself, to the extent of his lien, and secondly, in trust for the mortgagor. And he is bound to ordinary care and diligence, in the preservation and management of the property. The pledge which the Bank received, was subject to a paramount right of redemption in *Richard Cutts* and his assigns. They had a right to receive the money and discharge the first mortgage. If they had abused the trust, and had cancelled the bond and the first mortgage, without payment, what would have been the measure of their liability? They would undoubtedly have been holden, not for the value of the land pledged, but for the amount due, as if they had actually received the money. And this would have

been the whole value of the plaintiff's interest in the pledge. As assignees of the mortgage, they had the control of the remedies provided by law, either to compel payment or to effect a foreclosure. If they might discharge the mortgage before foreclosure, of which we think there can be no doubt, we perceive no sufficient reason why they had not the power to waive and relinquish possession, or any other remedy, which they were at liberty to pursue. They might be liable for the unfaithful management of their trust. Indeed, the Bank had conducted the business, with so little regard to the interest of the plaintiff, that we doubt not he might have held them answerable to him for the whole amount due on *Richard Cutts'* bond, and have required that it should be applied in payment of his notes, if he had not chosen to redeem his mortgage by paying the notes himself.

But when he took back the pledge, he received it in the condition in which it actually remained in their hands. They had waived in favor of the defendants, the assignees of *Richard Cutts*, the foreclosure which had been in a train for consummation. Nor do we think that before the foreclosure had been perfected, the consent of the plaintiff was essential to the validity of the waiver. In the first place, the Bank were the mortgagees in possession, with whom, therefore, the original mortgagor had a right to negotiate. Secondly, they had a right to determine for themselves, whether they would receive the pledge in payment, and thus convert their money into real estate, or whether they would suffer it to remain as collateral to their personal security, the bond. The plaintiff by declining to redeem, so far as he was concerned, might have thrown the mortgage upon them in payment of his own debt, but they would have been left to deal with the first mortgagor at their own discretion.

The entry against the assignees of *Richard Cutts* for condition broken was their act. Their attorney entered by authority from them, and the widow and heirs of *Thornton* were notified, that the Bank would hold for the purpose of foreclosure. The attorney testified, that the plaintiff consented to what was done; but this was by no means necessary to give it validity, nor was it the less their act. They did not profess to do it by the request, or for the benefit of the plaintiff. We are not aware of any reason

why they might not be permitted to waive it, with the assent of the assignees of *Richard Cutts* upon whom it was to bear. Suppose the attorney, the next day after he had taken possession, had, in pursuance of instructions, written to the assignees of *Richard*, that upon further consideration the Bank had concluded to waive their entry for the purpose of foreclosure, might not the assignees have confided in the second notice, as a relinquishment of the first? We think they might. The Bank, while the mortgage was in their hands, represented the plaintiff, the first mortgagee. They were clothed with full power, as his substitute; to treat with the mortgagor. Much more had they authority to determine the continuance, quality and intention of their own acts.

We cannot consider the waiver of the foreclosure a fraud upon the plaintiff. His security, to the amount of his debt, remained unimpaired. The lien continued on the land; and he was at liberty to pursue his personal remedy on the bond. Much of the argument of the counsel for the plaintiff, turns upon the assumption, that the entry against the widow and heirs of *Thornton* was made for him. While he held, he had no desire to foreclose. Why? He would not injure his brother. How does it appear, that he had less sympathy for his widowed sister and her children? He consented to what was done by the Bank against them as well as against himself. He acquiesced in what he could not prevent. When he came to redeem, he paid part of the expense, incurred on account of the mortgage. Rents are credited in the same account; and we see not why a part of the expense necessarily incurred, is not a fair charge in offset. But if the foreclosure had been waived, as we hold that it was, it could not be set up by the act of the plaintiff, in making the payment, or by the Bank in receiving it. We cannot regard the entry to foreclose as his act when done, and it could not be made his by relation, to the prejudice of third persons. Before the payment relied upon as an adoption, had been made, the act had been waived and vacated by those by and for whom it was done.

We have examined the authorities cited for the plaintiff, but are not satisfied that they conflict with the right or competency of the Bank, under the facts in the case to waive their entry to foreclose, against *Richard Cutts* and his assigns. To determine otherwise,

would be giving an undue advantage to the plaintiff over the defendants, who had been thrown off their guard, by confiding in the waiver by his assignees of their own act. If the law however had accorded him this advantage, we should have recognized it with the less reluctance, as experiments were tried by them, which might have subjected him to loss. As upon the facts, we are of opinion, that the equity of the defendants is not foreclosed, the verdict is set aside, and a new trial granted. And we come to this result, with the more satisfaction, as full justice may be done to the plaintiff, by holding the land charged with the full amount of his incumbrance.

Tristram Eaton *vs.* William Emerson.

In an action on a bond, conditioned to convey certain land on the payment of four notes according to the tenor thereof at four different fixed times, *it was held:* that a tender, made two days before a note fell due to the holder of the note, who replied, "you have made your tender, I shall not take the money," was sufficient evidence of the performance of the condition, as to that note; but that a tender made one day after another note fell due, to which the holder replied, "he had nothing to say or do about it," was not a sufficient excuse for the non-payment of that note, when it fell due.

Giving a bond to one to convey land to him on the performance of certain conditions, does not disqualify the obligor from conveying the same land to another, to whom he had before given a similar bond to convey the same land.

Where a note is made payable in one year, parol evidence is inadmissible to prove that when the note was written, the maker requested to have it made payable in two years, which the payee declined to do, but promised, that he would wait for the money two years.

This was an action of covenant broken on a bond given by the defendant to the plaintiff, dated *June* 23, 1830, reciting that the defendant had agreed to convey to the plaintiff two lots of land, and had received from the defendant his four promissory notes of the same date, each for the sum of $78, payable in one, two, three, and four years, with interest annually; and concluding as follows: "Now if the said *Emerson*, on the payment of said notes according to the tenor thereof, shall make and execute to said

Eaton a good and sufficient deed, then this obligation to be void." The counsel for the plaintiff offered to read to the jury the deposition of one *Atkinson*, when the counsel for the defendant objected to the reading of any portion thereof, excepting so much as related to the execution of the bond. *Emery J.*, before whom the trial was had, admitted the deposition, *de bene esse*, subject to be admitted or rejected during the trial, and the whole was read to the jury. Afterwards, the Judge, in his charge to the jury, instructed them that all the statements in *Atkinson's* deposition of conversations prior to the execution of the bond, were to be entirely disregarded by them; but the portions they were to disregard were not pointed out to them by the Judge. The substance of the deposition appears in the opinion of the Court. The plaintiff, to show that the defendant had extended the time of payment, in addition to the testimony of *Atkinson* in his deposition, called one *Pierce*, who swore, that he was at *Bangor* with the plaintiff the last of *May* or first of *June*, 1831, "at *Emerson's* boardinghouse, in the front yard, when no other person was present," and heard a conversation between them, in which "*Eaton* said he had not the money to pay the first note, but had a good horse and wagon; *Emerson* said he did not want them, did not care about the money, and could wait longer; that *Eaton* said he was going on to the land, and *Emerson* said nothing against it." The plaintiff proved, by sundry depositions, that on *June* 21st, 1832, he tendered to the defendant $353, "in payment for the four notes of hand given by him to Mr. *Emerson*," who said, "*Eaton, you have made your tender. I shall not take the money*," *and nothing more.* Also another tender, made *June* 24, 1833, of $96, to which the defendant said, "he had nothing to do or say about it." Also another tender of $100, made *June* 23, 1834, "and demanded the note which Mr. *Emerson* held against him. He refused to take the money, and did not give up the note." On *March* 21, 1832, the defendant gave a bond to *B. Milliken*, to convey the same land to him at a future day, on payment of a certain sum, but no conveyance had been made at the time of the trial. The plaintiff read in evidence a letter from the defendant to the plaintiff, dated *April* 7, 1832, of which the following is a copy: "Yours of the 4th inst. is received, and in answer I say, that you have never performed any part of your

agreement with me. When I last saw you, you said you would go and clear up the land, which you had cut down, and proceed on and make further falling of trees, but did not perform any part of what you promised. Therefore I consider your agreement at an end, and have accordingly sold the land to another person. I am ready to give up your notes by your handing me the bond."

The counsel of the defendant objected, that the tender of *June* 21, 1832, could at the farthest apply only to the first note, due in *June*, 1831, and not to that which became due two days after the tender, and in relation to which there was neither tender nor offer to pay, when it became due, nor for a year afterwards; that the tender of *June* 24, 1833, was not in season, and not enough in amount to pay the 2d and 3d notes then due, and interest on the 4th, and the tender of *June* 23, 1834, coupled with a demand of the note, as a condition, was invalid as to the 4th note, and that unless each of the three were paid, or payment tendered when due, the action must fail. He also insisted, that the giving of a bond to convey the land to another, did not disable him from conveying to the plaintiff, and did not dispense with payment or tender of payment. He also urged, that even if the other difficulties could be surmounted, that a demand for a deed should be made before any suit could be maintained. *Emery J.* instructed the jury, that the several tenders proved were sufficient and made at the proper times, provided the jury believed the testimony, that the extension of the time was made; that the jury were to consider the letter of the defendant, and from that, together with the other evidence, come to a conclusion, whether the defendant had in fact disabled himself from conveying; and if so, they would give such damages as they believed the plaintiff had sustained. The verdict was for the plaintiff, and was to be set aside, if the rulings, or instructions, were erroneous.

J. Shepley, for the defendant, renewed the objections made by him at the trial, and contended: —

1. The deposition of *Atkinson* was illegally admitted. The general principle, that parol evidence is inadmissible to vary or control the written instruments of the parties, is too well settled to need support or comment. The latest reported case in this State, is *Lincoln* v. *Avery*, 1 *Fairf.* 418. The conversation detailed in

the deposition shows, that it was before the delivery; but if it were not, it is well settled, that any conversation at the time, whether before or after the execution and delivery, to explain or control it, cannot be proved by parol evidence. 9 *Greenl.* 128; 4 *Greenl.* 371; 7 *Greenl.* 435; 5 *Greenl.* 384; 11 *Pick.* 417; 10 *Pick.* 228; 5 *Conn. R.* 451; 2 *Stark. Ev. last ed. in* 2 *vols.* 550, *note* 1. But if the Judge was right in his law, still there should be a new trial, because in such case the Court ought to have decided what was to be submitted to the jury, as legal evidence, and what was not; and not have left it to the jury to determine for themselves.

2. The defendant had not incapacitated himself from giving a deed of the premises. If a man give bonds to half a dozen men to convey to each the same tract of land, while the land remains his, he can convey to either. The bond was not given to *Milliken* until *Eaton* had forfeited all claim under his. If he had actually conveyed, he might have purchased back the land and given a good title. The letter does not aid the plaintiff. 1. Because the whole must be taken together, and thus shows a good cause for not conveying; and 2. Because the word *sold* applies to the sale to *Milliken* by bond, and not to any conveyance to another. It was therefore necessary to show full performance on the part of the plaintiff.

3. The testimony in relation to extension of the time of payment, related exclusively to the note due *June* 23, 1831. Not one word was proved to have been said by the defendant dispensing with the strictest performance respecting the other three. The tender of *June* 21, 1832, could be good but for the first of the four notes, for neither of the others had then fell due, and the plaintiff was under no obligation to take the money. His reply gave no reasons why he would not take the money, and merely put the plaintiff on his guard to be cautious. *Saunders* v. *Frost*, 5 *Pick.* 267. The tender of *June* 24, 1833, was made too late, as it was after the note was due. *City Bank* v. *Cutter*, 3 *Pick.* 418. The tender made on the 23d of *June*, 1834, although made on the right day, was invalid, because accompanied with a condition the plaintiff had no right to impose. *Brown* v. *Gilmore*, 8 *Greenl.* 107; *Loring* v. *Cooke*, 3 *Pick.* 48.

4. It was not *Emerson's* duty to follow *Eaton* with a deed, but *Eaton* should have demanded it, and waited a reasonable time to have had it made. *Hunt* v. *Livermore*, 5 *Pick.* 397.

D. Goodenow, for the plaintiff, insisted, that the deposition of *Atkinson* was rightly admitted, with the restriction put upon it by the Judge. This is not making a bargain to alter the effect of the writing, but merely to give an extension of time beyond that fixed in the note. *Smith* v. *Tilton*, 1 *Fairf.* 350; *Fuller* v. *McDonald*, 8 *Greenl.* 213; *Boyd* v. *Cleaveland*, 4 *Pick.* 525; *Kelleran* v. *Brown*, 4 *Mass. R.* 443; *Fleming* v. *Gilbert*, 3 *Johns. R.* 528; *Ward* v. *Winship*, 12 *Mass. R.* 481.

The defendant had disabled himself from conveying, and no tender of payment, or performance, on the part of the plaintiff was necessary. 8 *Johns. R.* 257; 11 *Johns. R.* 525; 16 *Mass. R.* 161; 14 *Mass. R.* 266.

The plaintiff tendered full performance of the contract on his part, within the time stipulated, and the extended time given him by the defendant, although he was not bound to do it. It is not, however, necessary to show full performance, because the tender may be waived; and the defendant did not refuse to take the money, because it was not offered at the right time, but because he had sold the land to another. The right may be waived, 7 *Johns. R.* 476; 7 *Greenl.* 91; 1 *Dane's Ab.* 249; 13 *Mass. R.* 396; 7 *Greenl.* 394. The tenders made were at the right time and were sufficient in amount. 5 *Coke's R.* 114; 3 *Salk.* 131; 5 *Pick.* 267; 4 *Greenl.* 298; 1 *Pick.* 485; 4 *Mass. R.* 245; 1 *Peters*, 455. If the defendant had intended to insist on a forfeiture he should have notified the plaintiff of his intention, having once told him he should not exact it at the time it became due.

But if any of the instructions of the Judge should be thought wrong, still the verdict ought not to be set aside, as the jury came to a correct decision, and a new trial would be of no service to the defendant. *Farrar* v. *Merrill*, 1 *Greenl.* 20.

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

Weston C. J. — The first payment to be made, according to the condition of the bond, and the terms of the notes given, was

the note which fell due at the end of the year, and the interest on the three other notes. If the defendant, after the execution of the contract, agreed to extend the first payment another year, as the jury have found, we think the enlarged time applied both to principal and interest. On the twenty-first of *June*, 1832, a sufficient sum was tendered, to cover the amount of the two first notes, with interest on the whole. It is insisted, that this tender, as it respects the second note, was two or three days too soon, and that the defendant was not then bound to receive it. If the plaintiff had claimed a deduction of interest, it might have been objectionable; but as there was an actual tender of the interest for full two years, more especially as the defendant admitted the tender, and made no objection on account of the time, we are of opinion, that it must be regarded as good for the first two notes, and the interest on the whole for two years.

Excluding the day of the date, in the computation of time, which is the rule in regard to notes of hand and bills of exchange, the third note became due on the twenty-third of *June*, 1833. *Chitty on Bills*, 343; *Windsor* v. *China*, 4 *Greenl.* 298. The plaintiff had the whole of the twenty-third of *June*, in which to pay the note; but a tender on the twenty-fourth was too late by one day, according to the condition of the bond, and the terms of the note. Nor do we think that the plaintiff can charge the defendant upon the bond, without a tender on his part. The defendant might have conveyed the land to the plaintiff, notwithstanding his subsequent obligation to convey to another.

The bond and the notes, referred to in the condition, were parts of one transaction. After the bond had been prepared and executed, according to the deposition of *Nathaniel Atkinson*, the plaintiff wanted to have the notes written, so that the first payment should not fall due under two years. The deponent states, that the defendant declined to have them so written; but said he would wait for that period of time. This must be regarded as inadmissible, according to the whole current of the authorities. The written instruments executed at the time, are the only legal evidence of what the parties then agreed; and they cannot be varied, enlarged or extended by parol testimony. There is, it is true, other evidence tending to show a subsequent enlargement of the time, which is not

liable to objection; but as this was a point controverted, the jury might not have been satisfied of this fact, without the aid of *Atkinson's* deposition, which was incompetent. The verdict must be set aside, and a new trial granted.

Samuel G. Dennett *vs.* James Hopkinson.

Where the selectmen of a town locate a highway upon the earth, erecting monuments on each side thereof, and make a return of the road to the town, which is duly accepted; and it appears afterwards, that there is a variance between the location by monuments and the return; *the return must govern.*

The action was *trespass quare clausum*, for taking away the fence of the plaintiff, in *Buxton*. The defendant, as surveyor of highways, justified the removal, because the fence was upon the public highway.

The selectmen of *Buxton* went upon the ground, and laid out a road, and made this report thereof to the town. "Laid out for the use of the town of *Buxton*, a town way, as follows, viz. — beginning at the northerly side line of the 700 acres granted to *Hill* and others, in the centre of the range road, between the ranges A and B, first division of land in *Buxton;* thence running in the middle of said road north-west until it meets the road which runs between lots No. 8 and 9, on the letter B. Said road to be four rods wide, one half of which lies on each side of said course." This return was duly accepted by the town. The defendant proved by the selectmen, and surveyor employed by them, that when they laid out the road, they went to a place believed by them, and acknowledged by the plaintiff, who was present with them, to be the centre of the rangeway, at one end thereof, and from thence ran north-west by the surveyor's compass at that time, to the other end of the road, and measured off two rods on each side of that line, and drove down stakes at the time on lines parallel with the centre line thus ascertained, and at two rods distance from it, as the road, making the road four rods wide. The plaintiff knew where the stakes were driven. The fence removed was within the limits thus staked

out, as a road. There was much evidence on the one side and on the other, as to where the old rangeway actually was.

The counsel for the defendant contended, that the defence was made good, if they proved to the satisfaction of the jury, that the fence removed by him, as surveyor of highways, was upon the road, as actually surveyed and staked out by the selectmen.

The counsel for the plaintiff contended, that the town road was in the centre of the rangeway, wherever the rangeway was in fact.

Emery J., presiding at the trial, instructed the jury, that it was a question of evidence for them to settle, where the centre of the range road between the ranges A and B, first division of land in *Buxton*, was, and whether the location by the selectmen of the four rods road, agreeably to their return, was in the centre of the range road. If the location was right, according to that return, recorded in the town records, the defendant is not liable. If otherwise, and the jury were satisfied, that the plaintiff was injured by tearing away the fence, when the surveyor had not a right to do what he did; they would find such damages, as they believed to be right from the evidence.

The verdict was for the plaintiff, and was to be set aside, if the instruction was wrong.

D. Goodenow and *J. Shepley*, for the defendant, supported the position taken at the trial. They said, that if the transactions had been precisely the same, and the return of the selectmen had been inserted, as the description in a deed, the law was perfectly well settled, that the parties to the deed must have been governed by the actual location and bounds made at the time; and they urged, that the same rules should be adhered to in the case of roads. *Esmond* v. *Tarbox*, 7 *Greenl.* 61; *Ripley* v. *Berry*, 5 *Greenl.* 24; *Pike* v. *Dyke*, 2 *Greenl.* 213; *Brown* v. *Gay*, 3 *Greenl.* 126; *Loring* v. *Norton*, 8 *Greenl.* 65. They said too, that the words of the return, "the road to be four rods wide, one half of which lies on each side of *said course*," shew, that the selectmen intended, that the course, as then run by them, should govern, and that it should not be perpetually varying, as the old rangeway might be found in one place, or in another.

Fairfield, for the plaintiff, also supported the position taken for the plaintiff at the trial, and insisted, that it was wholly immaterial

what the selectmen did; and that the return of the road accepted by the town alone must govern. In case of a road, if a return and a location differ, the return must govern. The rangeway is to be considered as a monument referred to in the return, and there is no greater difficulty in ascertaining, where that is, than in finding many other boundaries. He cited *Todd* v. *Rome*, 2 *Greenl.* 61; *Commonwealth* v. *Low*, 3 *Pick.* 408; *Howard* v. *Hutchinson*, 1 *Fairf.* 335, and *Flagg* v. *Thurston*, 13 *Pick.* 150.

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

WESTON C. J. — The rangeway had been anciently located, of which competent proof was adduced to the satisfaction of the jury. The side lines became, therefore, fixed and established monuments, which could not be changed or diverted, by any subsequent erroneous running. It would have presented a different question, if the original location had not conformed to the plan, upon which it was delineated.

To constitute a town way, it must appear, that the proceedings were in conformity with law. It must be laid out by the selectmen, and accepted by the town. Both are indispensable. If the selectmen laid out the way, under which the defendant claims to be protected, the town have not accepted it. They have accepted a road, upon the return of the selectmen, the centre of which is the centre of the rangeway. To allow a way, which diverges from this line, to have been legally established, would be to give effect to an error, which has never received the sanction of the town. In the judgment of the Court, upon the facts found, the defendant has failed in his justification.

Judgment on the verdict.

WILLIAM BEAL *et al. vs.* JOHN NASON, JR.

The *Revised Statute*, *c.* 52, § 12, by which actions, brought by heirs to recover real estate sold by executors, administrators, and guardians on license, are limited to five years from the giving of the deed, applies alike to sales made prior and subsequent to the passing of the act.

That *statute* violates no provisions of the constitution.

THIS was a writ of right, dated *Jan.* 19, 1835, wherein the demandants claimed a certain tract of land in *Biddeford*. The land demanded was formerly owned by *Joseph Beal*, grandfather of the demandants, *William Beal* and *Sally Whitten*, who are his heirs at law. The tenant proved, that *R. C. Shannon* was duly appointed administrator of the estate of said *Joseph*, in 1815, that within three months he returned an inventory of said deceased's estate, consisting of a tract of land including the demanded premises; a list of claims against the estate returned by commissioners; and that at the *Sept.* term of the Court of Common Pleas, said administrator was duly licensed to sell real estate of the intestate to the amount of $272 for the payment of debts. A certificate from a Justice of the Peace, that the oath was administered, was offered in evidence, not having been returned into the probate office, objected to, and admitted. There was a variety of evidence offered to show that the requisite notices of sale were given, no record thereof appearing in the probate office. This was objected to and admitted. The administrator, at a vendue, *Nov.* 8, 1815, sold land to the amount of $280,05, and the plaintiff contended, that the sale was void because it exceeded the sum for which the license was granted, and the tenant offered evidence to show, that the land was sold in different lots, and that this was one of the first sold, and within the amount of the license. The administrator gave a deed of the premises in proper form, dated *Nov.* 21, 1815, reciting a sale of the demanded premises, after due notice, to one *John Nason*, on the same 8th day of *November*, under whom the tenant derived title. Many objections were made, and overruled, and much evidence offered, all of which has become immaterial, as the opinion of the Court did not touch them. *William Beal* was 32 years of age when the suit was brought, and *Sally Whitten*, wife of *Geo. Whitten*, the other demandant, was then 33 years of age,

and had been married twelve years. Among the various objections made at the trial, was one by the counsel for the tenant, *that the suit could not be sustained, but that the demandants were barred by the provisions of the statate of Maine, c.* 52, § 12. But *Emery J.*, presiding at the trial, declined so to instruct the jury. The verdict, however, on the whole case, was for the tenant, under the instructions given on other points.

The several questions made at the trial were fully argued, but those having no bearing upon the ground of decision are omitted.

N. D. Appleton, for the demandants.

The statute of *Maine, ch.* 52, *sec.* 12, is no bar to this action. When this sale took place, there was no limitation by law then existing; and the clause in the 12th section extends, by the express words of it, only to licenses granted by that act. The words, "*sold under such license,*" necessarily refer to licenses authorized by that act.

This must have been the intention of the legislature. The construction contended for would impute to the legislature an unconstitutional enactment, which the Court will not do unless compelled to do it. If intended to act on sales made prior to the act, it is clearly void, being unconstitutional; because it disturbs vested rights; is retrospective in its operation; and operates as a repeal of general laws.

If the sale of this land was not legal, the title remained in the demandants, where it vested on their ancestor's death; and it surely was not competent for the legislature to take this property from them and give it to others without their consent. *Const. of Maine, art.* 1, § 11; *Lewis* v. *Webb*, 3 *Greenl.* 327; *Lewiston* v. *N. Yarmouth*, 5 *Greenl.* 67. If this law is holden to have retrospective operation, it in effect makes that legal, which at the time was illegal and void. Such act is unconstitutional. *Pro. Ken. Pur.* v. *Laboree*, 2 *Greenl.* 275. The case last cited is analogous to the present, and the reasoning of the Court conclusive in support of our position. In *Thayer* v. *Seavey*, 2 *Fairf.* 285, the legislature only changed the form of the action, but did not bar the right. Laws are generally to be considered prospective, and a retrospective effect is not to be given to a statute, unless such intention is

manifestly expressed, especially if it tends to produce injustice, or inconvenience.

Fairfield, for the defendant, relied on the proof of a compliance by the administrator with all the provisions of law, under the finding of the jury, and that the objections of the counsel for the demandants were untenable; and briefly argued the point made at the trial in relation to the statute of limitation.

This action cannot be maintained, not having been commenced within five years of the time of sale, and not coming within any of the exceptions, it being more than five years since the demandants were of age, and in a condition to assert their rights. *Rev. St. ch.* 52. There is nothing to distinguish this from the ordinary statutes of limitation. They usually apply to cases already existing, fixing the time when a party shall have a right to enforce a claim in a Court of Justice. This statute takes away no rights whatever from the demandants, but merely fixes the period after which the law will not permit them to take advantage of the loss of the evidence of the compliance with all the provisions of the law, or of unimportant errors in the proceedings of administrators. Many statutes of limitation are shorter than this. Five years are quite long enough for the heirs to find out whether the administrator has made any mistakes, when the proceeds of the sale have gone to pay debts. Although the statute applies to all cases, whether the sale was before or after the statute, still in this case it is immaterial, whether it is prospective, or retrospective, for many more than five years had elapsed after its passage before the suit. The act was unquestionably constitutional. *Thayer* v. *Seavey*, 2 *Fairf.* 290.

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

Weston C. J. — The statute laws in force, at the time of the separation of this State from *Massachusetts*, underwent a general revision in 1821, whereupon the former statutes, so far as they respected this State, were repealed. The act respecting executors, administrators and guardians, and the conveyance by them of real estate in certain cases, *Revised Statutes, ch.* 52, contains a general limitation of the liability of executors and administrators. *Chapter* 62 of the same statutes, limits actions real and personal, to the sev-

eral periods therein prescribed. It has never been understood in either case, that these statutes began to run only prospectively; and that no part of the period prior to their enactment, could enter into the computation.

Unless they applied to the past, as well as the future, as the prior statutes were repealed, remedies might be revived, which were barred by former laws. Or if the protection they afforded, when they attached, might be considered as vested; in all cases, where the periods of limitation had nearly, but not quite, expired, a new computation must begin from the enactment of our statutes, by which the periods would be greatly extended from their first commencement. This would neither accord with the benign policy, which dictated statutes of limitation, nor with the practice of our Courts.

The twelfth section of the statute first cited, provides, that "no action by any heir or other person, interested for the recovery of any real estate, sold under such license, shall be sustained, unless such action shall be brought, within the term of five years, after the execution and delivery of the deed, given under such license." The statute had previously made provision, for granting license to executors and administrators, to sell the real estates of persons deceased, for the payment of their debts, in terms varying very little, if at all, from the former statutes. The words, "such license," are not to be limited to such, as might be subsequently granted; but, in our judgment, embrace also those of a similar character, and for the same object, which had been granted under former laws.

To quiet purchasers, and for the protection of executors and administrators, the legislature thought proper to enact, that sales of this kind should not be disturbed after five years, with certain exceptions, not now in question. There was quite as much reason for extending the limitation to past sales, as to those which might be made in future. Unless this construction obtains, a sale made before the passage of the last statute, might be defeated at any time within twenty years, while those subsequently made, would become indefeasible in five years. In our opinion, the operation of the statute ought not to be thus narrowed.

The case of *Holyoke* v. *Haskins et ux.* 5 *Pick.* 20, may not accord with this construction. A similar question was there raised, under a statute of *Massachusetts*, containing the same provisions with those before cited from our own. The Court were of opinion, that the limitation did not apply to past sales. They give no other reason for it, than that otherwise vested rights might be disturbed. This does not appear to us quite satisfactory. If a party under no legal disability, had neglected to prosecute his remedy, for a supposed right, for five years, we think it is competent for the legislative power, to prescribe as a general rule, that the remedy shall no longer be enjoyed. Writs of review, by a former law, might within a limited period, be sued out as of right; but when the law was repealed the right, before available, was defeated. There was formerly no statute limitation of writs of error. In 1806, it was provided by law in *Massachusetts*, that no judgment before or subsequently rendered, should be reversed, unless a writ of error should be sued out, within twenty years from the rendition of such judgment. 3 *Mass. Laws*, 313. The same provision is re-enacted, in the same terms, in this State. *Statute* of 1821, *ch.* 52, § 15. This at once foreclosed the remedy, with respect to judgments, however erroneous, which had been rendered more than twenty years. It was deemed no injustice to such as had neglected for that period to prosecute the remedy. And the same reasoning may be applied to the statute under consideration.

But in the case before us, no vested rights were disturbed by the statute of this State. The limitation therein prescribed, did not begin to run, so as to affect the demandants, until after the passage of the statute, they being minors. Since they became of full age, they have had as long a time, within which to vindicate their rights, as is allowed to other citizens, or which is deemed consistent with the public good, which is best promoted, by quieting men in their possessions, within reasonable periods.

The tenant being, upon this ground, entitled to retain his verdict, it is unnecessary to examine other objections taken in the cause.

Judgment on the verdict.

CALVIN LOMBARD *vs.* SIMEON PEASE.

Admissions, made within six years, that services had been performed, but that they were paid for, or were rendered in part payment of a debt due, will not prevent the operation of the statute of limitations.

THE case was on a statement of facts, which sufficiently appear in the opinion of the Court.

D. Goodenow, for the plaintiff, contended, that the facts show an admission of unsettled demands between the parties; and cited *Baxter* v. *Penniman*, 8 *Mass. R.* 133; *Fisk* v. *Needham*, 11 *Mass. R.* 452; *Lloyd* v. *Maund*, 2 *T. R.* 769; *Davis* v. *Smith*, 4 *Greenl.* 337.

Jameson, for the defendant, commented on the language used, and contended, that the case came within the statute, according to the principles established by modern decisions.

The opinion of the Court was delivered on another day in the same term by

SHEPLEY J. — This is an action of *assumpsit* to recover for labor performed for the defendant in the month of *October*, 1829. The suit was commenced on the 23d day of *January*, 1836. The defendant pleaded the statute of limitations; and the plaintiff, to prevent the operation of the statute, proved, that during the winter of 1835-6, the defendant stated to a witness, "that he believed, that he did make a few staves, his workmen told him about two thousand; but that he stole shingle-timber at the same time, to much more than the value of making said staves." Another witness proved, that about five years before the commencement of the suit, "he went to said *Pease* to get payment for making two thousand of staves on *Eli Jackson's* account, that he made with *Calvin Lombard* to the amount of ten dollars, that *Jackson* sent him; *Pease* said he would not pay one cent; that he agreed with *Calvin Lombard* to make the staves towards what *Lombard* was owing him, that he set *Lombard* to work, and expected to allow him for all the staves he had made." It is argued for the plaintiff, that the proof shows, that the defendant within six years admitted, that there were mutual and unsettled accounts between the parties;

and that this case is within the principle, upon which this Court decided the case of *Davis* v. *Smith*, 4 *Greenl.* 337.

In that case the Court say, "it is manifest from inspection, that there was a mutuality of accounts, and that there were charges upon both sides within the period of six years." And it was held, that the operation of the statute of limitations was thereby prevented. The ground of decision is, that "where mutual accounts are relied upon to repel the operation of the statute, it is upon the principle of a new promise, of which the acknowledgement of an unsettled account, implied from new items of credit within six years, is evidence." In this case no services were performed, and no items of charge between the parties exist within six years. The acknowledgement of the defendant is not, that there were mutual accounts; it is only, that the plaintiff was indebted to him, without stating the manner in which such indebtedness existed; and it was accompanied by the declaration, that the labor was performed in part satisfaction of such debt. It is not perceived, therefore, that the facts in this case bring it within the principle of the case of *Davis* v. *Smith*. That case relates only to mutual accounts existing between the parties, where there are items in the account of each party within six years; and it cannot be regarded as embracing a case depending upon declarations or admissions; or a case where the accounts are not clearly proved to be mutual. The law in relation to admissions made by the party to be charged, must be regarded as settled. "Nothing short of an absolute promise, or a conditional promise accompanied by proof of a performance of the condition, or an unambiguous acknowledgement of the debt as existing and due at the time of such acknowledgement, will save a case from the operation of the statute." 3 *Greenl.* 97, *Perley* v. *Little*; 4 *Greenl.* 41, *Porter* v. *Hill*.

In the case of *Deshon et al.* v. *Eaton*, 4 *Greenl.* 413, it was decided, that the admission of the existence of unsettled demands between the parties, did not prevent the operation of the statute. The defendant in this case said, he "expected to allow him for all the staves he had made," but that declaration must be considered in connection with the declaration, that the labor was performed "towards what *Lombard* was owing him." The whole conversation is far from showing any admission of present indebtedness; or

any promise, conditional or otherwise, to pay; and it does not come within the principle of any of the later decisions.

Plaintiff nonsuit.

Elizabeth Ham *vs.* Rufus Ham.

The grantee in a deed of release, containing no covenants of warranty, is not thereby estopped from contesting the seisin of the grantor, and showing that he was himself before seised of the premises by an elder and better title.

