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REPORTS

OF

CASES 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

DURING THE PERIOD OF THESE REPORTS.

HON. NATHAN WESTON, LL. D. CHIEF JUSTICE.

HON. NICHOLAS EMERY, } JUSTICES.
HON. ETHER SHEPLEY, }

ADVERTISEMENT.

THE present Reporter has continued the practice of placing a particular term of the Court over the cases decided in each county. This does not however in every instance indicate the term at which the opinion was delivered, but merely that in which generally the greater portion of them are given. Opinions are delivered in some unimportant cases at the terms in which they are argued, or submitted without argument; in other cases, they are delivered, as soon as they are ready at the jury terms, and in counties other than those to which the cases belong; and sometimes a few are continued beyond the next law terms in the same counties. But the greater number of the decisions are made known at the law terms in the succeeding year; and these terms are now placed at the head of the pages. This mode of delivering opinions renders it impracticable to give the day when the opinion is read. The law terms, *holden in twelve counties each year*, commence on the Tuesday next preceding the last Tuesday of April, and continue until the last days of July. In September the jury trials commence, and each member of the Court is usually employed about three months in the performance of his arduous duty at those trials. It is therefore obvious, that the winter is about the only time the Court can devote to the examination of the law questions which have of late so greatly increased in number.

February 18, 1840.

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1838.

JOSEPH HOLBROOK *& al. vs.* SAMUEL HOLBROOK.

In an action upon a written promise, to indemnify the plaintiff against all claim upon him by one to whom he had previously given a bond to convey the same land, which was conveyed by the plaintiff to the promisor at the time the promise was made; a judgment against the plaintiff in a suit on the bond, in which the present defendant appeared as the attorney of the then defendant and present plaintiff, and after having knowledge of the cause of action, had suffered a default to be entered, is legal evidence of the right to recover on the bond in the present action.

If two are jointly liable, a demand made upon, or notice given to one, is equally binding on both.

A deed of the land conveys any interest the grantor has therein by virtue of an actual possession thereof for more than five years, although another has the better title.

THE original action, of which this is a review, was by *Samuel Holbrook* against *Joseph Holbrook* and *Warren Preston*, on a written contract, which will be found in 2 *Fairfield*, 361, as will also a description of the bond referred to, with other facts then in the case. On the present trial, some additional facts appeared. When *Saul Holbrook* brought his action against *Samuel* on the bond, *Mr. Preston*, one of the defendants, was *Samuel's* attorney, and received the bond from the then plaintiff's attorney, read a part of it, and then suffered the defendant to be defaulted. On the present trial, the judgment in that case was offered in evidence by *Samuel*,

and objected to by the plaintiffs in review. *Weston C. J.* presiding at the trial, ruled that if the jury were satisfied that *Preston* appeared in the action brought by *Saul*, and was apprized of what it was founded upon, the judgment was *prima facie* evidence against him and *Joseph*, but that it might be shown in defence, that the judgment, or the bond on which it was rendered, was collusively and fraudulently obtained.

The land described in the bond had been many years under cultivation, and had passed by deed through several persons, who had successively occupied it, to *Samuel Holbrook*, but the fee of the land had been in the proprietors of the *Kennebec Purchase*, who conveyed the same to *Preston* in 1818. The instruction requested by the counsel, and that actually given by the Chief Justice, appear in the opinion of the Court, in considering the second point. The counsel for the plaintiffs in review then insisted, that the action was defeated by reason of the covenant in the deed of *Samuel* to *Preston*, against all incumbrances made by him. The jury were instructed on this point, that if the claim of *Saul* was an incumbrance within that covenant, yet that the instrument declared on, having been executed at the same time with the deed, was intended by the parties to have operation and effect, and not to be defeated by the deed; and that the offset, set up to avoid circuity of action, could not prevail, inasmuch as the claim of *Saul* was not, and could not now be enforced as an incumbrance upon the land. The verdict for the original plaintiff was to be set aside, if either of the objections taken by the counsel for the plaintiffs in review ought to have been sustained.

Wells argued for the plaintiffs in review. On the first point, he cited *Twambley* v. *Henley*, 4 *Mass. R.* 441; and on the third, *Fairbanks* v. *Williamson*, 7 *Greenl.* 96.

F. Allen and *Tenney* argued for the original plaintiff. They cited on the first point, *Thacher* v. *Gammon*, 12 *Mass. R.* 268; 1 *Phil. Ev.* 241; 1 *Stark. Ev.* 191; 1 *Wheat.* 6; 7 *Cranch*, 271; 14 *Johns. R.* 81; 3 *East*, 316; 2 *N. H. Rep.* 190; 1 *Johns. R.* 517; *Hamilton* v. *Cutts*, 4 *Mass. R.* 349; 7 *Johns. R.* 171; *ib.* 173; 4 *Dallas*, 436; 6 *Johns. R.* 158; 3 *T. R.* 374; 5 *Wend.* 535; *Herring* v. *Polley*, 8 *Mass. R.* 113.

On the second point, they cited *Shaw* v. *Wise*, 1 *Fairf.* 113.

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

SHEPLEY J. — This is a review of the action reported, 2 *Fairf.* 361. The legal construction of the contract between the parties was finally settled in that case. It is not there decided, that upon legal principles, *Saul Holbrook* actually acquired any claim, right, or title in the premises by the bond from *Samuel Holbrook*.

That decision regards the contract as clearly intending to save *Samuel* harmless from that bond, although the language used in the contract, is that of a claim, right or title in the premises. And such a construction is made of the language as to carry into effect the intention of the parties, which intention to save *Samuel* harmless from the bond, the Court thought was clearly to be perceived from the situation of the parties, and the state of the facts then within their knowledge. This case presents no facts authorizing a different conclusion. And in the further examination, it is to be understood, that the contract of *Holbrook* and *Preston*, was a contract to save *Samuel Holbrook* harmless from his bond to *Saul Holbrook*, although *Saul* thereby acquired no claim, right or title in real estate by it.

Such being the contract, the first question made in this case is, whether the judgment recovered by *Saul* against *Samuel* on the bond can be evidence for *Samuel* in his suit against those, who have given him an indemnity against it.

That judgments under such circumstances are evidence for certain purposes, such as to prove the fact of damage, and in some cases the amount of damage, there can be no doubt. 1 *Stark. Ev.* 216.

Whether it was evidence to prove *Samuel's* title to recover, must depend upon, whether those contracting to indemnify him had such notice of the suit against him, that they could take upon themselves the defence of it by adducing testimony, cross-examining the witness, and entering an appeal. Where such notice is given the judgment binds the party, who engages to indemnify; and the party injured may offer it as evidence of his title to recover. *Marshall*

C. J., speaking of warranty and indemnity, says, "in such a case a judgment against the party to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on the contract of indemnity." *Clark's Executor* v. *Carrington*, 7 *Cranch*, 308.

In the case of *Kip* v. *Brigham*, 6 *Johns. R.* 158, where notice was given to the party liable to indemnify, and he assisted in the defence by his counsel, the judgment was held to be conclusive of the title to recover.

If the party is notified, so that he may appear, whether he does or not in fact appear and defend, it is sufficient to authorize the admission of the judgment against him upon the question of title. *Blasdale* v. *Babcock*, 1 *Johns. R.* 517.

No formal notice appears to have been given in this case to the parties liable to indemnify; but it appears that one of them, a counsellor of the Court, appeared for the defendant in that suit. The presiding Judge ruled, "that if the jury were satisfied, that *Preston* appeared in defence of the action brought by *Saul*, and was apprised of what it was founded upon, the judgment was *prima facie* evidence against him and *Joseph*."

It cannot be material to the person agreeing to indemnify, that he should have a formal notice served upon him. The law requires, that he should have notice before the judgment can be used against him, because he is the real party in interest. But any notice which will enable him to present any defence which he may have either in law, or on fact, is all that can be useful to him; and the law requires no vain or useless ceremonies in such cases. The ruling supposes, that he appeared in defence with a knowledge of what the action was founded upon, and of course with a knowledge, that he was a real party in interest, if he had agreed to indemnify against it. And knowing this, he had sufficient opportunity to defend. And where two are jointly liable, a demand made upon, or notice given to, one is sufficient.

The second point made, relates to the instructions given to the jury. The case states, that "the counsel for the plaintiffs in review contended thereupon, that in 1827, when the bond was given to *Saul*, the land belonged to *Preston*, and that therefore

Saul could derive from the bond given to him by *Samuel* no claim thereto; but I instructed the jury, that if *Samuel* received a conveyance from a party in possession and was in the actual seizin of the land, claiming it as his own, notwithstanding there might be an outstanding paramount title, *Saul* did acquire a claim in the premises in virtue of his bond." It is of importance to notice the real point of difference between the court and counsel. The counsel contended, that as *Preston* was the real owner of the land, *Saul* could derive no claim to it by his bond; or in other words, that if *Samuel* had performed, what the bond required of him by giving a deed to *Saul*, such deed would have conveyed nothing in the land, the title being in another. It was this position, which the Court was to meet; and the Judge, differing from the counsel, in substance says, a deed so made would have conveyed an interest in the land though the title was in another, because "*Samuel* received a conveyance from a party in possession and was in the actual seizin of the land, claiming it as his own." As the parties to this title and occupation were situated, our statute allows an interest in land to be thus conveyed; and there was no error in the conclusion of the Judge.

The case as drawn up makes the Judge say, that "*Saul* did acquire a claim in the premises in virtue of his bond," and it is now to be understood, that such language was addressed to the jury. But in looking at the subject matter under discussion at the time, and the point of difference; that expression, though erroneous, could have had no more influence upon the jury, than to negative the position taken by the counsel. And this it was proper that he should do. The jury were not led into any erroneous view of the rights of the parties by the instructions given; on the contrary, the true merits were really presented so as to enable them to find according to the rights of the parties.

The third point made at the trial relates to the effect of the deed from *Samuel Holbrook* to *Preston*, upon his contract of indemnity. And the instructions of the presiding Judge upon this point were clearly correct.

Judgment on the verdict.

MOSES NORTON *vs.* WARREN PRESTON.

An agreement for the conveyance of land, not reduced to writing, although performed in part by each party, cannot be enforced by *an action at law* for the recovery of damages.

This Court cannot exercise the jurisdiction in equity given by the statutes, unless the case is before them by equity process.

THE action was *assumpsit.* In the first count it was alleged, that in consideration that the plaintiff conveyed to the defendant, *April* 18, 1834, certain real estate in the County of *Penobscot*, valued by the parties at $5648, the defendant conveyed to him certain real estate in the County of *Somerset*, valued by them at $5200, and at the same time agreed with the plaintiff and one *A. H. Norton*, in consideration of the balance of $448, remaining unpaid in the exchange, to convey to them a lot and store valued by the parties at $2500, on condition that *A. H. Norton* should convey to the defendant certain other real estate, valued by the parties at $2052, which had been mutually agreed by the parties and *A. H. Norton* should be done, the lot and store to be owned by the plaintiff and *A. H. Norton* in proportion to the sum paid by each; that the plaintiff and *A. H. Norton*, had in all things conformed to the agreement; that *A. H. Norton* had offered to convey to the defendant the real estate agreed to be conveyed by him, and requested a conveyance of the lot and store; and that the defendant had refused to receive the deed and to pay the plaintiff the sum of $448. There was also a count for money had and received.

The plaintiff offered to prove the facts stated in the declaration and also that the defendant subsequently to the conveyances declared, that the lot and store were the property of the plaintiff, and requested the assessors not to tax him but the plaintiff therefor.

Weston C. J. presiding at the trial, intending to reserve the question, declined to admit the evidence on the ground, that the party offering it was estopped by his deed to the defendant in which he had acknowledged payment. The plaintiff became nonsuit by consent, and if in the opinion of the Court the evidence was improperly excluded, the nonsuit was to be taken off and the case stand for trial.

F. Allen and *Tenney*, argued for the plaintiff, and

Boutelle and *Wells*, for the defendant.

For the plaintiff it was contended:

1. The grantor is not estopped, by the acknowledgement in a deed of the payment of the consideration money, from showing, that the whole consideration was not in fact paid. The insertion of the consideration in a deed is not necessary to give it validity. 14 *Johns. R.* 210; 2 *Black. Com. chap.* 20. An additional consideration may be proved. 11 *Wheat.* 199; *Tyler* v. *Carleton*, 7 *Greenl.* 175. As a receipt for money, it is open to explanation. 1 *Johns. Cases*, 145; 2 *Johns. R.* 379; 12 *Johns. R.* 530; 5 *Johns. Rep.* 72; 3 *Johns. R.* 319; 2 *T. R.* 366; 3 *Stark. Ev.* 1272; 14 *Johns. R.* 212; *Lyman* v. *Clark*, 9 *Mass. R.* 235; *Adams* v. *Gould*, 8 *Greenl.* 438; *Smith* v. *Tilton*, 1 *Fairf.* 350. In an action for damages, for breach of covenant of seizin, the consideration money paid, not that stated in the deed, is the amount to be recovered. *Marston* v. *Hobbs*, 2 *Mass. R.* 433; *Bickford* v. *Page*, *ib.* 455; *Nichols* v. *Walter*, 8 *Mass. R.* 243; *Harris* v. *Newell*, *ib.* 262. In *England*, and in several of the States, this very question has been directly decided in our favor. 3 *T. R.* 474; 14 *Johns. R.* 210; 20 *Johns. R.* 338; 4 *Johns.* 23; 9 *Cowen*, 266; 12 *Serg. & R.* 231; 8 *Conn. R.* 304; 4 *N. H. Rep.* 229; *ib.* 397; *Wilkinson* v. *Scott*, 17 *Mass. R.* 249. In this State, the decision in *Steele* v. *Adams*, 1 *Greenl.* 1, has been much shaken in *Schillinger* v. *M'Cann*, 6 *Greenl.* 370; and *Tyler* v. *Carpenter*, 7 *Greenl.* 177.

2. The statute of frauds does not apply to cases of this description, where there has been a part performance by each party. *Goodwin* v *Gilbert*, 9 *Mass. Rep.* 510; *Pomeroy* v. *Winship*, 12 *Mass. R.* 514; *Davenport* v. *Mason*, 15 *Mass. R.* 85.

For the defendant, it was contended:

1. That the plaintiff was estopped from claiming by parol evidence to recover the consideration of a deed of lands, where the deed showed, that payment had been made. *Steele* v. *Adams*, 1 *Greenl.* 1; *Emery* v. *Chase*, 5 *Greenl.* 232; *Schillinger* v. *McCann*, 6 *Greenl.* 370; *Griswold* v. *Messinger*, 6 *Pick.* 517;

Pierson v. *Hooker*, 3 *Johns. R.* 68; 3 *Stark. Ev.* 1274, and cases cited; 1 *Stark. Ev.* 301; *Linscott* v. *Fernald*, 5 *Greenl.* 503.