The demandant claimed dower in fifty acres of land in *Shapleigh*, as the widow of *John Ham*, and on his seisin during the coverture. Whether *John Ham* was, or was not, seised of the premises, was the only question in the case. The plaintiff read a deed of release of the premises from *John Ham* to the tenant, dated *May* 5, 1828, acknowledged and recorded the same day, which deed of release contained no covenant, but the following: "So that neither I, the said *John Ham*, nor my heirs, nor any other person or persons, claiming from or under me or them, shall or will, by any way or means, have, claim, or demand any right or title to the aforesaid premises, or their appurtenances, or to any parcel or part thereof, forever." Also, another release of the same date, and with the same covenant, to the tenant from *Robert Fernald* and *William Stanley*, who had previously levied executions upon the premises, as the property of *John Ham*. Thereupon the counsel for the demandant contended, that the tenant was concluded and estopped to deny the seisin of *John Ham*, and that any evidence, tending to show that he was not so seised, was inadmissible in law. But *Emery J.* presiding, ruled for the trial, that he was not so estopped. The tenant then offered proof, that the land was the property of *George Ham*, father of *John* and of *Rufus Ham*, who conveyed the same to the tenant, when *John* was present, in 1818; and that although *John Ham* lived upon the premises, he always acknowledged the title of his father and brother, who usually took a portion of the profits. The widow of *George Ham* had claimed and had dower in the same premises. Immediately before

the releases were made, *Fernald* had entered upon the premises, and the tenant forbade him, and threatened to prosecute him, and after some dispute, by the advice of friends, the tenant agreed to give one hundred dollars for a quitclaim from *Fernald*, *Stanley*, and *John Ham*, and received the deeds in pursuance of that agreement. The jury were instructed, in case they found the premises to be in *George Ham*, and the tenant, and that *John Ham* was but their tenant at will, to find also, whether the tenant, when he took the deeds of release, intended to waive or abandon his right to the land and acknowledge theirs, or for the purpose of purchasing his peace and quieting his title. The jury found that *John Ham* was not seised, and also, that the tenant did not, by taking the releases, intend to waive or abandon his prior title, or acknowledge the other, but that he took the deeds for the purpose of purchasing his peace, and quieting his title. If the ruling or instructions were wrong, a new trial was to be granted.

D. Goodenow, for the demandant, contended, that the tenant, by taking the deed from *John Ham*, as well as by taking the deed from those claiming under him, during the coverture, was estopped from denying the title of *John Ham*. He relied upon *Nason* v. *Allen*, 6 *Greenl.* 243, as conclusive in his favor. He also considered *Hains* v. *Gardner*, 1 *Fairf.* 383, and *Hitchcock* v. *Carpenter*, 9 *Johns. R.* 344, as directly in point. That these are deeds of quitclaim, instead of warranty, makes no difference. *Fairbanks* v. *Williamson*, 7 *Greenl.* 96. The principle is, that a party is not at liberty to repudiate a title under a deed received by him.

N. D. Appleton, for the tenant, contended, that he was not estopped to contest the seisin of the demandant's husband, because of his receiving quitclaim deeds from her husband, and those who had levied on the land as his property. The grantee in a deed containing a covenant of seisin, but no covenants of warranty, is not estopped from setting up a different title against his grantee. The true reason which governs estoppels is, that after a man has by his own deed, or act *in pais*, admitted a fact to be true, he shall not be permitted to contradict it. He has not done it in this case. In his argument, he cited *Allen* v. *Sayward*, 5 *Greenl.* 231; *Com Dig. Estop. E.* 3, *and A.* 2; *Coke Lit.* 363; *Small* v. *Procter*, 15 *Mass. R.* 495; *Blight* v. *Rochester*, 7 *Wheat.* 547; *Fox* v. *Widgery*,

4 *Greenl.* 214; 5 *Dane*, 381; *Flagg* v. *Mann*, 14 *Pick.* 481; *Co. Lit.* 352; *Davis* v. *Hayden*, 9 *Mass. R.* 519; *Somes* v. *Skinner*, 16 *Mass. R.* 356; *Welland Canal* v. *Hathaway*, 8 *Wend.* 483; *Dart* v. *Dart*, 7 *Conn. R.* 250; *Jackson* v. *Wright*, 14 *Johns. R.* 193; 4 *Kent's Com.* 261.

The opinion of the Court was drawn up and delivered at the ensuing term in *Oxford* by

SHEPLEY J. — The plaintiff claims dower in the premises as the widow of *John Ham*, deceased; and she is entitled to recover, if her husband was seised during the coverture. If the testimony reported in the case was legally admitted, the seisin of the husband was disproved, and she cannot recover unless the defendant is estopped by the deed from the husband, or by levies made by his creditors, and deeds from them. If the defendant is estopped to deny the seisin, the testimony is of course inadmissible; otherwise, there does not seem to be any valid objection to it; for it is generally competent for the vendee to deny and disprove the seisin of the vendor. *Com. Dig. Estoppel, E.* 3; 15 *Mass. R.* 495, *Small* v. *Procter*. The doctrines of estoppel depend upon principles quite plain and simple; but in the application of them, many difficulties seem to have presented themselves; and the cases are not always easily reconciled. The law will not permit a man to say, that what he has said, or done, as a solemn act, by which others have acquired rights, was not according to the truth. Nor will it permit one, who has in like solemn manner admitted a matter to be true, to allege it to be false. But it must be clearly and certainly proved, that one has said, or done, or admitted it, before he is refused the liberty to deny it. *Ld. Coke* states, in the language of his time, that "it is called an estoppel or conclusion because a man's own act or acceptance stoppeth or closeth up his mouth to allege or plead the truth." *Co. Lit.* 352, *a*. Another distinguished jurist says, "every man is bound to speak and act according to the truth of the case, and the law will presume he has done so, and will not allow him to contradict such a reasonable presumption. This is the reason and foundation of the doctrine of estoppels." 4 *Kent's Com.* 260, *note d*. "The reason which governs estoppels is, that after a man has by his own deed, or act *in pais*, admitted a

fact to be true, he shall not be permitted to contradict it." 14 *Pick.* 481, *Flagg* v. *Mann.* Recitals in a deed do not generally estop the party to deny them because they are not, properly speaking, his own declarations, but are the declarations of others. 4 *Nev. & Man.* 857, *Shelton* v. *Shelton.* Yet they do in certain cases act as estoppels, coming within the principle of a party's own declarations, being so solemnly adopted by him as to make them his own. 4 *Peters*, 1, *Carver* v. *Jackson*; 12 *Wend.* 57, *Sayles* v. *Smith.* The application of these principles to the present case, would not be attended with difficulty, if no embarrassment existed in the decided cases. The case of *Hains* v. *Gardner*, 1 *Fairf.* 383, is relied upon for the plaintiff; but the tenants in that case held under warranty deed from the husband, containing the usual covenants. One of the covenants, which the purchasers took from the grantor, alleged in precise language, that the husband was seised; and the truth of this allegation, the tenants were not permitted to deny. The case comes within the principles in relation to estoppels before stated. The case of *Nason* v. *Allen*, cited for the plaintiff, is of a like character. The cases, cited at the bar, in 6 *Johns. R.* 290, 9 *Johns. R.* 344, and 3 *Pick.* 52, are the same in principle. The deeds in this case, taken by the tenant from the husband, and from the creditors, are releases, containing no allegation, that he was seised, nor any allegation, that the title to the estate was in him at any time during the coverture. The application of the same rules of law determines, that the tenant is not estopped by them. "Every estoppel ought to be a precise affirmation of that which maketh the estoppel," *Co. Lit.* 52, *a*; and nothing can be plainer, than that no such precise affirmation is found in these deeds, respecting the seisin of the husband. It is insisted also, that the levies estop the tenant, because he is a privy in estate under them. In the case of a judgment debtor, whose estate is taken by a levy of the execution, according to the provisions of the statute, it has been decided, that he was estopped "by the record of a judgment against him, and by the execution and return of it, as effectually as he could be by a deed under his own seal." *Varnum* v. *Abbot*, 12 *Mass. R.* 474. And as estoppels are mutual, it would seem, that the judgment creditor must be also bound by it. But is the tenant such a privy in estate as to be

alike bound? In order to estop him as such, he should have admitted in the act by which the estoppel is claimed against him, that a title was acquired by the levies. This he has not done; and is not therefore upon principle to be denied the right to prove, that the title was not acquired by the levies. The only covenant, in the deeds of release, is relied upon as an estoppel. The covenant is, "that neither I, the said *John Ham*, nor my heirs, nor any other person or persons, claiming from or under me or them, or in the name, right, or stead of me or them, shall or will, by any way or means, have, claim, or demand any right or title to the aforesaid premises, or their appurtenances, or to any part or parcel thereof, forever." In this language there is no assertion, that the grantor had any title whatever. He simply says, that he will not claim to have a title; and that no others, for or under him, shall make such a claim. How then does the tenant deny the truth of any allegation made in this language, when he asserts, that the party using it had no title? The right of the defendant to do this, is established also by the positions taken in the case, in 5 *Greenl.* 227, *Allen* v. *Sayward*, where it is said by the present Chief Justice, in delivering the opinion of the Court, "when a party has given a deed with a warranty of land, of which he had not a sufficient title, if he afterwards acquire a good title, it enures to the grantee by way of estoppel; and this to avoid circuity of action. But a covenant of seisin, or what is equivalent, that the party has good right to convey, does not thus operate upon an after acquired title. The party may have been seised, and may have conveyed his seisin to the grantee, by which these covenants are supported and verified; the seisin of the grantee may afterwards be divested upon elder and better title, and this may be subsequently lawfully purchased by the grantor for his own use and benefit; and it will not enure to the grantee, who in such case can have no claim whatever for breach of covenant."

The case in 7 *Greenl.* 96, *Fairbanks* v. *Williamson*, is said to present a covenant like those in the present deeds, and it was decided, that the defendant was estopped by it. The facts in that case and the language used, were of a very peculiar character, and the decision of the Court arose out of them. It cannot be regarded as furnishing a precedent for a case like the present.

In this case, the jury have found, that the husband was not seised during the coverture, and that the tenant, by receiving the deeds referred to, did not intend to waive or abandon his right to the land, or acknowledge theirs. It was decided in the case of *Fox* v. *Widgery*, that this question was a proper one for the consideration of the jury, and it having been found by them, there must be

Judgment upon the verdict.

JEREMIAH KIMBALL, *plff. in error*, *vs.* EBENEZER LITTLEFIELD.

Under the *statute* of 1836, *c.* 209, in addition to the militia act of 1834, selectmen of towns have no power to take from one company of militia, territory known by them to belong to it, and annex it to another.

By that statute it was made the duty of selectmen, in defining the limits of companies, to conform as nearly as might be, to such lines as had usually been considered the limits of the company.

The power to make new arrangements of companies, or alter their limits, is given by law to the Governor and Council.

SEVEN causes of error were assigned by the counsel for the plaintiff in error, but as the judgment was reversed without considering several of the errors assigned, the facts and arguments in relation to them, will be omitted. Two of them were the following.

2. Because the acts of the selectmen of *South Berwick*, in taking territory known by them to be included within the limits of the company commanded by Captain *Hanscomb*, and annexing the same to the company of Captain *Wentworth*, not conforming as nearly as might be to such lines as had usually been considered the limits of the company, were illegal and void.

3. Because the selectmen of *South Berwick* had no power by law to ascertain, define, or alter the limits of any company of militia including portions of territory known by them to belong to different towns.

The doings of the selectmen of *South Berwick*, in annexing part of *Hanscomb's* company to *Wentworth's*, were under date of

April 30, 1836. On the 25th of *March*, 1836, the selectmen of *York* defined the limits of *Hanscomb's* company according to its well known original limits, as prescribed many years before by the Governor and Council. The facts in the case sufficiently appear in the opinion of the Court.

The case was argued in writing, by *J. Shepley* and *Hobbs*, for the plaintiff *in error*, and by *Burleigh* and *J. Hubbard*, for the *original* plaintiff.

The counsel for the plaintiff in error, in their argument, endeavored to maintain the following propositions.

1. Under the *Stat.* of 1836, *ch.* 209, in addition to the militia act of 1834, selectmen of towns have no power to take from one company of militia, territory known by them to belong to it, and annex it to another. They cited *Gould* v. *Hutchins*, 1 *Fairf.* 155.

2. The selectmen had no power or authority by law to ascertain, define, or in any way interfere with a company of militia, including portions of territory known by them to belong to different towns; no such power being given them by statute, but remaining with the Governor and Council.

3. That the selectmen violated the clear provisions of the statute, in not conforming as nearly as might be to such lines, as have usually been considered the limits of the company.

4. The selectmen have no power to abolish, or destroy, a company of militia, which they may do effectually, if these proceedings are to be supported.

5. That the proceedings of the selectmen were not by the statute, made conclusive evidence of the limits of companies, except where the proceedings are legal. If the selectmen exceeded their authority, their acts are merely void. *Davoll* v. *Davoll*, 13 *Mass. R.* 264.

Burleigh & J. Hubbard, for the defendant in error, contended:

That the statute gave to the selectmen of towns the power — not to abolish old companies, and establish new ones, — but of changing the limits of existing companies, in all cases in their opinion requiring it. They insisted, that the statute of 1836 was substantially a re-enactment of the statute of 1832, and cited *Gould* v. *Hutchins*, 1 *Fairf.* 145, and *Morrison* v. *Witham*, *ibid.* 421.

This statute includes every company within the State, and gives to the selectmen of some town, the right to define its limits. The companies of infantry, except independent companies raised at large, are wholly within the limits of some one town.

The selectmen are by the statute made sole judges of the propriety of any alteration in the limits of companies, and their doings are made conclusive by it.

The limits of regiments must in all cases conform to the lines of the several towns composing such regiments. The supplies to be furnished by the towns, to "the commanding officers of each company within their respective towns," and other provisions of a similar kind, all indicate, that a company must be wholly within some town. If any company has been established, embracing a part of the territory of two towns, the establishment of such company was illegal and void.

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

Shepley J. — The plaintiff in error was a member of the company of infantry under the command of Captain *Hanscomb*, which was in the town of *York*, and composed a part of the first regiment in the first brigade and first division of the Militia of this State, as organized and arranged by the Governor and Council. A part of the town of *York* had been annexed to the town of *South Berwick* by an act of the legislature, and about two thirds of the members of that company, including the plaintiff in error, were resident upon that territory; and the selectmen of *South Berwick*, in ascertaining and defining the limits of a company existing in that town, under the command of Captain *Wentworth*, annexed all the territory, which had composed part of Captain *Hanscomb's* company to Captain *Wentworth's*, which belongs to the second regiment of the same brigade. The defendant in error is the clerk of *Wentworth's* company, and this judgment is for the penalty alleged to have been incurred by the plaintiff, by neglecting to perform military duty, in the company under the command of *Wentworth*.

The plaintiff still belongs to the company under the command of *Hanscomb*, unless transferred or annexed to *Wentworth's* by the doings of the selectmen of *South Berwick*.

By the sixth section of the act of *March* 8, 1834, *c.* 121, the Governor, with the advice of the Council, is authorized "to organize and arrange the Militia of this State conformably to the laws of the *United States*, and to make such alterations therein, as from time to time he may deem necessary."

By similar language in a former act, this Court decided, that the Governor and Council had power "to establish new companies and define their limits, to divide old ones, and to abolish or consolidate those already formed." 1 *Fairf.* 151, *Gould* v. *Hutchins.*

The ninth section of the act of *March* 9, 1832, *c.* 45, required the selectmen of towns "to define the limits of every company of infantry within their respective towns." This section was repealed by the act of 28th *February*, 1833, and the doings of the selectmen under it were "declared void and of no effect." It was decided, in *Gould* v. *Hutchins*, that the selectmen had power under the ninth section," before it was repealed, "to extend or curtail the limits of a company," but that it gave them no authority "to establish new ones, or to abolish old ones."

The first section of the act of 1836, *c.* 209, declares, that the selectmen "shall ascertain and define the limits of every company of infantry in their respective towns, conforming as nearly as may be to such lines as have usually been considered the limits of such companies." It is quite obvious, that the language of this enactment was carefully chosen and designed to give a power more restricted, than that conferred by the act of 1832. By this act it is made their duty, to ascertain the pre-existing limits of the company, if practicable; and having done this, to define, or describe them, conforming as nearly as may be to such lines as have been usually considered the limits.

The object appears to have been, not to change or alter the limits of companies, or to authorize the officers of towns to do it, but to retain them so far as they could be ascertained; and if not ascertained with certainty, then to conform as nearly as might be to what had been usually considered the limits. It might happen, that since the original lines were established, new dwellings had been erected where none existed before, or that former dwellings had been removed to new sites; and it might not be possible to ascertain whether the bounds of the company would include places then

without improvement or inhabitant. In these and other cases of difficulty in ascertaining the boundaries, it seems to have been the design of the legislature, to empower the officers of the towns to define the limits in such a manner, as to make them certain. But it does not appear to have been the intention to authorize the transfer of a single residence, well known to be within the limits of one company, to another company. By so doing, the town officers would not conform as nearly as may be to the usual limits. Nor is it necessary, that they should make such transfer, to effect all the objects designed to be accomplished by the act, that of having the usual limits of the companies defined by record, and so defined as to include all the inhabitants of the town, as then bounded, within the limits of some company.

If the selectmen may alter the limits at their discretion, and may annex two thirds of one company to another, surely the remaining third may be annexed to a different one, on the ground, that it is too small of itself to constitute a company; and thus they will be found possessed of a power to abolish a company; a power not designed to be given to them, but to be left with the Governor and Council. And this power, it was decided in the case of *Gould* v. *Hutchins*, was not conferred upon the selectmen by the unlimited language of the act of 1832.

The argument for the defendant in error objects, that by such a construction there may be cases, where, as in the present, the limits of the company cannot be established by the officers of towns, when it was intended, that the limits of all companies of infantry should be so established. And the act is apparently based upon the supposition, that power would thereby be conferred, sufficient for all such purposes. But if upon a new state of facts arising, it is found to be unequal to accomplish this, it is not for the Court by construction to extend it to such cases, when by doing so, it would necessarily destroy limitations, so clearly expressed, as to leave no doubt that they were designed; and would enable the town officers thereby to do, what it was most manifestly designed, they should not do. This may be one of those cases in which, by an unexpected state of things, acts of legislation are found inadequate to accomplish the whole objects expected of them;

but it is for the legislative, not the judicial department, to supply such defects as they arise.

No such defect, however, will probably be found to exist in this case, if the Governor and Council exercise the powers conferred upon them.

The argument for the defendant further objects, that the laws regulating the militia are framed upon the position, that each company of infantry is wholly within the limits of some one town, and that if the selectmen cannot, when towns are divided, or parts taken from one and annexed to another, so arrange the limits of the companies as to conform to them, certain privileges designed for them cannot be enjoyed, and certain duties imposed upon towns cannot be performed. And such seems to have been the impression of the Judge in delivering the opinion in the case of *Gould* v. *Hutchins*, where he says, "their authority extended only to companies of infantry, which it is understood are in every case territorial companies within each town, or corresponding with the limits of the town." Whether this is the fact in all cases, or whether it would be practicable to have it so in the new and sparsely settled towns and plantations, no information is afforded. Nor is there any positive enactment requiring, that it should be so. The power is given to the Governor and Council without limitation, and they may or may not have so arranged the companies of infantry. The difficulty supposed is not without a remedy; for although the selectmen cannot arrange the companies anew, conforming them to the altered boundaries of towns, the Governor and Council may do so. The ninth section of the act which confers the power upon the town officers declares, that nothing in the act shall be construed so as to affect the powers and duties of the Governor and Council, as granted in the former act. And in that act the power is given "to make such alterations therein as from time to time he may deem necessary." And it rather seems to be proper, that such power should be exclusively vested in the Governor and Council; for if important changes, as in the present case, are made in the number of soldiers composing companies or regiments, it should be known to the Commander-in-Chief, that he may understand, whether they are so organized as to be most effective, and if they are not, that he may cause the necessary alterations to be made. If such alterations can

take place without his knowledge, he may be uninformed of the disarranged and inefficient condition of a part of the militia. Some corps would be found to have many officers and few soldiers, and others more soldiers and a less proportion of officers, than was designed.

If it becomes necessary in consequence of the alteration of town lines, to alter the organization of the militia, there is an evident propriety in having it done by the Commander-in-Chief, that the due proportions of officers and men in the several corps may be preserved, which can never be accomplished by the officers of towns, whose interference may be attended with detriment, and probably would be with inconvenience, to the militia.

Judgment reversed.

Hiram Witham *vs.* Samuel Gowen.

In an action for malicious prosecution, a *conviction* of the offence before a Justice of the Peace is conclusive evidence of probable cause, unless such conviction was obtained exclusively or mainly by the *false* testimony of the defendant.

Exceptions from the Court of Common Pleas, *Whitman C. J.* presiding.

The plaintiff read to the jury the copy of a record, from which it appeared, that the plaintiff was convicted before a Justice of the Peace on a complaint made by the defendant against him, but that on an appeal to the Court of Common Pleas, he was acquitted. The plaintiff proposed to offer further evidence to support his action, but the Judge ruled, that the conviction before the Justice was conclusive proof of probable cause, unless the plaintiff could prove, that the conviction before the Justice was obtained exclusively or mainly upon the testimony of the defendant, and that such testimony was false. The plaintiff did not propose to offer any such testimony in the cause; whereupon the Judge ordered that the plaintiff should become nonsuit, and he excepted.

N. D. Appleton, for the plaintiff, said the only question in this case was, whether a conviction before a Justice of the Peace was *conclusive* evidence of probable cause, unless it was obtained exclusively or mainly by the false testimony of the defendant. He contended, that it was not, but only evidence to go to the jury with other evidence. He cited 1 *T. R.* 545; *Cro. Eliz.* 134; 2 *Dane*, 725; 1 *Salkeld*, 15; 4 *Burr.* 1971; 1 *Greenl.* 135; 1 *Wilson*, 232; 3 *Greenl.* 305; *ibid*, 362; 2 *Dane*, 730; 6 *Greenl.* 285; 2 *Browne*, 42; 2 *B. & Adolph.* 845; 6 *Pick.* 193; 12 *Pick.* 325; 3 *Mason*, 102; 5 *Mason*, 192; 4 *Munf.* 462; *ibid*, 59; 3 *Leigh*, 561.

D. Goodenow, for the defendant, said that the cases of the counsel for the plaintiff might be very good law, but had no application to the facts in this case. Any thing short of conviction, he admitted, would not be conclusive, and none of his cases show, that conviction would not. The instructions of the Judge are justified by well settled principles of law. *Ulmer* v. *Leland*, 1 *Greenl.* 135; *Reynolds* v. *Kennedy*, 1 *Wil.* 232; *Whitney* v. *Peckham*, 15 *Mass. R.* 243; *Smith* v. *Macdonald*, 3 *Esp. R.* 7; *Sutton* v. *Johnstone*, 1 *T. R.* 543, and cases there cited.

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

EMERY J. — The plaintiff having proposed to offer further evidence to support his action, which was for malicious prosecution, the Judge ruled, that the conviction before the Justice, the record whereof was produced by the plaintiff, was conclusive proof of probable cause, unless the plaintiff could prove that the conviction before the Justice was obtained exclusively or mainly upon the testimony of the defendant, and that such testimony was false. But the plaintiff did not propose to offer any such evidence, whereupon the Judge ordered, that the plaintiff should become nonsuit. The correctness of that decision is now called in question. It is insisted that probable cause is a mixed proposition of law and fact, and that as prosecutions should be undertaken from motives for the promotion of the public good, all the evidence should be submitted to the consideration of a jury.

Thus in the case of *Taylor* v. *Williams*, 2 *B. & Adol.* 845, cited by plaintiff's counsel, which was an action for indicting the plaintiff without probable cause, and the plaintiff relied on the non-appearance of the prosecutor in support of the indictment, and it was held that the Judge was authorized in leaving it to the jury to say, whether the motive of that non-appearance was a consciousness, on the part of the prosecutor, that he had no evidence to support the indictment. And the plaintiff here insists, that whenever the question of probable cause is a mixed question of law and fact, it may and must be properly left to a jury.

As by the report under consideration, the nature of the evidence intended to be produced is not communicated beyond what is detailed in the report, we do not perceive in that which is recited any thing, which should induce us to overrule the decision of the Judge, as to the conclusiveness of the conviction before the Justice. The case of *Whitney* v. *Peckham*, 15 *Mass. R.* 243, before the separation, sustains the Judge's ruling. And as the plaintiff did not propose to show, that the conviction was obtained exclusively or mainly upon the testimony of the defendant, or that the testimony was false, we do not feel authorized to overrule the opinion of the Judge.

We therefore overrule the exceptions.

JOANNA S. JUNKINS, *Adm'x*, *vs.* JOSEPH S. SIMPSON.

Where one exchanges a chattel, previously mortgaged by him, without disclosing the existence of the mortgage, the other party has a right to regard it as fraudulent. Such contract is not absolutely void, but voidable only at the election of the party defrauded.

The party having such election must rescind the contract wholly, or in no part; he cannot consider it void to reclaim his property, and at the same time in force for the purpose of recovering damages.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

Replevin for a yoke of oxen. It was proved, that about the first of *June*, 1835, *Elias Junkins*, the plaintiff's intestate, then living,

and who died the sixth of *September*, 1835, exchanged oxen with the defendant, and paid him ten dollars on the exchange. That after the death of the intestate, *Sept.* 17*th*, *Edward Simpson, jr.* notified the defendant, that he had a bill of sale of said oxen to secure the payment of fourteen dollars, and unless the same was paid, he should consider the oxen accountable; that the defendant, upon becoming satisfied such was the fact, *Sept.* 19, drove back the oxen he had in exchange, and left them with the plaintiff, who lived on the farm upon which the intestate resided at the time of the exchange, and claimed the oxen which he gave the intestate in exchange, and took them and drove them away, and claimed to hold the same; and it is for driving away and detaining these last mentioned cattle, that this action is brought.

The plaintiff had not, at that time, taken out administration upon the estate of her husband and refused to receive back the oxen, which were her husband's before the exchange, or to pay or extinguish the claim of said *Edward Simpson, jr.* on said oxen, or deliver up the oxen which were the defendant's before the exchange, or to do any thing tending to annul the original bargain of exchange, or to consider it as void. There was also evidence tending to prove, that the defendant had not worked the oxen, which he received in exchange, during the season, but that they had been kept in a good pasture, and had increased in value, and that the oxen he gave in exchange had been worked by the intestate, so that, if there was a difference of ten dollars at the time of the exchange, each pair was about equal in value on the said 19th of *September*. The Judge ruled and instructed the jury, that the defendant had no right, in the manner aforesaid, to treat the bargain of exchange as a nullity, or to consider it as void; even if the said *Edward Simpson, jr.* had a paramount title to the oxen, delivered to the defendant by the intestate in exchange; and if the same were delivered without the defendant's having any knowledge of such paramount title, or incumbrance upon the oxen, that his only remedy would be an action for damages, on the express or implied warranty, after having surrendered the oxen to such title, or after having paid, or extinguished, said incumbrance. The verdict was for the plaintiff, and the defendant filed exceptions.

D. Goodenow, for the defendant, contended, that he had a right to rescind the contract, and that this right was legally exercised in this case. The law implies a warranty, on a sale or exchange of property. As *Simpson* owned the oxen put to the defendant, he had a right to return them, and rescind the bargain. Fraudulent representations vitiate all contracts; and the withholding the knowledge of the transaction with *E. Simpson, jr.* by *Junkins*, was, in itself, a fraud on the defendant. 4 *Mass. R.* 488; 13 *Mass. R.* 139; 15 *Mass. R.* 319; 12 *Pick.* 312; 3 *Wend.* 236; 6 *Johns. R.* 110; 7 *Johns. R.* 324.

There was no necessity to return the $10. He might retain this sum as an indemnity for the injury to his oxen. He could not return it, because there was no one to receive it, *Junkins* having deceased, and no administration having been taken out.

Hayes, for the plaintiff, contended:

1. If the vendor would rescind a contract of sale of goods, and reclaim them, on account of fraud in the vendee, it must appear, that deceptive assertions or false representations were fraudulently made to induce him to part with his goods. 1 *Greenl.* 376; 4 *Greenl.* 306; 4 *Dane*, 474.

2. Where there is no fraud, and the purchaser has not been evicted, the contract cannot be rescinded, but the party is remitted to his remedies at law. 2 *Kent*, 471.

3. If one would avoid a sale or exchange of a chattel for fraud practised by the other party to the contract, he must not retain any part of the consideration received upon the sale or exchange. 4 *Mass. R.* 502; 1 *Dane*, 634.

4. If a contract be rescinded at all, it must be rescinded *in toto*. 12 *Wheat.* 183; 5 *East*, 449; 2 *Kent*, 480; 4 *Dane*, 471.

5. The sale by *Junkins* to *E. Simpson, jr.* was void, as against the defendant, as *Junkins* retained the possession, and the defendant had no notice of the sale. 13 *Mass. R.* 87; 8 *Mass. R.* 287.

6. The claim by *Simpson* was a mere claim for a small sum, and this incumbrance would not authorize a rescinding of the contract.

7. When goods are sold to two different persons by conveyances equally valid, he who first lawfully acquires the possession will

hold them against the other, so that the defendant had a good title against *Simpson, jr.* 17 *Mass. R.* 110; 12 *Mass. R.* 54.

The opinion of the Court was drawn up, and delivered on the circuit at *Oxford*, by

SHEPLEY J. — The facts in this case are presented in the bill of exceptions to the instructions given to the jury in the Court of Common Pleas. The first inquiry is, whether there was such a fraud practised by the plaintiff's intestate upon the defendant, in the exchange of the oxen, as to vacate the contract. It is insisted by the counsel for the defendant, that the contract was wholly void by reason of such fraud. Truth and good faith are certainly required by the law in the dealings between man and man; and these forbid, that a party should make a false representation knowingly, or that he should conceal material facts exclusively within his own knowledge. But where the facts are alike known to both parties, or where by a proper diligence they might be alike known to both, there being no false representation, the common law leaves the rights of the parties to be settled by the terms of the contract between them.

Different Courts have employed different language to express nearly the same legal principles. *Parsons C. J.* says, "not only good morals, but the common law requires good faith, and that every man in his contracts should act with common honesty, without over-reaching his neighbor by false allegations, or fraudulent concealments." 4 *Mass. R.* 488, *Bliss et al.* v. *Thompson.* It has been decided, that "a sale by sample is tantamount to an express warranty that the sample is a true representative of the kind." 13 *Mass. R.* 139, *Bradford* v. *Manly.*

The question arose soon after the close of the last war, whether a party, who had obtained information, that a peace had been concluded, was obliged to make known such information to one ignorant of the fact, before he concluded a bargain; and *Marshall C. J.*, in delivering the opinion of the Court, says, where the means of intelligence of extrinsic circumstances are equally accessible to both parties, one party having superior knowledge, is not obliged to make it known to the other, but he must take care not to say or do any thing, to impose upon the other. 2 *Wheat. R.* 178, *Laid-*

law v. *Organ.* "A vender has not a legal right to rescind a contract of sale and reclaim the goods sold, unless such fraud was practised in making the contract, that if the vender did not rescind it, he could recover damages against the vendee for the injury sustained by that fraud." 1 *Greenl.* 376, *Cross et al.* v. *Peters.* It appears, that before the intestate exchanged oxen, he had made a bill of sale of them to a third person to secure to him the payment of a sum of money due to him; and it does not appear, that the defendant, at the time, knew of the existence of such a contract, or that he had any opportunity to have become acquainted with it. It was exclusively within the knowledge of one party, being his own act, and he did not make it known; and for this reason the contract on his part must be regarded as fraudulent.

If other authorities were necessary, it would seem, that the case cited at the bar, of the sale of a slave, who was soon to be entitled to his freedom, which fact was known to the vender and not to the purchaser, would be a case in point. 7 *Johns. R.* 324.

But the counsel for the plaintiff resists this conclusion, alleging, that it does not appear, that such third person ever took delivery of the oxen before the exchange, and that as the oxen were delivered to the defendant upon the exchange, his title would prevail in preference to the first sale. It might well be so, were it not, that it also appears in the case, that the sale to the third person was not absolute, but only to secure the payment of fourteen dollars; and in such cases it has been held, that it is not necessary, that possession should accompany the deed, if the sale were proved to be *bona fide.* 5 *Greenl.* 96, *Reed* v. *Jewett;* 8 *Greenl.* 326, *Ulmer v. Hills.*

And as fraud cannot be presumed, there is nothing in the case to authorize the conclusion, that the first sale, for security, was not a valid one.

But although the exchange must be regarded as fraudulent on the part of the intestate, it does not follow, that the defendant should reclaim the oxen, which he parted with in exchange. That would depend upon the course, which he chose to pursue with regard to the contract. He had a right to avoid the contract for such fraud, by repudiating the whole, not a part of the bargain; or he might, at his election, regard the bargain as still binding on the

other party, and claim his damages for the fraud. He could not repudiate it in part, and still claim damages for the fraud, and constitute himself the judge of the amount of damages, and retain a portion of the property in payment. The contract was voidable at his election, not absolutely void.

Mr. Justice *Washington*, after examining several cases, states the result to be "if upon a sale with a warranty, or if by the special terms of the contract, the vendee is at liberty to return the article sold; an offer to return it is equivalent to an offer accepted by the vendor; and in that case, the contract is rescinded and at an end. But if the sale be absolute, and there be no subsequent agreement or consent of the vendor to take back the article, the contract remains open; and the vendee is put to his action upon the warranty, unless it be proved, that the vendor knew of the unsoundness of the article, and the vendee tendered a return of it within a reasonable time." *Thornton* v. *Wynn*, 12 *Wheat.* 183.

The principle is stated by *Shaw C. J.* in *Rowley* v. *Bigelow*, 12 *Pick.* 307, wherein he says, "being tainted by fraud, as between the immediate parties, the sale was voidable, and the vendors might avoid it, and reclaim their property. But it depended upon them to avoid it or not at their election. They might treat the sale as a nullity, and reclaim their goods, or affirm it and claim the price." *Mellen C. J.*, in *Seaver* v. *Dingley*, 4 *Greenl.* 306, says, "a fraudulent sale is voidable; it changes no property, if the vendor, on discovery and proof of the fraud, rescinds the contract, or treats it as a nullity. The defendant, when the exchange took place, received ten dollars from the intestate, as the difference of value between the oxen. This money he neither returned, nor offered to return, but claims to hold it, because the oxen, which he received, had increased in value by good usage, while those, which he delivered in exchange, had been hardly worked. And his counsel urges the necessity of permitting him to do it, to avoid circuity of action. But the law does not allow a party to rescind a contract, and at the same time make use of it as subsisting for the purpose of claiming damages.

The law, as stated by *Parsons C. J.* in 4 *Mass. R.* 502, *Kimball* v. *Cunningham*, clearly exhibits the rights and duties of the parties: "when a horse is sold upon an implied warranty that he is

sound, and at the time of the sale the vendor knows that he is not sound, this is such a fraud in him as will render the contract void at the election of the vendee." But he ought not to retain any part of the consideration he received upon the sale or exchange; as, if in exchange, he received money in boot, he ought to return not only the unsound horse, but also the money he received. For he shall not compel even the fraudulent seller to an action to recover back the property he parted with in the exchange. And *Lord Ellenborough C. J.*, in 5 *East's Rep.* 449, *Hunt* v. *Silk*, states, that when a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put in *statu quo*.

It has not been necessary to consider the effect of the offer to return the oxen, received by the defendant to the plaintiff before letters of administration were taken out, nor whether a tender of the money to her, would, or would not have been good, she being in charge of the property, because the defendant claimed to retain it, which he had no right to do, if he elected to rescind the contract. And as he did not rescind the contract wholly, he did not obtain a legal title to the oxen replevied. The exceptions are overruled, and judgment is to be entered upon the verdict.

Samuel Blaisdell *vs.* Edmund Cowell.

Where the demandant and tenant both claim the land under the *same person*, the former by a levy, and the latter by a deed with warranty; the interest of *such person* is balanced, and he may be a witness for either party.

Where actual fraud must be proved, to avoid a conveyance, the burthen of proof is on the party asserting the fraud.

Exceptions from the Court of Common Pleas, *Whitman C. J.* presiding.

This was a writ of entry, and the demandant claimed under a deed from *Samuel Cowell* to *James Cowell*, *Sept.* 30, 1828, and a levy by the demandant upon the same, *Nov.* 12, 1830. The judgment was rendered on a note dated *Oct.* 3, 1829. The tenant

claimed under a deed from the same *James Cowell*, dated *July* 30, 1829, and recorded the same day.

The question before the jury was, whether the deed from *James* to *Edmund Cowell*, the tenant, was given under such circumstances, as rendered it fraudulent and void, as to subsequent creditors. There was much testimony, on this question, introduced on each side. *James Cowell*, although living within the county, was not called by either party, as a witness. The exceptions state, that the "Judge, in charging the jury, suggested, among other things, that the defendant might have called *James Cowell* as a witness, who, if the transaction were *bona fide*, might be able to state from actual knowledge, all the facts tending to show it to be so; that in cases like this, that it was more reasonable to expect the defendant to introduce his grantor, than to expect the other party to do it, who was attempting to show the transaction fraudulent, although he was a competent witness, whether called by one party or the other; and, if the defendant, who comes to prove the transaction *bona fide*, would not introduce him, but content himself with resorting to detached pieces of evidence, and to circumstances with a view to establish the fairness of the sale, when he might be able to produce direct evidence of it, if it were so in fact, the jury might well consider, whether it was not a circumstance which ought to weigh against him."

The jury returned a verdict for the demandant, and the defendant excepted to the instructions of the Judge.

D. Goodenow and *N. D. Appleton*, for the tenant, argued in writing.

1. *James Cowell*, the grantor of the tenant, was not a competent witness for him in this case. He was directly interested in the event of the suit, having warranted the title to the defendant, and being liable to him on his covenants, if the demandant should prevail. 1 *Strange*, 445; 4 *Mass. R.* 441; 11 *Mass. R.* 499; 14 *Mass. R.* 250; 3 *Pick.* 284; 6 *Greenl.* 364; 3 *Wend.* 180; 2 *Binn.* 108; 6 *Binn.* 500; 3 *Greenl.* 462; 4 *Greenl.* 194; 5 *Greenl.* 451; 6 *Greenl.* 416; 6 *Johns. R.* 5.

2. But if *James Cowell* was a competent witness for the tenant, still the charge was erroneous, because in effect it went to change the burden of proof; and to induce the jury to be governed by

considerations not in evidence before them, and to substitute uncertain conjectures for legal proof. This was a case where *actual fraud* must be proved in the grantor, and a participation in, or knowledge of it, on the part of the grantee. 14 *Mass. R.* 250; 4 *Greenl.* 195.

Burleigh & J. T. Paine, argued in writing, for the tenant.

1. The exceptions cannot be sustained, because they are not to "any opinion, judgment, or direction in matter of law." For such causes alone do exceptions lie, by the act establishing the Court of Common Pleas, *c.* 193, § 5. The tenant merely alleges, that he is aggrieved by the erroneous views taken of the evidence by the Judge.

2. But if the exceptions are before the Court, the law was correctly stated to the jury.

James Cowell was a competent witness for the tenant, his interest being balanced. If the demandant succeeds, *James Cowell* will be liable to the tenant on his covenants to the value of the land; and if the tenant succeeds, the liability to the demandant will be the amount of the debt satisfied by the levy. *Prince* v. *Shepard*, 9 *Pick.* 176.

The omission on the part of the tenant to call *James Cowell*, was a circumstance proper for the consideration of the jury. The absence or non-production of a witness having a direct knowledge of the transaction, is to weigh against the party who ought to produce him. *Williams* v. *East Ind. Co.* 3 *East*, 192; *Blatch* v. *Archer*, *Cowper*, 65; 1 *Stark. Ev.* 452, 487, 494, 505; 2 *Stark. Ev.* 1252.

3. If the Judge erred in the instructions given, the error was not so material, as to require the Court to set aside the verdict. 3 *Johns. R.* 533; 10 *Johns. R.* 451; 2 *Pick.* 145; 5 *Pick.* 217.

4. They denied, that the Judge instructed the jury, that the burthen of proof on the issue, whether the deed was fraudulent or not, was on the tenant. There was much evidence in the case, and the Judge in his remarks commented upon it, and stated that the demandant must prove the deed to be fraudulent. The expression, in the sentence excepted to, does not warrant the inference now attempted to be drawn from it.

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

WESTON C. J. — The Judge below instructed the jury, that the grantor of the tenant, to whom he executed a deed of warranty, would have been a competent witness for him at the trial. As this was an opinion given in a matter of law, if erroneous, it does in our judgment furnish just ground of exception. But it does not appear to us to have been erroneous. In trials between creditors and the grantees or assignees of debtors, whose title is attempted to be impeached as fraudulent, the debtor is in our practice received as a competent witness for either party. His interest is regarded as balanced. If the creditor prevails, the debtor's land goes to pay his debt, at its fair and just value, as appraised by disinterested men under oath; and he becomes answerable upon his covenants for the same value to his grantee. If the grantee prevails, he escapes liability upon his covenants, but his debt remains unpaid. The practice has been so uniform upon this point, before our separation and since, that we do not feel at liberty to change it, by any nice balancing of possible consequences as to costs, or the chance of different estimates as to value. It has been directly decided in *Massachusetts*, that such a witness is competent against a creditor. *Prince* v. *Shepard et al.* 9 *Pick.* 176. The property in litigation in that case was personal; but the assignee held it under a covenant of general warranty; and we are not aware that such a covenant has a more extensive efficacy in real, than in personal estate.

Comparing the deed, under which the tenant held, with the title of the demandant, and the debt upon which it is based, that of the tenant must prevail, unless it is defeated upon the ground of actual fraud. To do this, the burthen of proof was very clearly upon the demandant. It is insisted, that the jury were otherwise instructed. If this is fairly deducible from the exceptions, they ought to be sustained. That part of the charge only is stated, which comments on the non-production of the witness by the tenant. For aught appears, the jury may have been properly instructed before, as to the state of the apparent title, and what it was incumbent on the demandant to do to defeat it. The Judge speaks of the tenant, "who comes to prove the transaction *bona fide*." He comes to exhibit such proof, if a *prima facie* case is made out against him.

And that the cause had advanced to this stage, appears from the facts reported.

It is stated, that evidence had been adduced, tending to show, if believed, that the deed was inoperative against subsequent creditors. How far this was repelled, must have been the part of the case, to which the attention of the jury was called. Without knowing what had been previously stated in other parts of the cause, we cannot deduce affirmatively, that the jury were instructed, that the burthen of proof was upon the tenant, to show that his deed was not fraudulent. That the burthen was upon the other side, is a principle of law, with which the Judge must have been familiar, and which never could have been seriously questioned. If the counsel for the tenant had any just apprehension, that the jury might have been misled upon this point, it was competent for them to have requested the Judge to instruct the jury directly and specifically, as he understood the law; and if such instruction had been improperly withheld, and he had then excepted, his exceptions would have been sustained.

As to the suggestion of the Judge, that the tenant might have called his grantor as a witness, and his intimation to the jury, that they might well consider, whether his omission to do so, ought not to weigh against him, it is a circumstance prominently exhibited, and may perhaps indicate the leaning of his mind, in regard to the effect of the testimony; but he left the whole matter to the consideration of the jury, to whom it properly belonged. He does not profess in this part of his charge to give a legal direction; but he submits it to their judgment, whether the circumstance stated, ought not to weigh against the tenant. We cannot discover in this language any erroneous "opinion, judgment or direction in matter of law."

Exceptions overruled.

WILLIAM P. HOOPER *vs.* SAMUEL EMERY *et al.*

Towns derive all their power from legislative enactments, and all their duties are imposed thereby.

Towns can grant, assess and collect only such sums of money, as they shall judge necessary for the settlement, maintenance, and support of the ministry, schools, the poor, for the making and repairing of highways, "and other necessary charges arising within the same town."

Towns have no right to give away money collected of the inhabitants by taxation.

The selectmen are neither required or permitted to violate the law by paying over money of the town in obedience to an *illegal vote* of such town.

Towns have no right to divide among the inhabitants thereof, according to families, the money received under the *statute* of 1837, *c.* 265, entitled "An act providing for the disposition and repayment of the public money, apportioned to the State of *Maine*, on deposit, by the government of the *United States*."

THE case came before the Court on a statement of facts, which sufficiently appear in the opinion of the Court.

There was a brief argument by

Fairfield & Haines, for the plaintiff, and by

A. G. Goodwin, for the defendants.

The opinion of the Court was drawn up, and delivered the week following, at the adjourned term in *Cumberland*, by

SHEPLEY J. — This is an action of *assumpsit*, brought to recover a sum of money alleged to be due from the defendants to the plaintiff. The facts are agreed; and from the agreement of the parties it appears, that at a legal meeting of the inhabitants of the town of *Biddeford*, qualified to vote in town affairs, on the fourth day of *April*, 1837, a vote was passed to receive the money apportioned to the town under the act of the eighth of *March*, 1837, *c.* 265, entitled "An act providing for the disposition and repayment of the public money, apportioned to the State of *Maine*, on deposit, by the government of the *United States*." And the defendants were chosen trustees to receive and "appropriate it." At the same meeting, a vote was passed, that the money so received should "*be divided among the inhabitants of the town according to families.*" The defendants, before the commencement of this suit, received

the money apportioned to the town of *Biddeford;* and on demand being made by the plaintiff, an inhabitant of said town and having a family, they refused to pay to him any portion thereof, assigning as a reason, "that the town could not legally make such a disposition of it."

If the plaintiff is entitled to recover any thing, the amount to be recovered is agreed. The parties agree, also, to waive all objections to the form of the process and mode of proceeding; and judgment is to be rendered according to the rights of the parties.

The first section of the act of the eighth of *March*, referred to, provides, "that the portion of the public money of the *United States*, which shall be received by the Treasurer of this State," "shall be deposited with the several cities, towns, and plantations thereof *upon the conditions and in the manner specified in this act.*" The provisions of the second section are, "that the condition on which any city, town, or plantation shall receive its proportion of said money shall be, that whenever the whole, or any part thereof shall be required for the purposes, and demanded in the manner prescribed in the aforesaid act of Congress, [being the act of the twenty-third of *June*, 1836, entitled "an act to regulate the deposit of the public money,"] it shall be promptly and faithfully refunded to the State within sixty days after notice for such repayment shall have been given it by the Treasurer of the State."

The eighteenth section is, "that any city, town, or organized plantation, is hereby authorized to appropriate its portion of the surplus revenue, or any part thereof, for the same purposes, that they have a right to any moneys accruing in the treasury from taxation; also to loan the same in such manner as they deem expedient, on receiving safe and ample security therefor."

The thirteenth section of the act of Congress referred to provides, "that the money which shall be in the treasury of the *United States* on the first day of *January*, 1837, reserving the sum of five millions of dollars, shall be deposited with the several States," "on the terms hereinafter specified; and the Secretary of the Treasury shall deliver the same to such Treasurer, or other competent authorities, on receiving certificates of deposit therefor, signed by such competent authorities, *which certificates* shall express the usual and legal obligations, *and pledge the faith of the State for*

the safe keeping and repayment thereof, and shall pledge the faith of the States receiving the same to pay the said moneys, and every part thereof, from time to time, whenever the same shall be required by the Secretary of the Treasury for the purpose of defraying any wants of the public treasury beyond the amount of five millions aforesaid."

The language of the act of Congress clearly exhibits the rights respectively of the *United States*, and of the States, in such surplus money. The right of property remains with the *United States;* while the right of use, keeping it safely, is yielded to the States. It is but a deposit with the States, requiring only a return in kind; not a return of the same coin. The States can make use of the money without accounting for any thing more, than the original sum received. Beyond this their rights do not extend. The faith of the State is pledged "for the safe keeping and re-payment thereof," when required according to the provisions of the act. This construction of the act is recognized by the legislature of this State, in the act of the eighth of *March*, providing that the money "shall be deposited with the several cities, towns, and plantations thereof," and requiring that "it shall be promptly and faithfully refunded to the State," whenever demanded of the State "in the manner provided in the aforesaid act of Congress."

This State had the right to prescribe the conditions upon which the municipal corporations should receive the money; and to define and limit their powers in relation to the use and employment of it. This has been done by the enactments before recited; and these corporations have no power over it, not derived from the provisions of the act of the eighth of *March*.

"The inhabitants of every town in this State are declared to be a body politic and corporate" by the statute; but these corporations derive none of their powers from, nor are any duties imposed upon them by, the common law. They have been denominated *quasi* corporations, and their whole capacities, powers, and duties are derived from legislative enactments. They cannot therefore appropriate this money in any other manner, than is provided in the act of the eighth of *March*. The manner in which it can be appropriated is clearly pointed out in the clause "that any city, town, or organized plantation is hereby authorized to appropriate its

portion of the surplus revenue, or any part thereof, *for the same purposes, that they have a right to any moneys accruing from taxation;* also, to loan the same in such manner as they deem expedient, *on receiving safe and ample security therefor.*"

The town of *Biddeford* has not attempted to loan it, and their rights in that respect do not necessarily come before the Court in this case. But as it has been suggested by the counsel for both parties, that the expression of an opinion upon that clause of the statute may prevent further litigation, the Court does not regard it as a departure from duty to express its opinion, that the only loans authorized by the act, are those made *bona fide* "on receiving safe and ample security therefor." No loans can be regarded as legally made by the corporations, unless the security taken be both safe and ample.

Whether the town could legally divide it among the inhabitants "according to families," is the direct question for consideration. And it is to be determined by ascertaining, whether they can so appropriate "moneys accruing in the treasury from taxation;" because it can only be appropriated according to the express terms of the act "for the same purposes."

Towns can appropriate moneys derived from taxation only to the purposes for which they are authorized by law to assess and collect them. The legislature has determined the purposes or uses for which money may be granted, assessed, and collected; and if it can be appropriated to different purposes after it has been collected, then the limitation upon the assessment and collection of it becomes ineffectual and void; because the town has only to express one object in the grant of the money, assess and collect it for that, and then expend it upon objects wholly different. The intention of the limitation was to prevent money from being assessed and collected for other objects, than those named in the laws; and this intention cannot be defeated by a misapplication of the money by way of appropriation. The limitations upon the appropriation, and upon the collection, being the same, when the money is derived from taxation, it becomes necessary to examine the statute provisions respecting the grant, assessment, and collection of money. In the sixth section of the act of the 19th of *June*, 1821, *Rev. Stat. c.* 114, the purposes for which money may be granted, are

thus expressed: "the citizens of any town," "legally qualified to vote," "may grant and vote such sum or sums of money as they shall judge necessary for the settlement, maintenance, and support of the ministry, schools, the poor, and other necessary charges arising within the same town, to be assessed upon the polls and property within the same as by law provided." Towns have also the power to grant and assess money for making and repairing highways; and they have been occasionally authorized to grant money for other purposes, by special enactments; but those purposes have been defined in the acts giving the power, and no authority can be derived from them to authorize any appropriation of the money referred to in this case. It cannot be contended, that the town of *Biddeford,* by the vote recited, has applied the money to the support of the ministry, schools, or the poor. Nor is there any good reason for asserting, that it has been applied to any "necessary charges arising within the same town;" because no intimation is afforded by the vote, or by the facts agreed, that the "families" had charges or claims of any kind against the town; and such an extraordinary state of the affairs of any town, cannot be presumed.

The case presented by the vote can be regarded only as a donation of the money to the "inhabitants of the town according to families." By a division according to "families" must be understood a division *per capita,* or by numbers; the word families being used in such a manner as to indicate clearly, that the term is derived from those parts of the same act, which provide for "ascertaining the population of the several cities, towns and plantations" by taking the number "of the persons belonging to such family." If towns cannot legally grant, assess, and collect money, and when it has been received, divide it by donation among the families according to numbers; then the money received under the act of the 8th of *March* cannot be so divided; because the appropriation of it is restricted by the act to "the same purposes, that they have a right to any money accruing in the treasury from taxation." To contend, that towns have the power to assess and collect money for the purpose of distributing it again according to numbers, is to ask for a construction, not only entirely unauthorized by the language of any statute, but in direct opposition to the language of limitation

employed in giving power to the towns to grant money. It not only does this, but it asks the Court to give a construction to the statutes, which would authorize towns, if so disposed, to violate "the principles of moral justice." For if the right to assess and collect money is without limit, it would not be difficult to continue the process of collection and division until the whole property held by the citizens of the town, had passed into, and out of the treasury; and until an equalization of property had been effected, as nearly, as it could be expected to be accomplished by placing it all in one common fund, and then dividing it by numbers, or *per capita*, without distinction of sex or age. Such a construction would be destructive of the security and safety of individual property; and subversive of individual industry and exertion. It would authorize a violation of what is asserted in our "declaration of rights" to be one of the natural rights of men, that of "acquiring, possessing and protecting property." Such a construction would authorise a violation also of that clause in the constitution of this State, which provides, that "private property shall not be taken for public uses without just compensation; *nor unless the public exigencies require it.*" No public exigency can require, that one citizen should place his estates in the public treasury for no purpose, but to be distributed to those, who have not contributed to accumulate them, and who are not dependant upon the public charity.

A construction of the statutes, which denies to the towns such powers, must commend itself to the judgment of every reflecting mind. It is not without the sanction of judicial authority. The language of our statute was copied from the statute of *Massachusetts* passed 1785, *ch.* 75, *sec.* 7. And that statute had received a judicial construction, while this State was a part of that State.

In the case of *Stetson et al.* v. *Kempton et al.* 13 *Mass. R.* 272, the language of the Court is, "the right of towns to grant or raise money so as to bind the property of the inhabitants, or subject their persons to arrest for non-payment, is certainly derived from statute." In the same case it is said, "in all cases the powers of towns are defined by the *statute* of 1785, *ch.* 75;" and that "in relation to the power of raising money and causing it to be assessed and collected, they are restricted to the cases of providing for the poor, for schools, for the support of public worship, and other necessary pur-

poses." And in that case the construction placed upon the terms, "other necessary purposes," was so strict, that the power to assess taxes "for the payment of additional wages allowed to the drafted militia of said town and other expenditures of defence" was denied to the town. In *Dillingham* v. *Snow et al.* 5 *Mass. R.* 547, it is said, "towns are municipal corporations with power to assess and collect money for the maintenance of schools, and of the poor, and for the making and repairing of roads, and for some other purposes." In a later case, it is said, "that it must appear by the vote of the town, that the money raised was for the purposes, for which towns are authorized to assess and collect it." 6 *Pick.* 101. Such a construction does not deprive towns of the right to take and hold real estate in their corporate capacity. That power, however, is derived from a Colonial act, passed so early as the year 1679. 13 *Mass. R.* 371. The principles of construction, stated in *Stetson et al.* v. *Kempton et al.* came before this Court in the case of *Bussey* v. *Gilmore*, 3 *Greenl.* 191; and the language of the Court is, "we are entirely satisfied with the principles of that case, and the deductions there drawn." No case has been noticed affording color for a different construction, unless the case of *Ford* v. *Clough et al.* 8 *Greenl.* 334, may be supposed to do it. In that case, it is said, "we apprehend, that perhaps it does not follow necessarily, that a town may not expend, or give away a sum of money lawfully, though they could not legally reimburse the treasury by a tax voted and assessed specially for that purpose."

It will be perceived, that the power to assess and collect, to "give away" is distinctly denied in that case. The power to give away, if it exist at all, must be restricted to cases, where the money comes into the treasury by a gift without restrictions upon the use of it; or to money, which comes into the treasury, not derived from taxation, and without restrictions upon the appropriation of it. In the case now under consideration there is a limitation restraining the appropriation to "the same purposes that they have a right to any moneys accruing in the treasury from taxation;" and the power to give it away finds no support in the case of *Ford* v. *Clough et al.*

The plaintiff contends, that the defendants have no right to set up this defence, and that it cannot avail them, it being their duty

to obey their instructions, whether the town had, or had not a legal right to divide the money agreeably to the vote.

It is true, that they are but trustees, and have no property in the fund in their own right. But trustees, in the execution of their trust, are neither required, or permitted, to violate the laws. It is sufficient for them to show, that the act required of them is an illegal act.

The plaintiff having no legal right to the money claimed, cannot maintain this action; and there must be judgment for the defendants according to the agreement of the parties.

NOTE.

By the *statute* of 1838, *ch.* 311, towns were authorized to distribute the money received under the act of 1837, *ch.* 265, "*per capita*, among the inhabitants thereof."

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF OXFORD, MAY TERM, 1837.

PETER CHARLES *& al. vs.* JOHN W. DANA.

Where an express promise by an instrument under seal remains in full force, one is never implied by law.

If the obligor in a bond, conditioned to convey land, refuses to fulfil the condition, and sells the land to another, *assumpsit* by the obligee for the money received cannot be sustained.

THE action was *assumpsit for money had and received, and paid, laid out and expended.* The writ was dated *Sept.* 4, 1835. The defendant and *Calvin Stone* had agreed to purchase the timber on a certain township No 2, on *Dead River*, one quarter of the purchase money to be paid in cash in thirty days, and the residue by notes in three equal annual payments. A few days afterwards *Dana* and *Stone* proposed to the plaintiffs, that they should take *one quarter part* of the purchase and advance *one half* of the cash payment. Nothing appears to have been done under this proposition, but afterwards *Stone* alone agreed with the plaintiffs, that they should advance his half of the cash payment, and take five sixteenths of the purchase, if they should elect to take within three months, and if they did not elect to take the share in the purchase, *Stone* was to repay them the amount by them advanced for him and one thousand dollars in addition. The plaintiffs, defendant, and *Stone* within the thirty days met the owners of the land at

Waterville, and there they all agreed, that the title should be given to *Dana* and that he should sign the notes as principal, and the others, as his sureties. This was carried into effect, and the deed made to *Dana*. The plaintiffs in pursuance of their agreement advanced the one half of the cash payment, amounting to about $2,800, which was paid towards the purchase. At the same time *Dana* gave *Stone* a bond to convey to him one half the purchase, if the plaintiffs did not elect to take; and if they did so elect to convey to him three sixteenths, and *Stone* gave *Dana* a bond to make one half the payments. The sum advanced by the plaintiffs was accounted for by *Dana* to *Stone*, as so much towards his half. At the same time, *April* 1, 1833, the defendant and *Stone* gave a bond to the plaintiffs in the penal sum of 10,000 dollars with this condition.

"The condition of this obligation is such, that if the above bounden *Dana & Stone* shall sell and convey, or cause to be conveyed, by a good and sufficient deed of conveyance, five sixteenths of all the timber on Township No. 2, (describing it,) to the said *Peter* and *Asa Charles*, if the said *Peter* and *Asa* shall, within three months from the date hereof, elect to purchase, at the same price *per* acre, and on the same conditions, and with the same restrictions, as are made in the purchase of the same township by *John W. Dana* of Messrs. *Redingtons* and others; and if the said *Peter* and *Asa*, within the three months above mentioned, shall not elect to purchase, on the terms and conditions above mentioned, and the said *Dana* and *Stone*, shall, within six months from the date hereof, pay or cause to be paid to the said *Peter* and *Asa*, their heirs, executors, administrators, or assigns, the sum of two thousand dollars; and within one year the sum of eighteen hundred and five dollars, all with interest; then this obligation to be null and void, otherwise to remain in full force and virtue."

Before the expiration of the three months, the plaintiffs elected to take the five sixteenths of the purchase, and gave notice thereof. In *June*, 1835, *Dana* conveyed the land, receiving one fourth in cash, and the remainder in notes secured by mortgage. There was evidence in relation to a tender of a deed made by the defendant to the plaintiffs, which it is unnecessary to state. A nonsuit was ordered by consent, with liberty to move to have the same taken

off; and the action was to stand for trial, if in the opinion of the Court, *this action* could be maintained.

Fessenden & Deblois, for the plaintiffs, contended, that *Dana* was bound to convey to the plaintiffs the interest they were to have within a reasonable time after notice was given, that they intended to take, and that not having done so, the defendant had rescinded the bargain, and that they were entitled to recover back the money paid.

When the defendant sold the plaintiffs' interest in the land, he became a trustee of their share of it for them, and they can recover it in this action. They cited 2 *Greenl.* 249; 1 *Com. on Con.* 4; *Com. Dig. Assumpsit, A* 3; 17 *Mass. R.* 389; 12 *Johns. R.* 274; 8 *Mass. R.* 261; 5 *Mass. R.* 365; *Chipman on Con.* 79; *Co. Lit.* 207; 7 *Johns. R.* 474; 1 *N. H. Rep.* 295; 1 *Root*, 448; 1 *B. & P.* 332; 1 *Camp.* 181; 7 *Johns. R.* 132; 11 *Johns. R.* 406; *ib.* 525; 1 *T. R.* 133; 5 *Johns. R.* 85; 10 *Johns. R.* 35; 11 *Johns. R.* 44; 16 *Mass. R.* 161; *Yelv.* 76; 9 *Cowen*, 46; 12 *Johns. R.* 190.

Mellen and *D. Goodenow*, for the defendant, insisted, that the only contract between the parties was one under his hand and seal, made, and accepted, by the plaintiffs at the time the money was paid. The money was never paid to the defendant, but to *Stone*, and the plaintiffs cannot recover even upon their own principles. The only possible claim upon him, is upon the bond he gave them. The gentlemen will not contend, that the defendant is liable in *assumpsit* on the stipulations in the bond.

When the plaintiffs elected to take the land, they waived all claim to recover back the money, and it was then the common case of a part payment, which cannot be recovered back. They were under no obligations to take the land, and chose to be off from their bargain, and throw it upon the defendant. It was unnecessary for the gentlemen to cite a long list of authorities to show, that when there is no time fixed for the performance of an act, that it must be done within a reasonable time. Their difficulty is, that they never have performed on their part, and have never entitled themselves to a deed. The facts show no trust; and in *a court of law*, no trust can be shown by any parol evidence whatever. They

cited 8 *Mass. R.* 431; 12 *Mass. R.* 104; 15 *Mass. R.* 218; 3 *Pick.* 205; 2 *Pick.* 292; 13 *Pick.* 281; *Co. Lit.* 286; 5 *Repts.* 214; 13 *Johns. R.* 359; 4 *Greenl.* 454; 6 *Greenl.* 142; 9 *Greenl.* 128; 1 *Peters,* 467; 5 *Pick.* 395; 6 *N. H. Repts.* 300.

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

WESTON C. J. — The money advanced by the plaintiffs, which was appropriated in part payment of the timber conveyed to the defendant, was procured by *Stone*, and received by the defendant, on account of his part of the purchase. *Stone* had entered into certain stipulations with the plaintiffs, to secure the performance of which, the defendant united with *Stone* in a bond to them. This excludes any *assumpsit*, which might have been implied by law, upon the receipt of the money.

The terms, upon which it was advanced, and the benefits to be enjoyed thereupon by the plaintiffs, were expressly and distinctly provided for in the condition of the bond. Aside from any claim they might have in equity, to enforce specific performance, and having regard only to remedies at law, the bond with its condition was the measure and limit of the defendant's liability. If he fulfilled the condition, the penalty was saved. If he failed to do so, he was liable to have judgment rendered against him for the penalty, and to be in execution for a sum equal in amount to the damages sustained by the plaintiffs.

It is insisted, that the defendant and *Stone* violated the condition of the bond, in certain particulars pointed out, and attempted to be sustained by authorities cited. What then? The contingency is provided for in the condition. In that case, the obligation of the penal part of the bond is to remain in full force. The appropriate remedy of the plaintiffs is upon the bond; and we are not aware that at law they have any other.

It is contended, that the defendant held the land, or part of it, in trust for the plaintiffs; and that having sold it, a part of the consideration was received for their use. We are very clear, that no trust resulted from the payment of part of the purchase money. A trust of this description arises from the original transaction, and attaches at once upon the conveyance of the land. *Buck* v. *Pike*,

2 *Fairf.* 8, and cases there cited. When the plaintiffs advanced the money, they had not decided, that they would be interested in the purchase. Their election, to this effect, was made at a subsequent period. And when the defendant was apprized of it, their right and his duty rested in contract. It presented a case of very common occurrence, where one man has given a bond, conditioned, upon certain terms, to convey land to another.

Equity may compel specific performance, even although it may affect a subsequent purchaser, who buys with notice of the prior contract. But at law, the remedy is on the bond. It is a personal obligation, wherein the obligor binds himself to pay a certain sum of money, if he fails to fulfil the condition. The remedy is adequate; and it is matter of positive contract. There is no occasion to resort to any implication of law, to do justice between the parties. The obligor is to fulfil, or to make full indemnity. This is all he binds himself to do, and all the law awards. Where an express promise remains in full force, one is never implied by law. Still less can it be implied in favor of a party, who has the security of an instrument under seal. If the obligor in a bond conditioned to convey land, refuses to fulfil the condition, and sells to another, *assumpsit* by the obligee, for the money received, cannot be sustained, without confounding legal remedies, and unsettling the principles of the common law.

Nonsuit confirmed.

Jackson Allen *vs.* John Allen.

Definite boundaries, given in a deed, will limit the generality of a term, previously used, which if unexplained would have included a greater quantity of land.

Thus, where the description was, "my homestead farm, being lot No. 13, in range 4;" *it was held*, that nothing passed by the deed excepting lot No. 13, although the grantor occupied other land adjoining that lot.

Exceptions from the Court of Common Pleas, *Whitman C. J.* presiding.

This was a writ of entry to recover twenty-five acres of land in *Jay*. Both parties derived title under *Asa Allen*. The demand-

ant claims by a deed describing the land thus, "my homestead farm, situated in said *Jay*, being lot No. 13, in range 4, containing one hundred acres of land, be the same more or less, with the buildings thereon." The premises demanded were a part of lot No 13, in range 3, and adjoined No. 13, in range 4. The demandant offered to prove, that at the time of the execution of that deed, that *Asa Allen*, the grantor, occupied, owned and improved, as his homestead farm, lot No. 13, in the 4th range, and also that part of lot No. 13, in the 3d range demanded in this action; that although the buildings were not on the demanded premises, his barn was within a few feet of the line of the lots; that no distinction was made between the lots in the improvement of them. He also offered to prove, that when he afterwards purchased the title of the grantee, at public auction, both parties to that deed were present, and that no notice was given, that the premises demanded were not a part of the premises described in the deed from *Asa Allen*. All this evidence was rejected by the Judge, who ruled, that the evidence produced and offered was insufficient to maintain the action, and directed a nonsuit. The defendant excepted.

R. Goodenow, for the demandant, argued, that the first part of the deed, "my homestead farm in *Jay*," conveyed all the homestead farm, and that the words following, being inconsistent with them, should be rejected. The number of the lot is descriptive of the farm, and not the farm descriptive of the lot. The testimony offered was to show the extent of the homestead farm, at the time of the conveyance, and is clearly admissible. *Worthington* v. *Hylyer*, 4 *Mass. R.* 205; *Cate* v. *Thayer*, 3 *Greenl.* 71; *Willard* v. *Moulton*, 4 *Greenl.* 14; *Keith* v. *Reynolds*, 3 *Greenl.* 393; *Drinkwater* v. *Sawyer*, 7 *Greenl.* 366; *Vose* v. *Handy*, 2 *Greenl.* 322; *Allen* v. *Richards*, 5 *Pick.* 512; *Storer* v. *Freeman*, 6 *Mass. R.* 435; *Leland* v. *Stone*, 10 *Mass. R.* 459; *Fowle* v. *Bigelow*, *ib.* 379.

Deblois and *Washburn*, for the tenant, argued, that the intent of the parties to the deed must govern, when it can be ascertained from the description in the deed. The word *homestead*, has no other meaning, than merely where he lived, where his house was, and the extent was ascertained by the description. The word means no more, than my home lot. But taking the whole description

together, no doubt can remain. There is no conflict in the different parts of the description, and in that respect it is unlike the cases cited for the demandant. Conflicting particulars in the description in a deed, should be reconciled, if possible. *Allen* v. *Littlefield*, 7 *Greenl.* 220; *Lyman* v. *Clark*, 9 *Mass. R.* 238; *Jackson* v. *Myers*, 3 *Johns. R.* 388; *Child* v. *Fickett*, 4 *Greenl.* 471; 4 *Kent's Com.* 455.

The opinion of the Court, after a continuance, was prepared by

WESTON C. J. — *Asa Allen* conveyed to *Thomas Allen, jun.*, in mortgage, his homestead farm in *Jay*. In the same sentence, he describes what that homestead is, giving definite and well known bounds, "being lot thirteen in range four," excepting one fourth part on the west end, not in controversy. The lines and courses of that lot, are the monuments, to which he refers. As if he had said, my homestead farm, within the lines of lot thirteen in range four. If his homestead embraced more, he conveys it only within the limits prescribed.

He had a right to explain, what he meant by his homestead, which he does, in terms perfectly plain and intelligible. He may have occupied part of another lot, in such a manner, that if he had used the term homestead alone, the land in controversy might have passed. But why should he be precluded from using language in the deed, explaining what he did mean to convey? And if that language is clear and unambiguous, why should not the conveyance be restricted and limited accordingly? To decide otherwise, would be to hold a party to a meaning, which the language used does not warrant.