2. The case clearly comes within the statute of frauds. It is a mere agreement to exchange lands. *Sherburne* v. *Fuller*, 5 *Mass. R.* 133. Besides, the plaintiff alone claims to recover on a mere parol agreement to convey land made by him and another person with the defendant. There has been no part performance of this contract. A contract was made between the plaintiff and defendant, and performed fully.

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

Shepley J. — It is important to understand, what the testimony excluded would have proved, if it had been admitted.

Upon examination, it is found to prove one entire contract for the exchange or conveyance of certain real estate described. There was no agreement for the payment of money; no act was to be done beyond that of a conveyance of real estate from party to party. The case presented, is that of an agreement for the conveyance of real estate, not reduced to writing, but performed in part by each party, and a further performance refused by one of the parties; and the other party seeking in this action at law to recover damages for such refusal.

The case does not therefore present the question decided in *Steele* v. *Adams*, nor invite a reexamination of it. The contract proved, can be no other than a contract for the sale of real estate; and the act to prevent frauds and perjuries provides, that "no action shall hereafter be maintained upon any contract for the sale of lands," "unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party charged therewith, or some other person thereunto by him lawfully authorized."

It is contended, that as there was a part performance, the contract is taken out of the statute. It was said by Mr. Justice *Buller*, "that as it is settled in equity, that a part performance takes it out of the statute, the same rule shall hold at law." *Brodie* v. *St. Paul*, 1 *Ves.* 326. Lord *Eldon* comments upon this remark of

Justice *Buller*, and shews, that according to their principles and modes of proceeding, the rule cannot be the same at law and in equity. *Cooth* v. *Jackson*, 6 *Ves.* 12. And such has been the decision at law. *Rondeau* v. *Wyatt*, 2 *H. Black.* 63. *Kent C. J.*, says, " there is such a dictum of Justice *Buller* while sitting in the Court of Chancery, but it has never been received as law." *Jackson* v. *Pierce*, 2 *Johns.* 222.

The contract between the parties cannot be enforced at law; and although this Court has jurisdiction in equity, this is not a process in equity; and it would be improper to act upon it as such; because if the plaintiff has an equitable right it is a different one from that of having damages assessed by a jury for a breach of contract, and the defendant may also, in a proceeding in equity, set up a defence, which he could not at law.

Nonsuit confirmed.

Isaac Marshall *vs.* Jacob C. Smith *& als.*

Where, by the terms of a written contract, one party is to build a vessel and convey the same by a bill of sale to the other on a day fixed, and the other party is to pay therefor at a time subsequent to that fixed for the sale; and where the bill of sale is made, within the time prescribed, wherein is contained an acknowledgment of payment of the consideration money; the bill of sale does not estop the vendee from recovering the price in an action on the contract.

Where one contracts in writing with three persons to give a bill of sale of two thirds of a vessel to two of them and of one third to the other, and in pursuance of the contract does convey two thirds; this is not a severance of the cause of action, and a suit may be maintained for the price against the whole.

Assumpsit to recover the price of a vessel, alleged to have been built and delivered to the defendants, founded on two agreements in writing, not under seal, the substance of which appears in the opinion of the Court. The defendants then read a bill of sale from the plaintiff to *Smith & Parsons*, two of the three defendants, under seal, made after the agreements, in which he transferred to them

two thirds of the vessel, and therein acknowledged the receipt of payment in full therefor. The plaintiff then offered to prove, that the bill of sale was intended only as a transfer of so much of the vessel, and not as evidence of payment; that he did not receive payment in full; that the accounts between the parties in regard to the building of the vessel were still unadjusted; and that subsequently to the bill of sale, *Smith & Parsons* admitted their indebtedness to the plaintiff for building the vessel. *Weston C. J.* presiding at the trial, refused to admit the evidence, holding the plaintiff estopped by his bill of sale. The counsel of the plaintiff then contended, that the bill of sale could be regarded as evidence only of the payment of two thirds of the vessel, and that he ought to recover the balance. The Chief Justice ruled, that although the contract was originally joint, it was severed by the bill of sale and acknowledgment of payment, and that the action could not be maintained against the three defendants. By agreement the plaintiff became nonsuit. If in the opinion of the Court, the evidence offered was admissible, or if the action could be maintained against all the defendants, a new trial was to be ordered.

Tenney, for the plaintiff, argued in support of the points made at the trial; and, on the question of estoppel, referred to the argument for the plaintiff, in *Norton* v. *Preston, ante p.* 14.

Wells, for the defendants, argued in support of the ruling at the trial, citing on the first point the argument for the defendants in *Norton* v. *Preston;* and on the second point, *Holland* v. *Weld*, 4 *Greenl.* 255; and *Baker* v. *Jewell*, 6 *Mass. R.* 460.

The opinion of the Court was afterwards drawn up by

Shepley J. — The written contracts between the parties exhibit their rights and duties. By the first contract, under date of *February* 7, 1834, the plaintiff agrees to build a vessel in the manner therein prescribed. *Smith* and *Parsons*, who are partners, agree to take one quarter, and *Dunning* another quarter of the vessel for what the other half sells for when launched. The whole is pledged to them for advances; and payment is to be made from their respective stores, in goods.

By another agreement of the twelfth of *July* following, the plaintiff agrees "to sell and deliver unto the said *Dunning*, *Smith* and *Parsons*; *Dunning* to have one third, and *Smith* and *Parsons* two thirds of the vessel." The hull is to be completed "and delivered afloat by the nineteenth day of *July* current."

The mode of payment is agreed to be as follows. Deducting, first, all advances already made by either to the plaintiff, or on account of the vessel; secondly, all liabilities they have incurred or may incur for the plaintiff; thirdly, all such bills as the vessel is liable for, "and pay the remainder in three and six months, equal payments."

The agreement is for a sale and delivery, and the intention of the parties doubtless was, that the sale should take place and the delivery be made at the same time. The plaintiff was to sell and deliver as one transaction, to be carried into effect at one time. When was it to take place? The contract answers, "by the nineteenth day of *July* current."

He did convey to *Smith* and *Parsons*, by bill of sale in the usual form, stating the consideration and acknowledging payment of it on the sixteenth day of *July*, three days before the time stipulated.

Was it not the intention of the parties, that the sale should be made by bill of sale in the usual form? The laws of the *United States* having required, that in case of sale "there shall be some instrument in writing, in the nature of a bill of sale," the legal conclusion is, that they must have intended that such an instrument should be made, and be the evidence of title.

The final adjustment and payment was not, by the agreement, to take place at the time of the sale, or before that day; for a credit of three and six months was given, from the date of the last contract. The plaintiff, then, was to execute the bill of sale and deliver the vessel before he could call for his pay; and it is not readily perceived how he could, at the time of sale and delivery, or before the first instalment became due, have compelled an adjustment. The promises of the parties were not dependent, or to be performed at the same time.

The plaintiff, in making the bill of sale of two thirds of the vessel to *Smith* and *Parsons*, did nothing inconsistent with, or op-

posed to his contract. The act was one required by it; and the acknowledgment of payment in the bill of sale, could not estop him on his independent contract, requiring payment to be made at a future time. Both contracts may with perfect consistency be enforced; and the doctrine of estoppel does not apply.

Nor was the conveyance of the two thirds a severance of the joint contract, because by it they had all agreed that *Smith* and *Parsons* should take the two thirds, and *Dunning* one third. And the fair construction of the contract is, that when the sale was made, it should be so made as to convey to each his proportion. And it cannot be material, if each obtained his part, whether the conveyance was by a joint or by separate bills of sale. The conveyance made, being in accordance with the contract and provided for by it, does not operate as a severance of it; and not operating as an estoppel, there must be a new trial.

Nonsuit set aside and a new trial granted.

Isaiah Dore *vs.* Thomas A. Hight.

Where the plaintiff replevies goods, which were lawfully seized by the defendant as *a collector of taxes*, and judgment is rendered for a return of the goods, the defendant is entitled to damages equal to six per cent. on the penalty of the bond.

The action was replevin. The defendant as collector of taxes took the goods and chattels replevied as the property of *John Ware* for the payment of taxes, and the jury found, that the chattels were the property of said *Ware*, and not the property of the plaintiff. Judgment was rendered for a return and restitution. *Parris J.*, before whom the trial took place, directed the jury, that the interest of six per cent. on the penal sum of the bond should be taken as the rule of estimating the damages. If this direction was correct, judgment was to be entered on the verdict, but if erroneous, the verdict was to be amended, as the Court should think proper.

Tenney, for the plaintiff, contended, that the *stat.* of 1821, *c.* 80, *sec.* 4, gave no power in a case like this, to estimate damages

for the defendant. It is confined to a taking on execution, and not for taxes.

C. Greene, for the defendant, said, that although there was a mistake of one word in the statute, still the meaning was sufficiently plain, taking the whole into consideration. The damages are to be assessed on the bond, and the taking on the warrant is as much on final process, as a taking on execution.

The opinion of the Court was prepared by

WESTON C. J. — The authority, under which the defendant, as collector of taxes, took the chattels in controversy, was in effect a process of execution. In such case, judgment being rendered for a return and restitution, the interest of six per cent. upon the penal sum of the bond, is by statute to be the rule for estimating the plaintiff's damages. The plaintiff here intended, is manifestly the plaintiff in the execution. The plaintiff in the suit before the court, is in the same section called the plaintiff in replevin. The plain and obvious meaning of this section, requires this construction.

Judgment on the verdict.

Inhabitants of NEW-VINEYARD, *Pet. for cer.* vs. *Inhabitants of the* COUNTY OF SOMERSET.

The County Commissioners have power to establish a public highway from one place to another place within the same town.

THE inhabitants of *New-Vineyard* petitioned for a certiorari to the County Commissioners for the purpose of having their proceedings in establishing a road, wholly within the limits of that town, quashed. The facts in the case, and the positions taken in argument appear in the opinion of the Court.

R. Goodenow, for the petitioners, cited *stat.* of 1821, *c.* 118, and *stat.* 1831, *c.* 500, *sec.* 4.

E. Allen, County Attorney, for the County, insisted, that the power given in the *stat.* of 1821, *c.* 118, was not restricted by

the act of 1831, *c.* 500; and cited *Commonwealth* v. *Cambridge*, 7 *Mass. R.* 158; *Emerson* v. *County of Washington*, 9 *Greenl.* 88, and 98; *Ex parte Baring*, 8 *Greenl.* 137; 3 *Pick.* 408; 10 *Mass. R.* 226; 1 *Pick.* 351.

H. Belcher appeared for the original petitioners.

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

SHEPLEY J. — This petition sets forth several errors in the proceedings in locating a highway in the town of *New-Vineyard;* none of which were insisted upon at the argument except one, alleging a want of jurisdiction in the county commissioners, because the highway prayed for is described in the petition as being wholly within the limits of that town.

The first section of the act of *March* 2d, 1821, gives the court of sessions authority to lay out or alter highways, "from town to town or place to place;" and this language is adopted from the act of *Massachusetts*, of the 27th of *February*, 1787; and it had there received a judicial construction in the case of the *Commonwealth* v. *Cambridge*, 7 *Mass. R.* 158; where it was decided, that the words from place to place authorized the sessions to establish a highway wholly within the limits of one town.

This construction, according to established precedents, must be understood to have been adopted by our legislature in its use of the same phraseology. That power the county commissioners had at the time these proceedings took place, unless repealed or altered by the act of the tenth of *March*, 1831. The third section of this act gives the county commissioners, "all the powers, authorities, and duties" of the court of sessions, "except so far as the same are modified or altered by the provisions of this act;" and all acts and parts of acts inconsistent with its provisions are repealed. The fourth section prescribes the mode of proceeding upon petitions, and says, "that all and every petition for the laying out, alteration, or discontinuance of any highway or common road leading from town to town shall be presented to the county commissioners."

The argument is, that the omission of the words "place to place" in this section is a limitation of their powers.

No highway for the convenience of all the citizens can be established, altered or discontinued by the towns, their authority extending only to the location of town and private ways. If an important alteration or a new highway is required to promote the public good, and to render more convenient the public travel for miles within the limits of any one town, such improvement cannot upon this construction be made, because there is no power either in the county commissioners or in the towns to make it. Nor can a way like situated, and which has become useless, be discontinued, for the same reason. A construction so manifestly at variance with all past proceedings, and making an alteration in the laws of such importance should not be adopted, unless it is clear that such was the intention of the legislature. The power is given to the county commissioners in the third section; and the omission of the words from place to place in a section not framed with any apparent design to act upon their jurisdiction, but with the design to prescribe merely the course of proceeding, cannot be regarded as exhibiting an intention on the part of the legislature of making so material an alteration in their powers. The purpose to be accomplished by the section is to be examined; and when that purpose is fully carried out, there is little reason to look for another, and a very different one. If it was the intention to limit the powers of the commissioners in such a manner, it would reasonably be expected, that such intention should be, if not clearly expressed, more distinctly exhibited, than by the omission of words in a section designed for a different purpose, than that of defining their jurisdiction and powers.

Writ not granted.

HERBERT SAVAGE *vs.* MOSES WHITAKER *& al.*

Where the consideration of a promissory note was an agreement to assign a contract made by a third person to carry the *United States'* mail, on a certain route, and which had been assigned to the payee of the note by such third person, without the assent of the Post Office Department; and where the Postmaster General afterwards availed himself of his right to consider the contract as forfeited by such assignment, and made a new contract with a different person; *it was held*, that the consideration of the note had failed, and that the action upon it could not be maintained.

An engagement to do a certain thing, involves an undertaking to secure and use effectually all the means necessary to accomplish the object.