That there might be no mistake, as to what the homestead he conveyed included, he gave it definite boundaries. They were such, as can be located with entire precision. The land thus described, was his homestead; but it would seem, not the whole of it. The term unexplained, would be understood to mean the whole, but explained, the conveyance embraces only the homestead within the limits given, if any regard is to be paid to the intention of the grantor, which is too plainly expressed to be misunderstood. The same question in principle, was presented to this Court in *Thorndike* v. *Richards*, 13 *Maine R.* 430, where definite boundaries given,

were held to limit the generality of a term, previously used, which if unexplained would have included a greater quantity of land.

In our opinion, the Judge, who presided at the trial, gave the true construction to the deed in question.

Exceptions overruled.

Ruth Abbott *vs.* Hezekiah Hutchins, Jr.

Where a hired servant has possession of the chattels of his master, and while thus in his possession they are attached as the property of the servant, his declarations that the chattels were his own are inadmissible in evidence, in determining whose property were the chattels, between the master and the attaching officer.

Replevin for sixteen bushels of clover seed. The defendant, as a deputy sheriff, justified the taking by virtue of a writ against one *Moody E. Abbott*, whose property he alleged the clover seed to be. The plaintiff carried on the farm of her late husband by consent of all the heirs, for her own benefit, and the grass seed was raised upon the farm. *Moody E. Abbott* was the son of the plaintiff, and lived with her as her hired man. For the purpose of showing, that the grass seed was the property of said *M. E. Abbott*, the defendant proved, that the said *Moody* set out with the grass seed for *Portland* to market the same, and that it was attached by the defendant on the way; and offered to prove, that on the same day, *M. E. Abbott* tried to get a receipter for the seed, as his property, and said it was his seed, and he wanted to carry it to *Portland;* also, that the said *Moody* tried to get a man to help him get out the seed, and promised that he would pay him, and in several instances had said, that the clover seed was his. The defendant also offered to prove, that before the attachment, *M. E. Abbott* applied to the witness to take a bill of sale of this grass seed, to prevent its being attached, as his property. *M. E. Abbott* was then present in Court. *Emery J.*, who tried the action, rejected all the proposed evidence, as merely hearsay. The defendant excepted to the ruling of the Judge.

Fessenden & Deblois, for the tenant, argued, that the declarations of the debtor, in the actual possession of the property, were admissible in evidence, as part of the *res gesta*; and that the proposed evidence was proper, as proof of facts and intentions, and certainly as acts of ownership over the property by having it in his possession, as his own, and treating it as his. They cited, as directly in point, *Pool* v. *Bridges*, 4 *Pick.* 378. They also cited 2 *Greenl.* 242; 8 *Greenl.* 194; 10 *Johns. R.* 291; 1 *Stark. Ev.* 46; 5 *Greenl.* 266; 1 *Esp. R.* 337; 1 *Ld. Raym.* 530; 14 *Mass. R.* 248.

S. Emery, for the plaintiff, contended, that the acts themselves, if proved in the proper manner, would not be admissible in evidence; and that if they were admissible, the mode of proof proposed was objectionable and illegal. *M. E. Wood* was present in Court, and should have been called. Declarations can only be evidence, as part of the *res gesta*, when they are competent, pertinent, and material to the issue on trial. In this case they were neither.

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

Weston C. J. — It appears that the farm upon which the clover seed in question was raised, was in the occupation of the plaintiff; and that she employed *Moses E. Abbott*, her son, in the capacity of a hired man. Being then the produce of her farm, by the labor of her man, it was clearly her property. If she was guilty of no fraud or collusion, of which not the slightest evidence is reported, her rights ought not to be affected by the acts, much less by the declarations of her hired man.

He was employed in the service of the plaintiff, and had acts to perform, in harvesting the produce of her farm, and in carrying it to market. If his declarations, while engaged in this business, that the produce was his, is evidence against her, she may lose it altogether by the claim of a third person, however unauthorized. A clerk in a store, or any other person, having the charge or oversight of another's property, may, upon the same principle, bring the title of the owner into jeopardy, by declaring the property his. And if the assurance with which it is made, and the frequency of its repetition, should at length command belief, the interest of the owner

may be defeated, without any fault whatever on his part. Such cannot be the law. The rights of a party are not to be affected, either by the acts or declarations of a third person.

There are certain cases, in which the intention of a party giving a character to his acts, may become the object of inquiry, where his declarations made at the time, are received as evidence of that intention. As, for instance, that a bankrupt absented himself from home to avoid his creditors. *Bateman* v. *Bailey*, 5 *T. R.* 512. Of the same character may be the declarations of a pauper, as to his motives for passing from one place to another. *Gorham* v. *Canton*, 5 *Greenl.* 266. So where a party is in possession of land, and a question arises as to the character of that possession, whether he claims it as his own, or holds it in subordination to the title of others, his declarations upon this point are admissible. And this depends upon the peculiar tenure of this species of property, in which a title may commence by disseisin, which by lapse of time may become indefeasible.

But the intentions of *Moses E. Abbott*, in carrying the plaintiff's clover seed to market, whatever they might have been, or whether avowed or not, had no tendency to impair her title. It was his duty to return the proceeds to his mother, and she would not be the less entitled to it, because it may have been his declared intention to pay his debts, or his taxes, with it, or otherwise to appropriate the money, which might be received for the seed, to his own use.

In *Pool* v. *Bridges*, 4 *Pick.* 368, the bailee, with whom the plaintiff proved he had deposited a quantity of wool, upon the owner's inquiry, stated what was his, and pointed it out to him, while in the process of being manufactured. It being in the course of business, in respect to property about which there was then no dispute, and *against the interest* of the party making the declaration, the evidence was received. Here the declaration offered, was an assertion of interest in the declarant.

Had it been originally his property, and the plaintiff had obtained title under a sale from him, his acts and declarations might have been evidence to show the sale collusive. *Bridge* v. *Eggleston*, 14 *Mass. R.* 245. But the case before us is of an entirely

different character; and in our opinion, the testimony offered by the defendant at the trial, was properly rejected.

Judgment on the verdict.

JOHN ROWE *vs.* GEORGE F. TRUITT.

An indorsement of a writ with the plaintiff's name merely, made by his attorney specially authorized in writing for that purpose, is a sufficient indorsement thereof.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

At the first term the defendant moved, that the writ be abated for want of being duly indorsed. The plaintiff's counsel, being specially authorized in writing for that purpose, wrote the name of the plaintiff, "*John Rowe*," upon the back of the writ when it was made. The Judge decided, that the writ was not indorsed agreeably to the statute, and adjudged, that the same should be abated. The plaintiff filed exceptions.

S. Emery, for the plaintiff, cited and relied upon *Stevens* v. *Getchell*, 2 *Fairf.* 443.

Codman, for the defendant, contended, that neither the plaintiff, nor the attorney, was bound, and that it was a mere evasion of the statute. *Harmon* v. *Watson*, 8 *Greenl.* 286.

The case was continued for advisement, and the opinion of the Court prepared afterwards by

EMERY J. — At the Court of Common Pleas, it was adjudged, that this writ was not indorsed agreeably to the statute, and that the same be abated. The writ was indorsed with the name of the plaintiff, simply thus, "*John Rowe*," and it was admitted, that the name thus indorsed was written not actually by the plaintiff, but by his counsel, and by the direction and order of the plaintiff, who specially authorized him in writing to sign his, the plaintiff's, name as aforesaid.

In 2 *Fairfield*, 443, *Stevens* v. *Getchell*, the principal question was upon the sufficiency of the indorsement of the writ, which was thus, "*Jacob Stevens*, indorser," admitted to have been written by *B. F. Emery, Esq.* the attorney who commenced the action, but in the presence of said *Stevens*, he making no objection thereto.

The Court decided, that being an inhabitant of the State, he had a legal right to indorse his own writ. He had authority to write his name himself, or empower another person as his agent to write it for him. The Court inferred the plaintiff's assent to the act of Mr. *Emery*, in so indorsing his name, and sustained the indorsement. And in the case under consideration, the plaintiff specially authorized his counsel in writing to sign his, the plaintiff's, name as aforesaid, and by his direction and order it was done. The case of *Skillings* v. *Boyd*, 1 *Fairf.* 43, was also cited in *Stevens* v. *Getchell*, as shewing it was not necessary to add the character of *attorney* to the name of the person who wrote the name of the principal.

The Court also considered it worthy to connect the fact of the prosecution of the suit by *Stevens*, after the objection was made and urged against the legality of the indorsement, as the ratification of the act of *Emery*, in signing the name of *Stevens*, as indorser, and equivalent to a previous authority.

And here we find *Rowe* persevering in his prosecution of the suit, after an objection against the propriety of the indorsement, and an adjudication against it.

The decision in *Stevens* v. *Getchell*, was in 1834. We do not recollect that it has since been overruled. We are of opinion, that the writ in this case was legally indorsed. The exceptions are sustained, and we adjudge that the defendant answer over to the merits of the action.

JAMES F. BRAGG, JR. *vs.* JAMES B. GREENLEAF.

A Judge of the Court of Common Pleas has power to allow an amendment of a writ by altering its date to a subsequent day, although prior to such amendment, the action appeared to have been commenced before the cause of action had accrued.

No action can be maintained upon an indorsed promissory note, but by one, or under the authority of one, having a legal interest in the note.

Thus where a note had been sold and indorsed to a third person, the payee cannot maintain an action thereon, without the direction, or consent, of the person to whom the note belongs.

EXCEPTIONS from the Court of Common Pleas, *Whitman C. J.* presiding.

Assumpsit on a promissory note made by the defendant and payable to the plaintiff in thirty days. The date was *April* 19, 1836, and the writ was dated *May* 19, 1836. At the trial, the defendant objected, that the action was prematurely brought, having been commenced before the expiration of the thirty days. The counsel for the plaintiff then filed an affidavit, stating that the writ was in fact made *May* 20, and dated the 19th by mistake, and moved for leave to amend by inserting the true date, to which the counsel for the defendant objected. The Judge permitted the amendment to be made. The name of the payee was indorsed on the back of the note, and the defendant objected to the reading of the note to the jury, because it appeared by inspection to have been negotiated, and, as the defendant averred, to *O. B. Dorrance*, and as the plaintiff's counsel admitted, averring at the same time, that the suit was commenced in the plaintiff's name by his consent and direction. The Judge overruled the objection, and permitted the note to be read in evidence. The verdict was for the plaintiff, and the defendant excepted.

Codman, said that the writ could no more be amended, than it could by altering the time of holding the Court, or affixing the seal of the Court, which are never allowed. *Bailey* v. *Smith*, 3 *Fairf.* 196. The case shows, that the plaintiff had no interest in the note, and therefore the action cannot be maintained in his name. *Bradford* v. *Bucknam*, 3 *Fairf.* 15.

Virgin, for the plaintiff.

The permitting, or the refusing of the amendment, is a mere discretionary act in the Judge, to which exceptions will not lie. *Wyman* v. *Dorr*, 3 *Greenl.* 183; *Clapp* v. *Balch*, *ib.* 216; 4 *Pick.* 341; *ib.* 429.

The Court had power to permit the amendment, and it was properly exercised. 2 *Pick.* 23; 1 *Pick.* 196; *ib.* 269; 1 *Mass. R.* 50; 2 *Mass. R.* 81; 11 *Mass. R.* 338; 3 *Greenl.* 243; 1 *Mass. R.* 433; 17 *Mass. R.* 376; 2 *Burrow*, 950; *Howe's Prac.* 187, 263; 3 *Greenl.* 29; 2 *Cowen*, 515.

The action was rightly brought in the name of the payee of the note. *Mosher* v. *Allen*, 16 *Mass. R.* 451.

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

WESTON C. J. — We think it was competent for the Judge below to allow the amendment objected to, upon the evidence before him, under the motion made for that purpose. Upon the other point the exceptions are sustained. It appears, that the plaintiff consented to and directed the suit; but as the case stands, it further appears, that he had at the time no interest whatever in the note. It may be prosecuted in the plaintiff's name, with his consent; but not, if he has no interest in it, unless the suit was brought under the direction of the party, to whom the note belonged. *Bradford et al.* v. *Bucknam*, 3 *Fairf.* 15.

Exceptions sustained.

SAMUEL BROWN *vs.* JAIRUS S. KEITH, *Adm'r.*

The *statute* of 1829, *ch.* 444, regulating appeals from the Court of Common Pleas, left the costs on judgments on reports of referees, in appealed cases, subject to the provisions of the *statute* of 1821, *ch.* 59, § 30.

By the latter statute full costs are taxed upon the reports of referees, where the plaintiff is the prevailing party, however small the amount recovered may be, unless the referees otherwise direct.

THE action, commenced *January* 5, 1835, was *assumpsit*, and the damage claimed was $700. At the Court of Common Pleas

a verdict was rendered for the defendant, *June Term*, 1835, from which the plaintiff appealed. At the *October Term* of the S. J. Court, 1836, the action was referred by rule of Court, and the report of the referees was made at *May Term*, 1837, that the plaintiff should recover against the goods and estate of the intestate the sum of ten dollars damages. The report was silent respecting costs of Court. The plaintiff moved for full costs of both Courts. The defendant also moved for costs of Court, and also, that the report should be recommitted to the same referees, that they might state, if they chose, how the costs should be taxed.

The question was argued in writing by *J. C. Woodman*, for the plaintiff, and by *D. Goodenow*, for the defendant.

For the plaintiff, the counsel relied upon the express words of the *Rev. Stat. c.* 59, § 30, and insisted that the *statute* of 1829, *c.* 444, did not apply to cases like this. He cited *Moore* v. *Heald*, 7 *Mass. R.* 447; *Nelson* v. *Andrews*, 2 *Mass. R.* 164; *Hodges* v. *Hodges*, 9 *Mass. R.* 320.

For the defendant, it was urged, that the *statute* of 1829, *c.* 444, settled the rule in relation to costs in this case. The appeal had been taken before the action was referred, and the Court must see the object of the legislature, to prevent appeals from the Court of Common Pleas in small cases. The counsel examined and commented upon the statutes regulating appeals and costs, and insisted, that the defendant was entitled to costs after the appeal to this Court, made by the plaintiff, from a verdict against him. He cited *Godfrey* v. *Godfrey*, 1 *Pick.* 236; *Gilman* v. *Burges*, 12 *Mass. R.* 206; *Wightman* v. *Hastings*, 4 *Mass. R.* 244; *Lakeman* v. *Morse*, 9 *Mass. R.* 126; *Leighton* v. *Boody*, 3 *Greenl.* 42; *Chase* v. *Tucker*, 2 *Pick.* 27; *Andrews* v. *Austin*, *ib.* 528.

The opinion of the Court was afterwards prepared by

WESTON C. J. — In determining the original jurisdiction of the respective Courts, it was provided, that Justices of the Peace should have exclusive cognizance in suits, where the debt or damages demanded should not exceed twenty dollars. It was intended, that for demands not exceeding this amount, the Common Pleas should only have appellate jurisdiction.

That the policy of the law might not be defeated, by laying the damages higher, where more was not expected to be recovered, it was enacted that in such case, in actions originally brought in the Common Pleas, if the plaintiff did not recover more than twenty dollars debt or damage, he should be entitled to costs, only to the amount of one fourth part of the sum recovered. *Statute of* 1821, *c.* 59, § 30. Where judgment was obtained for more than twenty dollars, the jurisdiction of the Common Pleas was justified; but an appeal lay from a judgment there rendered, to the Supreme Judicial Court.

In the progress of legislation upon the jurisdiction of courts, these appeals were first restricted, and finally abolished. It was the manifest policy of the *statute of* 1829, *c.* 444, to give the Common Pleas, with certain exceptions, final jurisdiction, where the debt or damage recovered, did not exceed one hundred dollars; and their final cognizance to this amount was protected, not by absolutely denying appeals, but by subjecting the appellant to certain hazards in regard to costs. If the defendant appealed, and reduced the damages, his appeal was so far justified, that a higher rate of costs could not be awarded against him. But if the plaintiff recovered any thing in such case, he was the prevailing party, entitled to costs according to the former general law. To full costs, if he recovered more than twenty dollars; otherwise, to a quarter costs only.

The object of the first law was, to sustain the original jurisdiction of a Justice of the Peace, and of the second, to uphold the final jurisdiction of the Common Pleas. The provisions of the first law had existed in *Massachusetts*, prior to our separation. But it had been there adjudged, that they did not apply to judgments, rendered on reports of referees; but that in such cases, the plaintiff was entitled to full costs, although he recovered less than twenty dollars, unless the referees otherwise awarded. *Moore* v. *Heald*, 7 *Mass. R.* 467. It had been previously decided, that referees had a discretion upon the question of costs. *Nelson* v. *Andrews*, 2 *Mass. R.* 164.

It was thus settled, not only that the restriction in the general law as to costs, did not apply to reports of referees, but that they might withhold costs altogether from the prevailing party. Upon

the revision of the laws in this State, these rules, which before depended upon construction, were made the subject of special enactment. The thirtieth section of the statute first cited provides, "that where judgment shall be rendered upon the report of referees, full costs shall be taxed for the party recovering, notwithstanding the judgment be under twenty dollars, unless a different adjudication respecting the costs shall be made by the report itself." Prior decisions, and at length the Legislature itself, having placed a judgment so rendered upon a ground differing from other judgments, in respect to costs, we are not satisfied, that a distinction thus marked, was intended to be done away by the *statute of* 1829, before cited, in cases coming up by appeal from the Common Pleas.

The reason for the distinction exists as strongly in these as in other cases; and every consideration, upon which a discretion in the referees, in respect to costs, is based, applies with equal force. In our opinion, the *statute of* 1829 left judgments on reports of referees, subject to the special provisions of the former law. As the case stands then, the plaintiff is entitled to full costs; and the defendant's motion for costs in his favor must be overruled. The referees, however, might have determined differently; and as they may not have given the question a distinct consideration, or might have misunderstood the liability of the defendant, we recommit the report, that they may determine, whether the justice of the case requires, that full costs should be awarded in favor of the plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN, MAY TERM, 1837.

WARREN L. HOUDLETTE *vs.* JONATHAN S. TALLMAN.

Where the law can pronounce upon a state of facts relative to a sale of goods, that there is, or is not a delivery and acceptance, it is a question of law, to be decided by the Court; but where there may be uncertainty and difficulty in determining the true intent of the parties, respecting the delivery and acceptance, from the facts proved, the question of acceptance is to be determined by the jury.

When in a conversation relative to the sale of goods, the agreement is, that the payment of the price is to be made at the time the property is removed, these are concurrent acts, and the right of property does not pass before these acts take place.

So long as there remains a further act to be performed to determine the quantity or price of the goods, the sale is incomplete, and the property does not pass.

TROVER for 38 tons of screwed hay. The plaintiff introduced evidence tending to prove by parol a sale of the hay, on the 9th of *April*, 1835; and a material question arose, whether there was proof of a delivery. It was proved, that the hay was previously all screwed, and weighed and labelled, and the weight marked on each bundle. The hay was all in one barn, and the sale, if such it was, embraced all the hay. There was proof, that the price agreed on was $11,50 per ton, and that it was not to be taken away from the defendant's barn until the 5th of *June* following, and was to be

paid for before taken away. No earnest money was paid, and there was nothing in writing, and the plaintiff did not prove, that the quantity of hay was ascertained by the parties by adding up the marks of the weights on the bundles, or in any other way, but only that the defendant estimated the quantity at about 38 tons. The defendant sold the hay during the latter part of *May*, for $16,50 per ton.

The instruction requested by the counsel for the plaintiff, and that given by *Weston C. J.* at the trial, appear in the opinion of the Court. The jury returned their verdict for the defendant, stating in writing, that the bargain was not closed until the bundles were counted, and the weight of each added up. The verdict was to be set aside, if the instruction was erroneous.

F. Allen, for the plaintiff, contended, that where every thing was done, so that it was unnecessary to have the parties together to complete the bargain, the contract is complete, and it does not fall within the statute of frauds. Here all the hay in the barn was sold, the price and the weight agreed, and the presence of the other party was unnecessary. The subsequent sale of the hay before the time fixed for taking it and paying for it, dispenses with the necessity of a tender. He cited *Chaplin* v. *Rogers*, 1 *East*, 192; *Anderson* v. *Scott*, 1 *Campbell*, 235, *note*; *Elmore* v. *Stone*, 1 *Taunt.* 458; *Wyman* v. *Winslow*, 2 *Fairf.* 398.

Mitchell, for the defendant.

The plaintiff never did any act whatever relating to the hay. All was done by the defendant before the conversation about the sale to the plaintiff took place. The case is clearly within the statute of frauds. If the goods are to be weighed, or marked, or the price or quantity to be ascertained, the sale is not complete, and is not binding on either party. *Phillips* v. *Hunnewell*, 4 *Greenl.* 376; 2 *Kent's Com.* 3*d ed.* 497, 502, and cases cited; *Howe* v. *Palmer*, 3 *B. & Ald.* 321; *Hodgson* v. *LeBret*, 1 *Campbell*, 233.

The leading case cited for the plaintiff from *East*, was examined and placed on its true grounds in *Rice* v. *Austin*, 17 *Mass. R.* 197.

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

SHEPLEY J. — In *April*, 1835, the defendant having in his barn a quantity of hay, which had been screwed, weighed, and labelled, had a conversation with the plaintiff respecting the sale of it. In this conversation the plaintiff agreed to purchase and the defendant to sell all the hay then in the barn, estimated to be about thirty-eight tons, at eleven dollars and fifty cents per ton. The hay was not to be removed from the defendant's barn until the fishing season was over, which would be about the fifth of *June* then next, and payment was then to be made. There was no written contract between the parties, nor was there any earnest money paid.

The counsel for the plaintiff requested the Judge to instruct the jury, that where nothing remained but to add together the several marks to determine the quantity, the bargain might be considered complete.

This was declined, and the jury were instructed, that if the parties had not agreed upon the quantity, and it was necessary to ascertain it, to examine the bundles, take the weight of each, as found labelled upon them, which would make it necessary where some of the bundles were on the top of others to remove them, in order to inspect the labels, and to add up the weight of the several bundles, the sale and transfer was not complete.

The third section of the act to prevent frauds and perjury was derived from the seventeenth section of the act of 29 *Car. 2. ch.* 3, the language of which has received a construction in the country from which it was taken; and certain definite rules seem to have been so well established, that they may be regarded as applicable to other cases which may arise.

Where payment of the price is to be made at the time the property is removed, these are concurrent acts, and the right of property does not pass before these acts take place. *Tempest* v. *Fitzgerald*, 3 *M. & S.* 680.

Where the vendor has any claim or lien upon the property there is no delivery and acceptance within the statute. *Baldney* v. *Parker*, 3 *B. & C.* 37; *Thompson* v. *Maceroni*, *idem.* 1.

So long as the purchaser has a right to object to the quantity or quality of the goods there can be no such acceptance as the statute

requires. *Howe* v. *Palmer*, 3 *B.* & *A.* 321; *Hanson* v. *Armitage*, 5 *B.* & *A.* 557.

Where any act remains to be done to constitute an ultimate acceptance by the vendee the sale is not perfected; as where a horse was to remain with the vendors twenty days, without charge to the vendee, and the horse was then put to grass by direction of the vendee, and by his desire was *entered, as the horse of the vendor.* *Carter* v. *Toussaint*, 5 *B.* & *A.* 855; *Kent* v. *Huskisson*, 3 *B.* & *P.* 283.

There must be a delivery and acceptance, but where the goods are ponderous it may be constructive or symbolic, as by the delivery of the key of the place where they are deposited to the vendee. 2 *P. Wms.* 308. Or by the acceptance of a sample, *it being a part of the quantity* to be delivered. *Hinde* v. *Whitehouse*, 7 *East*, 558. But the acceptance of a sample not being part of the quantity, is not such a delivery. *Cooper* v. *Elston*, 7 *T. R.* 10.

The counsel for the plaintiff relies upon the case of *Chaplin* v. *Rogers*, 1 *East*, 192, and argues, that the case was not rightly understood by the Court in the case of *Rice* v. *Austin*, 17 *Mass. R.* 204, because it was there regarded as a case where the purchaser had exercised acts of ownership over part of the goods, when in fact it appears from the case, that the person who took part of them on his account had no authority to do it. But Mr. Justice *Bayley*, in *Howe* v. *Palmer*, speaking of the case of *Chaplin* v. *Rogers*, says, the jury thought there was sufficient evidence to draw the conclusion of an actual acceptance, inasmuch as the vendee had dealt with the hay as his own; and he appears to have understood the case to be substantially what it was understood to be by the Court in the case of *Rice* v. *Austin*. And perhaps it may be necessary to consider the case as turning upon that point to admit its authority.

Where the law can pronounce upon a state of facts, that there is, or is not, a delivery and acceptance, it is a question of law to be decided by the Court. But where there may be uncertainty and difficulty in determining the true intent of the parties respecting the delivery and acceptance from the facts proved, the question of acceptance is to be decided by the jury. *Blenkinsop* v. *Clayton*, 7 *Taunt.* 597; *Chaplin* v. *Rogers*, 1 *East*, 194; *Phillips* v. *Bistolli*,

2 *B & C.* 511. The application of these principles to the state of facts will determine, that the sale was incomplete, and within the statute of frauds. There remained a further act to be performed to determine the quantity; and the instructions must be regarded as correct.

The defendant had a right to object to the quantity until it was fully and finally ascertained, so as to require no further investigation; and he was not therefore bound by what had taken place. The price also was to have been paid, when the hay was removed, and for that reason the sale was not perfect. If these difficulties had not been presented, the equivocal acts of the parties might have been left to a jury, as they were in this case, upon which the jury have decided that the sale was incomplete.

Exceptions overruled.

Josiah C. Coombs *vs.* Benjamin F. Emery.

The *statute* of 1821, *c.* 160, "to prevent fraud in firewood, bark, or coal, exposed to sale," does not render a contract for the sale of cord-wood, less than four feet long, void.

In towns where there are no legal surveyors of wood, it is not unlawful for the vendor and vendee to cause the quantity to be ascertained by any measurer appointed for that purpose by themselves.

Exceptions from the Court of Common Pleas, *Whitman C. J.* presiding.

Assumpsit for 15 cords of wood, and the expense of piling and surveying it. The plaintiff read in evidence a paper signed by the defendant. "I hereby agree to take of *J. C. Coombs*, a gondola of wood surveyed on his wharf, at 2-3 my expense, at $3,25 per cord." Also an order signed by the defendant. "Mr. *J. C. Coombs.* Sir: Please deliver *A. M. Wood* the wood I agreed with you for, say from 12 to 15 cords, and I will account to you for the same." *Wood* received of the plaintiff, surveyed by *William Lunt*, 15 cords of wood, and delivered the same, with *Lunt's* survey bill, to the defendant at *Bath*, who made no objection to the quantity

or length. It was in evidence, that the wood in question was viewed by both parties on the day the contract was made, and previous thereto; that the wood was from three to three and a half feet in length, averaging about three feet three inches. The plaintiff proved, that the parties agreed, that the wood should be piled four and a half feet high, and that eight feet in length of range should be a cord; and that *William Lunt* should survey the same in that manner. *Lunt* did survey the wood, and in that manner. He was not a sworn surveyor of the town of *Bowdoinham*, where the wood was, when it was delivered, and where the contract was made. There was no evidence, that the town of *Bowdoinham* that year had voted it necessary to appoint surveyors of wood or bark, or that any surveyors were appointed by the town. The Judge ruled, that the action could not be maintained, and directed a nonsuit; and the plaintiff excepted thereto.

Mitchell, for the plaintiff, insisted, that the famous shingle case, on which the decision in the Court of Common Pleas was based, did not apply to the case now before the Court.

1. This was not a sale of wood by the cord, but of a pile of wood, examined by the parties, and a price fixed by them. There was a mode of ascertaining the quantity agreed on, having no relation to the mode provided by law for measuring wood. The parties had a right to make their own bargains.

2. The statute respecting the admeasurement of wood has no application, where towns do not appoint surveyors according to the provisions of it.

3. The *statute of* 1821, *c.* 60, merely prescribes what shall be a cord of wood, but does not prohibit the sale of wood measured in any other way. The sale of the wood, therefore, does not fall within the principle of the shingle decision.

Groton, for the defendant, insisted, that this was precisely the case of *Wheeler* v. *Russell*, 17 *Mass. R.* 258. This is an unlawful contract, and cannot be the foundation of any action. The statute is imperative, that wood measurers shall be appointed in each town where wood is sold. The penalties for the non-observance of the provisions of the act are quite as severe, as they were in the statute upon which the case of *Wheeler* v. *Russell* was predicated. Our statute does provide, substantially, that no wood

shall be sold on a wharf, as this was, without a legal survey. The statute regulates what shall be a cord of wood, and how it shall be measured; and if the parties undertake to evade it by their bargains, their contracts are illegal and void.

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

WESTON C. J. — The *stat.* of 1821, *ch.* 160, in relation to wood, bark, and coal, section first, prescribes the length, width and height, to constitute a cord, of all cord wood exposed for sale. It is not however to be inferred, that the sale of wood, varying in length from that, which is thus prescribed, is unlawful; for the fourth section prescribes, that in ranges of wood upon a wharf, what it may want in length, shall be made up in height. The third, fourth and fifth sections have reference to duties, and impose penalties, where sworn surveyors are appointed; and it does not appear that there were any such surveyors, appointed by the town of *Bowdoinham.* It does not appear to us, as the case is presented, that it was unlawful for the parties, to cause the quantity of wood to be estimated in any mode, satisfactory to them. If any mistake however has been made, the defendant ought not to be held liable to pay for a greater quantity, than he actually received.

The *stat.* of 1821, *ch.* 158, in relation to lumber, section third provides, that no shingles shall be offered for sale, except such as shall conform to the dimensions there given. The sale of such, as depart from the standard, is expressly inhibited. The sale therefore in *Wheeler* v. *Russell,* 17 *Mass. R.* 258, was in direct violation of the statute; and upon that ground held to be unlawful. That in relation to wood prescribes the dimensions of cord wood, and what shall constitute a cord; but it does not make the sale of wood, varying from this standard, unlawful, or provide, that wood in any other shape or form, or by any other estimate, satisfactory to the parties, may not be a fair subject of contract. The parties may have misconceived the actual quantity, which may be set right upon another trial; but we perceive no evidence of such fraud or illegality in the contract, as deprives the plaintiff of a remedy at law.

Exceptions sustained.

CHARLES HARDING, *Adm'r*, *vs.* MOSES SPRINGER.

Husband and wife are regarded as one person in law, and when land is conveyed to them, they are not seised of moieties, but of the entirety of the estate; and the survivor takes the whole.

Where one seised of land by indefeasible title takes a mortgage thereof to himself, with covenants of warranty, and dies, and the mortgagor becomes entitled to the same land as heir; he is not estopped from asserting his title as heir against the administrator, in a suit upon the mortgage.

EXCEPTIONS from the Court of Common Pleas, *Perham J.* presiding.

This was an action on a mortgage, made by *Joseph G. Torrey* to *Azubah Torrey*, the plaintiff's intestate. After the evidence was closed, the presiding Judge directed a nonsuit, to which the plaintiff excepted. The facts in the case sufficiently appear in the opinion of the Court.

Mitchell, for the demandant, said that *Joseph Torrey* and his wife took the estate by entirety and not by moieties, and the wife, as survivor, took the whole. 5 *Mass. R.* 521; 2 *Kent's Com.* 132, *note c.* When *J. G. Torrey*, the son, made the mortgage, the whole estate was in fact in the mother. Upon the death of the mother, a share of her estate descended to him, as one of her heirs, and instantly, in consequence of his deed of the same land to her with warranty, her heirs took the land to hold in mortgage. *J. G. Torrey*, the son, is estopped to set up any opposing title, and so are all claiming under him, whether by levy or by deed.

F. Allen, for the tenant, agreed, that *Joseph* and wife took as joint tenants, and not as tenants in common, and that the survivor took the whole; and cited, in addition to those cited for the demandant, 8 *Mass. R.* 274; 12 *Mass. R.* 474. On the death of the father, the son, supposing that he inherited the land from his father, mortgaged it to his mother, but nothing passed, or could pass, to her by that deed, as she was then the sole owner in fee. On her death, he took a share of the estate, as one of her heirs, and the defendant levied upon it as his property, after it descended to him. This is equivalent to a statute conveyance by her to him at that time, and the deed can be no estoppel to a title derived from the grantee in the deed.

The action was continued for advisement, and the opinion of the Court was, at a subsequent term, drawn up by

SHEPLEY J. — On the seventh day of *March*, 1808, *Joseph Torrey*, and *Azubah*, his wife, acquired title to the premises demanded, by a deed conveying the same to them and their heirs in fee. *Joseph Torrey* died about the year 1816, and *Azubah*, the wife, in 1833.

Husband and wife, being regarded as one person in law, are not in such cases seised of moieties, but of the entirety of the estate; and the survivor takes the whole. 5 *Mass. R.* 521, *Shaw* v. *Hearsey*; 2 *Kent's Com.* 132.

The widow, being sole owner of the estate, on the ninth day of *February*, 1830, took a deed of mortgage of the same from their son, with covenants of warranty; and this suit is brought by her administrator, on that mortgage, to recover possession. The defendant claims by virtue of a levy of an execution upon the premises after the estate had descended in part to the same son, as one of her heirs at law. It is quite obvious, that the mother acquired nothing by the deed from her son. But it is said, that the son was estopped by his deed to deny, that she did acquire title by it, and that so is the defendant, claiming under him as a privy in estate. And this would be so, if he had mortgaged with warranty to a stranger to the title, and had afterward acquired the title. 3 *Pick.* 51, *Somes* v. *Skinner*. The title which he acquired after his deed, was not from a third person, but from the same person to whom he had conveyed. Neither she nor her representative can deny, that her own title was good, because she had taken a conveyance from one having no title. The ground upon which the grantee recovers upon his warranty, is, that he has lost the land by an elder and better title than that of the grantor, and is therefore entitled to other lands of like value. *Co. Lit.* 365, *a*. And if the warrantor has since acquired the title to the lands, his grantee shall hold those lands by way of estoppel, instead of allowing the grantor to recover them from him, and then render to him other lands of equal value. *Co. Lit.* 265, *b*.

In this case, the grantee, having before a perfect title, could never recover against her grantor other lands, because she could never prove the loss of the title to the land which the deed pur-

ported to convey. The foundation, upon which the doctrine of estoppels in such cases is built, fails, and the law of estoppels has no place. The intestate acquired no title by the deed, and her representative can claim nothing by estoppel; and cannot, therefore, maintain this suit.

Exceptions overruled, and nonsuit confirmed.

Mary Kuhn *vs.* Charles Kaler.

A widow is not entitled to dower in a tract of woodland, which the husband sold from the lot on which he lived, still retaining as part of the farm, at that time and until his death many years afterwards, an abundant supply of wood for fuel, fencing, and repairs.

Exceptions from the Court of Common Pleas, *Smith J.* presiding.

The only question raised in the case, was, whether the widow was entitled to dower in land situated as this was. The premises in which dower was claimed, containing about fifteen acres, and part of a larger tract, was wholly woodland, and on which no improvements have ever been made. When this tract was conveyed by the husband of the demandant to the tenant, in 1805, the residue of the tract consisted of about 90 acres, on which were the house, other buildings, and improvements of the husband of the demandant, about 70 acres thereof still remaining woodland wholly unimproved, and on which then were, and still are, growing trees and timber abundantly sufficient for fuel, fencing, and all repairs. The Judge was of opinion, that the plaintiff was not entitled to dower in the 15 acre lot of woodland, demanded in the writ, and ordered a nonsuit; and the plaintiff filed exceptions.

Bulfinch, for the demandant, said, that the question before the Court was, whether the husband by separating this lot from the rest of the farm, can bar the wife of her dower therein, although this is and has been entirely woodland. The wife is dowable of woodland, when composing a part of a farm. *White v. Willis*, 7 *Pick.* 143. If the husband cuts up his farm, and conveys it in

parcels to different persons, it cannot deprive the widow of her right to dower.

F. Allen and *I. G. Reed*, for the tenant, contended, that the rule was, that the wife is not dowable of woodland, unless it composes a part of a farm, and is necessary for fuel, fencing, or repairs. In this case, the facts show conclusively, that this tract of wild land could not be necessary for that purpose. It never was any part of the farm. They cited *Conner* v. *Shepherd*, 15 *Mass. R.* 164; *Webb* v. *Townsend*, 1 *Pick.* 21; and *White* v. *Willis*, cited for the demandant.

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

Shepley J. — The general rule, that the widow is dowable of all lands of which her husband was seised during coverture, has ever been subject to certain exceptions. An additional exception was established in *Massachusetts*, while *Maine* was a part of that State, by the case of *Conner* v. *Shepherd*, where it was decided, that a widow was not dowable of unimproved lands. In the case of *White et ux.* v. *Willis*, it is said, that this exception was not designed to extend to lands of this description used with the homestead, or cultivated land.

The fifteen acres of unimproved land in which dower is now claimed were separated from the farm as early as 1805, leaving connected with it sufficient lands of the same description for the purpose of obtaining firewood, fencing, and building materials. And since that time, this tract has not been connected with or appendant to, a cultivated farm.

The argument of the plaintiff is, that it does not appear, that the widow could have assigned to her, in that part of the woodland remaining in connection with the farm, a convenient part for the purpose of obtaining firewood, fencing, &c. But considering the large quantity of such land remaining with the small quantity of improved land, it cannot be presumed, that she cannot have her dower assigned conveniently for such purposes. And if such were the condition of the whole farm, the proof should come from the plaintiff, this being necessary to establish her right to dower in unimproved land so long disconnected with the farm.

Exceptions overruled.

Samuel Phillips *et al. vs.* Peter Williams.

It is no valid objection to an extent of an execution upon lands, that but two of the appraisers signed the return, without any reason given why the third did not sign, if it appear from the return of the officer, that all three acted.

In an extent it is not essential, that the magistrate, administering the oath to the appraisers, should either make or sign a certificate thereof; but it is sufficient, if it appear by the return of the officer, that they were duly sworn.

Where the officer returned, that the appraisers were duly sworn, "as will appear by the certificates of the Justices," and there was no name signed to one of the certificates; the extent was held good.

Exceptions from the Court of Common Pleas, *Smith J.* presiding.

Trespass quare clausum. The plaintiffs claimed the *locus in quo* by virtue of the levy of an execution thereon in their favor against the defendant, *June* 3, 1830, as his property. Two objections were made to this levy. 1. That it does not appear, that *Eusebius Fales*, one of the appraisers, was sworn. 2. That it does not appear, that *Ballard Green*, who did not sign the return, acted as an appraiser, or viewed the land. On the back of the execution, preceding the return, was a certificate, bearing date the day of the levy, *June* 3, 1830, commencing, "Personally appeared *Eusebius Fales* and made oath," &c. in the proper form of a certificate of his being sworn, as an appraiser, but no name was signed to this return. Immediately following, and of the same date, was a certificate in proper form, that *Joshua Jordan* and *Ballard Green* had taken the appraiser's oath, signed by *Eusebius Fales*, as Justice of the Peace. In the officer's return, he says, "I have this day caused *Eusebius Fales, Esq., Ballard Green*, and *Joshua Jordan*, gentlemen, in said county, and freeholders, being three disinterested and discreet men, to be duly sworn faithfully and impartially to appraise such real estate of the within named *Peter Williams* as should be shown to them, to satisfy this execution and all fees, according to their best skill and judgment, as will appear by the certificates of the Justices." "And the appraisers having this day viewed the aforesaid premises, appraised the same upon their oaths aforesaid," &c. "and the said appraisers set out the same tracts of land by metes and bounds on the same 3d day of *June*, 1830."

In the return of the appraisers, which was signed by *Fales* and *Jordan* only, the land was particularly described. The description of the land was not repeated in the return of the officer, but only referred to, thus: "the aforesaid tracts of land, which are particularly bounded and described, as in the foregoing return of the appraisers." The parties agreed, that a nonsuit or default should be entered according to the opinion of the Court. The Judge of the Court of Common Pleas directed a nonsuit, and the plaintiffs excepted.

J. S. Abbott, for the plaintiffs.

It has been repeatedly settled, that neither the Justices before whom the appraisers are sworn, nor the appraisers themselves, need make any certificate of their doings. *Barnard* v. *Fisher*, 7 *Mass. R.* 71; *Williams* v. *Amory*, 14 *Mass. R.* 20; *Bamford* v. *Melvin*, 7 *Greenl.* 14. And if the return of the officer shows, that all the requisites of the law have been complied with, the levy is good. And where the officer's return does not state all the facts, but refers to the appraisers' or Justices' certificate, as part of it, the return is good. If the officer states the facts, his statement is conclusive, even if there be a reference to the return of the Justice, and there be no return of his, or a defective one. *Shove* v. *Dow*, 13 *Mass. R.* 529; *Howard* v. *Turner*, 6 *Greenl.* 106. The return in this case, shows that all the appraisers were sworn. If the certificates referred to do not fully confirm the return of the officer, they do not contradict it.

It is not necessary that all the appraisers should sign the return. It is sufficient, if they all view the land, and act in the appraisal. If two of them concur in the appraisal, it is sufficient. *Moffit* v. *Jaquins*, 2 *Pick.* 331; *Barrett* v. *Porter*, 14 *Mass. R.* 143. In this case, the officer's return shows, that the three viewed the land, and acted as appraisers.

Cilley, for the defendant.

It is well settled, that every thing the statute requires must appear either in the return of the officer, or in some of the proceedings referred to, and made part of it. Where any thing is referred to in the return, it becomes a part of it. The burthen is on the plaintiffs to show a compliance with the statute provisions. Here the officer only says, that the appraisers were sworn in the manner

which appears from the certificates, and they show, that but two were sworn. These certificates are referred to quite as strongly, as part of the return, as the description of the land in the appraisers' return; and if one is rejected, the other must be also. Admit them both, as part of the return, or reject both, and the levy is void. The case of *Howard* v. *Turner*, 6 *Greenl.* 106, referred to on the other side, is an authority directly in our favor.

The case does not show, that the appraiser, who did not sign the return, acted. The return refers expressly to the certificate of the appraisers, and no fair construction of the return can make it refer to any other appraisers, than those who have affixed their signatures to their doings. The appraisers' return excludes the supposition, that more than two acted. The return of the officer merely shows, that three were chosen, but does not show, that more than two of them were sworn, or acted.

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

Weston C. J. — The officer, in his return upon the execution, states, that he caused the appraisers, naming them, to be duly sworn, faithfully and impartially to appraise such real estate, as should be shown to them, according to their best skill and judgment, "as will appear by the certificates of the Justices." One of those certificates was not signed by the Justice, but there is nothing in either, which contradicts, or is inconsistent with the material fact, set forth in the return, namely, that the appraisers were duly sworn. It was not essential, that the Justice should either make or sign a certificate. The return of the officer is plenary evidence upon this point. *Williams* v. *Amory*, 14 *Mass. R.* 20.

By "the appraisers," who are stated in the return to have viewed the premises, must, in our opinion, be understood the three, whose appointment and qualification had been previously certified. The absence of either is not intimated; and it is not to be inferred from the fact, that the written appraisement is signed by but two of them. It has been held to be no objection to a return, that when two only sign the appraisement, no reason is assigned for the omission of the subscription of the third, where it otherwise appears, that the three acted. *Barrett* v. *Porter*, 14 *Mass. R.* 143.

Exceptions sustained.

ZENAS LATHROP *vs.* JAMES COOK.

An action of *replevin* cannot be maintained by the owner of goods against an officer, who had returned an attachment thereof on a writ against a third person, but had not taken them into his possession, and where the plaintiff in replevin had the actual possession at the time of the attachment, and retained it until after the commencement of his suit; although the plaintiff had given a receipt to the officer, promising to return the goods to him on demand, but containing no admission that the property was not in himself.

Where the owner of goods, which were returned by an officer as attached upon a writ against a third person, retains them in his own possession, and gives to the officer a receipt, promising to deliver the goods to him on demand, but containing no admission that they were the property of such third person; proof that the goods were his property furnishes a valid defence to the owner, in an action against him on the receipt.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding.

The action was *replevin* for a pair of oxen. The defence was, that he did not take the oxen, and that they were not the property of the plaintiff. The property of the plaintiff in the oxen was fully proved, and that the defendant, as a deputy sheriff, had attached them, as the property of one *Harding*, on a writ against him in favor of one *Libby*. It was also proved, that the oxen were in the possession of the plaintiff, when they were attached by the defendant, and were never removed, and continued in the plaintiff's possession until and at the time this writ of replevin was brought. When the defendant returned the oxen, as attached, on the writ, the plaintiff gave a receipt for them of which a copy follows. "*Lincoln ss. May* 14, 1835. Received of *James Cook*, deputy sheriff, one yoke of oxen to the value of fifty dollars which I promise to deliver to said *Cook* on demand free of expense, the same being attached by him." The defendant made a demand upon the plaintiff for the oxen. The Judge instructed the jury, that the action could not be sustained, if they were satisfied, that the plaintiff was in possession of the property at the time of the attachment and to the time they were replevied; whereupon the plaintiff submitted to a nonsuit, with leave to file exceptions.

Harding, for the plaintiff, contended, that replevin will lie against an officer for chattels attached by him in favor of any person other

than the one as whose property they were attached. *Statute* of 1821, *ch.* 80, § 4; *ib. ch.* 60; 17 *Mass. R.* 606; 5 *Mass. R.* 280; *ib.* 304.

Where an officer attaches property, and sets a keeper over it, or takes a receipt for it, it is not necessary to remove it, and the attachment is good. 12 *Mass. R.* 497; 16 *Johns. R.* 288; 1 *Wend.* 210. The lien created by the attachment was not dissolved by taking the receipt, and the attachment is good, if the property is not removed. He cannot now say, that he has not attached and taken the oxen. 7 *Greenl.* 178; 10 *Pick.* 166; 10 *Mass. R.* 125. Trespass would lie here, and where trespass can be maintained for property attached replevin may be also. 6 *Halsted*, 370; 1 *Wend.* 109. The officer by the attachment deprived the plaintiff of the use of the oxen.

Bulfinch, for the defendant.

This is an action of *replevin* brought by the plaintiff to take the oxen out of his own hands. To maintain this action the defendant must have both taken and detained the property; and he has done neither. If the return of the officer is an estoppel against the defendant, the receipt is against the plaintiff. The case cited on the other side, 10 *Pick.* 166, shows that an action will not lie for the property by an owner for a mere return of it upon the writ. When the defendant attempts to take the oxen out of the hands of the plaintiff, it will be soon enough for him to interfere.

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

Shepley J. — The object of the writ of replevin is to redeliver goods and chattels, or to restore the possession of them, to the person who has the general or special property in them. The statute prescribing the forms of writs, *ch.* 63, *sec.* 8, requires the allegation to be made in the writ of replevin, not only that the defendant took the goods, but that he has "them unlawfully detained to this day." It appears from the bill of exceptions, that the defendant never had the actual possession of the goods alleged in the writ to have been detained by him, but that the plaintiff, at the time of the attachment and ever since, has had the possession of them. The plaintiff, having receipted for the goods, as attached by the defendant, might ordinarily be regarded as holding them as the servant of the

defendant, who would, in contemplation of law, have possession. But in this case the plaintiff has proved, that he was the owner of the property, and that the attachment was made wrongfully. Under such circumstances the defendant cannot be regarded as having the constructive possession by his wrongful act, unless he has the legal right to obtain possession. He can have no such legal right unless it arises out of the receipt of the plaintiff. The terms of the receipt are not in the usual form; and the plaintiff does not therein admit, that the property was in the person against whom the attachment issued, or that it was in any third person. He has not thereby disenabled himself to allege and prove it to have been his own property. To maintain this suit the defendant must be proved to have been in the actual or constructive possession of the goods.

In a suit upon the receipt, by the defendant against the plaintiff, he may prove, that the property receipted for was not the property of the debtor, and that it has been restored to the owner; and the defence will be good. 13 *Mass. R.* 224, *Larned* v. *Bryant et al.*

This Court has expressed its approbation of that case; and when speaking of the claims of the creditor, debtor and owner, upon the attaching officer, says, "and if the true owner should call on him for it, he might defend himself by proving, that such true owner had already the property in his possession, or had availed himself of its proceeds, or in some way appropriated it to his own use and benefit." 8 *Greenl.* 122, *Fisher* v. *Bartlett et al.* Such proof has been offered in this case; the plaintiff being the true owner, has always had the possession, which cannot be legally disturbed by the defendant.

The plaintiff failing to prove any such unlawful detention, either actual, or constructive, as the statute requires, cannot maintain this suit.

The exceptions are overruled, and the nonsuit is confirmed.

WALTER BLAKE, *Adm'r*, *vs.* NATHAN HILL.

Where the plaintiff, an inhabitant of the State, indorses his writ, enters his action, and dies, and his administrator comes in and prosecutes; no new indorser is required.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding.

Moody Munroe, the original plaintiff, an inhabitant of the State, entered this action at the *December* term, 1830, having himself indorsed the writ, and died in 1834. At the *April* term, 1836, the defendant moved, that a new indorser should be furnished. At the next term, *Walter Blake*, having been appointed administrator, appeared in that capacity to prosecute the suit. At the *April* term, 1837, the defendant renewed his motion for a new indorser, and it was overruled by the Court, to which the defendant excepted.

Harding, for the defendant, contended, that this case was within the equity of the *st. of* 1821, *c.* 59, § 8, and cited *Oysted* v. *Shed*, 8 *Mass. R.* 272.

E. Smith, for the defendant, was stopped by the Court.

BY THE COURT, *at the same term.*

The case presented, is not one in which a new indorser may be required.

PETER FULLER *et al. vs.* DAVID SPEAR.

It is competent for the legislative power, as well in navigable as in other waters, to appropriate and regulate fisheries, otherwise public.

The provisions of the *Massachusetts* special act of *March* 6, 1802, regulating the fishery within the town of *Warren*, extend over the navigable waters within that town.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding.

In this action, the plaintiffs demand the penalty provided by the *Massachusetts* special act of *March* 6, 1802, being entitled "An

act to regulate the shad and alewive fishery in the town of *Warren*, in the county of *Lincoln*." The defendant took that description of fish with a seine in the *St. George's* river within the limits of the town of *Warren*, and about fifty feet from the shore, and opposite to land of the defendant. If the provisions of the act extended to navigable waters within the town, the defendant had subjected himself to the penalty. The plaintiffs were duly chosen fish-wardens under the act. The Judge was of opinion, that the provisions of the act were in force, where the fish were taken; and by consent of the defendant, with leave to except, directed a default. The defendant filed exceptions to the ruling.

Cilley, for the defendant, contended, that by the true construction of the statute, its provisions extended only to waters within the town not navigable. The fish may be taken at any place before they reach fresh water. The general principles of the case, *Coolidge* v. *Williams*, 4 *Mass. R.* 140, support our defence.

E. Smith, for the plaintiffs, said that the law was well settled, that navigable waters belong to the public, and that the legislature may make such regulations in relation to such waters, as they choose. The letter of the statute includes navigable waters within the town, and the spirit of it certainly does, for otherwise the fish would never reach the fresh water. The very object of it was to preserve the fish within the town, and would be entirely useless on the construction contended for by the defendant.

The opinion of the Court was afterwards drawn up by

Weston C. J. — The only question raised is, whether the statute, upon which the plaintiffs rely, embraces navigable waters. It is undoubtedly competent for the legislative power, as well in these, as in other waters, to appropriate and regulate fisheries, otherwise public. The terms of the statute are broad enough to embrace these waters; and we perceive no sufficient ground for the limitation, for which the defendant contends.

Exceptions overruled.

JONATHAN EASTMAN *vs.* JAMES RICE.

Since the *statute* of 1834, *ch.* 137, concerning pounds, &c., no action can be maintained by the owner of a field against the owner of cattle rightfully on an adjoining close, and straying therefrom through an insufficient fence upon such field, unless the fence has been divided, and the owner of the cattle thereby, or in some way legally bound to keep the fence in repair; nor can the cattle be lawfully impounded for that cause.

The person taking and impounding cattle without justifiable cause is liable to an action therefor, although acting as the servant of another, unless the certificate required by the *stat.* of 1834, *ch.* 137, be left with the pound keeper.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding.

Replevin for cattle. The general issue was pleaded, and a brief statement filed, alleging that the defendant took the cattle by command of *D. F. Harding*, doing damage in his field, between which and the plaintiff's pasture there was no legal and sufficient fence, and put them in the pound for that cause. The taking of the cattle on the field of *Harding* was proved, and the impounding by defendant, and that the defendant acted by the order of *Harding*, but no notice was left by the defendant with the pound keeper, that he thus acted, or for what cause they were impounded. The land of the plaintiff and *Harding* adjoined, and the portion belonging to the plaintiff immediately adjoining *Harding* was woodland, and next to the woodland was the plaintiff's pasture; and there was no fence to obstruct the passage of the cattle from the pasture to the field. No division, or assignment of the fence was shown.

The defendant contended: 1. That there being no fence between the closes of the plaintiff and *Harding*, the plaintiff by law was bound to keep his cattle on his own close. 2. That if any action could be maintained, that it should be against *Harding*, and not the defendant. *Smith J.* ruled, that since the *st. of* 1834, *c.* 137, the common law on this subject, as applicable to this case, is not in force in this State, and that the fact, that there was no legal fence, furnished no justification for the impounding. And on the second point, he ruled, that unless the defendant produced evidence, that he left a certificate with the pound keeper, that he impounded the cattle as agent of *Harding*, or that *Harding* impounded them,

that the suit was rightly brought against him. The verdict was for the plaintiff, and the defendant filed exceptions.

Foote and *Harding*, for the defendant, were about arguing in favor of the first position taken by them at the Court of Common Pleas, when they were informed by the Court, that this question had been recently decided against them in the case, *Gooch* v. *Stephenson*, argued on the last circuit in *Washington*. (13 *Maine R.* 371.)

On the second point, they urged, that the owner of the land alone could claim damage for the injury done, and that the suit could not be maintained against the servant of the owner of the land, who directs the act. The *statute of* 1834, *c.* 137, expressly prohibits it.

J. S. Abbott, for the plaintiff, said, that the certificate required by the statute had not been left with the pound keeper. The plaintiff, therefore, must necessarily then bring his action against the person taking his cattle and delivering them into the custody of the pound keeper.

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

Weston C. J. — There was evidence to charge the defendant, as the impounder of the cattle. The act was done by him: and there was no written certificate, such as the statute requires, to fix the liability upon any other person.

The defendant has failed to make out any defence, under the statute of 1834; and by that statute, the right to impound at common law, in such a case as this, is expressly taken away.

Exceptions overruled.

STATE OF MAINE *vs.* MOSES CALL.

When a party in the Court of Common Pleas files exceptions to the opinion of the Judge, and at the same time moves for a new trial for alleged misconduct in the jury, the Judge has the right to require such party to make his election to insist on his exceptions, or rely on his motion; and his election to proceed on his *motion for a new trial* is a waiver of his right to except to any decision of the Judge made *during the trial of the action.*

Call was indicted and tried in the Court of Common Pleas for an offence. During the trial several objections were made by the counsel of *Call*, presenting questions of law, which were overruled by *Smith J.* presiding at the trial. The jury returned a verdict of guilty. The counsel of *Call* wished to file exceptions to the ruling and opinions of the Judge, and also to be heard on a motion for a new trial, because of the alleged misconduct of some of the jurors. The Judge ruled, that the accused might, if he saw fit, file exceptions, and upon their being allowed, all further proceedings would be stayed in the Court of Common Pleas, and it was left to his election by the Judge, to file exceptions, or rely upon the motion for a new trial. *Call* elected the latter, and the case was continued until the next term, when a hearing was had on the motion for a new trial. The Judge was of opinion, that the motion for a new trial was not sustained, and refused to grant it. Exceptions were then filed to the ruling of the Judge during the trial, and for refusing to grant a new trial.

All the questions were argued, by *Mellen* and *Farley*, for *Call*, and by *Clifford, Attorney General*, for the State.

THE COURT HELD, that the Judge of the Court of Common Pleas had the right to put the accused to his election, to file exceptions, or waive them and proceed on his motion for a new trial; and that his election of the latter course, was a waiver of his right to except to any ruling of the Judge, during the trial. No opinion, therefore, was given on the questions of law argued on the exceptions.

In relation to the motion for a new trial, it was remarked, by *Emery J.*, who delivered the opinion of the Court, that the proof of misconduct in jurors should be unequivocal, and fully satisfac-

tory, to induce the Court to set aside their verdict; that this was a motion addressed to the discretion of the Court; and that whether this Court could, or could not, grant a new trial on exceptions to the decision of the Judge of the Court of Common Pleas, denying such motion, in this case they perceive no cause to interfere.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF KENNEBEC, MAY TERM, 1837.

THOMAS S. FARRINGTON *vs.* WILLIAM T. BLISH *et als.*

If a complaint for flowing lands by the erection of mills, under *st. of* 1821, *c.* 45, do not allege, that the respondent had erected a watermill on his own land, or on the land of another with his consent, and that it became necessary to raise a suitable head of water to work such mill, whereby the land of the complainant was flowed, the complaint is bad in substance.

Such defects in the complaint are not cured by a verdict for the complainant.

Nothing is to be presumed by the verdict to have been proved, but what is expressly stated in the complaint, or what is necessarily implied from the facts which are stated.

The defects are not cured, if the respondent plead, that he had a right to flow the land by grant from the same grantor, paramount to that of the complainant, without payment of damages, or that he had a license therefor directly from the complainant.

COMPLAINT for flowing lands. The complaint alleges merely, that the complainant was seised of a tract of meadow land in *China*, in this county, which was described, adjoining on a certain stream of water, also described, and that the defendants have erected upon said stream of water a certain mill-dam, and for many years, to wit, ten, have kept up the same dam, whereby the land of the complainant has been overflowed with water for the space of four years, and thereby rendered of no value; and concludes with a prayer for assessment of damages. The respondents pleaded, by brief statement, that the dam mentioned did not cause the water to over-

flow the land of the complainant to subject him to any injury; that the complainant was not at the time seised of the land; that the respondents had a right to flow the land without the payment of damages; and that they had a license from the complainant to erect the dam, and flow back the water. In the Court of Common Pleas, the respondents pleaded a prior grant from the grantor of the complainant to flow the land without payment of damages, which was withdrawn in this Court. The verdict was for the complainant, and the respondents moved in arrest of judgment, and assigned several causes therefor.

Wells, for the respondents, said, that there were but two facts alleged in the complaint, to wit: that the complainant owned a tract of land on a stream, and that the respondents erected a dam across it. All besides is mere inference from these facts. He contended, that the complaint was bad in substance.

1. Because it is not alleged therein, that the respondents owned the land on which the dam was erected, or that they had any consent or authority from the owner to erect the same.

2. Because it is not alleged in the complaint, that the respondents, or any other person, or persons, had erected, owned, occupied, or possessed any watermill, or any other mill, or mills, whatever. *St. of* 1821, *c.* 45; *st. of* 1824, *c.* 261.

3. There is no allegation, that a head of water was necessary for the working of any mills. For a mere wanton injury by flowing back water, there is a remedy, but not by this process. He argued, that all these were essential to the maintenance of the process, and should have been alleged and proved. They are necessary to bring the complainant within the remedy pointed out by the statute.

4. Nor are these omissions cured by the pleadings or the verdict. The case, *Slack* v. *Lyon*, 9 *Pick.* 62, is directly in point, that the declaration is fatally defective. In that case, all the material facts omitted in the complaint, were admitted and alleged in the pleas. Here, no one fact omitted, is admitted or alleged.

The total omission of any fact necessary to be stated, is not cured by the verdict. Nothing, except what is stated, is to be presumed from the verdict, unless necessarily implied from what is stated. *Bartlett* v. *Crozier*, 17 *Johns. R.* 250; *Williams* v. *H. & Q.*

B. & T. Corp., 4 *Pick.* 341; *Soper* v. *Har. Coll.*, 1 *Pick.* 177; *Smith* v. *Moore*, 6 *Greenl.* 274; *Hall's case*, 5 *Greenl.* 409; *Little* v. *Thompson*, 2 *Greenl.* 228.

F. Allen & Boutelle, for the complainant, contended, that the defects in the complaint were cured by the pleadings, as much as in the case *Slack* v. *Lyon*. There is a material difference between that case and this. There the allegation was only that a *dam* had been erected; but here it is that a *mill-dam* had been erected, implying that there was, or was to be a mill. It is not necessary, that all the circumstances should be stated in the declaration, even on demurrer, and the omission of all of them is cured by the verdict. If the respondents have erected a mill-dam across the stream, they cannot now come in and say, that it was a mere trespass, and that there was no mill there. It is the dam which does the mischief and not the mill. The jury have found that the complainant's land was flowed by a mill-dam placed across the stream by the defendants. Every thing in addition to the allegations in the complaint, necessary to the support of the action, will be presumed from the verdict, to have been proved. This is a remedial statute, and the cases cited for the respondents are all on penal statutes. They cited *Fuller* v. *Holden*, 4 *Mass. R.* 498; *Richardson* v. *Eastman*, 12 *Mass. R.* 505; *Ward* v. *Bartholomew*, 6 *Pick.* 409; *Pangburn* v. *Ramsey*, 11 *Johns. R.* 141; *Warren* v. *Litchfield*, 7 *Greenl.* 63; 2 *Tidd's Pr.* 824; 2 *Chitty's Pl.* 228, 230; *Axtell* v. *Coombs*, 4 *Greenl.* 322.

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

Weston C. J. — The case under consideration, is a complaint provided for by the statute, for the support and regulation of mills. *Statute* of 1821, *c.* 45. It is a process specially given, which should contain averments of all the facts, made essential by the statute, to enable the complainant to avail himself of the remedy prescribed.

The statute makes it lawful for any person who has erected, or who may erect any watermill on his own land, or on the land of another, by the consent of the owner, for the working of which a suitable head of water is necessary, to continue such head, subject

to certain conditions, notwithstanding the land of others may be flowed thereby. But any person sustaining damage, by reason of his lands being thus flowed, may make complaint thereof to the Common Pleas, of which the owner or occupant of the mill is to be served with an attested copy. And thereupon such proceedings are to be had, as the statute prescribes.

To bring the case therefore within the statute, it was necessary for the complainant to set forth, that the respondents had erected a watermill on their own land, or on the land of another with his own consent, and that it became necessary to raise a suitable head of water to work it, whereby the land of the complainant was flowed, with an averment of the damages he had sustained thereupon. The complaint before us contains no averment, that the respondents had erected, or caused to be erected, on their own land, or on the land of any other person by his consent, any watermill whatever; or that they had any concern or interest in any such mill, or that it was necessary to raise any head of water, for the working of any mill.

The complaint then is clearly defective, in omitting averments essential to its prosecution. The respondents, in their pleadings in the Common Pleas, set up a right to flow in virtue of a grant from the proprietors of the *Kennebec Purchase*, who were the owners at the time, of the land flowed, as well as of the land where the dam was erected, to *John Getchell*, his heirs and assigns, under whom they claim. These pleadings were by permission withdrawn in the Supreme Court, but if they had remained, they do not supply the omissions in the complaint.

But it is insisted, that the defects in the complaint are cured by the verdict. It is true, that the Court are cautious how they arrest judgment after verdict. They will not intend any thing to overturn it, and will overrule objections, which they would have listened to on demurrer. A verdict will cure a title defectively set forth; but will not cure a defective title. *English* v. *Burnell*, 2 *Wilson*, 258; *Weston* v. *Mann*, 3 *Burrow*, 1725. Where a plaintiff has stated his ground of action defectively or inaccurately, all circumstances necessary to complete what is thus imperfectly stated, are presumed to have been proved, after verdict. But no such presumption can be made, where the plaintiff has omitted to state a

cause of action. *Rushton* v. *Aspinall*, *Douglas*, 679. In *Bull* v. *Steward*, 1 *Wilson*, 255, the defendant being a bailiff, was charged with having suffered the escape of *Alice Rawlin*, who was, as the declaration stated, indebted to the plaintiff. A motion was, after verdict, made in arrest of judgment, because the declaration did not set forth, how she was indebted; but the motion was overruled; the Court saying that, being after verdict, they would suppose every thing necessary, to have been proved. But this must not be taken too broadly; otherwise, it might be difficult in any case to support a writ of error after verdict. How she was indebted, was a circumstance, which must have been proved in showing her indebted. It would have been otherwise, if the averment that she was indebted, had been omitted.

The limitation of the rule, was well stated by Mr. Justice *Buller*, in *Spieres* v. *Parker*, 1 *T. R.* 141, "that nothing was to be presumed after verdict, but what was expressly stated in the declaration, or what was necessarily implied from the facts which were stated." And in *Bartlet* v. *Crozier*, 17 *Johns. R.* 139, Chancellor *Kent*, whose opinion was unanimously sustained by the Court of Errors, says, "the Court are never to presume a cause of action, even after verdict, when none appears." The modern law upon this subject, is stated in a learned note to *Spencer* v. *Overton*, 1 *Day*, 186, said to have been drawn by Judge *Reeve*, which is cited with approbation in *Little* v. *Thompson*, 2 *Greenl.* 228. It is there said, "the idea which has been entertained by respectable lawyers, that after verdict, the Court will presume facts, not stated, necessary to support legal inferences, appears to be unfounded." And the same general doctrine is sustained by the Court in *Williams* v. *Hingham, &c. Turnpike*, 4 *Pick.* 341.

In *Kingsley* v. *Bill et al.*, 9 *Mass. R.* 198, a promise to perform an award, although not averred, was held to be implied from the allegation, that the parties had submitted to arbitration. But the want of an allegation, that the award was published, was deemed a fatal defect, after verdict.

Richards v. *Eastman*, 12 *Mass. R.* 505, was trespass for taking and carrying away mahogany tables, chairs and bureau. After verdict, the Court refused to arrest the judgment, because the number must have been proved at the trial. This would result necessarily,

from the proof of the averment made. And in *Ward* v. *Bartholomew*, 6 *Pick.* 409, seisin in the demandant, which was not averred, was implied in the allegation, that he was disseised by the tenant, which was directly found by the verdict. In *Warren* v. *Litchfield*, 7 *Greenl.* 63, the damages found by the jury were referred to the averment in the declaration, which was unexceptionable, upon the principle, that after verdict, every legal intendment is to be admitted in its support. In *Pangburn* v. *Ramsay*, 11 *Johns. R.* 141, the plaintiff averred, that by reason of a false return made by the defendant, he was unable upon *certiorari*, to procure a reversal of the judgment. This was held after verdict, equivalent to an averment, that the judgment was affirmed.

It has been urged that all, which the statute has made essential, is implied in the term mill-dam, which is to be found in the complaint; and we are referred to the ninth and tenth sections of the statute, where that term is used. The term is there first introduced, and it must be understood that it is so, with reference to the previous sections, which relate to a watermill, with which a dam to raise a suitable head of water, is necessarily connected. It is true, a mill-dam supposes a mill, actually built or intended to be. But the respondents may have erected the dam, and other persons the mill. The erection of a water mill, for the working of which a suitable head of water is necessary, is made the foundation of the complaint. And if the respondents have erected a mill-dam, we cannot regard it as implied, that they have also erected a mill. The head of water depends upon what the mill requires, upon which alone its continuance is lawful; subject to the special remedy for the owner of the land flowed, provided by statute, which is to be pursued against the owner or occupant of the mill.

The opinion of the Court is, that the complaint is fatally defective, as it stands.

FRANCIS NORRIS *vs.* THOMAS S. BRIDGHAM.

Where goods were attached by an officer on *mesne* process, who had ceased to be in office when judgment was rendered in the suit, and no demand was made upon him for the property attached, within thirty days after judgment; the officer is thereby discharged from any liability to the judgment creditor by reason of such attachment.

Where goods attached by an officer upon a writ are delivered to a keeper upon his written promise to redeliver the same upon demand, and by him are permitted to remain in the possession of the debtor; and the officer afterwards, and before judgment, makes a demand of the goods upon the receipter, and on his refusal to return them brings a suit against him, and during the pendency of this suit judgment is rendered in the original action, and no demand of the goods is made upon the attaching officer, until after thirty days after the rendition of the judgment; the attaching officer is no longer liable, and can recover no more than nominal damages in his action upon the receipt.