ASSUMPSIT on a promissory note. The defence was a want or failure of consideration, and the defendants proved, that the note declared on, and another, both amounting to $500, were given in consideration of a contract of which a copy follows. "Whereas *Daniel Bunker* has procured from the General Government the right of transporting the mail on Post Route, No. 29, for the sum of $2475 per annum, and whereas the said *Bunker* has agreed to transfer the contract to *Herbert Savage*. Now be it known, that I, *Herbert Savage*, in consideration of $500 to me paid by *Moses Whitaker* and *Cyrus Bryant*, the receipt whereof is hereby acknowledged, do hereby undertake, promise and agree to transfer and assign to said *Bryant* and *Whitaker* all the right, title and interest I may have in said contract in consequence of said assignment from said *Bunker*, provided said *Whitaker* and *Bryant* shall first execute and deliver to said *Savage* a good and sufficient bond, conditioned to do and perform all the stipulations and agreements, that the said *Savage* is bound to do and perform by his agreement with said *Bunker*." The defendants also proved, that in consequence of a violation by *Bunker* of the following rule of the General Post Office; "No contract or bid can be transferred without the special and written approbation of the Postmaster General; and an assignment of a contract or bid, without his consent first obtained in writing, shall forfeit it" — in his transfer to the plaintiff, *Savage*, the contract with *Bunker* was never completed by the Postmaster General, but the contract for that route was let to another person, by reason of which the defendants derived no bene-

fit from their contract with the plaintiff. At the trial the plaintiff contended, that the defendants, at the time of making the note declared on, had knowledge of that rule of the Post Office Department, and gave the note under a full knowledge of the hazard under which they contracted; but the jury specially found, that the rule referred to "was read in the presence of *Whitaker*, but not explained to him, so that he understood it, before he signed the note declared on." There was no evidence that *Bryant* had any knowledge of it. A verdict was taken for the plaintiff by consent, subject to the opinion of the whole Court upon the case; and a nonsuit was to be entered, or the verdict to stand.

Boutelle, for the defendants, contended, that the consideration of the note was illegal, and the note thereby void; and also, that if it were otherwise, and the consideration was originally good, yet that it had wholly failed. He cited *Dickinson* v. *Hall*, 14 *Pick.* 217; *Cone* v. *Baldwin*, 12 *Pick.* 545; 1 *Phil. Ev.* 85; 2 *Stark. Ev.* 38.

F. Allen and *Tenney*, for the plaintiff, insisted, that the consideration of the note was the contract made with him by the defendants, giving them the same right to the contract to carry the mail, which he had from *Bunker*. This the plaintiff contracted to convey and no more. That the Post Office Department had the option to refuse to complete the contract, might lessen the value, but could not render the contract between the parties illegal. There was no fraud or deception practised. Although the defendants did not derive a benefit from the purchase, that was no failure of the consideration of the note, but merely a failure to succeed in the speculation. They cited *Bowen* v. *Bell*, 20 *Johns. R.* 338; *Baker* v. *Page*, 2 *Fairf.* 381; *Armstrong* v. *Toler*, 11 *Wheat.* 258; *Wolcott* v. *Knight*, 6 *Mass. R.* 418; *Woodward* v. *Cowing*, 13 *Mass. R.* 216; 4 *Burrow.* 2069.

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

WESTON C. J. — Payment of the note in suit is resisted by the defendants, on account of the alleged unlawfulness of the consideration. By the regulations of the Postmaster General, which he

had legal authority to make, no contract, or bid for a contract, can be transferred, without his written approbation first had and obtained under the penalty of a forfeiture of such contract or bid. The answer given to this is, that the consideration for the note in question, was a promise or engagement, that such transfer should be made; and that this is not to be regarded as unlawful, inasmuch as the written consent of the Postmaster General might be obtained. We are inclined to adopt this construction; but in our judgment, there has been manifestly a failure of consideration.

Bunker, who had a right to the contract, had agreed to assign it to the plaintiff, and the plaintiff agreed to transfer and assign to the defendants all the interest he had in said contract, "in consequence of said assignment from said *Bunker*." This assignment, made or to be made, is assumed as the basis and subject matter of the plaintiff's contract. *Bunker* had undertaken to make that effectual. If it failed, the plaintiff had nothing to transfer, and the defendants obtained nothing. If that took effect, he had still a duty to perform, in causing the interest to be transferred to the defendants. An engagement to do a certain thing, involves an undertaking to secure and use effectually all the means, necessary to accomplish the object; and among these, the most important and essential was, to obtain the written consent of the Postmaster General. It was not the mere chance, that this might be effected, which formed the consideration for the note. The defendants were to stand in the place of *Bunker*, and to enjoy the emoluments, which were expected to be derived, from the contract with the government.

The case finds, that the assignment from *Bunker* failed, the Postmaster General being dissatisfied with his course, and having actually contracted with another. No fault is imputable to the defendants. That which the plaintiff undertook to sell, and for which the defendants engaged to pay a valuable consideration, has been arrested and defeated by an authority, over which they had no control. It seems to us, that it would be neither equitable nor just, to hold them to pay the stipulated price. The verdict is accordingly set aside; and upon the facts reported, we are of opinion, that a nonsuit should be entered.

Plaintiff nonsuit.

NATHAN DENNETT *vs. Inhabitants of* WELLINGTON.

In an action against a town for damages sustained in the loss of a horse, alleged to have been caused by a defect in the highway, and where the defence was, that the injury was occasioned by driving rapidly an unbroken and unmanageable horse in the night, and not by badness of the road; *it was held*, that evidence of the previous bad behaviour of the horse was admissible.

THE plaintiff claimed damages for the loss of a horse, alleged to have been killed by reason of a defect in a public highway within the town of *Wellington*, on the second of *September*, 1835. The defendants insisted, that the loss was occasioned by the imprudence of the plaintiff in driving very rapidly an unbroken and unmanageable horse in the night time. The defendants called a former owner of the horse to prove that it was high spirited and unbroken, and was proceeding to give an instance of the misbehaviour of the horse while he owned it the *February* before the accident. This was objected to, but admitted by *Weston C. J.* on the trial. The verdict for the defendants was to be set aside, if the admission was erroneous.

Hutchinson, for the plaintiff, insisted that the testimony objected to had no relation to the subject matter of the trial, and ought not to have been admitted.

Tenney, for the defendants, said that two things were necessary to the maintenance of the action, a defect in the highway, and ordinary care in the traveller. And it was as much the duty of the plaintiff to provide himself with suitable animals and vehicles, as to make use of proper care himself. The testimony of the bad conduct of the horse at a time previous to the accident was proper to show the character of the horse. 2 *Pick.* 621; 7 *ib.* 188; 11 *East*, 60; 1 *Cowen*, 179; 6 *ib.* 189; 3 *Stark. Ev.* 986.

The opinion of the Court was prepared by

WESTON C. J. — The defence was placed upon a want of common prudence in the plaintiff, in driving rapidly an unbroken and unmanageable horse, in the night time. Upon this point the character of the horse was to be taken into the account. He was killed in *September*. If he was unbroken the *February* before,

this was a fact proper for the consideration of the jury, in the absence of testimony showing that his character had undergone a change.

Judgment on the verdict.

Samuel Gould *vs. Inhabitants of* New-Portland.

An agreement between a town and one of its inhabitants, that he should collect the taxes for a fixed compensation, on being chosen sole collector and constable, performed on the part of the town, is a legal contract and binding on the collector.

Where a town chooses one of its inhabitants collector of taxes, on his agreeing to make the collection for a certain per cent., he is bound to collect for that compensation not only the amount raised at the meeting when he was chosen, but all taxes where the money was raised and the bills committed to him during the year.

The action was *assumpsit*, for services performed by the plaintiff as collector of taxes in *New-Portland*. At the *March* meeting in 1834, the plaintiff offered to serve as collector for one and an half per cent., he to be the sole constable. The town chose the plaintiff constable and chose no other. He was also chosen collector, and the vote was thus recorded. "Chose *Samuel Gould, Esq.* collector, by his collecting for one and an half per cent., and by his posting all warrants free of expense." The town raised a sum of money at that meeting, and a further sum at a meeting in *May* following, and also an additional sum in *December* of that year, to rebuild a bridge, which had been carried away. All the tax bills of that year were committed to the plaintiff, and he performed the service; but did not finish his collection until the following year. The plaintiff had been paid one and an half per cent. for the collections made by him. At the trial, the plaintiff's counsel contended: — 1. That he was not bound to collect any of the money for one and an half per cent. by reason of any thing which took place at the *March* meeting. 2. That if he was bound to collect any money for that compensation, it was limited to the amount raised at the meeting at which he was chosen. *Weston C. J.* ruled, that the plaintiff was limited to one and an half per cent. upon all the

bills committed to him for collection, for money raised in the year 1834. The plaintiff then consented to become nonsuit, and the action was to stand for trial, if the opinion of the Court should be with the plaintiff, on either ground taken by him.

Wells, for the plaintiff, argued in support of the positions taken at the trial.

Tenney, for the defendants, said, that by the *stat. c.* 116, collectors were not bound to serve when chosen, though constables were. *Morrell* v. *Sylvester*, 1 *Greenl.* 248; *Mussey* v. *White*, 3 *Greenl.* 290. The contract between the plaintiff and the town was a legal one, and applied to all the money raised during the year, and he must be bound by his contract.

The opinion of the Court was afterwards drawn up by

WESTON C. J. — The plaintiff agreed to act as collector, for one and an half per cent., he to be sole constable. The town consented, chose him constable and collector, and chose no other constable. There was nothing in the agreement, limiting the commission, or the stipulation of *Gould*, to the moneys to be raised at that meeting.

All that he subsequently collected, although part of it might be after the close of the municipal year, was under his appointment at that time. Having accepted the office, he was bound to collect all moneys, raised and assessed that year, for which he had a sufficient warrant. *Nonsuit confirmed.*

LEVI JOHNSON, *Treasurer*, *vs.* NOAH GOODRIDGE.

A collector of taxes, who has given a bond to the town "to pay over the money collected to the treasurer," is bound to pay over money voluntarily paid to him by the inhabitants, although the tax bills committed to him are imperfect and illegal, and although he has received no collector's warrant.

If a majority of the assessors sign the tax lists in such manner, as clearly to show their intention to give them their official sanction, it is immaterial on what part of the lists the signatures appear.

DEBT on a bond, given by *Jonathan Goodridge*, as principal, and the defendant, as surety, jointly and severally, to the plaintiff as

Treasurer of the town of *Canaan*, with this condition. "The condition of this obligation is such, that whereas the said *Jonathan Goodridge* was chosen to the office of collector for the town of *Canaan*, for the year 1832; now if the said *Jonathan Goodridge* shall faithfully perform his duty, and pay over the money collected to the said treasurer, then this obligation shall be void, otherwise shall remain in full force and virtue." The facts in the case sufficiently appear in the opinion of the Court. A default was entered, subject to be taken off, if the action could not be maintained.

Tenney, for the defendant, contended:

1. The action cannot be maintained, because the tax bills committed to the collector were not signed by the assessors. *Foxcroft* v. *Nevens*, 4 *Greenl.* 72; *Colby* v. *Russell*, 3 *Greenl.* 227; *Mansfield* v. *Doughty*, 3 *Mass. R.* 398.

2. Because the collector had no warrant or power to collect the taxes, or to excuse him from personal liability. *Ford* v. *Clough*, 8 *Greenl.* 342; *Colby* v. *Russell*, before cited; *Holden* v. *Eaton*, 8 *Pick.* 346; *Elwell* v. *Shaw*, 1 *Greenl.* 339; *Salem I. F. Co.* v. *Danvers*, 10 *Mass. R.* 514; *Amesbury W. & C. Co.* v. *Amesbury*, 17 *Pick.* 461.

Wells and *L. Johnson*, for the plaintiff, contended, that as the money was voluntarily paid by the inhabitants, who could not under such circumstances recover it back, the collector should be held to pay it over to the town according to the condition of his bond; or it would operate not only as a fraud upon the town, but upon the inhabitants who had paid their taxes. *Foxcroft* v. *Nevens*, 4 *Greenl.* 72, and cases there cited; *Ford* v. *Clough*, 8 *Greenl.* 334, and cases there cited.

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

SHEPLEY J. — The defendant is surety on the official bond of *Jonathan Goodridge* as collector of taxes for the town of *Canaan*, for the year 1832. The condition of the bond is, "now if the said *Jonathan Goodridge* shall faithfully perform his duty and pay over the money collected to the treasurer, then this obligation to be void."

The facts relied upon to prove a breach, are; that during the year 1832, certain bills, on what was called the fine tax on the highway, in the handwriting of one, and having the signatures and direction of two out of the three assessors, on the first page, in these words, "To *Jonathan Goodridge,* collector. Fine tax on the highways for 1832, assessed on the estates of non residents by

"*Wentworth Tuttle,* } *Assessors of*
"*Isaac Holt,* } *Canaan.*"

were put into the hands of the collector for collection, without any accompanying warrant. And that said collector had made certain collections upon these bills, which he had not paid over to the treasurer. Upon inspection of the tax lists which are referred to, it appears, that the two first pages purport to be assessments on the estates of non residents; and the remaining pages assessments upon the polls and estates of residents.

The defence is, that the defendant is not liable, because the tax lists were not under the hands of a majority of the assessors; and because the assessors did not commit the same with a warrant under their hands to the collector, the statute requiring both these acts to be performed by them.

It is admitted, that there was no warrant, but insisted, that the tax lists were sufficiently authenticated. In the statute, the language used is not, subscribed, or signed; it is, "make perfect lists under their hands." All that can reasonably be required, is to accomplish the object designed by the statute, which is, that the lists should bear upon them the official sanction of a majority of the assessors, evidenced by their signatures. If a majority sign the lists in such a manner as to shew that the intention was thereby to give them their official sanction, that may be sufficient, on whatever part of the lists it be made. But the intention or object of the signature must clearly appear. It must be a signing for the purpose of special authentication. It is difficult to say, that any more of these lists, than the pages bearing the assessments upon non residents are so authenticated. The assessors limit their signatures to taxes on the estates of non residents; and the words, "non residents," being a proper description of certain portions of the tax lists, cannot be rejected as words without meaning. The collector must then be regarded as having lists of assessment not in a legal form put

into his hands to collect, and without any warrant for so doing. Yet he has collected portions of the taxes on such lists, and has not paid over the money to the treasurer. This money is not his own; he does not prove that it was received under such a mistake of facts, or in such a compulsory manner, that he is obliged by law to return it to those from whom he received it. The argument is, that it might have been so received, but the Court can act only upon proof. The money was collected by him in his official character as collector, and in that character he holds it. One of the acts required of him by the bond is, "to pay over the money collected to the treasurer." That duty he has not performed, and the result is a clear breach of his bond, unless he is excused by some neglect on the part of the officers of the town, in doing what the bond or contract between the parties required of them. If the plaintiff sought to recover of the defendant damages for want of faithfulness in collecting, or in performing other duties, than that of paying over money collected; the defence might be good, that the officers of the town had not on their part performed their duty so as to enable him to perform his. But they have placed no obstructions in the way of his duty in paying over money collected; nor is there any thing in the *condition of the bond* requiring them to do as a precedent act, what they have not done.

In the case of *Foxcroft* v. *Nevens*, 4 *Greenl.* 72, the condition of the bond was in substance, that he should collect and pay into the treasury, all such taxes as he should have sufficient warrant for; and the bond itself imposed the duty upon the plaintiff to shew, that he had a warrant. Failing to do this, the Court held, that no breach of the bond was proved. That this was the ground of decision clearly appears where it is said by the present Chief Justice, "but the limitation here extends as well to the sums which were to be accounted for and paid over, as to those which were to be collected."

In the case of *Ford* v. *Clough*, 8 *Greenl.* 334, the condition of the bond was, "faithfully to discharge his duty as collector;" and the objections were there taken, that no legal lists were committed to the collector, and that he had no legal warrant. The then Chief Justice, reasoning upon the case as thus stated, and without inquiring whether the facts were so, assigns his reasons for the opinion,

and says, " for these reasons we are of opinion, that according to the facts, as found by the jury, the condition of the bond has been violated by the unfaithfulness and negligence of *Clough*, in not paying into the town treasury the moneys he had collected on the bills of assessment committed to him for collection, though such bills were liable to the objections urged against them, by reason of the specified imperfections therein, and omissions of duty on the part of the assessors before and at the time of commitment."

Whether the other town officers have performed their duties or not, is not made a part of the contract between the parties in this case; and their neglect cannot therefore be assigned by the collector, or his surety, as an excuse for any neglect of his, which did not happen in consequence of theirs.

Judgment on the default.

WILLIAM HASKELL *vs.* MORAL GREEN *& al.**

Proof that the principal in a bond, given by a debtor arrested on execution pursuant to the provisions of the staute of 1822, *c.* 209, for the relief of poor debtors, was afterwards wholly deprived of his reason, and thus remained until after the time limited in the bond for taking the debtor's oath, and was thereby rendered incapable of taking it, furnishes no valid defence to an action on the bond.

One cannot be excused for not taking the poor debtor's oath, by showing that he was so destitute of property, that he might justly and legally have taken it.

EXCEPTIONS from the Court of Common Pleas, *Smith J.* presiding. *Moral Green*, one of the defendants, having been committed to prison on an execution in favor of the present plaintiff, was, on the 4th day of *November*, 1834, enlarged, on giving a bond in the usual form to the plaintiff, conditioned that the said *Moral* should continue a true prisoner within the limits of the jail-yard, and not depart without the exterior bounds thereof until lawfully discharged from his imprisonment; and, if he should not be discharged from his said imprisonment according to law, within nine

* The Chief Justice was necessarily absent during the hearing of this and the two following cases.

months from the date of the bond, should surrender himself to the jail-keeper within three days of the end of said nine months, and go into close confinement. In this action of debt upon the bond, the defendants pleaded the general issue, and filed a brief statement, averring, that after his commitment, on *July* 1, 1835, the said *Moral* caused the plaintiff to be cited according to law, to appear at the office of the jailer of the county, on *July* 17, 1835, at 10 o'clock, A. M. and therein notified the plaintiff of his intention to take the poor debtor's oath; that said *Moral* on said 17th of *July*, and for a long time before, and for a long time after the expiration of the nine months and three days, mentioned in the bond, was wholly deprived of his reason and understanding, and totally incapable of taking said oath; and that said *Moral* from the time of his commitment to the time of trial had been destitute of property, real or personal, excepting such as is by law exempted from attachment and execution; and that he had been during the whole of that period well entitled to the benefit of the poor debtor act, and had committed no escape. The defendants, on the trial, offered evidence to prove the facts set forth in the brief statement; but the Judge considered, that such facts would not constitute a defence, and ruled that the evidence was inadmissible. A verdict was returned for the plaintiff, and the defendants filed exceptions.

Tenney, for the defendants, argued, that unless the evidence offered was admissible, the sureties are liable to pay the debt of an insolvent man, who becomes incapable of taking the oath by the act of God. The Justices could not administer the oath to him, while deprived of his reason. In *New-York* bail are excused, when the principal is deprived of the power of surrender by the act of God, or of the law. In *Massachusetts* it has been held, that bail is excused by the act of God, disabling the principal from being surrendered, although the decisions have not been in accordance with those of *New-York* in regard to the act of the law. The same principle should apply to this case. He cited *Champion* v. *Noyes*, 2 *Mass. R.* 481; *Parker* v. *Chandler*, 8 *Mass. R.* 264; *Loflin* v. *Fowler*, 18 *Johns. R.* 335; *Sayward* v. *Conant*, 11 *Mass. R.* 146; *Harrington* v. *Dennie*, 13 *Mass. R.* 93; *Phœnix F. Ins. Co.* v. *Mowatt*, 6 *Cowen*, 699.

Boutelle argued for the plaintiff.

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

SHEPLEY J. — The defendant, who was principal in this bond, taken pursuant to the act of *February* 9, 1822, for the relief of poor debtors, *ch.* 209, notified his creditor and proposed to take the poor debtor's oath; but on account of being "wholly deprived of his reason" before the day appointed, he did not take the oath. Nor did he surrender himself within nine months and three days; nor was he surrendered within that time by his bail, because he remained in the same condition of mental alienation until after that time. The defendants also offered to prove, that he was so destitute of property, that he was well entitled to take the oath. One cannot be excused for not taking the oath, by showing that he might have justly and legally taken it. Does his want of sanity afford an excuse for not fulfilling the condition of his bond? That question arose in the Court of King's Bench, in a case of bail, where a commission of lunacy had issued and the principal continued to be a lunatic; and the court intimated, that there could be no foundation for an *exoneretur* being entered on that account. *Cock* v. *Bell*, 13 *East*, 355.

The same question again arose in that court in a case of bail, where an attempt had been made to surrender the principal, and the keeper of the prison had refused to receive him because he had no place for the reception of a person of that description. It appeared also that the principal had become lunatic during his residence in the rules. Yet the *exoneretur* was refused. *Anderson's Bail*, 2 *Chitty's Rep.* 104.

There has not in this case been a performance, and the law does not regard such a misfortune, as a sufficient excuse.

Exceptions overruled.

Moses Norton *vs.* Samuel L. Valentine.

Where an officer has made a false return, he is responsible for the ordinary results of his own acts; but not for the illegal or oppressive conduct of the creditor, or another officer. The injury and loss which the plaintiff actually sustained by the false return are the only proper subjects of examination in estimating the damages.

In an action against an officer for falsely returning that he had left a true and attested copy of a citation to take the debtor's oath, under the statute of 1831, *c.* 520, at the last and usual place of abode of the debtor, the certificate of the Justices, that he was notified, is not conclusive evidence of the fact.

If the debtor, without having had notice, happen to be present before the Justices, he is not bound to plead to or object to their jurisdiction.

A promise by the debtor to the creditor to pay the debt does not preclude the debtor from maintaining an action for the false return.

Improper or irrelative testimony cannot become admissible merely because it is introduced by the cross-examination of a witness called by the adverse party.

Exceptions from the Court of Common Pleas, *Smith J.* presiding.

The action was case, for a false return upon the citation to the plaintiff to disclose the actual state of his business affairs, pursuant to the statute of 1831, *c.* 520, for the abolition of imprisonment of honest debtors, served by the defendant. The citation was founded on an execution issued on a judgment rendered in the county of *Penobscot*, against the defendant and others, in favor of one *Snow*, and was returnable before Justices in that county. The defendant was a deputy sheriff for the county of *Penobscot*, and returned on the citation, that he had left a true and attested copy of the same at the last and usual place of abode of the plaintiff. The Justices before whom the citation was returnable, certified, that the plaintiff was notified and did not appear, and *Snow* sued out another execution, running against the body, on which the plaintiff was arrested by another officer and committed to prison. The plaintiff offered evidence tending to show, that the plaintiff had removed with his family from *Bangor*, where he had formerly resided, to *Norridgewock*, in the county of *Somerset*, some months before the service of the citation; but it appeared that he had after his re-

moval occasionally worked and boarded at *Bangor*. There was no direct evidence, that the plaintiff was in the county of *Penobscot*, when the service was made, but there was evidence tending to show that he was present at the time and place where the citation was returnable, but it did not appear, that he made his appearance known to the Justices, or even that he knew that any citation had issued. The defendant returned on an execution in favor of a third person against the plaintiff, on the day next following his return on the citation, that he could not find the plaintiff within his precinct. The Judge instructed the jury, that if the plaintiff had removed his family to *Norridgewock*, before the service of the citation, and if his and their home was in *Norridgewock*, that the residence of the plaintiff would be in that town, and the return on the citation false; that if the plaintiff were present before the Justices, he was under no obligation to plead to, or object to the jurisdiction of the Justices; and that their adjudication was no evidence, that the plaintiff's residence was in the county of *Penobscot*. The defendant proved, that after the return day of the citation, the plaintiff promised to pay the execution to the attorney of the creditor, if he would keep it until a certain day; that it was kept until that day; and that then the plaintiff refused to pay it. The Judge ruled, that the promise and agreement were no waiver of any claim against the defendant for a false return. The plaintiff offered testimony, appearing in the cross examination of a deponent, whose deposition was taken by the defendant, and read by him on the trial, tending to show, that *Snow's* demand was secured by a mortgage, and that he had taken possession under it; that when the plaintiff was committed on the execution by another officer, it was done with violence, and in the presence of a large number of persons; and that the plaintiff borrowed the money of his brother to pay the execution, who said when he loaned it, that he had himself borrowed it for that purpose. To the admission of all this evidence the defendant seasonably objected, but the Judge overruled the objections, and admitted the evidence. To the ruling and instructions of the Judge, and to the admission of the evidence, the defendant excepted.

Wells, for the defendant, contended, that the service was properly made in the county of *Penobscot*, and by leaving a copy of

the citation at the house where the plaintiff boarded. Where the family resides in one county, and the man lives and boards in another, the notice is properly left at his boarding place.

As the plaintiff was present at the time and place, he should have objected to the jurisdiction of the Justices, if he intended to insist, that the proceedings were in the wrong county; and not having done so, he is bound by them. Their adjudication is conclusive evidence, that he was notified. The promise to pay the execution to the attorney of the creditor was a waiver of any irregularity in the previous proceedings. He argued, that each particular of the testimony objected to and admitted was clearly inadmissible, and material in the decision of the questions before the jury.

Tenney, for the plaintiff, said the ground of complaint was, that the defendant had falsely returned, that he had left a copy of the notice at the plaintiff's last and usual place of abode, when he had not done so. And this was done wilfully, and not by mistake. He therefore is justly and legally chargeable with all which the plaintiff has lost by his illegal act. Without this return the creditor could not have taken out an execution against the body. The case does not show, that the plaintiff had any knowledge of the proceedings before the Justices, and had it been otherwise, he could not have made any successful objection to their acting, because the return would have been conclusive, except in a suit against him.

The usual place of abode of any man is where his family resides. 1 *Mass. R.* 58; 4 *ib.* 556; *ib.* 312; 7 *ib.* 1; 9 *ib.* 543; 11 *ib.* 350; *ib.* 424; 10 *ib.* 488; 3 *Greenl.* 455; 4 *ib.* 234; 8 *ib.* 203; 1 *Stark. Ev.* 39; *Story's Conflict of Laws*, 42, 45.

No objection having been made to the questions in the deposition, when it was taken, it cannot be done at the trial. 1 *Phil. on Ev.* 222, *note c*; 3 *Binney*, 130.

The testimony of the witness to which objection is made came out on cross examination, and was proper to test his credit, and much latitude is given for that purpose. 1 *Stark. Ev.* 129, 132; 1 *Phil. Ev.* 221, 227. The defendant's false return caused all the injury sustained by the plaintiff, and he is responsible for it. It was the natural consequence of the defendant's acts. 1 *Mass. R.* 145; 7 *Mass. R.* 169; 11 *Mass. R.* 137; 1 *Chitty's Pl.* 125

to 128. To show the amount of the plaintiff's damage, he must show every thing which took place at the time. The evidence was properly admitted as part of the *res gesta*.

The opinion of the Court was drawn up by

SHEPLEY J. — The defendant is responsible for the consequences of his own acts; but however illegal may have been his conduct, he is not to be made responsible for the acts of others, unless they are produced as the ordinary results of his own. He was in no degree responsible for any course, which the plaintiff might have taken; and whether oppressive or not, it was not for him as an officer to judge. Whether the judgment creditor had a mortgage upon real estate to secure his debt and had entered for condition broken, was not a matter, which should injure the defendant or increase the damages against him. The defendant had no right or power to restrain the creditor from enforcing the collection of his debt by as many different methods as the law would permit.

Nor can it make any difference that the testimony in this case came out by the cross examination of a witness introduced by the defendant. Illegal or irrelative testimony cannot be thus properly introduced.

Nor can the defendant be held responsible for the illegal or harsh conduct of the officer, who arrested the plaintiff on the alias execution. If such officer conducted wrongfully, for that wrong he should himself answer; and the plaintiff has his remedy against him; and to him only, and not to the defendant, can he in justice resort.

What the plaintiff's brother said respecting the manner of obtaining the money is clearly inadmissible.

No valid objection appears to exist to the other rulings and instructions of the presiding Judge.

The injury and loss which the plaintiff actually sustained by the wrongful act of the defendant are the only proper subjects of examination in estimating the damages; and as these might have been, and for aught that appears, were inflamed by the illegal testimony, there must be a new trial.

Exceptions sustained, and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF PENOBSCOT, JUNE TERM, 1838.

M. P. SAWYER *& al. vs.* WILLIAM HAMMATT *& al.*

Where a right to cut and take a certain quantity of standing timber from a tract of land is reserved, or given, in a written contract, and no *time when* is fixed by the parties, the law prescribes a *reasonable time* within which it must be done.

When written instruments have reference to a former contract, and contain recitals of its subject matter, and it appears, that there is a variance between such instruments, and between them and the contract; the recitals are to be explained and corrected by the contract to which reference is made.

If a contract in writing expressly refer to a written instrument, the law will imply, that a party to the contract has notice of the contents of such instrument.

THIS action was before the whole Court once before, and the report is found in 3 *Fairf.* 391. It was again tried before SHEPLEY J., at the *October* term, 1836. The facts in the case sufficiently appear in the former report and in the opinion of the Court in this.

The case was argued by

F. Allen, for the plaintiffs, who cited *Pease* v. *Gibson*, 6 *Greenl.* 81, and *Wilson* v. *Reed*, 3 *Johns.* 175.

And by *Rogers*, for the defendant, who cited *Hunt* v. *Livermore*, 5 *Pick.* 395, and *Davlin* v. *Hill*, 2 *Fairf.* 434.