ASSUMPSIT on a receipt. The plaintiff, as a deputy sheriff, had attached divers articles, as the property of one *Leadbetter*, and took the receipt therefor, signed by the defendant, promising to deliver the same to the plaintiff on demand. Judgment was rendered in the suit against *Leadbetter*, *June* term of the Common Pleas, 1834, for a sum greater than the value of the property attached. The plaintiff made a demand of the property of the defendant, *October* 10, 1833, and immediately commenced this suit. Within thirty days after judgment an execution was taken out upon the judgment, and delivered to a coroner of the county, as the office of sheriff was then vacant. The coroner had notice of the attachment, and though not having the receipt, within thirty days demanded the property of the defendant, but made no demand therefor of the plaintiff within the thirty days. When the attachment was made and the receipt given, the property was permitted by the receipter to go back into the possession of the debtor, and at the time of the judgment part of it had been consumed by the debtor, part of it remained, and part of it had been destroyed without any fault of the debtor.

It was contended by the counsel for the defendant, that he was answerable to the plaintiff only so far, as he was liable to the attaching creditor, and that no demand having been made upon the plaintiff, his liability to the creditor had ceased. *Weston C. J.*, presiding at the trial, overruled the objection, that the damages

might be assessed. The verdict for the plaintiff was to be amended, or set aside, if the want of such demand is fatal to the action, and a nonsuit entered.

D. Williams and *May*, for the defendant.

As no demand was made upon the plaintiff within the thirty days, he is not liable to the creditor. 9 *Mass. R.* 258; 11 *Mass. R.* 211; *ib.* 317; 14 *Mass. R.* 196; 16 *Mass. R.* 465; *Story on Bailments*, § 132.

As the property was left in the hands of the debtor, the owner of it, the officer is not liable over to him. 11 *Mass. R.* 219; 16 *Mass. R.* 5; 14 *Mass. R.* 196; 8 *Greenl.* 130; 12 *Pick.* 202; 9 *Mass. R.* 360.

But if the defendant could have been rendered liable to the plaintiff by a proper demand on him by a coroner, yet this demand was unavailing, because the coroner did not have the receipt to deliver up, if the property was delivered by the receipter. 7 *Mass. R.* 483.

But if the action can be maintained, the damages should be but nominal. 8 *Greenl.* 122; 12 *Mass. R.* 163; 1 *Fairf.* 20; *ib.* 397.

Wells and *S. W. Robinson*, for the plaintiff, contended, that no demand for the property within thirty days after judgment, by the coroner upon the plaintiff, was necessary. The plaintiff had already made his demand, and had brought this suit before judgment was rendered. The attachment was not released by any act of the creditor, for he put his execution into the hands of an officer within thirty days after judgment. Nor by any omission of the coroner, for he made a demand of the property of the defendant, who was bound to produce it, either to him or to the plaintiff. No demand is necessary, when the property cannot be produced. The demand would be wholly useless, whether made upon the receipter, or upon the attaching officer, and therefore the law does not require it. *Jewett* v. *Torrey*, 11 *Mass. R.* 219; *Whittier* v. *Smith*, *ib.* 211; *White* v. *Bagley*, 7 *Pick.* 288. The plaintiff, having attached the property, is accountable for it; and the defendant, having failed to comply with his written promise to deliver the property to the plaintiff, is liable to him.

The amount to be recovered, should be the value of the property at the time judgment was rendered. *Robinson* v. *Mansfield*, 13 *Pick.* 139; *Johns* v. *Church*, 12 *Pick.* 557; *Wakefield* v. *Stedman*, *ib.* 562; *Chapman* v. *Searle*, 3 *Pick.* 38. As there was a good cause of action, when the suit was commenced, and the plaintiff has done nothing to impair his rights, we are entitled to at least nominal damages.

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

SHEPLEY J. — It is provided by statute, that goods attached on mesne process shall be held as security for the debt for thirty days after judgment; and if the creditor shall not take them within the thirty days, the attachment shall be void. *Statute* of 1821, *ch.* 60, *sec.* 1. When the officer takes a receipter for the property, such receipter is regarded as his servant; and the goods remaining in the possession of the receipter may be again attached by the same sheriff on a subsequent process; but where the goods are permitted to remain in the possession of the debtor, the officer by himself or his servant is not regarded as in possession, so that he can again attach the same goods without seising them anew. 9 *Mass. R.* 258, *Knapp* v. *Sprague*. In such case the debtor is rightfully in possession by consent, and his rights cannot be disturbed, unless the persons claiming can exhibit a title to reclaim the property. If the officer or his servant would call upon him, he must show a judgment recovered, and that an execution has issued thereon, and that a demand has been made within thirty days after judgment, unless some agreement shall otherwise specially provide.

In this case judgment was recovered against the debtor in this Court, *June* term, 1834. The officer had taken the defendant's accountable receipt for the property attached, to be delivered *on demand*; and before the tenth day of *October*, 1833, the plaintiff had demanded the property, and on that day instituted this suit. He then had a right to repossess himself of the property according to the terms of the receipt. 11 *Mass. R.* 211, *Whittier* v. *Smith et als.*; 3 *Fairf.* 328, *Carr* v. *Farley*. The suit having been rightly brought, the plaintiff is entitled to maintain it.

Since that time, judgment having been recovered, and execution sued out, the creditor has neglected for more than thirty days to have any demand made of the officer, or to pursue such course as to render the officer responsible to him for the property. The officer is at liberty to surrender the receipt and permit the debtor to retain the property, and no suit could be maintained against him for so doing. 8 *Greenl.* 130, *Bradbury* v. *Taylor*; 11 *Mass. R.* 317, *Lyman* v. *Lyman*; 12 *Pick.* 202, *Howard et al.* v. *Smith*; 3 *Fairf.* 241, *Wheeler et al.* v. *Fish.* The officer being released from his liability to the creditor, the defendant may give that in evidence in mitigation of damages, where the debtor has the goods in his possession, as the officer cannot have occasion to recover them for the purpose of returning them to him. *Whittier* v. *Smith et als.* The plaintiff being responsible neither to the debtor nor creditor, his damages can be only nominal. 16 *Mass. R.* 5, *Cooper* v. *Mowry et als.*

The demand made of the defendant by the coroner could not prevent him from setting up this defence, as he was not responsible to him. He could not have discharged his contract with the plaintiff by a delivery to the coroner, as the coroner does not appear to have acted as the agent of the plaintiff, or by his authority, or to have professed to do so. The creditor having no right to control the receipt, could communicate no authority to the coroner; who can have no claim against the defendant by such demand. 3 *Greenl.* 357, *Clark* v. *Clough.* The act was wholly inoperative, and does not change the relation of the parties.

The verdict is set aside, and a new trial granted.

Lucy Shaw *vs.* Henry Russ.

As the law was when *Maine* became an independent State, a *feme covert* could not bar her right of dower by any release, made during the *coverture*, in which her husband did not join.

Lucy Shaw demanded dower in a tract of land of which her husband was seised during the coverture, and which he conveyed to one *Hibbard*, under whom the tenant claims, *Nov.* 16, 1816.

She did not join in this conveyance; but *Jan.* 9, 1817, she gave a deed of release in which her husband did not join, "in consideration of one hundred and fifty dollars paid her husband," to said *Hibbard*, of her claim to dower in the same premises. The parties agreed, that if the evidence was admissible, the tenant could prove, that when the husband of the demandant conveyed to *Hibbard*, he kept back $150 of the purchase money because the demandant would not release her dower, and paid it on the delivery of her release. If the demandant was dowable, commissioners were to be appointed to assign the dower.

May, for the demandant, contended, that the deed of a married woman was entirely void; and that a release of her right of dower in land previously conveyed by him, was no exception to the rule. The husband and wife must join in the conveyance to bar her claim to dower. *Powell* v. *Monson & Brim. M. Co.*, 3 *Mason*, 347; *Jackson on Real Actions*, 326; 2 *Kent's Com.* 152; *Stinson* v. *Sumner*, 9 *Mass. R.* 143; *Andrews* v. *Hooper*, 13 *Mass. R.* 472. The cases of *Fowler* v. *Shearer*, 7 *Mass. R.* 14, and *Rowe* v. *Hamilton*, 3 *Greenl.* 63, must be understood with the limitation, that if the wife convey by separate deed, the husband must join. The consideration, too, must be the same. In this case it is different. So says the deed, and the tenant is estopped to deny it. *Steele* v. *Adams*, 1 *Greenl.* 1; *Ex parte Thomes*, 3 *Greenl.* 50. The mere parol assent of the husband to the deed of his wife, will not make it good. *Osgood* v. *Breed*, 12 *Mass. R.* 525. The release in this case bears date before the separation, and about the same time, as that mentioned in 3 *Mason*, 347, and must be governed by the laws of *Massachusetts*. *Blanchard* v. *Russell*, 13 *Mass. R.* 1; *King* v. *Dedham Bank*, 15 *Mass. R.* 447; *Foster* v. *Essex Bank*, 16 *Mass. R.* 245; 2 *Greenl.* 275. These cases show, that if our statute does give the power contended for by the tenant, it can make no difference in this case.

H. Belcher, for the tenant, contended, that the wife can release her claim to dower by a separate deed, referring to her husband's, without his signing with her. This has been considered the law ever since 1810, and such has been the practice. In this case, the deed is to the grantee of the demandant's husband, and refers to

that deed, and is part of the same contract. The husband had already by his deed of warranty given his assent that his wife should complete the title. The case of *Fowler* v. *Shearer*, 7 *Mass. R.* 14, before the separation, and *Rowe* v. *Hamilton*, 3 *Greenl.* 63, since, are conclusive in favor of the defendant.

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

WESTON C. J. — The instrument, upon which the defendant relies, to bar the demandant of her dower, was executed in 1817; whether therefore it is to have this effect or not, will depend upon the laws of *Massachusetts* at that time.

By an ordinance of the colonial government in 1641, *Anc. Charters*, 99, a widow was to be endowed, who had not been provided for by way of jointure, notwithstanding any thing done or suffered by the husband, otherwise than by some act or consent of the wife, signified by writing under her hand, and acknowledged before some magistrate, or others authorized thereunto. Whether this was done by joining with the husband, or whether it might be done subsequently, by a separate instrument, does not appear.

The late Chief Justice *Parsons*, in the case of *Fowler* v. *Shearer*, 7 *Mass. R.* 14, says, that this ordinance having expired with the first charter, it was provided by the provincial legislature, by *statute*, 9 *Will.* 3, *ch.* 7, that the widow should have her dower in land sold or mortgaged, who had not joined with her husband in such sale or mortgage. And by the statute, directing the mode of transferring real estates by deed, *statute* of 1783, *ch.* 37, dower is saved to the widow, unless she had joined with her husband in the conveyance. In the case before cited, the Chief Justice states, "that the usual mode by which a wife is joined, is by introducing her in the close of the deed, as expressly relinquishing all claim to dower in the premises sold, and by her executing the deed with her husband. And it has been sometimes done by her separate deed, subsequent to her husband's sale, in which the sale is recited as a consideration, on which she relinquishes her claim to dower. The deed of a *feme covert*, thus executed to bar her claim to dower, is not voidable, but will bind her as to such claim."

He points out the modes, in which the deed of the wife, joining with her husband, may be effectual for the relinquishment of dower.

This he says may be done, by uniting in the original conveyance, or subsequently by her separate deed. It may deserve consideration, whether by her separate deed, he is to be understood to mean any thing more, than an instrument separate and distinct from the original conveyance, without repeating, that she thus joined with her husband in executing such separate deed; as he was professedly stating in what manner the joining with her husband, authorized by statute, was executed. The *dictum*, in the connection in which it stands, is not altogether free from obscurity.

But if by her separate deed, he means an instrument, in which her husband does not join, which, but for what precedes, may be the more obvious construction, it does not appear to us to be warranted by the provincial statute, to which he adverts, or by that of the Commonwealth, which is substantially to the same effect. The deed of a *feme covert* is, by the common law, absolutely void. Her deed, relinquishing her dower, when she joins with her husband, is an exception authorized by statute. Another exception, established by long uniform usage is, where she unites with her husband, in conveying by deed any interest whatever, which she may have in real estate. And the validity of this usage, has been repeatedly recognized by direct judicial decisions. But that a *feme covert* may relinquish her right of dower, by her separate deed, has never been directly decided in *Massachusetts* or in this State. As to a usage to this effect, we are not aware that an instance has been presented to the consideration of the Court there; and this is the first attempt of the kind, which has come to our knowledge here. The ground upon which it is entitled to be recognized as an exception to the well settled principle of the common law, is in our judgment altogether too feeble to be sustained. In *Stearns* v. *Swift*, 8 *Pick.* 532, where the case of *Fowler* v. *Shearer*, is adverted to, the husband joined with the wife in a separate deed, relinquishing her dower.

In *Powell et ux.* v. *The Monson & Brimfield Man. Co.*, 3 *Mason*, 347, *Story J.* repudiates the dictum of Chief Justice *Parsons*, and insists, that if it is to be regarded as law, it is to be adopted with the limitation therein expressed, namely, that in the separate deed of the *feme covert*, the sale made by her husband, must be recited as a consideration, on which she relinquishes her claim to

dower. The point decided in *Rowe* v. *Hamilton*, 3 *Greenl.* 63, was, that a *feme covert* cannot bar her right of dower, by any release made to the husband during the coverture. And *Mellen C. J.* understands, that from the opinion in *Fowler* v. *Shearer*, she may release her dower, by her separate deed to the grantee of her husband, when made "in consideration of the husband's conveyance." The instrument, upon which the tenant relies, has no such consideration, but one altogether distinct and independent; so that it is not sustained by the case of *Fowler* v. *Shearer*.

In our opinion, the instrument purporting to be the deed of the demandant to the tenant, while she was a *feme covert*, is void at law; and that she is, notwithstanding, dowable in the demanded premises. How far, since the date of that instrument, the law has been changed by our own statute, we are not called upon to determine.

PHILANDER SOULE *et al. vs.* GREENLIEF WHITE *et al. Executors.*

Where goods, which had been pledged, were seised and sold on execution, prior to the *st.* of 1835, *c.* 188, "concerning mortgages and pledges of personal property," and trespass was brought for the goods by the pledgee against the officer; *it was held*, that the measure of damages was the value of the property, and not the amount for which the goods were pledged.

TRESPASS for certain chattels taken by *Randall Fish*, a deputy of the testator, late sheriff of the county. *Fish* took the chattels on an execution against one *Cowan*. The title set up by the plaintiffs was an instrument in writing from *Cowan*, whereby he pledged to them the property in controversy, to secure to them certain claims against him, and to indemnify them against certain liabilities, which they had assumed on his account. The fairness of the transaction was impeached, but the jury sustained the title of the plaintiffs. The counsel for the defendants contended, that, as they defended in behalf of an execution creditor of *Cowan*, the plaintiffs were entitled to no greater sum in damages, than was

necessary to secure and indemnify them. The verdict was for the value of the chattels, and was to be reduced by the sum of $235,83, if the Court should be of opinion, that the plaintiffs' claim ought to be limited, as the defendants contended it should be.

Bradbury, for the defendants, argued, that as the defendants were in the place of an execution creditor of *Cowan*, and the property had gone to pay his debt, that the plaintiffs were not liable to *Cowan*, and therefore could recover only such sum, as would indemnify them. The property was liable to be taken as against *Cowan*, and against every one but the plaintiffs. He cited *Coggs* v. *Barnard*, 2 *Ld. Raymond*, 912; *Cowing* v. *Snow*, 11 *Mass. R.* 415; *Boyden* v. *Moore*, 11 *Pick.* 362; *Daggett* v. *Adams*, 1 *Greenl.* 198; *Prescott* v. *Wright*, 6 *Mass. R.* 20; *Starr* v. *Jackson*, 11 *Mass. R.* 519; *Rich* v. *Bell*, 16 *Mass. R.* 294; *Wallis* v. *Truesdell*, 6 *Pick.* 455; *Weld* v. *Bartlett*, 10 *Mass. R.* 470.

Boutelle, for the plaintiffs, urged, that the right of property was in the plaintiffs, and that there was no attachable interest in the property, as *Cowan's*. The deputy, therefore, was a mere trespasser, and took the property of the plaintiffs wrongfully. The measure of damage is the value of the property. *Holbrook* v. *Baker*, 5 *Greenl.* 309.

The plaintiffs are liable over to *Cowan* for any balance, and this verdict, should the reduction be made, would be no bar to a suit by him against the plaintiffs. *Badlam* v. *Tucker*, 1 *Pick.* 284. The *statute* of 1835, *c.* 188, gives the right to attach the property thus situated, which did not before exist.

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

Emery J. — A verdict having been rendered in this case for the value of the property taken by *Randall Fish*, a deputy of the defendant's testator, late sheriff of this county, the question now is, whether the plaintiff shall be restricted in his damages to the value of the amount of his claim against the debtor, because the plaintiff is a mortgagee of the property, and his debt was unpaid.

It has been argued, certainly with strength, that the damages to the plaintiff ought to be only commensurate with the injury to which he has been subjected, that nothing more could be expected from him on the part of the mortgagor, than ordinary care for re-

storing the goods, and that it was not the mortgagee's fault, that the goods were attached for the mortgagor's debt. And the mortgagor ought not to complain, inasmuch as the proceeds of the sale of the goods have gone in payment of the mortgagor's debts. Cases, too, have been cited wherein both in *trespass* and in case, officers have been permitted to show in mitigation of damages an appropriation of the proceeds of property which they have improperly taken, to the payment of the plaintiff's debts.

Thus in 11 *Mass. R.* 415, *Cowing* v. *Snow*, where a barrel of flour had been put in the defendant's hands by a master of a vessel to whom freight and some advances were due, with directions not to deliver the flour till the sum due was paid, the measure of damages was holden to be the $1,85 which was due, though the value of the barrel of flour was a much larger sum.

So in 6 *Mass. R.* 20, *Prescott* v. *Wright*, where the officer having seised goods in execution after the proper time of returning the precept, and proceeding to sell them, paid the debt on the execution, he was permitted to shew this in mitigation of damages.

In *Holt's* argument in *Coggs* v. *Barnard*, 2 *Ld. Raym.* 912, cited, it is asserted, that if a creditor takes a pawn, he is bound to restore it upon payment of the debt. Yet it is sufficient if the pawnee use true diligence, and he will be indemnified in so doing, and notwithstanding the loss, yet he shall resort to the pawner for his debt. In *Southcote's* case, the reason given is, because the pawnee has a special property in the pawn. But *Holt* says, the true reason is, that the law requires nothing extraordinary of the pawnee, only that he shall use an ordinary care for restoring the goods. But if the money for which the goods were pawned be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrongdoer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined. And a man that keeps goods by wrong, must be answerable for them at all events, for the detaining of them by him is the reason of the loss.

In 1 *Pick.* 389, *Badlam, Ex'r,* v. *Tucker et al.* it was decided, that chattels pawned or mortgaged are not liable to attachment in an action against the mortgagor or pawner, that the mortgagee or

pawnee is not compellable to sell when no agreement has been made that he should sell, and that he is not liable to the trustee process. And in *Holbrook* v. *Baker*, 5 *Greenl.* 309, the authority of *Badlam* v. *Tucker et al.* is recognized by this Court, which is made to say, they "know no law which authorizes a creditor to attach or seise a right to redeem a chattel." The statute which has since been passed, allowing such attachment on tender, we apprehend does not afford a good reason for altering the verdict in this case.

There must be judgment on the verdict.

ARZA HAYWARD *vs.* RICHARD SEDGLEY, *et al.*

A tenant at will, in actual possession of the land, may maintain an action of trespass, *quare clausum*, against a stranger to the title, for cutting and carrying away trees.

THE action, was *trespass quare clausum*, for cutting down and carrying away a quantity of wood standing thereon; and came before the Court on an agreed statement of facts. On *December* 24, 1832, the plaintiff acquired a title by deed to the premises, where the trees were cut, and has occupied and improved the same ever since. In *January*, 1833, the plaintiff, by an absolute deed, conveyed the same premises to *James Bolton*. If parol testimony be admissible for that purpose, the plaintiff can prove by *Bolton*, that the conveyance to him, though absolute in its terms, was intended only as a mortgage to secure a sum of money, which had been repaid after the commencement of the suit, though no conveyance back had taken place. The defendants cut and carried away the trees after the conveyance to *Bolton*, but claimed no title under him. A default was to be entered, if the plaintiff was entitled to recover, and if not, a nonsuit.

D. Williams, for the plaintiff, insisted, that the plaintiff, as tenant at will in the actual occupation, can maintain this action against mere strangers, as the defendants are. *Starr* v. *Jackson*, 11 *Mass. R.* 519.

Parol evidence is admissible to show, that both the plaintiff and *Bolton* admit the conveyance to be a mortgage. The defendant cannot set up, that a third person owns the land, against his express admission. *Smith* v. *Tilton*, 1 *Fairf.* 350; *Gardiner Man. Co.* v. *Heald*, 5 *Greenl.* 381.

Vose, contended, that as the injury was done to the freehold, a mere tenant at will, such as the plaintiff is, though in possession, cannot maintain an action of trespass for it. *Starr* v. *Jackson*, 11 *Mass. R.* 519, cited for the plaintiff; *Com. Dig. Trespass, B.* 2; 2 *Roll. Ab.* 551, § 47.

The authorities are uniform, that parol evidence cannot be admitted to change a deed, on its face absolute, into a mortgage. *Mease* v. *Mease*, 1 *Cowper*, 47; *Meres* v. *Ansell*, 3 *Wilson*, 275; *Flint* v. *Sheldon*, 13 *Mass. R.* 443; *Stackpole* v. *Arnold*, 11 *Mass. R.* 27; *Hale* v. *Jewell*, 7 *Greenl.* 435.

The opinion of the Court, after a continuance, was prepared by

SHEPLEY J. — The plaintiff, at the time the trespass was committed, was in the actual possession of the premises, although he had before that time conveyed the same to a third person, who has never entered into possession.

Possession is sufficient to maintain this action. And any possession is a legal possession against a wrongdoer. 1 *East*, 244, *Graham* v. *Peat.* The objection in this case is, that the injury is to the freehold, and that the owner only can maintain the action for such an injury. But the cases cited and relied upon, tend only to shew, that the owner may have his action for his injury, although there be a tenant in possession; not that the tenant may not also have his action for his injury. The case in the *Year Book*, 19 *Hen.* 6, 45, decides, that a tenant at will may have an action for injury to the soil, and the landlord also for his injury. The same rule applies to the cutting of trees. If trees are cut upon the land of tenant at will, he may have an action of trespass. *Roll. Ab. Trespass, n.* 4; *Com. Dig. Trespass, B,* 2. The principle is quite explicitly stated in *note* 2, *Co. Lit.* 57, *a.* "If a stranger cuts trees, the tenant at will shall have an action, as shall also the lessor, regard being had to their several losses."

Whether the owner can in this case, maintain an action of tres-

pass, it is not now necessary to decide. It has been decided in *Massachusetts*, that he can, 11 *Mass. R.* 519, *Starr* v. *Jackson;* and in *New York* that he cannot. 1 *Johns. R.* 511, *Campbell* v. *Arnold.*

No question is raised in the case respecting the amount of damages, and the plaintiff being entitled to maintain the action, the defendants, according to the agreement, are to be defaulted.

THOMAS FILLEBROWN *vs.* SOLOMON R. WEBBER *et al.*

Mem.—Weston C. J., being a relative of one of the parties, did not sit in the hearing and determination of the case.

Where in an action of *trespass*, *qu. cl.*, brought before a Justice of the Peace, the defendant pleads only the general issue, and the action is carried by appeal to the Court of Common Pleas, he cannot there file a brief statement of soil and freehold, or give any evidence, which may bring the title to real estate in question.

And if evidence of title be permitted to be given, and the instructions in relation thereto are erroneous, they are irrelative to the issue, and furnish no cause for a new trial.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding.

This was an action of *trespass* for breaking and entering the plaintiff's close in *Hallowell.* The action was originally brought before the Municipal Court of *Hallowell*, having the same jurisdiction in civil actions, as a Justice of the Peace. The general issue only, not guilty, was pleaded. The Municipal Court rendered judgment in favor of the plaintiffs, from which judgment the defendants appealed. At the trial of the action in the Court of Common Pleas, the defendants offered to file a brief statement, asserting title in one of the defendants, and annex the same to the plea. The Judge ruled, that as the brief statement was not filed in the Court below, that it could not then be filed in the Court of Common Pleas. The defendants then offered evidence, which, they contended, showed title in one of the defendants, but which

the Judge ruled was not sufficient in law for that purpose. The defendants excepted to the rulings of the Court, in several particulars; but the opinion of the Court renders it unnecessary to state any but the first.

The case was argued in writing.

Wells, for the defendants, contended, that the brief statement ought to have been received, and cited *st. of* 1831, *c.* 514; *Hodgdon* v. *Foster*, 9 *Greenl.* 113.

Emmons, for the plaintiff, contended, that the common law right to give soil and freehold under the general issue, was taken away by the *statute of* 1821, *c.* 76, § 11, a transcript of the statute of *Massachusetts* on that subject, in actions originally commenced before a Justice of the Peace. *Lynch* v. *Rosseter*, 6 *Pick.* 419; *Pitman* v. *Flint*, 10 *Pick.* 504.

The *st. of* 1831, *c.* 514, merely substitutes the brief statement for a special plea.

The opinion of the Court was drawn up by

Shepley J. — The first question presented in this bill of exceptions is, whether the Judge presiding at the trial, improperly refused to allow the defendants to file a brief statement, alleging title in one of them. The *statute* of 1821, prescribing the power of Justices of the Peace, *c.* 76, § 11, provides, that when any action of trespass shall be brought before any Justice of the Peace, and the defendant shall plead the general issue, he shall not be allowed to offer any evidence that may bring the title of real estate in question. In the case of *Hodgdon* v. *Foster*, 9 *Greenl.* 113, it was decided, that so much of the statute of 1821, as requires a special plea of title, was repealed by the statute of 1831, *ch.* 514, abolishing special pleading; and that the jurisdiction of the justice would be superseded by filing a plea of the general issue accompanied by a brief statement, in accordance with the provisions of the statute of 1831, claiming title. Such brief statement having the effect of a special plea of title, the absence of it leaves the case before the magistrate subject to the operation of the clause recited from the eleventh section of the statute of 1821; as it was manifestly the intention of the legislature, that the magistrates should not decide upon the title to real estate. The design of the statute abolishing

special pleading, was not to alter the rights of parties, but to act upon the forms of proceeding by which those rights were to be presented for decision. In this case, there being no claim of title put in before the magistrate, he heard the case upon the merits, and the appeal only carried up the case as it was presented before him. To have allowed the question of title to have been made above, would have been to substitute a new controversy after the appeal; and there can be no doubt, that the brief statement, proposing to do it, was properly rejected. It appears from the bill of exceptions, that although the brief statement was rejected, the defendants were permitted "to go into evidence in the same manner as if a brief statement claiming title" had been filed; and the evidence introduced, and instructions given, which are the other subjects of complaint, had reference to the title thus brought into contestation. As it was by favor only, that such a course was allowed, the testimony and instructions were irrelative to the issue, which could be tried as matter of right; and if any latitude was given in the testimony, or error committed in the instructions, which are not the subjects of consideration, the effect was only to qualify a favor, not to violate a right.

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

MAINE STAGE COMPANY *vs.* BENJAMIN LONGLEY.

The bailor of goods is a competent witness for the bailee, when he has no interest in the event of the suit.

Where a deposition has been regularly taken in a cause, and has not been left on the files after the first term by the party, he cannot use it as a deposition, during the life of the deponent; but he may read it in evidence, if the deponent be not alive at the time of the trial, as the testimony of a deceased witness.

Where one acts as the agent of a corporation, parol evidence is admissible to prove his agency.

Proof, that the general owner of goods delivered them to the plaintiff, to be transported to a fixed place for a compensation, and that in consequence of the non-delivery of the goods the plaintiff had agreed to pay therefor, *was held* to be sufficient evidence of property in the plaintiff to enable him to maintain an action of trover therefor.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding.

The action was *trover* for a trunk, containing goods, described particularly in the declaration. The testimony of *Young* and *Sawin*, referred to in the fourth exception, was in substance this. *Young* testified, that he was the general owner of the trunk and goods, and delivered them to *Sawin*, who was then acting as the agent of the plaintiffs, and who engaged to transport the same to *Beal's* tavern in *Turner;* and that he paid *Sawin* fifty cents for so doing, and by his direction put the trunk into the baggage room at the stage house, that he had not since seen it, and that the plaintiffs had agreed to pay him for it. *Sawin* deposed, that when the trunk was delivered to him by *Young*, he was the agent of the plaintiffs, and that the defendant took this trunk, and carried it out before it was light in the morning, and said he should give it to the driver of the *Paris* stage, not a stage of the plaintiffs. The other facts in the case, the objections made in the Court of Common Pleas by the defendant's counsel, and the rulings of the Judge thereon, appear in the opinion of the Court. The verdict was for the plaintiffs, and the defendant excepted.

The case was argued in writing, by *May* for the defendant, and by *Wells* for the plaintiffs.

For the defendant, it was argued:

1. The general owner of the goods in controversy is not a competent witness to prove their ownership or value. *Young* was interested in the event of the suit, and ought not to have been received, as a witness. *Chesley* v. *St. Clair*, 1 *N. H. Rep.* 189; *Jackson* v. *Varick*, 7 *Cowen*, 239; 1 *Stark. Ev.* 147; *Brewer* v. *Curtis*, 3 *Fairf.* 51; *Hale* v. *Smith*, 6 *Greenl.* 416; *Heermance* v. *Verney*, 6 *Johns. R.* 5; *Henderson* v. *Sevey*, 2 *Greenl.* 139; *Barney* v. *Dewey*, 13 *Johns. R.* 224.

2. The deposition, having been withdrawn from the files, could not be used, and was no longer a deposition. *Potter* v. *Leeds*, 1 *Pick.* 309. The death of the party was not proved; and if it had been, would have furnished no cause for using the deposition. *Braintree* v. *Hingham*, 1 *Pick.* 245.

3. The Judge ought not to have admitted parol evidence to prove the agency of *Sawin*. 7 *Mass. R.* 102; 8 *Mass. R.* 292; 10 *Mass. R.* 397; 4 *Greenl.* 44; 1 *Mass. R.* 483; 2 *Stark.* 55; 5 *Wheat.* 420; 4 *Greenl.* 209.

4. The plaintiffs had not such an interest or property in the goods, as would enable them to maintain the action. *Story on Bailments*, § 495, 498, 528; 5 *Mass. R.* 303; 17 *Mass. R.* 479; 9 *Mass. R.* 104; *ib.* 265; 13 *Mass. R.* 294.

Wells, for the plaintiffs, contended:

1. To render a witness incompetent, he must have a legal, certain and immediate interest in the result of the cause, or in the record, as an instrument of evidence. *Young* could gain or lose nothing, and was a competent witness. 2 *Stark. on Ev.* 743; 5 *Pick.* 447; 3 *Mass. R.* 29; 1 *Phil. on Ev.* 250; 14 *Johns. R.* 79; 6 *Pick.* 262.

2. The deposition was legally taken, when the deponent was under oath, and between the parties in this very case. Since the death of the deponent, the deposition has become competent evidence, as the testimony of a deceased witness. *Le Baron* v. *Crombie*, 14 *Mass. R.* 234.

3. The agency of *Sawin* was provable by parol. *Paley on Agency*, 2; 4 *Greenl.* 503; 7 *Greenl.* 118; 12 *Wheat.* 64; *Paley on Agency*, 238; 2 *Fairf.* 70; *Ticonic Bridge* v. *Moor*, 13 *Maine R.* 240.

4. The plaintiffs had sufficient interest in the property to maintain trover. *Eaton* v. *Lynde*, 15 *Mass. R.* 242; *Chitty on Pl.* 150.

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

SHEPLEY J. — The first exception taken, is to the admission of *Harvey Young* as a witness for the plaintiffs.

There can be no doubt, that the vendor of goods is not to be admitted to prove the title of his vendee, where such title is in controversy, because he is by law bound to warrant the title. In the case cited from 1 *N. H. Rep.* 189, it was decided, that the bailor was not a competent witness for the bailee, to prove the general property in himself. In that case the only question, as stated by the Court, was, whether the property belonged to the witness or to the defendant; and the witness was held to be inadmissible because a recovery by the bailee would enure to the benefit of the witness by transferring the property to the defendant. The case states, that the rule is not general, but that the bailor may be a witness for the bailee, when he has no interest in the recovery.

In this case the witness was not called to prove the general property in the goods. The bill of exceptions states, that he was called "to prove the delivery of the said goods to the plaintiffs to be transported, and also the value of said goods." It appears, that the only objection was made to his competency thus to testify; and the ruling was upon that point; although after he was admitted, the examination may have extended in some particulars farther than was proposed. If it did, no objection appears to have been made, nor any exception to have been taken to such extended examination; and this Court is limited to the examination of the exceptions taken. The witness might have been interested in the amount which the plaintiffs might recover of the defendant, as fixing the measure of his own indemnity, if he had not before settled with the plaintiffs, so that what he was to receive was finally determined, whether the plaintiffs recovered much, or little, or nothing. It appears from his own testimony, reported in the case, that his compensation could not in any manner depend upon the result of the suit. In such case the vendor has been admitted to testify for the vendee respecting the right of property; he having stated, that

he was in no way accountable to the vendee by the terms of the sale, whether the vendee's title proved to be good or bad. 6 *Pick.* 262, *Smith* v. *Dennie.*

The second exception is taken to the admission of the deposition of one *Sawin.* The objection was, that the deposition, having been taken and filed at a former term of the Court, had not remained on file, as required by the twenty-first rule of the Court of Common Pleas. The plaintiff's counsel did not admit the allegation to be true, nor offer any proof, that it was not, but stated, that the deponent was dead; and thereupon the Judge overruled the objection. The defendant's counsel argues, that there was no proof of the death, but as he does not appear to have made that objection at the trial, it is not open to him now.