The opinion of the Court was delivered at the *June* term, 1838, by

SHEPLEY J. — This case having been again submitted to a jury the facts are presented in some respects differently. Another document, signed by the defendant, has been produced; and one formerly rejected as illegal, is now by the act of the other party rendered legal testimony. The defendant, by his bond to *Treat* and others, of the 26th of *December*, 1832, reserved to himself the right to cut and take from the township three millions feet of board logs. There being no time limited in the contract, the law prescribes a reasonable time within which it should be done. By a deed dated the 17th, but not delivered till after the 24th of *January*, 1833, the defendant conveyed the land to *Treat* and others without any reservation, and the land would pass to them and to their grantees free from any claim on his part existing before the deed, unless such claim was recognized by some other valid contract.

The contract of the 24th of *January*, 1833, accepted by the plaintiff, *Sawyer*, with *Usher*, who afterward assigned all his interest in it to *Sawyer*, refers to "the three millions feet of timber to be obtained in the present *winter* by *William Hammatt* according to the terms of his contract with the purchasers from him." It is very difficult now, since no other contract is found to have existed relating to this timber, between him and those who purchased of him, to perceive that this reference could have been to any other contract, than the bond from the defendant to *Treat* and others. At the time, *Sawyer* might have been ignorant, whether the contract referred to should prove to be this bond or some other contract having special reference to the timber. And this may have had its influence upon the jury in finding, as they have done, that the existence of that contract was not known to either of the plaintiffs. But although neither of them had ever seen, or been informed of the contents of such a paper, the law will infer, that *Sawyer* must have understood, that the defendant was to obtain three millions feet of timber, and that such right existed by virtue of some "contract with the purchasers from him," (*Hammatt,*) because it is so stated in a paper signed by *Sawyer*. Whatever might be the

form of the contract, and whether the reference be to the bond, or to some other contract embracing the same matter, the effect would be the same. The quantity of timber would be reserved to the defendant; and any error in the time and mode of taking it would be liable to be corrected by the paper to which reference was made, whatever that paper should prove to be.

The principal difficulty arises from the papers of a later date. In the one bearing date on the 22d of *February* following, signed by the defendant and prepared and presented to the plaintiffs to inform them of his rights, he states the mortgage taken to himself as security, and that neither he, nor any other person has any other claim "except the reserved right to take three millions board logs the present *season*." It was undoubtedly competent for the defendant to alter and vary his own rights by shortening the time allowed him to take the timber, and if the plaintiffs so understood that paper, and made their contract accordingly, it is but just, that the defendant should, and he must be bound by it. Looking at the attending circumstances, and the paper signed by *Sawyer* and *Little*, bearing date the 25th of *February*, it is not easy to come to the conclusion, that it was so understood by them. It was left with *Sawyer* and *Little* by *Mitchell*, when he completed with them the contract made with *Sawyer* and *Usher*. It was not presented for the purpose of correcting any error, or of exhibiting any change of the rights of the defendant as before understood, nor for the purpose of forming a new contract; but it was used as explanatory of those rights, which had already been considered and regarded in making the contract with *Mitchell*. Its operation upon their minds and their construction of it may be inferred when taken in connexion with the paper signed by them on the day when it was presented to them. This last paper given by them to *Mitchell*, to be the evidence of the defendant's right to the timber, recites the existence of a "permit," a term not used before, authorizing it to be taken "in the present year," and says, we "hereby agree that said *Hammatt* may there get said three millions feet of timber without hindrance or claim from us." Had they regarded an early time as very important, and of the essence of the contract, it is not probable, while they had the defendant's statement of it, as the present season, before them, that they would have yielded to him the whole

year. It is more probable from a consideration of all the facts and papers, that it was well understood, that it was to be taken off as soon as it conveniently could be; and that the exact time when it was to be wholly removed received so little attention, that the various statements of the time were, either not noticed, or not regarded as of importance. In no other way is it to be accounted for, that careful and intelligent men should have so differently and carelessly stated the time, unless it happened from their understanding, that they were not making a contract to secure definitely the defendant's rights, but only reciting or referring to another contract, by which those rights were secured, and by which any unimportant error might be corrected. And it is important to notice, that the time limited for taking the timber off, in the paper signed by *Sawyer* and *Little*, is only stated by way of recital of another agreement, and that it is not a limitation incorporated as originating with them. The three last papers do not purport to be the contract by which the defendant's rights were secured, but to state, or recite its character so as to make known its substance. And as they refer to a contract by which the defendant's right existed, and do not originate and define the right, the correct course appears to be to refer them to the recited document, to correct any error, or explain any doubt. This principle was adopted where one contract was recited in another, as charging an estate with one debt, when the body of the recited contract was found to charge the estate with two debts. There being no proof of mistake or fraud the recital was corrected by the original. *Price* v. *Bigham's Ex'r*, 7 *Har. & Johns.* 296.

If it be said, that the defendant is bound by his limitation of the time to the present season, it may with equal propriety be said, that the plaintiffs are bound by their recital, that it extends to the present year. Does not the difficulty of fixing upon either as the one more properly binding, suggest the propriety of referring them for explanation to the paper which occasioned their existence? So the intrinsic difficulty of comprehending with certainty, what the true intention of the parties, when so variously expressed, really was, points to the same course.

Nor is it perceived, that the application of this principle can be regarded as incorrect because the jury have found, that the plaintiffs had no knowledge of the existence of the bond from the de-

fendant to *Treat* and others. The answer to any difficulty arising from that source is, that *Sawyer* and *Little* have referred to a permit, and the former has accepted an instrument referring to a contract, between the former owners and the defendant, as exhibiting his rights; and if they had no such knowledge as would authorize a jury to find the existence of the bond as a fact known to them, yet a knowledge of some valid license is necessarily inferred; and the law will attach that reference to the only license which had existed, and to which alone it could apply. The law will not suppose one to be ignorant of that to which his contract refers, but will imply notice of it, whether he have actual knowledge of it or not, when referred to in a contract, to which he is a party.

It would not be safe to allow a party to set up his want of knowledge in such a case; he might as well plead a want of knowledge of the effect of any other stipulation in the contract. If there be fault, it is that of the party to sign an instrument containing a recital of another, of the actual existence of which he has no knowledge. And if injury arise, it would not be just to cast it upon the party who receives the instrument with such a recital, and who has a just right to conclude, that it was understandingly made.

The conclusion is, that the documents were all properly admitted in evidence; that the different statements in relation to the time are all to be construed and reformed by the original contract conferring the right; that the timber was all taken off within the reasonable time which the law allowed; and that according to the agreement of the parties, judgment be entered for the defendant.

Asa H. Norton *vs.* Allen Marden.

Where the parties contract under a mutual mistake of the *facts* supposed to exist, there being no fraud, and no beneficial interest obtained, the one who pays can recover back the money paid.

But money paid under a mistake of the *law* cannot be reclaimed.

A mistake of a *foreign law* is regarded as a mistake of a fact.

Nor can it be recovered back, when voluntarily paid, or paid with a knowledge, or means of knowledge in hand, of the facts.

Nor where there may have been a mistake of the facts, if the party paying has derived a substantial benefit from such payment.

Assumpsit for money had and received, brought to recover back the consideration money paid by the plaintiff to the defendant for the assignment of a bond of a lot of land in *Bangor*. The defendant held by assignment a bond for the conveyance of a lot, described in the bond, on payment of a specified sum. Prior to the bargain between these parties, there being no evidence that the defendant knew where the lot was, they went together and inquired and entered upon land supposed by them to be the same described in the bond, and thereupon the defendant assigned over the bond, and received the price agreed on. The plaintiff soon afterwards discovered, that the lot described in the bond was a different one from that seen by the parties, and much inferior to it, and gave notice thereof to the defendant, offered back the bond, and demanded the money paid by him.

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The trial was before *Shepley J.*, who instructed the jury, that if they were satisfied from the testimony, that the defendant showed to the plaintiff a different lot from that described in the bond, before the contract was made between them; and that it was made upon that erroneous information; and that from the description in the bond he was not undeceived; they would find for the plaintiff, whether such erroneous information was given by the defendant fraudulently, or through mistake, or want of information on the part of the defendant; and if not thus satisfied, that they should find for the defendant. The verdict was for the plaintiff, and the defendant excepted.

J. Appleton, argued for the defendant, and cited 1 *Munf.* 336; 13 *Com. Law R.* 293; 2 *Hall*, 258; 5 *Com. L. R.* 57; 4 *Bos.*

& P. 263; 2 *Atk.* 592; *Wright*, 493; 1 *Story's Eq.* 159, 161, 165; 1 *Wend.* 185; 2 *Caines*, 48; 2 *East*, 318; *Emerson* v. *Co. of Washington*, 9 *Greenl.* 88; *Soper* v. *Stevens*, 14 *Maine R.* 133.

Kent argued for the plaintiff, and cited 1 *Wend.* 355; 3 *Maule & S.* 344; 2 *Black. R.* 824; 1 *Salk.* 289; *Bradford* v. *Manly*, 13 *Mass. R.* 139; *Hastings* v. *Lovering*, 2 *Pick.* 214; *Pearson* v. *Lord*, 6 *Mass. R.* 81; *Garland* v. *Salem Bank*, 9 *Mass. R.* 408.

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

Shepley J. — This is assumpsit for money had and received, brought to recover back a sum of money alleged to have been paid under a mistake. And the question presented by this bill of exceptions is, whether where parties contract under a mutual mistake of the facts supposed to exist, there being no fraud, and no beneficial interest obtained, the one who pays can recover back the money paid.

Certain principles in relation to this action seem now to be well settled. Money paid under a mistake of the law cannot be reclaimed. *Doug.* 471; *Bilbie* v. *Lumley*, 2 *East*, 469; *Stevens* v. *Lynch*, 12 *East*, 38; *Brisbane* v. *Dacres*, 5 *Taunt.* 144; *Mowatt* v. *Wright*, 1 *Wend.* 355. But a mistake of a foreign law is regarded as a mistake of a fact, 9 *Pick.* 112. Nor can it be reclaimed, when voluntarily paid with a knowledge, or means of knowledge in hand of the facts. *Martin* v. *Morgan*, 1 *Brod. & Bing.* 289; *Welsh* v. *Carter*, 1 *Wend.* 185. Nor where there may be a mistake of the facts, if the party paying has derived a substantial benefit from such payment; because he is not then entitled *ex aequo et bono* to reclaim it. *Taylor* v. *Hare*, 4 *B. & P.* 262. But when paid under a mistake of facts, and without any laches on the part of the payer, and without any substantial benefit derived from it, it may be recovered back. *Hern* v. *Nicholls*, 1 *Salk.* 289; *Cox* v. *Prentice*, 3 *M. & S.* 344; *Milnes* v. *Duncan*, 6 *B. & C.* 671; *Garland* v. *Salem Bank*, 9 *Mass. R.* 408.

In Mowatt v. *Wright*, it is said, that an error of fact takes place, either when some fact which really exists is unknown, or some fact

is supposed to exist, which really does not exist. And that, "the cases founded on mistake seem to rest on this principle, that if parties, believing that a certain state of things exist, come to an agreement with such belief for a basis, on discovering their mutual error, they are remitted to their original rights."

In *Cox* v. *Prentice*, *Lord Ellenborough* says, "now this is a case of mutual innocence and equal error, which is not an unusual case for money had and received."

In the case now under consideration the instructions required, that the jury should find, that there was a mistake of fact, viz.: that the plaintiff supposed, that he was purchasing a bond for a different lot from the one described in it; and that they should also find, that the contract was made upon that mistake of facts. But it is insisted, that the plaintiff had the means of correct knowledge. And in one sense a person may be said always to have the means of knowledge. He may have access to books, and to the assistance and instructions of his fellow men. But the means of knowledge which the law requires are such, as the party may avail himself of as then present without calling to his aid other assistance. And in this case there is no ground for inferring, that the plaintiff had then the means of knowing that the true lot designated in the bond was not the one examined. He does not appear to have had any more satisfactory means of knowledge, than the statements of the defendant, and those proved to be erroneous.

It is also insisted, that the case is within the principle of the decisions of this Court, that the party, who takes a deed of release of real estate, if he obtain thereby no title, cannot recover back the money paid. Both parties in such cases, must be supposed to understand the tract of land purporting to be conveyed. And the absence of all covenants of title is satisfactory evidence, that they knew that the title was doubtful, and that the contract was made upon that basis. If in such cases there is any mistake, it is rather a mistake of law, than of fact. But the substance of the contract is, that the party purchasing agrees to purchase the other's right, whatever it may be, and take the risk of the title upon himself. And in such cases, there is no principle of law, which authorizes him to reclaim the purchase money in case of an entire failure of title. This is not the case of a conveyance of real estate,

but the assignment of a contract for a conveyance, and the contract of assignment made upon a mistake of facts. And there is no evidence, that the plaintiff obtained any benefit from it.

Exceptions overruled, and Judgment on the verdict.

JONATHAN PICKARD *vs.* JOHN LOW.

The mortgagee of personal property, where there is no agreement that the mortgagor shall retain the possession, may maintain replevin therefor, before the expiration of the time of credit; although the mortgagor had been suffered to retain the possession, and had sold the property to a third person.

THE action was replevin for a pair of oxen. The writ bore date *October* 10, 1835, and the oxen were replevied the same day. To prove the property in himself the plaintiff produced and proved a paper in these words. "Know all men by these presents, that I, *Wyman C. Hardy*, do agree with *Jonathan Pickard to bill a sail* a yoke of oxen for to secure a payment of thirty dollars, to be paid the twenty-fifth of *October*. If not paid then, the oxen to be the said *Pickard's;* if paid at the time, the above instrument to be null and void." A description of the oxen only followed, the paper was dated *June* 17, 1835, was under seal, and was signed by *Wyman C. Hardy*. The plaintiff proved, that on the day the paper was executed, he agreed with *Hardy* to sell him the oxen for sixty dollars; that he took *Hardy's* note for $30, payable *October* 25, 1835; that the bill of sale was made to secure the other $30; and that he then delivered the oxen to *Hardy*. The note was produced unpaid. It was admitted by the parties, that before the writ was sued out, *Hardy* drove the oxen to *Bangor* and sold them to the defendant. A nonsuit was directed by consent, which was to be set aside, and the defendant defaulted, if in the opinion of the Court, upon these facts, the action could be maintained.

Kent, for the plaintiff, contended, that on the sale to *Hardy*, and the mortgage back to the plaintiff, the oxen became his property, subject only to be defeated by payment of the money by the day fixed in the bill of sale. The plaintiff had the right to take them

into his own possession, whenever he pleased. He cited *Lunt* v. *Whitaker*, 1 *Fairf.* 310 ; *Reed* v. *Jewett*, 5 *Greenl.* 96 ; *Tibbetts* v. *Towle*, 3 *Fairf.* 341 ; and 3 *Caines' Cases in Error*, 200.

Rogers, for the defendant, contended, that by the paper *Hardy* had the right to retain the possession of the oxen until the time fixed for payment, before which time the action was brought. To maintain replevin the plaintiff must not only be the owner of the property, but must have the right of immediate possession. He cited *Wyman* v. *Dorr*, 3 *Greenl.* 183 ; and *Vincent* v. *Cornell*, 13 *Pick.* 294.

The case was continued *nisi*, and the opinion of the Court was delivered at a subsequent term by

Emery J. — It is contended, that the right of possession was in *Hardy* at the time the suit was commenced, and therefore replevin would not lie.

By a conveyance in mortgage of goods *the whole legal title passes conditionally to the mortgagee*, and if not redeemed at the time appointed for payment, the title becomes absolute at law, though equity will interfere to compel a redemption. *Story on Bailment*, 197. In a pledge, the special property only, passes to the pledgee, the general property remaining in the pledger. A mortgage may be valid without possession in the mortgagee. *Ward* v. *Sumner*, 5 *Pick.* 59 ; *Holmes* v. *Crane*, 2 *Pick.* 607. But cases of this description are said to stand on very peculiar grounds, and are deemed exceptions to the general rule. The person in whom the general property in a personal chattel is, may maintain an action of trover for the conversion thereof, although he has never been in the actual possession thereof, because a general property in the case of a personal chattel, draws to it a possession in law. And such possession is, by reason of the transitory nature of a personal chattel, sufficient to found this action upon. 2 *Buls.* 268 ; 6 *Bac. Ab.* 682. Still however, to sustain the action of trover, the plaintiff must prove, that at the time of taking, he had the actual possession, or at least a virtual possession of the property ; for if he had a right to the possession, the possession is then implied by law. The person who has the general property,

may transfer the right to the possession for a limited time, and so be restrained from sustaining an action.

Thus if property be leased for a term unexpired, and before the expiration of the term, the property be attached as the property of the lessee, while in his actual possession, the lessor cannot maintain replevin against the officer, because the lessee was entitled to the possession, and his property in the chattels was liable to attachment. *Collins* v. *Evans*, 15 *Pick.* 63; and in 3 *Pick.* 255, it was decided, in *Wheeler* v. *Train*, that the plaintiff should have a right to the possession to maintain replevin.

The action of replevin has been considered to depend on the same principles as the action of trover, and as stated by *Wilde J.* in delivering the opinion of the Court in the case last cited, where he says, to maintain replevin or trover, the plaintiff must have the right of possession at the time of taking, or at the time of suing out his writ. He also observes, that a debtor may mortgage his property to his creditor, and retain the possession until condition broken, if such is the agreement. What is the evidence, that in the case under consideration there was any such agreement? For we cannot but consider that this paper, under seal, was intended as a mortgage for the oxen, as a security for the payment of the note. Where it appears from the terms of the condition, by necessary implication, that it must have been the understanding of the parties, that the mortgagor should retain possession, unless the condition be broken, we should protect the possession of the mortgagor.

As in the case of mortgage of real estate, *Hartshorn* v. *Hubbard*, 2 *N. H. Rep.* 453, where the condition was, that the mortgagor should carry on and improve a farm in a husbandlike manner during the life of the mortgagee and his present wife, and deliver to them one half of the yearly produce of the farm; and the mortgagor had ever since the conveyance been in possession of the mortgaged premises, and had performed every thing by him to be done, up to the time of the verdict, according to the condition. It was held, that in such case, the mortgagee could neither enter nor expel, nor maintain a writ of entry against the mortgagor until the condition is broken, or some waste done.

But in respect to this personal property mortgaged, we do not perceive any such necessary implication. The words, "if not paid

then the oxen to be the said *Pickard's*," is only stating just what the law infers from the fact of a mortgage of goods and chattels, as security for the payment of money at a certain time.

The security of the mortgagee ought not to be diminished by the act of the mortgagor. Even in the case of hiring goods, where an arrangement was made for selling them by the hirer, contrary to the special purpose for which he took them, he was considered guilty of a conversion. *Loeschman* v. *Machin*, 2 *Stark. R.* 311. And *Abbot J.* avowed it as his opinion, that if goods be let on hire, although the person who hires them has the possession of them for the special purpose for which they are lent, yet if he send them to an auctioneer to be sold, he is guilty of a conversion of the goods; and that if the auctioneer afterwards refuse to deliver them to the owner, unless he will pay a sum of money, which he claims, he is also guilty of a conversion. And although leave was granted to *Maryatt* for the defendant to move the point, he never availed himself of the liberty.

A different construction has been held in *Wyman* v. *Dorr*, 3 *Greenl.* 183, cited by the defendant's counsel, who insists, that on the 10th of *October*, 1835, the plaintiff was not entitled to the possession, that it then continued in *Hardy*, and that the writ of that date was sued out by the plaintiff fifteen days too soon. And the case in 13 *Pick.* 294, *Vincent* v. *Cornell*, is relied on as decisive in his client's favor. In that case *Justice Wilde* observes, that the agreement between *William Cornell* and the plaintiff amounted to a conditional sale, liable to be defeated, it is true, on the non performance of the condition. *Vincent*, the plaintiff in that case, owned the oxen, for which trover was brought, on the 8th *February*, 1831, which he then exchanged with *William Cornell*, who was poor and in debt, for another yoke of oxen; and said *William Cornell* was to pay to the plaintiff $25,50 to boot, by the 7th of *May*, and he signed and delivered to the plaintiff an agreement, dated 8th of *February*, 1831, in which he acknowledged that he had received of the plaintiff the oxen in question, principally to keep for the plaintiff till the 7th of *May*, and promised to provide food for them for their work and to return them within the time mentioned, in as good order as they then were; or in case he should pay the plaintiff $25,50 by the 7th of *May*, then the plaintiff was

to release his right to the oxen, but if he should neglect to pay that sum by the time limited, then the plaintiff is to have full right and lawful authority to take the oxen. This was in effect an agreement on the part of the plaintiff to lease these oxen to *William* for that time. This was an action of trover. Between the 8th of *February* and the 7th of *May*, *Pardon Cornell*, the defendant in that case, without notice of the agreement, purchased the oxen of *William*, and afterwards sold them to *Tripp*. In that case, the judgment of the Common Pleas, for the plaintiff, was set aside. We think, that the agreement in that case sufficiently distinguishes it from the one under consideration. We consider that *Hardy* had no right to sell this property, but subject to the plaintiff's better right. He should have taken care, that the note should have been paid at its maturity, if he would have defeated the plaintiff's claim. But as it now is, the plaintiff's right, it would seem, has become absolute, as we have not presented to us any evidence that the redemption has been effected by the payment of the note. The plaintiff, on finding that the mortgagor had undertaken by a transfer to render it more difficult for him to follow his security, had a right immediately to replevy from the second purchaser, lest another alienation might follow, and he be still more distant from his remedy. The *pro forma* direction of nonsuit must be set aside, and as the facts reported lead us to the conclusion, that the plaintiff is entitled to maintain the action, the defendant is to be defaulted.

NOTE. — By the statute of 1839, *c.* 390, no mortgage of personal property, where the debt secured amounts to more than thirty dollars, shall be valid against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or unless the mortgage be recorded by the clerk of the city, town, or plantation, where the mortgagor resides.

JOSIAH FULLER *vs.* JOSEPH WHIPPLE, JR.

Where an action was brought on a judgment in full force then, but which judgment was reversed before the trial of the action, and by reason thereof the plaintiff became nonsuit; the defendant was allowed full costs.

DEBT on a judgment recovered in the State of *Connecticut*, which at the time of the commencement of the suit was in full force, and not revoked or annulled. Subsequently proceedings in the Supreme Court in *Connecticut* were instituted, which resulted in a reversal of the judgment, and the record of the reversal was produced at the trial, and thereupon the plaintiff became nonsuit. The defendant moved for costs, which was opposed by the plaintiff, who denied, that any costs could be given, and if any, only after the reversal of the judgment. *Shepley J.*, then holding the Court, directed full costs to be allowed, to which direction the plaintiff excepted.

Kent, for the plaintiff, argued, that as there was a good cause of action when the suit was commenced, and which failed only from subsequent acts, the defendant was not entitled to costs; and if to any, only to costs accruing after the reversal of the judgment. He cited *McNeil* v. *Bright*, 4 *Mass. R.* 282; *Stinson* v. *Sumner*, 9 *Mass. R.* 143; *Thayer* v. *Seavey*, 2 *Fairf.* 284; *Smith* v. *Barker*, 1 *Fairf.* 458; *Foster* v. *Jones*, 15 *Mass. R.* 185; *Winthrop* v. *Carleton*, 8 *Mass. R.* 456.

P. Chandler, for the defendant, contended, that he was entitled to his costs, as the prevailing party; and cited *Hart* v. *Fitzgerald*, 2 *Mass. R.* 509; and *Gilbreth* v. *Brown*, 15 *Mass. R.* 179.

By the Court.

WESTON C. J. — The reversal of the judgment, left the action without any support whatever. It was incident to that judgment, be so dealt with, on process in error. The plaintiff, having failed in his action, and having become nonsuit, the defendant is the prevailing party; and as such entitled to costs.

Exceptions overruled.

William F. Homer *& al. vs.* James M. Brainerd.

Where the Justice taking a deposition omits to certify, that the adverse party was duly notified, but annexes the notification, from which it appears that legal notice was given, the deposition is admissible.

On the trial the plaintiff offered to read a deposition, to the admission of which the defendant objected, because it did not appear by the certificate of the Justice, that due notice had been given to the adverse party. Shepley J. presiding, overruled the objection, and permitted the deposition to be read, to which the defendant excepted.

The facts bearing on the question are given in the opinion of the Court.

J. Appleton, for the defendant, supported the objection taken at the trial, and cited, *stat.* of 1821, *c.* 85, § 2; *Barnes* v. *Ball,* 1 *Mass. R.* 73; *Amory* v. *Fellowes,* 5 *Mass. R.* 219.

Kent, for the plaintiff, contended, that the deposition did show, that due notice had been given, and that the admission of it was right; and cited the same statute; *Minot* v. *Bridgewater,* 15 *Mass. R.* 492; and *Ulmer* v. *Hill,* 8 *Greenl.* 326.

The opinion of the Court was drawn up by

Shepley J. — The statute provides, that "when the adverse party is not present at the taking of such deposition, the Justice taking the same, shall certify, that he was duly notified." *Stat.* of 1821, *c.* 85, § 2. It cannot have been the intention, that the Justice should so certify, when notice had not in fact been given, and this language must be regarded as directory. In the case of *Barnes* v. *Ball & al.* the deposition was objected to because it did not appear by the certificate of the magistrate, that the adverse party or his attorney was present. Parol evidence was offered to prove that fact, but it was not admitted, and the deposition was excluded. In the case of *Minot* v. *Bridgewater,* the magistrate had certified, that notice had been given; but the notice being produced did not contain the name of the deponent; the deposition having been admitted by the presiding Judge, the Court granted a new trial, holding the certificate of the magistrate not to be conclusive.

In this case the Justice omitted to certify, that notice was given; but the notice in due form, issued by another magistrate and duly served by a constable of the town upon the adverse party, was annexed to the deposition. The statute provides, that a notice so issued and served "shall be deemed sufficient notice;" and its legal effect cannot be destroyed by the omission of the Justice to make his certificate.

Exceptions overruled.

STILLMAN WILSON *vs.* GEORGE GILLIS *& al.*

Where an officer arrests a debtor on a writ, pursuant to the provisions of the *st.* of 1831, *c.* 520, and takes him before two Justices of the peace, and of the quorum, it is the duty of such officer to detain the debtor under arrest until he shall be discharged by the Justices, or be again committed to his custody by their mittimus.

It is the duty of the officer having the debtor in his keeping under the mittimus, to release him on his giving to such officer a sufficient bond, conformable to the provisions of the statute, running to the creditor.

The officer's return of these proceedings on the writ is legal evidence of the facts, in a suit upon the bond.

Where there has been a breach of the condition of such bond, the damage actually sustained is the proper and equitable measure of the claim of the creditor.

DEBT on a bond, dated *Oct.* 7, 1834. On the same day, *Gillis* was arrested on a writ in favor of the plaintiff, and taken before two Justices of, &c. but refused to disclose the state of his business affairs, and the Justices made out a mittimus directing him to be committed to prison, and delivered the same to the officer making the arrest, who had *Gillis* in custody. He then gave the bond declared on and was discharged by the officer, who returned on the writ that he had arrested the defendant and had him before two Justices, &c. and that "the Justices having ordered the within named *Gillis* to be imprisoned, I have taken a bond agreeably to the provisions of the law for the abolition of imprisonment of honest debtors for debt, which bond is enclosed." This was the bond in suit. The bond recited these facts, and the condition was, "if the said *Gillis* shall notify said creditor within fifteen days after

final judgment in said action, if such judgment shall be against said *Gillis*, to attend to the making of a disclosure by said *Gillis*, according to the provisions of an act (describing the *stat.* of 1831, *c.* 520,) and shall, in pursuance of said notice, attend and make a disclosure of his business affairs, and all and every description of property, as required by the act aforesaid," &c. Judgment was obtained against *Gillis* in the original suit, for $448 damages, and $11,91 costs. *Gillis* took no measures to notify the plaintiff or to disclose the state of his affairs after judgment, although several months had elapsed before this suit was brought.

The counsel for the defendant objected, that the action could not be maintained. He offered evidence to show, that *Gillis*, at the time of the arrest, and for more than fifteen days after the judgment, was insolvent, and insisted, that in such case the damages should be but nominal. This testimony was objected to but admitted by the Judge. Evidence was introduced, tending to show, that *Gillis* was, and was not, insolvent. The jury were instructed by SHEPLEY J., before whom was the trial, to ascertain and return with their verdict the actual damages which the plaintiff had suffered by reason of the neglect to perform the condition of the bond. They found the amount to be $150. If the plaintiff was entitled to recover, the Court were to determine the amount, and whether the evidence objected to was admissible; and if the action could not be maintained, were to set aside the verdict, and order a nonsuit.

Rogers argued for the defendants, and cited *stat.* of 1821, *c.* 520; 1 *Hawkins*, *c.* 28, § 19; 1 *Russell on Crimes*, 508; and *Gowen* v. *Nowell*, 2 *Greenl.* 13.

F. H. Allen argued for the plaintiff, commenting on the different sections of the statute, and cited *Clap* v. *Cofran*, 7 *Mass. R.* 98; *Freeman* v. *Davis*, *ib.* 200; and *Bartlett* v. *Willis*, 3 *Mass. R.* 86.