It would seem to be the duty of the party proposing to use a deposition to show a compliance with the law and the rules of the Court to entitle him to the use of it. The Judge does not appear to have admitted the deposition on the ground of a compliance with the rule, but because the deponent had since deceased. It does not appear, that the deposition had not been legally taken, and the defendant's rights secured to him by a cross examination; and it must be so understood here. The question then presented, is, whether the deposition, as such, being rightfully excluded, can nevertheless be read, as the testimony of the deceased witness already given, between the same parties upon the same matter.

The general rule appears to be well established in *England*, that where a witness has been examined in a judicial proceeding between the same parties in relation to the same matter, and has since deceased, his former examination is admissible, as secondary evidence. 1 *Phil. Ev.* 199; 1 *Stark. Ev.* 43; 3 *Taunt.* 262, *Doncaster* v. *Day*; 2 *Carr. & Payne*, 440, *Doe* v. *Passingham*; 3 *C. & P.* 387, *Todd* v. *Winchelsea.* In *Massachusetts* the testimony of a witness, who had testified on a former trial, and who had since been convicted of larceny, was not admitted to be proved in evidence. And the Chief Justice, while he admits its existence in *England*, states some difficulties in relation to it, and that he has no knowledge of any decision upon it in that State, or of any practical admission of the principle by their Courts. 14 *Mass. R.* 234, *Le Baron* v. *Crombie et al.* In *New York*, the rule is

fully recognized, even though the testimony was first given, not in a court of justice, but before commissioners duly authorized. 2 *Johns. R.* 17, *Jackson* v. *Bailey.* And the same rule is admitted, where the parties are not the same, if privies, in blood, in estate, or in law. 15 *Johns. R.* 539, *Jackson* v. *Lawson.* Does the same rule apply, where the testimony was originally given in the form of a deposition? The reason for it is stronger, as the testimony is made certain, and there is no danger that the very language is not given.

The case cited from 1 *Pick.* 245, where a deposition taken *in perpetuam,* and not recorded, was not admitted, is not in principle opposed. Not being recorded, it could not be admitted by the statute, and when offered as hearsay testimony, it was not found to come within any rule for the admission of such testimony. It was not offered, and if it had been, could not, probably, have been admitted, as the former testimony of a witness since deceased; as such depositions are not usually taken between the same parties in relation to the same matter, affording an opportunity for cross examination.

Upon the trial of an issue out of chancery, the depositions of witnesses taken for the hearing are not allowed to be read in the courts of law, if the witnesses are alive and able to attend. When the witnesses have deceased, their depositions may be read without an order from chancery for that purpose; though it would seem to be not unusual for the purpose of saving the trouble of producing the record, to pass an order, that the depositions of such witnesses taken in the cause, as shall be then dead, or unable to attend, may be used. 1 *Ves. & Bea.* 34, *Corbett* v. *Corbett.*

Depositions taken in a former case, where the same matters were in issue, the witnesses being dead, were ordered to be used. 1 *Ch. Ca.* 73. The deposition of a witness, who had become interested, was allowed to be read at the trial. 1 *Mass. R.* 4.

The third exception taken, is to the admission of parol evidence to prove, that *Sawin* was the agent of the plaintiffs. It is said in the case cited from 7 *Mass. R.* 102, that it is not to be admitted, that a corporation can make a parol contract unless by the intervention of some agent duly authorized. So in the case cited from 8 *Mass. R.* 292, it is said, "aggregate corporations cannot contract

without vote, because there is no other way, in which they can express their assent." In the case cited from 10 *Mass. R.* 397, it is said, that corporations established by statute are not restricted to the common law mode of binding themselves only by deed, but that they have powers given them to employ agents by votes, "or in such other manner as the corporation may by their by-laws direct." If it is to be understood by these cases, that no parol proof of an agency could be admitted to bind the corporation, that rule must have been since changed; and it is now well settled, as well in *Massachusetts* as in other States, that the same presumptions are applicable to corporations, as to individuals; and that a deed, or vote, or by-law, is not necessary to establish a contract, promise, or agency. 1 *Pick.* 297, *Canal Bridge* v. *Gordon;* 8 *Pick.* 56, *New Eng. In. Co.* v. *DeWolf;* *idem*, 178, *Smith* v. *First C. M. in Lowell;* 1 *N. H. Rep.* 23, *Eastman* v. *Coos Bank;* 14 *Johns. R.* 118, *Dunn* v. *St. Andrews Church;* 3 *Halsted*, 182, *Baptist Church* v. *Mulford;* 12 *Serg. & R.* 312, *Bank of N. Liberties* v. *Cresson;* 1 *Har. & Gill*, 426, *Union Bank of Maryland* v. *Ridgely;* 12 *Wheat.* 64, *U. S. Bank* v. *Dandridge.*

The fourth exception is to the instruction to the jury, that if they believed the testimony of *Sawin*, the plaintiffs had such an interest in the property as would enable them to maintain this action.

There does not appear to have been any error in this instruction. 2 *Saund.* 47, *note* 1; 15 *Mass. R.* 242, *Eaton et al.* v. *Lynde.*

The exceptions are overruled.

JOHN SMITH *vs.* JOSEPH HISCOCK *et al.*

If a promissory note has been indorsed and transferred, *bona fide*, before it fell due, the want of consideration is not an available defence against a subsequent holder, to whom it was passed by the indorsee, after it fell due.

And if the note was thus indorsed, as collateral security for a demand short of its nominal value, want of consideration furnishes no valid defence.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding.

Assumpsit by the plaintiff, as indorsee, against the defendant, as promissor of a note of hand given to one *Russ*, or order, and by him indorsed, dated *April* 16, 1833, for $833,33, payable in *Jan.* 1835, with interest after. In *September*, 1834, the note was indorsed and placed in the hands of *Bachelder*, a deputy sheriff, as security for a demand of about $500, in his hands against *Russ*. *Bachelder* was authorized by *Russ* to make sale of the note to pay the demand, if not otherwise paid. In *December*, 1834, *Bachelder* shew the note to the plaintiff, and informed him of the terms on which he held it, when the plaintiff said he would take it, and pay *Bachelder*, if *Russ* would take up a note held by the plaintiff against him of about $200. This conversation was communicated by *Bachelder* to *Russ*, who agreed that the plaintiff might take it on those terms. *Bachelder* told *Smith* what *Russ* had said, and he agreed to take the note. The arrangement was to be completed the first time *Russ* came that way. After the note became due, *Feb.* 21, 1835, *Bachelder* and *Russ* went to *Smith's* store, where the note was handed to *Russ*, who went to *Smith's* house with him. They soon returned, and *Russ* paid *Bachelder* the amount of the demand in his hands. The defendants proved by an attorney, then their counsel, that in *December*, 1835, he informed the plaintiff, that the note was given for a void patent right, was without consideration, and was negotiated to him after it became due, and that the plaintiff did not deny this statement, but replied, that if the patent was not good, he could not recover in this action, and wished it to be continued, until another action in which that attorney was counsel, and in which the validity of the patent was to be determined, was ended. The plaintiff seasonably objected to the admission of this testimony, but the Judge overruled the objection. The defendants then offered to prove, that the note was without consideration, to which the plaintiff's counsel objected, but the objection was overruled. The verdict was for the defendants, and the plaintiff excepted.

The case was argued in writing.

H. Belcher, for the plaintiff, contended, that the defendants had no right to introduce evidence to show, that the note was without consideration, inasmuch as it was indorsed and thrown into the market before its maturity; and that it was immaterial, whether the

plaintiff received the note after or before the note became payable, as it never became the property of the payee, after he first indorsed it. *Bayley on Bills*, 349. But the note was the property of the plaintiff before it fell due, as *Bachelder* held it as well for the plaintiff as for himself.

There is nothing in the case, which shows that either *Bachelder* or the plaintiff had any suspicion that the note was without consideration. What the plaintiff said to the counsel of the defendants, was immaterial and inadmissible, and cannot prejudice his rights.

Wells, for the defendants.

1. It was incumbent on the defendants to prove, that the note was negotiated after it became due, and also that it was without consideration, and it is immaterial, which is first proved. *Bridge* v. *Eggleston*, 14 *Mass. R.* 245; *Foster* v. *Hall*, 12 *Pick.* 89.

2. Here was evidence on both sides, and in such cases, the question was for the jury and not for the Court. *Perley* v. *Little*, 3 *Greenl.* 97; *Frothingham* v. *Dutton*, 2 *Greenl.* 255.

3. But if the Judge had decided, that the note was overdue when negotiated, he would have decided right. There was no sale of the note to the plaintiff until it was handed to him by the payee. The instruction of the Court was right, and if there be error, it is an error of the jury, for which exceptions will not lie.

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

WESTON C. J. — If the note, upon which this action was brought, being negotiable, had been indorsed *bona fide* before it was due, the want of consideration is not an available defence, against a subsequent holder, to whom it may have been passed, after it was due. *Bayley on Bills*, 349, and the cases there cited. The promise is good to the first indorsee, free from that objection, and the power of transferring it to others, with the same immunity, is incident to the legal right, which he had acquired in the instrument. By the first negotiation, the want of consideration, between the original parties, ceases as a valid ground of defence.

From the evidence in the case it appears, that the note was indorsed, *bona fide*, by *Russ*, the payee, to *Bachelder*, more than three months before it became due. He thereupon became the fair

holder for value. And his title was not the less valid because he held it as collateral security, upon a demand, short of its nominal value. *Bosanquet et als.* v. *Dudman*, 1 *Starkie's R.* 1. In that case the plaintiffs, who were bankers, held the bill then in suit, with others, as collateral security for acceptances for the party, of whom they received it, beyond his cash balance. The suit was against the acceptor, who had accepted it for the accommodation of the original parties. Lord *Ellenborough* would not permit the amount of the excess to be inquired into, ruling, that whenever the acceptances exceeded the cash balance, the plaintiffs held all the collateral bills for value. And the principle decided in that case, is incorporated by *Bayley* in his text. *Bayley*, 350.

The note in this case, passed from *Bachelder* to the plaintiff, through the hands of *Russ*, but *Bachelder* never parted with his interest in it, until he received from the plaintiff, through *Russ*, in pursuance of a previous understanding, the sum of five or six hundred dollars, for the security of which he held the note. The plaintiff then, received the note from *Bachelder*, through *Russ*, and is as much entitled, as *Bachelder* would have been, to repel the defence now set up. If the latter, sometime after the indorsement to him, became the agent of *Russ*, in regard to the excess, beyond what was wanted for his own security, *Russ* was his agent in passing the note to the plaintiff, and receiving from him the value, for which *Bachelder* held it. To the extent of his interest in the note, the latter, in his negotiations with the plaintiff, was acting for himself and not for *Russ;* although *Russ* had an interest in having the note turned to the best advantage.

Pending this suit, the plaintiff was told, by the counsel for the defendant, that the note was given for a void patent, and therefore without consideration, and that this defence would be set up against the note, as it was negotiated to him, after it became due. This the plaintiff did not deny, but said he supposed he should fail in the action, if the patent proved bad. He did not contradict the counsel, upon a point of law, believing, no doubt, at the time, that such would be the legal result. His own counsel has since advised him, that his case is not quite so desperate. He was not informed at the time, and did not then know, that he would be protected, if the note had been negotiated, *bona fide*, for value, before it was due

to *Bachelder*, of whom he purchased it; and he ought not to be prejudiced by a supposition, intimated under a misapprehension of the law.

In our opinion, the evidence of a want of consideration, upon the case as it is presented, did not afford legal matter of defence against the plaintiff, and ought to have been rejected. The exceptions are accordingly sustained, the verdict set aside, and a new trial granted.

GARDINER BANK *vs.* SAMUEL HODGDON *et al.*

In a Court of Equity, if the vendor of chattels be permitted to retain the possession thereof after an absolute sale, this is *prima facie* evidence of fraud upon creditors; and unless a satisfactory explanation be given, it will be held conclusive.

And where the explanation offered by the vendee is, that the vendor was indebted to him in the sum of $300, and to secure that amount, he purchased real estate of the value of $900, paying the balance in cash, and also made another purchase of chattels to the amount of $600, paying therefor in cash and in his own notes to the vendor; it will not be deemed satisfactory.

THIS was a bill in equity, alleging that the plaintiffs are judgment creditors of *Elwell*, one of the defendants, and that *Elwell* was possessed of sufficient property for the payment of his debts, but had fraudulently and collusively conveyed the same to *Hodgdon*, the other defendant, to defraud the plaintiffs, and his other creditors, and that *Hodgdon* had received the conveyances of the property with the same view, and had left it in the possession, and under the control of *Elwell*, as before the conveyances were made. After the interrogatories, the bill concluded with a prayer, that *Hodgdon* should be held to pay the debt from *Elwell* to the plaintiffs, or that he should deliver up the property to be taken to satisfy the same.

The defendants filed answers, which were excepted to by the counsel for the plaintiffs, as incomplete and insufficient, and additional answers were made. *Hodgdon*, in his answers, says, that *Elwell* was indebted to him in about the sum of three hundred dollars, that he wished to secure his debt, and purchased *Elwell's* real

estate for $900, and paid in part by giving up the notes he held against him, and the balance in cash; that he purchased a number of horses and other property of *Elwell*, and paid him therefor $600, of which $400 was paid in cash, and the residue by his note; that the purchase was made by him in good faith, and without any intention to defraud the creditors of *Elwell*, and that his only inducement was to secure his debt against *Elwell*. In answer to the interrogatories, he gave a particular description of the property, and what had been done with it. He admitted, that *Elwell* had retained the possession of all the property purchased, both real and personal, under an agreement with him to pay rent therefor. The answer stated, in answer to an interrogatory, that the sale of the land and chattels, was on the same day, but did not state them to be parts of the same transaction, but treated them as distinct sales. Testimony was taken by the plaintiffs, to prove fraud in the transaction, and by the defendants to repel the imputation.

F. Allen, for the plaintiffs, argued, that if the trust be made out, fraud is an inference of law. The answer denies all fraud, and if untrue in that denial, the answer does not aid the defendant. *Hadden* v. *Spader*, 20 *Johns. R.* 554; *Spader* v. *Davis*, 5 *Johns. Ch. R.* 280. He contended, that if this case is to be tried by the same rules as a trial at law, and the Court will draw only the same inferences, as a jury would, under the instruction of the Court, that fraud was proved. Where the sale is absolute, and the possession remains with the seller, that fact is universally held to be either conclusive, or *prima facie*, evidence of fraud. *Twyne's case*, 3 *Coke*, 8; *Coburn* v. *Pickering*, 3 *N. H. Rep.* 415; *Sturtevant* v. *Ballard*, 9 *Johns. R.* 337; *U. States* v. *Hooe*, 3 *Cranch*, 73; *Brooks* v. *Powers*, 16 *Mass. R.* 244; *Edwards* v. *Harben*, 2 *T. R.* 594; *Hamilton* v. *Russell*, 1 *Cranch*, 309.

In a Court of Equity fraud may be presumed from the circumstances and condition of the parties contracting; and this goes farther than the rule of law, which is, that it must not be presumed, but proved. *Fonbl. Eq.* 133, *4th Am. ed.*; 1 *Dess. Eq. R.* 289; *Chesterfield* v. *Jansen*, 2 *Ves.* 155; 1 *Story's Eq.* § 188. He went into an examination of the answers, and inferred, that they shew fraud on their face, and urged, that with the proof, the conclusion was irresistible, that the sale was fraudulent.

Bachelder, for the defendants, argued, that fraud is not to be presumed, but must be proved. To make a contract fraudulent and void, there must be a secret trust for the benefit of the seller. Each party must be conusant of the fraud, to vitiate the contract, and whatever the motives of *Elwell* may have been, the conduct of *Hodgdon* is free from all suspicion. He wished to secure his own debt, and for this purpose alone, and without any intention to injure others, he purchased the property. He so says in his answer, and there is nothing in the evidence to disprove it. He commented on the testimony, and contended, that there was nothing unusual in the transaction, and that the purchase was *bona fide*, and for a full consideration, actually paid. His leaving the property in *Elwell's* possession is fully explained, and gives no cause for suspicion, when the consideration is fully paid, as in this case. He cited *Northampton Bank* v. *Whiting*, 12 *Mass. R.* 110; *Harrison* v. *Phillips Academy*, *ibid.* 456; *Bridge* v. *Eggleston*, 14 *Mass. R.* 245; 2 *Cowper*, 432; 2 *Mason*, 276; *Brooks* v. *Powers*, 16 *Mass. R.* 244; *Badlam* v. *Tucker*, 1 *Pick.* 389.

The opinion of the Court, after a continuance *nisi*, was prepared by

WESTON C. J. — The defendant, *Hodgdon*, being the creditor of *Elwell*, to the amount of about three hundred dollars, purchased his real estate, for an adequate price, giving up therefor his own demands, and paying the balance of the consideration in cash. He denies all fraud and collusion in his answer; and avers that his object was, to secure his debt. We perceive nothing in this part of the case, sufficiently marked, to countervail the answer. The deed conveying the estate was duly recorded, which was notice to all persons interested to know the fact. And the subsequent occupancy by *Elwell*, at a rent, was consistent with the purchase, as *Hodgdon* did not want the property for his personal use, and the rent was a fair profit upon the investment.

But the purchase of the personal chattels stands upon a different ground. *Hodgdon's* own debt was secured when he took a deed of the real estate. That transaction was finished. It is not pretended, in the answer of either of the defendants, that the purchase of the personal estate was to be a condition, upon which alone *El-*

well was willing to part with the real. He had sold that for a fair price, and had received full payment in hand.

Hodgdon took an absolute bill of sale of the personal chattels, but left them all in the possession of *Elwell.* This is deemed, by our law, *prima facie* evidence of fraud. It may be explained; and if the explanation is satisfactory, the legal imputation of fraud is removed. If the object of *Hodgdon* had been to make a loan of money, a mortgage of the personal chattels for security, would have been a lawful transaction. And if this had been his purpose, we do not say that the inference of fraud might not have been thereby repelled, notwithstanding the form in which the business was done. But he gives no such explanation in his answer. The security of his previous debt is the only avowed motive, for his large advances for the purchase of property, which he did not want, and which was still suffered to remain, and that for a long period, with every mark of trust and confidence, in the hands of the former owner, then in failing circumstances. Besides, his debt had been cancelled by the purchase of the real estate, leaving very strong ground to justify the inference, that the avowed motive is merely colorable.

The fraudulent character, which attaches in the eye of the law, in favor of creditors, to an absolute sale of personal chattels, where the vendor is suffered to remain in possession, is rather aggravated than removed, by the explanation attempted. A portion of the moneys received may have been appropriated by *Elwell* to the payment of his debts. Taking, however, the bill, answer, and proof, together, we are of opinion, that the fraud charged has been sustained. And we are further of opinion, that the defendant, *Hodgdon,* for his unlawful interposition, to defeat or delay the creditors of *Elwell,* ought to be held liable for an amount, equal to the plaintiffs' judgment against *Elwell.* And it is accordingly ordered and decreed, that he pay the same with costs.

Isaac Smith *vs.* Ebenezer Frye.

Mem. — The argument in this case was had before *Shepley J.* was a member of the Court.

Regularly, exceptions should be signed by the party excepting, or by his counsel; but if this be omitted, and the exceptions are allowed and signed by the Judge, no advantage can be taken afterwards of the omission.

A judgment of the Court of Common Pleas will not be reversed, because the Judge directed a nonsuit, without the assent of the plaintiff, or his counsel, when the evidence offered on his part, would not by law enable him to maintain his action.

Where a guaranty is written over the name of the payee of a note, indorsed in blank, without his knowledge or consent, such note cannot be given in evidence under the money counts.

While such guaranty remains written over the name of the payee, parol evidence is inadmissible to charge him as indorser.

This was a writ of error, brought to reverse a judgment of the Court of Common Pleas in an action commenced originally by the plaintiff in error, before a Justice of the Peace. At the trial in the Court of Common Pleas, the plaintiff offered to prove, that, although the note was indorsed by *Frye* in blank, he promised at that time to be responsible, at all events, for its payment. This evidence was objected to, and the Judge decided, that it was improper evidence on either count in the declaration. It appeared in evidence, that when *Frye* indorsed and delivered the note to the agent of the plaintiff, the name only was written upon it, and that the writing over it was made afterwards without the knowledge or consent of *Frye*. The Judge decided, that the writing above the name could not be read in evidence on either count in the declaration. The Judge directed a nonsuit, and the plaintiff excepted. The original declaration, the note on which the action was founded, the errors assigned, and the facts in the case, sufficiently appear in the opinion of the Court.

S. W. Robinson, argued for the plaintiff in error, and cited *Jones* v. *Fales*, 4 *Mass. R.* 245; *Widgery* v. *Monroe*, 6 *Mass. R.* 449; *Boyd* v. *Cleaveland*, 4 *Pick.* 525; *Fuller* v. *McDonald*, 8 *Greenl.* 213; *Taunton Bank* v. *Richardson*, 5 *Pick.* 436; *Bayley on Bills*, 182, *note* 108; *State Bank* v. *Hurd*, 12 *Mass. R.* 172.

Boutelle, argued for the defendant, and cited *Oxford Bank* v. *Haynes,* 8 *Pick.* 423.

The action was continued *nisi,* and again at the *May* term, 1837, and the opinion of the Court was afterwards drawn up by

EMERY J. — The plaintiff in error seeks to reverse a judgment of the Court of Common Pleas, rendered upon a nonsuit directed by that Court.

The declaration in the original suit, which was before a Justice of the Peace, contains five counts; one for nine dollars forty-three cents, on an account annexed for freight of leather and passage to *Boston;* another count for fifteen dollars, for so much money had and received; a third count for the like sum of fifteen dollars for so much money paid, laid out, and expended; the fourth count is, for that one *Bailey,* on the 23d of *Feb.* 1827, by his note of that date, for value received promised the said *Eben'r Frye* to pay him or order the sum of nine dollars and forty-three cents in sixty days and interest, and thereafterwards, to wit, on the same day, said *Frye,* for value received, by his indorsement on the back of said note, promised the plaintiff to guaranty the payment of said note to him according to its tenor; and the plaintiff avers that the said note never was paid to him by said *Bailey;* whereby, &c. The fifth count was like the fourth, on a certain other note of the like sum and date, given by *Bailey* to *Frye* or order in sixty days and interest; and said *Frye* afterward, on the same day, for a valuable consideration, promised the plaintiff to guaranty the payment of the same note to him, and that he, the said *Frye,* would pay the contents of said note to the plaintiff, if the said *Bailey* did not, and the plaintiff avers, that the said *Bailey* did not at any time pay the said note to him; whereby, &c.

This fifth count was an amendment entered by consent. The general issue was pleaded and joined.

The plaintiff offered to introduce in evidence a note from *Bailey* to said *Frye* of the same tenor and date, as described in the 4th and 5th counts, having the following indorsements written on the back thereof: "Pay to *I. Smith,* and I guaranty the payment of the within to said *Smith,* and promise to pay the contents to him, if the within do not. *Ebenezer Frye.*"

After a lapse of between eight and nine years, subsequent to the rendition of the judgment, a writ of error is sued out, and the plaintiff has assigned the five following errors:

First Error.—For that at the trial of said original action the plaintiff, having offered in evidence the note declared on, which was of the following tenor, to wit, "*Augusta*, 23*d Feb.* 1827. For value received of *Eben'r Frye*, I promise to pay him or order nine dollars, forty-three cents in sixty days and interest. (Signed) *Caleb P. Bailey*," with the following indorsement, to wit, "Pay to *I. Smith*, and I guaranty the payment of the within to said *Smith*, and promise to pay the contents to him if the within do not. (Signed) *Eben'r Frye*", and it appearing that at the time said note was passed to the plaintiff, the said indorsement was in blank, and the guaranty over said *Frye's* name filled up afterwards without his knowledge or assent, the presiding Judge refused to permit the writing above said *Frye's* name to be read in evidence, notwithstanding the plaintiff offered to prove by parol evidence that said *Frye* agreed to be responsible to the plaintiff at all events for said note, and that said *Bailey* should call and pay it without giving the plaintiff any trouble whatever; whereas he ought to have permitted said writing to be read in evidence.

Second Error.—For that the plaintiff, having at said trial offered to prove by parol evidence, that he held a note against said *Frye* of the same amount as the one offered in evidence, which he left with his agent for collection; that *Frye* soon after called on the agent and stated to him that he had a note of the same amount against one *Bailey*, and if the agent would take it, *Bailey* would call and pay it without giving the agent or plaintiff any trouble, and if *Bailey* did not, he, the said *Frye*, would at all events be responsible for the payment; that upon this understanding, the agent took the note against *Bailey*, which said *Frye* indorsed at the time with his name, and gave up to *Frye* the plaintiff's note; that the agent never knew any thing about *Bailey*, nor made any inquiries about him, relying solely on *Frye's* engagement to pay the note; that the arrangement was made solely at *Frye's* request, and for his accommodation; and that the plaintiff's note was given up to *Frye* only in consideration of *Frye's* agreement to be responsible at all events for the payment of *Bailey's* note: yet the presiding

Judge refused to admit said evidence, but directed a nonsuit; — whereas he ought to have permitted the evidence offered to go to the jury.

Third Error. — Because the presiding Judge directed, that the plaintiff should be nonsuited ;—whereas he ought to have submitted the cause to the jury, and admitted the evidence offered by the plaintiff.

Fourth Error. — Because the presiding Judge refused to admit the evidence offered by the plaintiff, as stated under the second assignment of error; — whereas he ought to have allowed the same to go to the jury, and to have instructed them that it was competent for the plaintiff to prove by parol, that the said *Frye* had agreed to waive demand and notice on said note; that they would be authorized to infer such waiver from the evidence offered, and that if said *Frye* did agree to waive demand on said *Bailey* and notice to himself, then the action was well maintained.

Fifth Error. — Because the Judge refused to admit the said evidence as proper under either count in the plaintiff's declaration; — whereas he ought to have ruled that it was admissible and proper, either to support the special counts upon the note itself, or the count for money had and received.

In the bill of exceptions, on which the writ of error is brought, in addition to what is set forth in the assignment of errors, it is recited, that "it was admitted by the counsel for the plaintiff that the first note against said *Frye* was to be considered as paid by said transfer of the note against *Bailey*, and he declined to have the evidence admitted and the case put to the jury on that point, but insisted, that parol testimony might be introduced to show that at the time of the indorsement by the defendant of said note against *Bailey*, the defendant agreed at all events to guarantee the payment of said note to the plaintiff if the said *Bailey* did not. The Judge then refused to admit the testimony as proper on either count in the declaration, and directed a nonsuit."

At the *May Term*, 1836, said *Frye* comes, &c. and protesting that the bill of exceptions was not signed by the said *Smith*, or his counsel, at the Court when the action was tried, and the exceptions were not recorded on the records of said Court, and reserving to himself the benefit of this exception to the regularity of the record

and proceedings in this case, says, there is no error in said record and proceedings, and this, &c. by his attorney, and the plaintiff likewise by his attorney.

It does appear by the return of the presiding Judge, to the writ of error, under his seal, dated the twentieth day of *May*, 1836, that the said bill of exceptions, which is under his seal, was not signed by the plaintiff's counsel until this day, but was put on file, and not recorded.

In that bill of exceptions it is stated, that the "counsel for the plaintiff excepted to the opinion and direction of the Court in matter of law, and requested the Judge presiding in the cause, to put his seal to this bill of exceptions, this nineteenth day of *December*, *A. D.* 1827, before the final adjournment of said Court. Examined, and allowed, and sealed.—*Sam'l E. Smith*, *J. C. C. Pleas.*

We do not, under these circumstances, admit that the defendant in error is to derive any benefit from the exception, that the bill of exceptions was not signed by *Smith* or his counsel. It is sufficient that it was reduced to writing and presented to the Court before the adjournment thereof without day, if allowed by the Court. It may be most clerical and advisable for counsel always to sign the exceptions, which may be tendered to the Court for allowance. But by the *statute* of *Westminster*, 2, (13 *E* 1) if one impleaded before any of the Justices allege an exception, praying that the Justices will allow it, and if they will not, if he write the exception and require the Justices to put their seals to it, the Justices shall so do, and if one will not, another shall.

The truth of it can never be doubted after the bill is sealed, for the adverse party is concluded from averring the contrary, or supplying an omission in it. *Bul. N. P.* 315, 316.

We may, therefore, proceed to the examination of the errors assigned, in connection with what we find in the bill of exceptions.

The decisions in *New York*, in relation to this subject, are of this import.

If the evidence offered in this case would not authorize a jury to find a verdict for the plaintiff, or the Court would set it aside, if so found, as contrary to evidence, it would be the duty of the Court to confirm the nonsuit. 1 *Wend.* 379.

So if the plaintiff be nonsuited for a defect in his proof, as applied to one count of the declaration, he cannot avail himself of the objection on a bill of exceptions, that such proof entitled him to recover on another count; unless it appear, that the attention of the Judge was directed to that fact at the trial; but it is otherwise where the nonsuit has been ordered by the Court without motion of the defendant. 8 *Cowen*, 35; 2 *Wend.* 158.

It has been held in the Supreme Court of the *United States*, that the Circuit Court of *Georgia* District had no authority to order a peremptory nonsuit against the will of the plaintiff; and that he had a right to a trial by jury, and to have had the cause submitted to them. He might agree to a nonsuit, but if he did not so choose, the Court could not compel him to submit to it.

Justice *Johnson* dissented from this opinion, with not a little feeling. He "ordered the plaintiff below," he said, "to be nonsuited, because the evidence was so inadequate to maintain his suit, and had the jury found for him, he would have set the verdict aside and ordered a new trial." He further says, "I must submit, I suppose, but I cannot do it without protesting against the right of forcing upon my Circuit the practice of other Circuits in this mode. By a rule of this Court, it is unquestionably in the power of the Court to do it. But until then, I can never know what is the practice of my own Circuit, until I come here to learn it." 1 *Peters' S. C. Rep.* 469, *Doe on demise of Elmore* v. *Grymes et al.*

In the same Court, in the case of *De Wolf* v. *Rabaud et al.* 1 *Peters' S. C. Rep.* 497, after the evidence was closed in the Court below, the defendant moved for a nonsuit, which motion was overruled, and Justice *Story*, delivering the opinion of the Court, observed, "This refusal certainly constituted no ground for reversal in this Court. A nonsuit may not be ordered by the Court upon the application of the defendant, and cannot, as we have had occasion to decide at the present term, be ordered in any case without the consent and acquiescence of the plaintiff," referring to the case of *Elmore* v. *Grymes*.

In *Massachusetts*, in the case of *Mitchel et al.* v. *New England Marine Ins. Co.* 6 *Pick.* 117, where the defendants called for the survey, but the plaintiffs did not produce it, nor give any excuse for not producing it, and for that reason the defendants' counsel

moved, that the plaintiffs should be nonsuited, and the motion, at *nisi prius*, was overruled, and a verdict returned for the plaintiffs. The full Court, at the Law Term, said, "We are not clear, that the Judge had a right to order a nonsuit in the present case; we should think that nonsuits have been entered rather by consent, upon the recommendation of the Judge, either with a view to raise a question of law, or because the counsel thought the action could not be sustained. A motion to nonsuit was not correct in point of form. But if there was a substantial ground for such application, the defendants should have a remedy."

It would seem that there is not a perfect uniformity in the practice of the different States on this subject.

In this State, in the action *Perley* v. *Little*, 3 *Greenl.* 97, the Chief Justice of the Court of Common Pleas directed a nonsuit, on the ground, that what was proved was not sufficient to take the case out of the statute of limitations, to which the plaintiff filed exceptions, alleging that the evidence was sufficient, and that the Judge had no authority to order a nonsuit without consent of the plaintiff, but should have submitted the evidence to a jury.

This Court, delivering its opinion through the late Chief Justice, say, "In a case like the present, we think that Court has a right to order a nonsuit; because, if its opinion of the law is mistaken, and upon the facts proved by the plaintiff, the action is maintainable, the error may be corrected, and the plaintiff be restored to his rights, by filing an exception to the order and decision of the Court, as was done in the present instance. We are of opinion the nonsuit was proper and that it must be confirmed."

In the argument, the counsel for the plaintiff in error stated, that the writing over the defendant's name "was probably written by the counsel at the trial, doubtless supposing he had a right so to do, and he conceded, that when the payee puts his name in blank, on the back of the note, it is considered as a contract in writing, not to be varied by parol evidence." Though the bill of exceptions does not communicate the manner and time, when the writing over the defendant's name was made, it is not inconsistent with the explanation thus presented to us. The precise time when *Bailey's* note was indorsed by *Frye*, is not stated, nor whether it was then over due, and the plaintiff's counsel argued, that as he gained

nothing by filling up the indorsement as he did, the contract should stand, as if nothing had been done. He cites the case of *Jocelyn* v. *Ames*, 3 *Mass. R.* 274, as justifying his position. "He did not contend that the defendant should be charged as guarantee, but that he should have been charged as indorser under the count for money had and received."

On behalf of the defendant in error, it is made a question, whether the plaintiff, having filled up the indorsement as for a guaranty, he can avail himself of the evidence to charge the defendant as indorser. And he urges, that the plaintiff has once made his election not to treat the defendant as indorser; and he attempts to distinguish this case from *Fuller* v. *McDonald*, because, he says, the writing in that case was after the note was payable. And he insists, that the error was not on the part of the Court, but on that of the plaintiff's counsel.

We consider that it is competent for a plaintiff to recover against an indorser upon the count for money had and received. 12 *Mass. R.* 172, *State Bank* v. *Hurd*. It certainly is *prima facie* evidence. 7 *Wheat.* 35, *Page's Admr.* v. *Bank of Alexandria*.

At the time of this trial, the fourth volume of *Pickering's Reports* was not published, so that neither party could have contemplated the case of *Boyd et al.* v. *Cleaveland*, cited by the plaintiff's counsel. And the case of *Fuller* v. *McDonald*, 8 *Greenl.* 213, which recognized and relied on *Boyd et al.* v. *Cleaveland*, as a strong authority, was not decided till 1832. The law, however, is to be deemed as existing long before.

But in *Boyd et al.* v. *Cleaveland*, 4 *Pick.* 525, the suit was against the defendant as indorser. At the time the note was indorsed and delivered to the plaintiff in payment for flour, one of the plaintiffs observed to the defendant, that he did not know any of the other parties to the note, had no confidence in them and should look wholly to the defendant. The defendant replied, that he should be in *New York*, when the note would become due, and would then take it up, if it were not paid by any other party to it.