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

WESTON C. J.—The principal defendant was arrested on mesne process, in virtue of the twelfth section of the *stat.* of 1831, *c.* 520, in relation to imprisonment for debt. That section does not prescribe the mode, in which the order of the Justices shall be verified,

where the order is, that the party under arrest shall be imprisoned, and he gives bond to procure his liberation. The original order, under their hands, is adduced in evidence; and we perceive no reason why it should not be regarded as sufficient, there being no express provision, requiring any special mode of proof.

It has been contended, that the return of the officer, as to the order of the Justices, and the bond thereupon taken, ought not to have been received in evidence. That his duty under his precept was discharged, when he carried the party arrested before the Justices, and that his return of further proceedings was unofficial and unauthorized. We think otherwise. It was the duty of the officer, to detain him under arrest, until his discharge therefrom was ordered by the Justices. They were not charged with the security of his person. This devolves upon the officer, who is to hold him under arrest, until he is otherwise disposed of by order of law. If his imprisonment is ordered, the Justices are required to issue their mittimus for this purpose, if he does not give the bond, which the statute authorizes. If he does give bond, the statute does not prescribe who shall receive it. We think however, that it may be lawfully and properly taken by the officer, running to the creditor, and received for his use. Indeed the officer could not be justified in continuing the arrest, after the tender of an adequate and sufficient bond. We hold it then to be his duty, to return upon his precept, not only that he had made the arrest required, but what had become of his prisoner. That he had carried him before two Justices of the Peace and of the quorum, and had discharged him upon their order, or had upon their order imprisoned him, having a mittimus for that purpose, or had liberated him, upon his giving the bond required by law, as the case might be.

The penalty of the bond having become forfeited, by breach of the conditions, the plaintiff is entitled to execution, for so much as in equity and good conscience, he ought to have. His counsel insists, that it should be for the amount of the execution and interest, as was allowed on jail bonds for the liberty of the yard, and as is awarded against bail. Formerly jail bonds were not subject to be chancered, and when that was permitted, execution was to issue in no case for an amouut less than the original debt, cost and interest. And when bail are charged, they are to satisfy the judgment against

their principal out of their own estate, by an express provision of the statute, regulating bail in civil actions. The amount, for which execution shall issue, upon the forfeiture of such a bond as is now before us, is not limited or regulated by statute, so that the damage actually sustained is the proper equitable measure of the plaintiff's claim. This the jury have settled, and he must have judgment accordingly.

When the Justices refused to discharge the principal defendant, and ordered his imprisonment, the officer was justified in affording him a reasonable time to procure a bond for his enlargement, and his detention for this purpose was lawful. He should have prepared and tendered a bond in conformity with the statute. If the bond in suit is liable to exception as a statute bond, it was freely and voluntarily executed on his part, and he derived from it the benefit he sought. And it seems to us that it may be regarded as a bond good at common law. It may be sustained as such, according to the case of *Winthrop* v. *Dockendorff & al.* and the cases there cited.

Inhabitants of EXETER *vs. Inhabitants of* BRIGHTON.

Where a pauper left a town prior to *March* 21, 1821, without any intention of returning, and did not return, he gained no settlement in that town by the settlement act of that date, although he had acquired no home in any other place.

EXCEPTIONS from the Court of Common Pleas.

The action was brought for supplies furnished to one *Rogers*, alleged to have fallen into distress in *Exeter* and in need of immediate relief, and to have had his settlement at the time in *Brighton*. The question was, whether the pauper had gained a settlement in *Brighton* by dwelling and having his home there on the twenty-first of *March*, 1821.

Sometime in the autumn of 1820 the pauper was married to the daughter of one *Downes*, who then resided in *Brighton*, and continued to reside with *Downes* until *December* of that year, when *Downes* removed to *Wellington*. *Rogers* with his wife resided in *Brighton* until sometime in the month of *February*, 1821, when

they went to the house of *Downes* in *Wellington*, but whether with the intention of remaining there or not, the evidence was conflicting. After a few days he left *Wellington*, and did not return there again until *May*. The plaintiffs introduced testimony tending to show that *Rogers* was residing in *Brighton*, *March* 21, 1821, and the defendants, to show, that he with his wife were at that time residing in *Athens*.

PERHAM J., presiding at the trial, stated to the jury, that if they found by the evidence, that the pauper had his *settlement* and home at *Brighton* on the 21st of *March*, 1821, the defendant town would be liable in this action. That if they found the pauper's domicil to have been previously in *Brighton*, but that if he had left the town and was absent that day, they would inquire with what intention he left; if for a time, for any purpose, to seek employment, or the like, with the intention of returning, he would still dwell and have his home there within the meaning of the statute, although he might not be personally in the town on that day. But if he had previously taken up his settlement and left the town, with the intention of not returning, and was absent that day, his domicil would have been discontinued, although he should not have gained any elsewhere; and in such case, the defendant town would not be liable in this action. That if *Rogers* had gone from *Brighton* with his wife before *March* 21st, with what things he had, with an intention to seek some other place of residence, but not with an intention of returning, he could not be considered as residing in *Brighton* on that day, although he might not have become a resident in any other town.

The verdict was for the defendants, and the plaintiffs filed exceptions.

J. Appleton, for the plaintiffs, contended: —

1. That the jury were misled by the instruction of the Judge, in requiring them to find, that the pauper had his settlement in *Brighton*, as well as his residence, on the 21st of *March*, 1821.

2. That the Judge erred in instructing them, that if the pauper left *Brighton* before that time with no intention of returning there, his home remained there no longer, although he had acquired no new one; and urged, that the old home remained, until a new one was gained. He cited *Jennison* v. *Hapgood*, 10 *Pick.* 98; *Sto-*

ry's Conflict of Laws, 47; 5 *Vesey*, 750; 4 *Cowen*, 516; 2 *Kent's Com.* 346; *Civil Code Napoleon, Tit.* 3, § 303; *Knox* v. *Waldoborough*, 3 *Greenl.* 455; *Parsonsfield* v. *Perkins*, 2 *Greenl.* 411.

Kent, for the defendants, said, that the first question was not raised at the trial, and that it was well understood by the jury, that if the pauper had his home at *Brighton* on the twenty-first of *March*, he had a settlement there.

He contended, that the instruction on the second point was right; and cited *Turner* v. *Buckfield*, 3 *Greenl.* 229; *Boothbay* v. *Wiscasset*, *ib.* 354; *Knox* v. *Waldoborough*, *ib.* 455; *Richmond* v. *Vassalborough*, 5 *Greenl.* 396; *Waterborough* v. *Newfield*, 8 *Greenl.* 203.

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

Weston C. J. — The authorities cited for the defendants, show that a domicil once established, continues until a new one is acquired. It is not then at all times true, that a party has his home where his domicil is, although it may be true, that he can have no home where it is not. If he abandons his former residence, with an intention not to return, but to fix his home elsewhere, while in the transit to his new, and it may be distant, destination, we are of opinion, that whatever may be said of his domicil, his home has ceased at his former residence, within the meaning of the statute, for the support and relief of the poor.

That which was his home, no longer remains such, after he has finally left it. The words of the statute, in reference to the twenty-first of *March*, 1821, the time in question, are, that the pauper "shall be deemed to have a settlement in the town, where he then dwells, and has his home." If on the day before, he had left the town, where he before lived, with an intention not to return, we do not think he could be said to dwell and have his home there on that day, although he may not have found a home elsewhere, or may not have reached that, to which it was his intention to repair. Home and domicil may, and generally do, mean the same thing; but a home may be relinquished and abandoned, while the domicil of the party, upon which many civil rights and duties depend, may in legal

contemplation remain. Upon this point, the jury were, in our opinion, properly instructed. The Judge, who presided at the trial, by settlement and home, undoubtedly meant the same thing. Where the home of the pauper was on that day, there the statute fixed his settlement; and this question was left very fairly to the jury.

Exceptions overruled.

MIGHILL H. BLOOD *vs.* RUFUS K. HARDY *& al.*

A contract in relation to real estate, to be binding at law, must be in writing, and signed by the party to be charged, or by some other person by him thereunto lawfully authorized; but where the writing is not under seal, it is not necessary, that the authority of one to sign for another should be in writing.

A condition in such writing for the benefit of the party to be charged may be waived by him by parol.

Where acts are to be performed by each party to a contract at the same time, and one tenders money in performance on his part, and brings his action to recover damages on failure of the other party, he is under no obligation to bring the money into Court.

EXCEPTIONS from the Court of Common Pleas.

This was an action of assumpsit to recover damages of the defendants which the plaintiff alleged he had sustained by reason of their refusal to assign to him one sixth part of their interest in a bond made by the trustees of the ministerial and school lands in the town of *Edinburgh*, to one *Nathan Winslow*, and by *Winslow* assigned to the defendants.

To sustain the action the plaintiff offered in evidence a paper of which a copy follows. "*Bangor*, *May* 25, 1835. We hereby agree that *Mighill H. Blood* is entitled to one sixth part of the net gains of the sale of the ministerial and school lands in the town of *Edinburgh*, of which we have this day received the assignment of a bond given by the trustees of said land, and that he shall receive an additional interest of one sixth in said bond by paying in proportion with them to the conditions of said document. Provided *Milford P. Norton*, *Esq.* thinks that we are in justice bound to grant said additional interest.

"*Hardy & Perkins.*"

The defendants objected to the admission of the paper in evidence, and required proof of its execution by *Perkins*, admitting at the same time its signature by *Rufus K. Hardy*. The defendants also admitted, that they were at that time partners in trade under the firm of *Hardy & Perkins*, but denied any partnership beyond one for common mercantile purposes. The plaintiff then, for the purpose of showing an authority by *Hardy* to bind the firm, proved that *Perkins* had been on the land, and had personally acted in the purchase of the bond of *Winslow;* that the bond was assigned to *Hardy & Perkins*, that their notes were given as consideration for the assignment; and that when *Hardy & Perkins* made a sale of the bond, a note was taken payable to *Hardy & Perkins*.

The defendants objected to this evidence going to the jury to prove such authority, but PERHAM J., presiding at the trial, admitted the paper, and instructed the jury, that if they were satisfied from the evidence, that *Hardy* had authority to sign the name of *Perkins* to the paper, the signature of the firm by *Hardy* would bind the defendants; but that, being partners would not authorize *Hardy* to use the name of the firm, except in the course of the regular business of the firm, unless he was especially authorized so to do by *Perkins*.

The plaintiff also introduced a witness, who testified, that he was present at the counting room of *Hardy & Perkins*, about the last of *May*, 1835, and that there appeared to be some misapprehension between the plaintiff and *Hardy* in relation to the contract above stated; that the plaintiff told *Hardy*, that *Norton* had declined to decide the matter, and that it was then agreed by said *Hardy* to waive the proviso in the paper, and that the plaintiff should be entitled to the additional sixth without reference to *Norton*. The witness further stated, that the plaintiff told *Hardy* he should pay soon. *Hardy* replied, well you may have it any time. The plaintiff said he was going to *Bucksport*, and witness thinks, he did not return till about a fortnight.

To the admission of the testimony of this witness the defendants objected, but the Judge overruled the objection.

The plaintiff further proved, that he made a tender to *Hardy* of the sum of $125,50, *June* 11, 1835, and requested an assignment

of one sixth of the bond, and that *Hardy* declined to receive it, because it was too late; that at the expiration of six months he offered to release *Hardy* $130, and in a year tendered $130 more in bills, all of which *Hardy* declined. The land was sold by the defendants before this suit was brought.

On this part of the case the defendants contended, that it was no tender, inasmuch as the money tendered had not been brought into Court, and on this point no ruling was made, but the Judge left this evidence to the jury to say, whether the tender had been in season.

The defendants further contended, that by legal construction, the paper offered contained no agreement to assign a sixth part of the bond to the defendants from *Winslow* to the plaintiff; but the Judge ruled otherwise.

The jury returned a verdict for the plaintiff. To which several rulings and instructions the defendants excepted.

F. H. Allen, for the defendants, supported the several grounds of defence taken at the trial, and controverted the correctness of the decisions of the Judge. He cited 9 *Wendell*, 68; *Roberts on Frauds*, 81; 14 *Johns. R.* 358.

Abbott, for the plaintiff, defended the decisions at the Common Pleas, and cited *Munroe* v. *Perkins*, 9 *Pick.* 298; *Dearborn* v. *Cross*, 7 *Cowen*, 48.

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

WESTON C. J. — A contract in relation to real estate, to be binding at law, must be in writing, signed by the party to be charged, or some other person thereunto by him lawfully authorized. The instrument adduced in evidence, is not under seal. It was not necessary, that the authority of *Hardy* to sign for *Perkins*, should be in writing. It might be given or proved by parol; and the testimony received to prove it, was, in our judgment, competent. The jury were properly instructed upon this point. If they have found the authority, without sufficient evidence, it is not matter of exception to the opinion of the Judge. But we cannot say, if it was a question before us, that it was insufficient. The defendants were general partners. They bought the bond for the land jointly, to sell again, with a view to profit. They sold jointly; and re-

ceived a note payable to them, by the name of their firm. This may not have been, and probably was not, a part of their ordinary partnership concern; but being connected, they might speculate together in a business, which attracted general attention at that period.

The agreement contains these words, "provided *Milford P. Norton, Esq.* thinks that we are in justice bound, to grant said additional interest." This was a condition or qualification interposed, for the benefit of the defendants. We doubt not, they might waive it by parol. In *Fleming* v. *Gilbert*, 3 *Johns.* 520, it was held, that the strict performance of the condition of a bond, might be so waived. And the same opinion is intimated in *Dearborn & al.* v. *Thrasher*, 7 *Cowen*, 48. If the proviso was waived, which is in proof, the plaintiff became entitled to the benefit of the contract by paying, or offering to pay, his proportion of the purchase money. The plaintiff made the requisite tender. As it was refused, he is under no obligation to bring the money into Court. He is not the debtor of the defendants. They have realized the profits, in which the plaintiff was to be a sharer. The amount of his proportion was received by them to his use, which sustains the plaintiff's declaration.

Exceptions overruled.

Winslow Chase *vs.* Charles Gilman.

If the clerk make a mistake, in an execution for costs, of the time when judgment was rendered, it may be amended, when produced in evidence in *scire facias* against the indorser of the original writ.

A judgment must be taken to have been rendered on the last day of the term, unless a special judgment be entered.

If an execution be dated the third day of *June*, and be made returnable at the end of three months, it may be served on the third day of *September*.

A return by an officer, on an execution for costs, of the avoidance or inability of the plaintiff in the action, is conclusive evidence of the fact, in *scire facias*, against the indorser of the writ.