The Court held, that the plaintiffs were not required to give notice of the non-payment by the maker; that the occasion of the promise was to be regarded. It was made to obviate a difficulty suggested by the plaintiffs, and the Court would not give it such a

construction, as would render it wholly nugatory. And though the defendant's counsel contended, that the promise was conditional, and that no conditional promise to pay, could amount to a waiver of the right to notice, yet it was thought immaterial, whether the promise was conditional or absolute, for a promise depending on a contingency is as binding, when the contingency happens, as an unconditional undertaking. But the radical difficulty in the present case is, that in looking at the whole proceedings we perceive an attempt improperly, though doubtless with no bad intention, to write over an indorser's name, without his knowledge or assent, a guaranty, which the law, under such circumstances, will not sanction. And though we may regret the omission to move for leave to cancel that writing, and substitute the proper one, no mention is made of any such motion. The papers come up to us with that writing of guaranty still remaining, as the foundation of the plaintiff's claim.

The Judge certifies in the bill of exceptions, that the plaintiff declined to have the evidence admitted, that the first note against *Frye* was to be considered as paid by the transfer of the note against *Bailey*, and the cause put to the jury on that point, but insisted that parol testimony might be introduced to show, that at the time of the indorsement by the defendant of the note against *Bailey*, the defendant agreed, at all events, to guaranty the payment of it to the plaintiff if *Bailey* did not. Upon this strenuous persisting on the part of the plaintiff to introduce parol evidence on the contract, still apparently remaining in writing, without any motion for leave to cancel it, we cannot say that the Judge erred. The regularity of practice required of the plaintiff a different course preliminary to the introduction of parol evidence, which might have availed him, as evidencing a waiver of the right to insist on demand and notice, had there been only a common and ordinary indorsement. But in the peculiar manner in which the affair was pursued, no motion or request being made to the Judge to give the instruction stated in the 4th error, we are constrained to decide, that neither of the errors is well assigned; and we affirm the judgment.

We feel less reluctance in coming to this conclusion, because our decision does not preclude the plaintiff from commencing a new

action, if he apprehends, that he is furnished with sufficient proof to sustain it. See 1 *Pick.* 371, *Bridge et al.* v. *Sumner.*

ISAAC GAGE *et al. vs.* DEAN W. SMITH *et al.*

Where a written lease of land is made for a stipulated time, an action of *assumpsit* for use and occupation cannot be maintained for rent, accruing before the lease has terminated.

Where the lessor reserves to himself the right "to enter, and without process of law, and without notice, expel the lessee, if he shall fail to pay the rent, as agreed," a *notice* by the lessor to one occupying under the lessee, that the lessor will look to him for rent, made when no rent was due, and not upon the land demised, does not terminate the lease.

ASSUMPSIT for the use and occupation of a store in *Hallowell,* from *July* 15 to *Dec.* 4, 1834. The plaintiffs had leased the store to *F. C. Krantz* for one year from the fifteenth of *April,* 1834, at a certain rent, payable quarterly. The defendants entered into the occupation of the store under *Krantz* at the commencement of his term, and continued it until the close of the term for which rent is claimed. The lease provided, "that the lessors may enter to view, and make improvement, and without process of law, and without notice, expel the lessee, if he shall fail to pay the rent as aforesaid, or shall make or suffer any strip or waste thereof." It did not appear in the case, whether the first quarter's rent was, or was not, paid, further than bringing the suit for rent after *July* 15, was evidence thereof. On the last of *July,* 1834, *Gage,* one of the plaintiffs, notified the defendants, they then being together in a building adjoining the store, that he should look to them for the rent.

At the trial, before *Weston C. J.,* the plaintiffs claimed to support their action against the defendants, as occupants of the store; and the defendants contended, that they were in under *Krantz,* and liable only to him. The Chief Justice, being of opinion, that the lease was not terminated by the notice, directed a nonsuit, which was to be set aside, if the Court should be of a different opinion.

Bradbury, for the plaintiffs, contended, that the lease terminated without notice, by the neglect to pay the rent according to its terms. But if notice was necessary, it was given. They were distinctly notified, that if they remained, they must pay rent to the plaintiffs. There is no necessity to give notice upon the land, except when the party would take advantage of a conditional conveyance.

Wells, for the defendants, said that the action could not be maintained, unless the lease had terminated. That it was not terminated by the notice, appeared:

1. Because no rent was shown to be due from any one, when the notice was given.

2. Because no *demand* was made of the rent.

3. If the notice can be considered a demand, it should have been made upon the premises demised.

4. The demand should have been made on the day the rent became due. He cited *Co. Lit.* 201, *b*, 202, *a*; *Jackson* v. *Harrison*, 17 *Johns. R.* 66; *Wood* v. *Partridge*, 11 *Mass. R.* 488; *Wyman* v. *Hook*, 2 *Greenl.* 337; *Boston* v. *Binney*, 11 *Pick.* 1.

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

Weston C. J. — The plaintiffs, in their lease to *Krantz*, reserved to themselves the right to enter, and without process of law and without notice, expel the lessee, if he should fail to pay the rent, or should make or suffer any strip or waste. They now claim of the defendants a sum of money, for the use and occupation of the store, for a period covered by the lease. Their right to do so, depends upon the question, whether the interest of the lessee had terminated.

It is insisted, that this effect was produced, by the notice given in an adjoining building, to the defendants, on the last of *July*, 1834, that the plaintiffs should look to them for the rent. To this there are two objections, each of which appears to be fatal to their claim. They did not enter to expel the lessee; and if they had, it does not appear, that they had any right to do so. The lessee was not their tenant at will. They might enter to expel him, if he failed to pay his rent, or made strip or waste; but not otherwise. There is no evidence, that at the time of the notice, any rent was

due, or that the tenant had made strip or waste. It does not appear, that the rent for the first quarter remained unpaid; and the rent for the second quarter was not due, until the fifteenth of *October*, following the notice,

Nonsuit confirmed.

ETHAN A. MASON *vs.* WILLIAM BRIDGE.

Where a written contract to find materials and build a stone dam stipulated, that "it is mutually agreed between the parties, that all the work and materials shall be inspected by a third person, and made to correspond with the decision of such person in all respects, whose decision shall be final between the parties," such third person has no power to give a legal construction of what the contract requires of the parties, but merely to determine the differences, which relate to the workmanship, and to the fitness and quality of the materials proposed to be used.

Where the contract provides, that "the wall is to be laid on timber, and projected into the bank fifteen feet," and the slope of the bank, whereon it was to be built, is upon an angle of forty-five degrees, the contract is complied with by projecting the wall into the bank fifteen feet on the average.

If the contract states, that the dam shall be built "of the same height, thickness, and quality of work, as the old dam now standing," and the old dam had never been finished, and the front part only had been raised to the intended height; a fair construction of the contract requires, that the new dam shall be made as high as the front of the old one.

ASSUMPSIT for labor and materials on the defendant's dam across *Bridge's* brook. The parties had made a written contract in relation to the building of the dam, and while the work was proceeding, they differed in their construction of the contract, and agreed, that the work should be completed in the manner contended for by the defendant, and that if the contract did not require it, he would pay for all the additional work. The trial was before *Weston C. J.* and the jury returned a verdict for the plaintiff, and on one point in opposition to the instruction of the Chief Justice upon the law. The facts in the case, and the questions raised at the trial, sufficiently appear in the opinion of the Court.

The case was argued by *D. Williams*, for the defendant, and by *Vose*, for the plaintiff, who cited *Stackpole* v. *Arnold*, 11 *Mass.*

R. 27; *Tucker* v. *Maxwell, ib.* 143; *Johnson* v. *Johnson, ib.* 359; *Wilkinson* v. *Scott,* 17 *Mass. R.* 249; *King* v. *Inhabitants of Scammonden,* 3 *T. R.* 474; *Kyd on Awards,* 140, 73; *Towne* v. *Jaquith,* 6 *Mass. R.* 46.

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

Shepley J. — The plaintiff contracted, under seal, with the defendant, to build a stone dam across *Bridge's* brook, which was afterwards built; and that contract was settled. The present action is for work, and labor, and materials found for the same dam; and the plaintiff alleges, that the labor and materials now sued for were not required by the written contract to be furnished. To ascertain what portion of this work did not come within the contract, it becomes necessary to decide upon the true construction of it. The first difference arose respecting the powers of a third person, to whom, by the contract, certain matters were referred. The defendant contended, that he was to decide all differences between them, as well what the contract required of each of them, as other points of difference. While the plaintiff contended, that he was only to decide upon the workmanship and the materials. The language of the contract is, "and it is mutually agreed between the parties, that all the work and materials shall be inspected by a third person, and made to correspond with the decision of such person as may be selected, in all respects, whose decision shall be final between the parties." It was the work and materials, which were to be inspected, and were to be made to correspond with the decision. There is no intention exhibited of giving him any power to determine other differences than those which related to the workmanship, and to the fitness and quality of the materials proposed to be used. He cannot decide upon matters not expressly referred to him. What a legal construction of the contract required of the parties, not having been submitted to him, the law, and not the arbitrator, must decide.

Another clause of the contract upon which a difference arises, reads, "the wall to be laid on timber and projected into the bank fifteen feet." The case finds, that "the slope of the bank was upon an angle of forty-five degrees, and it was ascertained, that

the end of the dam being made plumb would enter the bank eleven feet more at the bottom than at the top; and therefore, if it entered at the top nine feet and a half, it would, upon an average, be projected into the bank fifteen feet." The plaintiff contended, that this was all, that the contract in this particular required of him; while the defendant insisted, that the dam was to be so constructed as to extend into the bank fifteen feet, measuring at the top of the bank; which would make it necessary to extend it into the bank twenty-six feet at the bottom.

The dam was constructed as the defendant desired, subject to the right of the plaintiff to claim compensation for the difference, if he was not by the contract obliged thus to build it. It is not contended, that the dam should have been so built as to slope in conformity to the bank. If the bank adjoining the stream had been perpendicular, there could have been no doubt respecting what the contract required. The cubic feet of earth to be removed, and of wall to be erected would have been made certain. It cannot be supposed, that the parties entered into the contract without some estimate in their own minds, of the labor to be performed in removing the earth and laying up the stones. The peculiar angle of the bank should require neither more nor less labor to be performed, unless there is some evidence in the contract, that such was the intention. The contract contains no such intimation; and in the absence of it, the construction should be such, as would exact the same amount of labor and materials, whatever might be the angle of the bank. The peculiar formation of the bank can make no difference in the legal construction of the contract. There can be no difficulty in ascertaining by testimony how many feet of wall the plaintiff has built, beyond what this construction of the contract would require, and for that, and any other labor occasioned by it, he would be entitled to recover a reasonable compensation. And this is understood to have been in substance the instruction given.

Another subject of difference had reference to the manner in which the dam should be constructed near the top of it. The terms of the contract in relation to this subject were, that the dam should be built "of the same height, thickness, and quality of work as the old dam now standing." The case finds, that "about two feet in height, of the upper part of the old dam, had only the front

stones laid up ; and when the plaintiff had carried up the new one in the same manner, he stopped and insisted, that he had done what his contract required." The defendant contended, that the wall was to be carried up, as high as the top of the old dam, of an uniform thickness. The plaintiff did so finish it, and claims pay for it, as not being required by the contract. The only testimony in the case, respecting the condition of the top of the old dam, states, that it was "manifestly left unfinished;" and such must be taken to be its true condition, as presented to the eye.

The intention of the parties is to be ascertained from the language, which they use, and is to be carried into effect. What could have been the design in referring to the thickness and height of the old dam? Was it to give a general outline of the dimensions, or was it intended to require an exact conformity in all respects to it? If the latter is the true construction, the plaintiff would have been obliged so to construct it as to present precisely the same thickness in the new as in the old one, in each particular part of it ; and if the old one presented an uneven surface, whether occasioned by time, accident, or formation of the stones, the new one must conform to it.

So, if one or more stones had fallen out, or had been omitted in building, no matter in what part of the old dam, the plaintiff, upon this construction might have left the same defects in the new one. Can it make any difference whether the defects were at the top, or in any other part of the dam? Could the plaintiff have intended to be bound by his contract to make a *fac simile* of the old dam? Or did he understand the intention to be, that he should build a new and "good substantial stone dam," and present it to the eye of every beholder "manifestly left unfinished"? The construction contended for by the plaintiff is quite too absurd to admit of its being regarded as the true one. A rational and practical execution of the contract rejects it, and adopts the former construction as the true one. The plaintiff is not entitled to recover for this part of his claim, as a proper execution of the contract required the performance of this service.

The verdict is set aside, and a new trial granted.

Leonard Cobb *vs.* Josephus Stevens.

Where labor has been performed under a special contract, but which is so uncertain, and unintelligible, that it cannot be understood, the law will imply a promise to pay the fair value of the service.

Exceptions from the Court of Common Pleas, *Whitman C. J.* presiding.

This case was referred to *D. Williams*, Esq. to be decided upon legal principles. The referee heard the parties, and made a report of the evidence; and thereupon awarded, that the plaintiff should recover $32,86, with costs, if his opinion, that the plaintiff was entitled to recover, was legal; but if, in the opinion of the Court, the plaintiff was not entitled to recover, the defendant should be allowed his costs. The only testimony in relation to the agreement, was from one *Wilbur*, who stated, "that the plaintiff agreed to work for the defendant ten months, at $10 per month, commencing *Jan.* 5, 1835, reserving, however, the right to leave for a particular reason, which was not stated, and that if he left before the expiration of the time agreed for, he would leave it to some third person to say how much he should receive for the time he should work: and further, that if the plaintiff left the defendant's employment, and worked for any other person in shoemaking for the reason reserved to himself, he should forfeit his wages for the time he should work for the defendant." Under this agreement, the plaintiff labored for the defendant from *Jan.* 5 to *June* 11, 1835, when he left the defendant, and worked for others in the neighborhood at the business of making shoes. Shortly before leaving, they had difficulty, and the defendant said, that if he hated every body as bad as he did *Cobb*, he should not want to live long. Before the action was commenced, the plaintiff proposed a reference, and the defendant declined, saying nothing was due. The defendant objected to the acceptance of the report, because a special contract was proved, and had not been waived or rescinded by the parties, and also because upon the facts the plaintiff was not entitled to recover. *Whitman C. J.* ruled, that it was impossible to understand the contract, as testified to by *Wilbur;* and it being vague, uncertain, and unintelligible, the plaintiff was entitled to recover a

quantum meruit for his services, in the same manner as if no such contract had been made, and accepted the report. The defendant excepted.

The case was argued in writing.

May, for the defendant, contended, that the facts reported by the referee, show, that the labor sued for was performed under a special contract, which has not been performed by the plaintiff, or waived, or rescinded by the defendant.

The parties must have intended something by their agreement, and it should be so construed, as to carry their intentions into effect, if it can be discovered. 3 *Randolph*, 487; *Chitty on Con.* 3*d ed.* 22; *Chitty on Bills*, 190; 2 *Kent's Com.* 557. The true construction is, that such a reason must occur, under the reservation as would prevent the plaintiff from working at shoemaking for any one. But if not, and the reservation is void for uncertainty, it leaves the contract, as if no reservation had been made. 8 *Pick.* 284; 3 *Pick.* 272; 4 *Pick.* 54; 1 *Saund.* 65 *and notes.* If he should leave before the time expired, he was to forfeit his wages. This is binding upon him. 7 *Mass. R.* 107; 1 *Greenl.* 125; 3 *Greenl.* 97; 17 *Mass. R.* 188; 7 *Pick.* 155; 8 *Pick.* 537; *ib.* 284; 6 *Pick.* 206. Nor is it against the policy of the law prohibiting restraint in trade. 4 *Burr.* 2225; 6 *Pick.* 206; 8 *Mass. R.* 223; 3 *Pick.* 188; 4 *Greenl.* 102. The rule of law is, that the party must go on his special contract, while it remains in force, and stand or fall by that. Where there is an express contract, the law will not imply one. 2 *Pick.* 267; 3 *Taunt.* 52; 4 *Greenl.* 454; 7 *Mass. R.* 107; 1 *Fairf.* 30; 14 *Mass. R.* 266.

Wells, for the plaintiff, said, that the question was, whether on the facts appearing in the case, the report of the referee ought to be accepted. He examined the contract, and said, that to give a man a right to leave for a reason known only to himself, is equivalent to saying, that he may leave whenever he pleases. But if the defendant's construction is right, and the plaintiff left the service of the defendant without leave, he may recover what his services are worth to the plaintiff. *Hayden* v. *Madison*, 7 *Greenl.* 77; *Abbott* v. *Hermon*, *ib.* 118; *Jewett* v. *Weston*, 2 *Fairf.* 346; *Hayward* v. *Leonard*, 7 *Pick.* 181; *Smith* v. 1*st Con. M. in Lowell*, 8

Pick. 178; *Linningdale* v. *Livingston*, 10 *Johns. R.* 36. That part of the contract, that the plaintiff should work for no other person at shoemaking, is void for restraint of trade. *Pierce* v. *Woodward*, 6 *Pick.* 206; *Palmer* v. *Stebbins*, 3 *Pick.* 188; *Perkins* v. *Lyman*, 9 *Mass. R.* 522; *Pierce* v. *Fuller*, 8 *Mass. R.* 223; 2 *Com. on Con.* 468; *Merrill* v. *Merrill*, 15 *Mass. R.* 488; *Stearns* v. *Barrett*, 1 *Pick.* 451.

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

WESTON C. J. — The plaintiff is entitled to recover, as upon a *quantum meruit*, unless there was a special agreement, which precludes his claim. Upon this point, we are of opinion with the Judge below, that the evidence of such an agreement is too vague, to justify the rejection of the award upon this ground. The plaintiff was to forfeit his wages, if he left the defendant's employment, and worked for other persons in the neighborhood at shoemaking, within the time limited, in virtue of his reserved right to do so, for a reason not communicated to the witness, and of which we have no evidence. He might have left for other reasons.

There is evidence, that the defendant had conceived a violent hatred against the plaintiff. If this was before he left, it must have rendered his further continuance in the defendant's service very uncomfortable. How far the judgment of the referee was influenced by this consideration, does not appear. If he had any justifiable cause for leaving, he was entitled to a fair, if not a full compensation for what he had done.

Exceptions overruled.

THOMAS CORDIS *et al. vs.* HENRY SAGER *et als.*

By the act of 1831, *ch.* 520, *sec.* 12, where the debtor is arrested on mesne process, carried before two Justices of the Peace and of the Quorum, and by them ordered to be imprisoned, because he is not entitled to a discharge from arrest, the *mittimus*, under the hands and seals of the Justices, is competent evidence to prove the facts therein stated.

If such *mittimus* show a regular course of proceedings on the part of the magistrates, it is a sufficient authority to the officer and to the prison keeper to detain such debtor; and a bond in the usual form, given to obtain his discharge, is good.

The obligors in such bond are estopped to deny the facts therein stated.

Where the name of the County is written by the Justices in the margin of the *mittimus*, and it is directed by them to an officer of the same County, they must be considered as magistrates of that County, in the absence of all opposing proof.

THIS was an action of debt on a bond, dated *Jan.* 19, 1835, made by *Sager*, as principal, and the other defendants, as his sureties, to the plaintiffs. On the 17th of the same *January*, *Sager* was arrested on a writ against him in favor of the plaintiffs, and taken by the officer before two Justices of the Peace and of the Quorum; and the officer returned, that after a hearing of the parties, the Justices ordered *Sager* to be committed, and that on the *mittimus*, "he let him to bail" and took a bond which he returned with the writ. The bond thus returned is the one in suit. It did not appear, that the Justices made any adjudication, or order, in relation to the examination before them, or of the disclosure of the debtor, unless the *mittimus* is evidence thereof. The other facts in the case, sufficiently appear in the opinion of the Court. If the action could be maintained, the Court was to determine the amount of damages.

Wells, for the defendants, contended, that as this bond was given under the *st.* of 1831, *c.* 520, § 12, there must be an adjudication by the Justices, that the debtor had property, in the manner provided in the statute, before they could legally issue the *mittimus*. The *mittimus* is equally void without an adjudication, as an execution without a judgment. 1 *Chitty on Pl.* 184; 3 *Stark. Ev.* 1447; *Hildreth* v. *Thompson*, 16 *Mass. R.* 191; *Winslow* v. *Hathaway*, 1 *Pick.* 210. The detention of *Sager*, therefore, on the

mittimus, was unlawful, and the bond, being given to procure his discharge, is void for *duress*. *Crowell* v. *Gleason*, 1 *Fairf.* 325; *Chase* v. *Dwinal*, 7 *Greenl.* 134; *Watkins* v. *Baird*, 6 *Mass. R.* 506; *Kavanagh* v. *Saunders*, 8 *Greenl.* 426; 4 *Cruise's Dig.* 406; *Worcester* v. *Eaton*, 13 *Mass. R.* 371.

The proceedings do not show, that the Justices resided in the county where the arrest was made, as required by the statute.

Nothing is to be presumed in favor of the jurisdiction of inferior magistrates, and nothing appears on the papers showing it. *Smith* v. *Rice*, 11 *Mass. R.* 507; *Libby* v. *Main*, 2 *Fairf.* 344.

The recitals in the bond cannot estop the defendants, because the bond is void for *duress*.

S. W. Robinson, for the plaintiffs, argued, that the statute did not contemplate, that the Justices should keep a record of their doings, but should annex their result to the writ. The *mittimus* annexed is sufficient evidence of their proceedings. But the case merely shows, that no record was produced, and it was the duty of the defendants to do it, or to show there was none. If the *mittimus* was legal, then the bond is legal. The bond recites all the facts, which can be necessary in a record; and the defendants are estopped to deny any facts stated therein. *Cutler* v. *Dickinson*, 8 *Pick.* 386; *Steele* v. *Adams*, 1 *Greenl.* 1; *Milliken* v. *Coombs*, *ib.* 343; *Bean* v. *Parker*, 17 *Mass. R.* 591; *Cady* v. *Eggleston*, 11 *Mass. R.* 282.

The *mittimus* shows, that the Justices resided in the county where the arrest was made. There has been a breach of the bond by a neglect to cite in the creditor, and take the oath.

The opinion of the Court, after a continuance, was prepared by

WESTON C. J. — The Justices of the Peace and of the Quorum, who signed the mittimus, must be taken to be such for the county of *Washington*, which is written in the margin, and to the sheriff of which county, or his deputy, it is directed.

By the *statute* of 1831, *c.* 520, § 12, they are constituted a court, and clothed with jurisdiction of the subject matter, in regard to which they undertook to act, as set forth in the mittimus. The very object of a mittimus is, to state the cause of detention and commitment, and the proceedings upon which it is based, that it

may appear therefrom, whether such detention and commitment is lawful. It is a sufficient authority to the sheriff and to the prison keeper; and is competent evidence upon a writ of *habeas corpus.*

Being under the hands and seals of the magistrates, in the lawful exercise of their jurisdiction, it is evidence, that *Sager*, the principal, was duly brought before them under the statute. That they adjudged, upon his disclosure, that he was possessed of property, or other means of payment, as was supposed by the oath of the creditors. That he refused to surrender it, so that it might be taken upon the writ; and that they thereupon ordered him into the custody of the sheriff, to be committed to the common gaol, until discharged by the creditors, or by order of law. The question raised is, whether he was lawfully in custody. We cannot doubt, that upon this point the warrant or *mittimus* is proper evidence; and it fully proves a regular course of proceeding on the part of the magistrates.

The same facts are also proved by the recitals in the bond, which the defendants, who executed it, are estopped to deny, unless it was obtained by duress, which does not appear. On the other hand, by the officer's return on the writ, to which the bond was annexed, it does appear, that it was lawfully taken under the statute, for the enlargement of the principal. It is not pretended, that the condition of the bond has been fulfilled. The default is to stand. Judgment is to be entered for the plaintiffs for the penalty of the bond; and they are to have execution, for the amount of their former judgment against the principal, with interest; and for their costs.

GEORGE PAGE *vs.* SAMUEL HOMANS *& al.*

Handwriting may be proved by any witness, who has previously acquired a general knowledge of the handwriting of the party, whose signature is in question, from having seen him write, from having carried on a correspondence with him, or from an acquaintance gained from having seen handwriting, acknowledged or proved to be his.

But if the witness have no previous knowledge of the handwriting, he will not be permitted to testify in relation to it, from information derived merely from a comparison of handwriting in Court.

If a question, collateral to the issue on trial, be put to a witness on cross-examination, his answer must be taken as conclusive, and cannot be contradicted by other evidence.

But where a witness testified in relation to the genuineness of a signature, and on cross-examination a slip of paper was put into his hands, having the name of a person written upon it three times, with a request to say, whether the writing was by the same, or by different hands, and he answered by the same; and a witness was then called, and permitted to testify, objection being made, that the writing was by different hands; *it was held*, that although the Judge might have rejected the testimony, yet that its admission did not furnish sufficient cause for granting a new trial.

ASSUMPSIT on a note of hand purporting to have been signed by *Isaac Thompson*, *Samuel Homans* and *Charles Keene*. *Thompson* did not answer. *Homans* and *Keene* denied, that the signature of their names to the note was in their handwriting, or made by their authority. To prove and to disprove the genuineness of the signatures, testimony was introduced on both sides. A number of specimens of the true signatures of each were introduced and submitted to the jury. The plaintiff called *W. Morse*, who had never seen the defendants write, was unacquainted with their handwriting, and professed no peculiar skill in signatures. He was requested to examine the specimens and signatures, and thereupon to give his opinion, whether those affixed to the note were the handwriting of the defendants. This was objected to, and the testimony was rejected by *Weston C. J.*, before whom the trial took place.

To prove the signature of *Homans* the plaintiff called *J. Hedge*, and on his cross-examination, the counsel for the defendants put into his hands a slip of paper, having the name of *Asaph R. Nichols* written upon it three times, and inquired of the witness, whether in his opinion it was written by the same hand. He answered

affirmatively, and Mr. *Nichols* was then called by the defendants, and inquired of whether the names were written by the same, or by different hands. This inquiry was objected to by the counsel of the plaintiff, but permitted by the Chief Justice. A verdict was returned for the defendants, which was to be set aside, if the testimony rejected ought to have been received, or if that which was admitted ought to have been rejected.

The case was argued in writing by *Wells*, for the plaintiff, by *Bradbury*, for *Homans*, and by *Emmons*, for *Keene*.

Wells argued,

1. *Morse* should have been admitted to testify to the handwriting of the defendants. A person, who has seen another write, has corresponded with him, *or has seen writing acknowledged to be his*, may be admitted to testify. *Hammond's case*, 2 *Greenl.* 33. There can be no difference between seeing handwriting upon the stand, and having seen it previously, saving that the latest impression would be the most accurate. The whole reasoning of the Court, in *Hammond's case*, is founded upon what was considered a well established rule, *the having seen writing acknowledged to be genuine.* If having seen a person write once, qualifies a man to be a witness to testify to the handwriting, should not he testify, who has the genuine hand before him?

2. The testimony of Mr. *Nichols* ought not to have been received, because it was in relation to a matter *foreign* and collateral to the issue. The question to be decided was, whether the note was signed by the defendants, or either of them. If the witness answered affirmatively or negatively, it had no tendency to prove the issue between the parties. The signatures of the defendants might be familiar to the witness, and he might testify to it with certainty, when he could not readily discover a good counterfeit, when he was wholly unacquainted with the writing. The handwriting of *Nichols* was not in issue. The question there was, whether it was possible to imitate a handwriting so well, that a stranger could not detect the forgery. The determination of this question might have introduced more witnesses, and have been attended with much greater difficulty, than whether the signatures to the notes were those of the defendants. *Stark. on Ev.* 134; *Spencely* v. *DeWillot*, 7

East, 108; *Young* v. *Mason*, 8 *Pick.* 551; *Odiorne* v. *Winkley*, 2 *Gallison*, 51.

3. If the question relates to a collateral matter, the answer of the witness cannot be contradicted. *Harris* v. *Tippet*, 2 *Camp.* 637, and the cases there cited; 1 *Stark. on Ev.* 146.

Unless this is collateral evidence, then it must follow, that because a witness may commit an error on some possible question which might be put to him, having no connexion with the subject on trial, he must, necessarily, commit a mistake in every thing. If every collateral question is to be tried out, one trial might be the work of months.

4. The evidence was very material, because it was calculated to lead the jury into mistakes, and to lessen the weight, which ought to have been given to the testimony of the witness. It might have been, and probably was, the occasion of the verdict for the defendants.

Bradbury, for *Homans*.

The testimony of *Morse* was properly excluded. The rule of law is well established, that a witness, not professing skill and science in handwriting, and who had no *previous* knowledge of the hand in question, cannot be permitted to testify in relation to it from a mere comparison of hands. 11 *Serg. & Rawle*, 333; 2 *Stark. Ev.* 654, *note* 1; *Titford* v. *Knox*, 2 *Johns. Cases*, 211. To admit such evidence, would be to substitute the opinions of witnesses called by the party for that of the jurors.

He contended, that the testimony of *Nichols* was rightly admitted, to test the value of the opinion of the witness, *Hedge*, in the same manner, as if he was testifying about colors, to hand him specimens, and inquire whether they were the same or different.

He argued, that this was not collateral to the subject of inquiry, as it did not contradict or impeach the witness, but merely stated an independent fact, which might have a tendency to show, that the witness was not infallible. But even if the admission was erroneous, it is too trivial to have any effect on the jury, and the verdict ought not to be set aside on that account.

Emmons, for *Keene*, argued to show, that there are insuperable objections to the admission of the testimony rejected, both from authority and principle. The position assumed is this, that there must be some basis laid previous to the witness' appearance upon

the stand, as the ground of his qualification to testify, from comparison of hands, to the character, as to genuineness or falsity, of the signature or handwriting in dispute. This basis consists either in having seen the party write—seen his correspondence—some peculiar skill in judging of handwriting—and possibly in certain cases, in the witness having had the acknowledged and indisputable handwriting of the party whose handwriting is the subject of inquiry, in his possession, and had an opportunity of carefully and critically comparing the specimens acknowledged to be genuine with those alleged to be spurious. He commented upon *Hammond's case*, and insisted, that it did not authorize the admission of testimony of this description, and cited *Phillips on Ev.* 372; *Homer* v. *Wallis*, 11 *Mass. R.* 312; *Titford* v. *Knox*, 2 *Johns. Cases*, 211; *Martin* v. *Tayloe*, *April*, 1803, and *U. States* v. *Johns*, 1806, *decisions in the Cir. Court U. S. for Pennsylvania*, *Wharton's Dig.* 245.

The testimony of *Nichols*, he contended, was properly admitted. He argued, that the answer of the witness is not conclusive, as to every collateral fact. Testimony in relation to any collateral fact is admissible, unless it discredits the witness stating such fact. In this case *Nichols'* testimony did not discredit *Hedge*. 1. Because it did not show, that *Hedge's* testimony was not true. 2. Admitting it did show, that *Hedge's* opinion was erroneous, that could not reflect any discredit on him as a witness. 1 *Stark. Ev.* 17, § 7. He commented on the cases cited for the plaintiff, and contended, that they did not extend to the exclusion of this testimony.

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

Weston C. J.—To prove the handwriting of any person, any witness may be called who has, by sufficient means, acquired a knowledge of the general character of the handwriting of the party, whose signature is in question. This may have been acquired, from having seen him write, from having carried on a correspondence with him, or, as was decided in *Hammond's case*, 2 *Greenl.* 32, from an acquaintance gained, from having seen handwriting, acknowledged or proved to be his. These are the sources of that previous knowledge, which may qualify the witness to state his belief,

whether the handwriting in question is or is not genuine. He testifies from a standard of comparison, existing in his mind, the sources of which are not usually in court to be produced at the trial. In *Hammond's case*, they had been lost and destroyed.

In the case under consideration, the witness had no previous knowledge. He was called upon to exercise his judgment upon a comparison then to be made. What light could he afford, upon the point in controversy? He possessed no peculiar skill. It must have been more satisfactory to the jury, to see with their own eyes, than to ask the aid of his. He could only state how the evidence impressed his mind. The same evidence was before the jury; and it was their duty to determine its force and effect. It was to their judgment, and not to the opinion of a witness, as to the weight of the evidence, to which the parties submitted. No case has been adduced, which warrants such a course of proceeding, except where the witness has been in a situation, to acquire a peculiar degree of skill, in regard to handwriting. In *Titford* v. *Knox*, 2 *Johns. Cases*, 211, it was decided, that if a witness had no previous knowledge of the hand, he cannot be permitted to testify as to his belief, from a knowledge acquired in Court, from a comparison of hands. In this State, where it is competent to submit that comparison to the judgment of the jury, there is neither necessity nor propriety in the admission of such testimony. The evidence of their own senses is better in its nature, than the statement of another, although under oath, as to how it appears to his eye.

It has become a rule of evidence, that a collateral fact, not bearing upon the issue, elicited in cross-examination, is not to be contradicted. The question in issue was the genuineness of a disputed signature. A witness, acquainted with the handwriting of the party sought to be charged, testified that he believed it to be his. The defendant was permitted to prove, that signatures could be so perfectly imitated by an adroit penman, as to render detection extremely difficult. We do not regard it as clear, that such testimony did not bear upon the issue, and was not proper for the consideration of the jury, in determining the weight of evidence, depending upon resemblance, whether deduced from a standard of comparison in the mind of a witness, or from genuine signatures before them. Such resemblance may generally be satisfactory.

But if signatures proved to be spurious, may have a resemblance equally striking, it may not be sufficient to overbalance facts and circumstances, calculated to throw suspicion upon the integrity of the instrument in controversy. That a resemblance is so far from being conclusive evidence upon this point, that it may be altogether delusive, was proved by the testimony of the two witnesses taken together.

The jury were called upon to find the signature genuine, because such was the opinion of the witness. We are not prepared to determine, that the admission of testimony fairly calculated to test the accuracy of his judgment, or the force of his conclusions, in regard to handwriting, if it may be deemed collateral in its character, is an objection sufficiently important, to require that the verdict should be set aside and a new trial granted. We think the Judge might have rejected the testimony; for there must be some limit to collateral inquiries, even where they might in some of their aspects have a slight bearing upon the issue to be tried. In the case before us, we are not satisfied, that the verdict ought to be disturbed upon this objection.

Judgment on the verdict.

A TABLE

OF

THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.