Exceptions from the Court of Common Pleas.

Scire facias against the defendant, as indorser of a writ in favor of one *George M. Nichols* against the present plaintiff. The

brief statement of the defence was, that there was not any such execution, as was described in the declaration, and that no such execution was placed in the hands of an officer to serve according to law. The plaintiff produced the record of a judgment in his favor, for costs, against *Nichols*, at the *May* term of the Court of Common Pleas, 1835, and proved the handwriting of the defendant, as indorser of the writ, and also produced an execution purporting to be issued on the judgment, but the execution described the judgment, as rendered on the fourth *Tuesday* of *June*, instead of the fourth in *May*, when the Court was actually holden by law. To the admission of this execution the defendant objected, because no such term of that Court was holden by law. But PERHAM J., presiding, on motion of the plaintiff, permitted the Clerk to amend the execution, by substituting *May* for *June*, and admitted the execution in evidence. On inspection of the execution it appeared, that a return as follows, had been made upon it, and erased. "No part satisfied, *J. W. Carr, D. Shff.*" The following return was upon it: — "*Penobscot, ss. Sept.* 3, 1836. I have made diligent search for the property and body of the within named *Nichols*, and can find neither within my precinct. I therefore return the execution in no part satisfied. *A. Jones, Dep. Sheriff.*" No other evidence was offered to show, that the execution was in the hands of an officer during the time it was in force. The execution was dated *June* 3, 1836, and made returnable "at the end of three months." The defendant requested the Judge to instruct the jury, that there was no evidence, that the execution was in the hands of the officer during the life of it. The Judge stated to the jury, that the officer made his return at his peril, and that the facts stated in the return were to be received as true in this action. The verdict was for the plaintiff, and the defendant excepted.

Brinley argued for the defendant: —

1. An amendment of the record in a material point, which will vary the issue, or point to be tried, cannot be granted. 2 *W. Black.* 920; 2 *Wils.* 147; *Com. Dig. Amendment, Z*, and 2 *A*; 1 *Petersdorf's Ab.* 388, *note* 1 & 3; 3 *Bos. & P.* 321; 2 *Stra.* 1165.

2. The Courts have no power to order an amendment of a writ of execution. 12 *Mod.* 247; *Comb.* 433; 2 *Arch. Prac.* 246.

3. The amendment ought not to have been made, because the record is not between the parties to the present suit. *Emerson* v. *Upton*, 9 *Pick.* 167; *Howe's Prac.* 391.

4. The execution was dated *June* 3, 1836, and judgment was rendered on the 4th *Tuesday* of *May*, 1835, and of course more than one year had elapsed. *St. c.* 60, § 3; *Ruggles* v. *Ives*, 6 *Mass. R.* 494.

5. The officer's return is dated *Sept.* 3, and the execution, *June* 3. It was not therefore in the hands of the officer during its lifetime.

A. W. Paine, for the plaintiff.

1. The amendment was rightly permitted. *Sawyer* v. *Baker*, 3 *Greenl.* 29; 3 *Johns. R.* 94; *ib.* 144; 5 *Johns. R.* 100; 4 *Wend.* 462; *ib.* 474; 1 *Johns. Cas.* 31; 2 *T. R.* 737; *Wright* v. *Wright*, 6 *Greenl.* 415; 2 *B. & P.* 336.

2. The officer's return is conclusive. *Harkness* v. *Farley*, 2 *Fairf.* 491; *Slayton* v. *Chester*, 4 *Mass. R.* 478; *Bott* v. *Burnell*, 9 *Mass. R.* 96; *ib.* 11 *Mass. R.* 163; *Bean* v. *Parker*, 17 *Mass. R.* 591; *Eastabrook* v. *Hapgood*, 10 *Mass. R.* 313; *Winchell* v. *Stiles*, 15 *Mass. R.* 230; *Ruggles* v. *Ives*, 6 *Mass. R.* 494; *Howe's Prac.* 119.

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

Weston C. J. — The misrecital in the execution, of the term at which judgment was recovered, was a misprision of the clerk. There is a record to amend by; and it is competent for the Court to permit it to be amended. *Wright* v. *Wright*, 6 *Greenl.* 415. That a writ of execution, being a judicial process, may be amended, appears from the cases cited for the plaintiff; and among others, from *Sawyer* v. *Baker*, 3 *Greenl.* 29, decided by this Court.

The term of the Common Pleas, at which judgment was rendered, was holden on the fourth *Tuesday* of *May*, 1835; but it was continued for several weeks; and unless a special judgment was entered, which does not appear, it must be taken to have been rendered the last day of the term. It is apparent, from the date, that the execution was issued within the year.

It was dated on the third day of *June*, 1836, and was returnable at the end of three months. The return day was the third of *September* following. On that day, which was seasonable, it has a return indorsed thereon by an officer, that he had made diligent search for the property and body of the execution debtor; but was unable to find either. He must have had it long enough, to enable him to perform that service; and his return is conclusive upon this point. *Ruggles & al.* v. *Ives*, 6 *Mass. R.* 494.

Exceptions overruled.

GRENVILLE FLINT *vs.* ORIMEL ROGERS.

A presentment of a draft, payable at a particular Bank, to the Cashier for payment at the Bank, on the day it fell due, but after business hours, who refused payment because the acceptors had provided no funds, was held sufficient.

After due demand and refusal of payment, and after notice thereof has been put into the post-office directed to the indorser of a draft resident in another town, an action against such indorser, commenced on the same day, may be maintained, although by the regular course of the mail the notice would not reach him until the next day.

The admission of immaterial testimony furnishes no cause of exception to the ruling of a Judge.

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EXCEPTIONS from the Court of Common Pleas.

Assumpsit on a draft, accepted by *Cram, Dutton & Co.* of *Bangor*, and drawn and indorsed by the defendant, residing at *Orono*, dated *Oct.* 15, 1835, and payable at the *Kenduskeag* Bank at *Bangor*, in sixty days from date. The writ was dated *Dec.* 17, 1835, handed to an officer at 6 o'clock, P. M., and served the same evening. The plaintiff proved by *Rice*, a notary public, that the draft was handed to him by the cashier of the *Mercantile* Bank in the afternoon of the 17th of *December*, after regular banking hours, and that he immediately called at the *Kenduskeag* Bank for payment, which was refused, the Cashier replying, that there were no funds there to pay the draft; that he then protested it for nonpayment, and at 4 o'clock put notices thereof in the Post-office in *Bangor*, directed to the drawer and indorsers at their respective

places of residence. He made no other demand of payment, and returned the draft to the *Mercantile* Bank after protest and notice. He stated, that this was his usual course of proceeding in such cases. The Cashier of the *Kenduskeag* Bank stated, that he had no knowledge that the draft was in that Bank, except when brought in by *Rice*, and that the acceptors of the draft had no funds in the Bank during the three days of grace. He also testified, that the plaintiff directed him to take all necessary steps to hold all the parties to the draft. This was objected to by the defendant, but PERHAM J., then holding the Court, admitted it. The *Bangor* mail for *Orono* then left but once each day, arriving there about eleven o'clock, A. M.

The counsel for the defendant requested the Judge to instruct the jury, that the action could not be maintained upon this evidence.

1. Because the action was prematurely brought.

2. Because the draft was not in the *Kenduskeag* Bank during the banking hours of the three days of grace.

The Judge declined to give the instruction, and a verdict was returned for the plaintiff. The defendant filed exceptions.

J. Appleton argued for the defendant.

1. The plaintiff's statement to the Cashier was inadmissible, being no part of any transaction.

2. The action cannot be maintained against the defendant, because no legal demand was made on the acceptors, not having been made at the bank in banking hours, nor on them personally. *Freeman* v. *Boynton*, 7 *Mass. R.* 486; 14 *East*, 500; 5 *Taunt.* 30; *Woodbridge* v. *Brigham*, 13 *Mass. R.* 556; 2 *Hall's S. C. R.* 112, 429; *Shaw* v. *Reed*, 12 *Pick.* 132; 1 *Maule & S.* 29; 2 *Taunt.* 224; 2 *B. & Ad.* 188; 6 *T. R.* 385; *Wing* v. *Davis*, 7 *Greenl.* 31.

3. The action was prematurely brought, having been instituted before the notice could possibly have reached the defendant. 5 *Serg. & R.* 318; 3 *Wend.* 170; 2 *Porter*, 32.

Blake, for the plaintiff.

1. After the notice was put into the post-office, the cause of action accrued, and the suit might then be well brought. *Stanton* v.

Blossom, 14 *Mass. R.* 116; *Shed* v. *Brett*, 1 *Pick.* 401; *City Bank* v. *Cutter*, 3 *Pick.* 414.

2. The demand made at the Bank of the cashier was sufficient; and if it had not been, there was no necessity for making a demand, as there were no funds of the acceptors there to pay the draft. *Woodbridge* v. *Brigham*, cited for defendant; *Garnett* v. *Woodcock*, 1 *Stark. R.* 475; *Bayley on Bills*, 137; 18 *Johns. R.* 230; *Boston Bank* v. *Hodges*, 9 *Pick.* 420.

3. The testimony of the declarations of the plaintiff was wholly immaterial; the Court did not charge upon it, nor did the jury find in relation to it.

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

WESTON C. J. — The direction given by the plaintiff to *Dodd*, the cashier of *Kenduskeag* bank, that all the necessary steps should be taken, to charge the parties to the draft, was quite immaterial. If proved to have been taken in behalf of the plaintiff, the defendant would be holden, if there had been no such direction to him; and if not taken, the direction would not help the case. The testimony being immaterial, its admission is no cause of exception.

On the 17th of *December*, 1835, being the last day of grace, the draft was payable at the *Kenduskeag* bank. On that day, but after banking hours, it having been given to a notary for this purpose, he demanded it at the bank, when payment was refused by the cashier, the acceptors having no funds there. The law requiring a demand is satisfied, if the draft was in the bank, or was demanded there, on the day when it fell due. The objection is, that the demand was not seasonable, not having been made on that day, in banking hours. But the cashier, whose duty it is to attend to business of this sort, remaining there, and having returned a negative answer, and it appearing that the acceptors had provided no funds, we hold the demand to have been sufficient.

In *Garnett* v. *Woodcock*, 1 *Stark. R.* 475, it was ruled by Lord *Ellenborough*, that a presentment at a banker's after business hours, is good, if the banker have left some one to give an answer; and his opinion was sustained by the court. *Bayley* in his text, says, no objection can be made to a presentment at a banker's, at

an unseasonable hour, if the banker, or any agent in his behalf, is there at the time of such presentment. And he adopts that principle, as decided in the case cited from *Starkie*, to which he refers. *Bayley on Bills*, 137. There, the answer was given by a boy. Here, the demand was made on the day at the bank, upon the cashier, its regular officer and organ, in the transaction of its business.

A seasonable demand having been made, it was incumbent on the holder, to use due diligence, to give notice to the defendant. This is proved to have been done in this case, by the agency of the notary, before the action was commenced. This having been done, it is well settled, that a right of action thereupon accrues, without waiting for the notice to reach its destination. *Shed* v. *Brett*, 1 *Pick.* 401. *City Bank* v. *Cutter*, 3 *Pick.* 414. *Greely & al.* v. *Thurston*, 4 *Greenl.* 479.

Exceptions overruled.

Henry Warren *vs.* Allen Gilman.

If a person who indorses a bill to another, for value or collection, shall again come to the possession thereof, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder of the bill, and entitled to recover, although there may be upon it his own or a subsequent indorsement, which he may strike from the bill or not at his pleasure.

Where a Judge of the C. C. Pleas left to the jury to enquire and say, whether reasonable notice had been given to an indorser, and they found that such notice had been given, but the evidence was too deficient and uncertain to authorize such finding, a new trial was granted.

Exceptions from the Court of Common Pleas.

Assumpsit against the defendant as indorser of a bill of exchange drawn in his favor by *S. A. Gilman* on *Charles Gilman*, accepted by him and indorsed by the defendant, dated *June* 30, 1836, payable in thirty days at the *Suffolk* bank in *Boston*. On the trial before Perham J. the plaintiff produced the bill. The name of the defendant was written upon the back of it in blank, and it might be perceived, that there had been written below, and a pen stricken across several times to erase it, as follows. "Pay *M. S. Parker*,

Cashr., *John Wyman*, Cashr.," Recd. pay. *Henry B. Stone*, Prest." The plaintiff produced in evidence a protest by a notary in *Boston*, who stated, that at the request of *M. S. Parker* he had, on the 2d of *August*, 1836, presented the bill at the *Suffolk* bank, that payment was refused because of no funds of the parties, and that on the same day he sent notice of the demand and nonpayment to the drawer, indorser, and acceptor, enclosed to *John Wyman, Esq.*, Cashier, by mail to *Bangor, Maine*, requiring payment of them respectively. *Stone* was President, and *Parker* Cashier, of the *Suffolk* bank, *Wyman* Cashier of the *Penobscot* bank at *Bangor*, and the drawer, indorser, and acceptor lived at *Bangor*. *Wyman* was called as a witness by the plaintiff, and testified, " that he received the protest by mail with certain papers enclosed; that he either gave the papers to the several parties to the bill, or put them into the post-office, but could not tell which; that he could not say at what time he gave the papers or put them into the post-office, but supposed it was in season on the day he received them, as was his usual practice; nor could he say at what time he received the papers." This was all the evidence.

The defendant objected to the admission of the protest, as being incompetent to maintain the issue on the part of the plaintiff; and also objected to the admission of the bill of exchange, the signatures to which were admitted. The objections were overruled by the Judge. The defendant requested the Judge to instruct the jury, that if the bill had been paid to the President of the *Suffolk* bank, that the same thereby became *functus officio*, and no action could be maintained thereon by the plaintiff. The Judge declined to give this instruction, but stated to the jury, that if they had evidence, that the bill was paid by the drawer or accepter, it thereby became cancelled, and could not be afterwards negotiated, but that one indorser had a right to save his credit by paying and taking it up, and might erase his name without impairing his claim on the parties to it; and that if the plaintiff was the holder of the bill, though his own name did not appear, the action was maintainable. The defendant further requested the Judge to instruct the jury, that the evidence of notice was not seasonable, and that it should have been sent directly to the defendant. The Judge declined to give this

instruction, but told the jury to enquire if reasonable notice had been given.

The verdict was for the plaintiff, and the defendant filed exceptions.

Rogers argued for the defendant, supporting the positions taken at the Court of Common Pleas, and cited 5 *Johns. R.* 375; *Grimshaw* v. *Bender*, 6 *Mass. R.* 157; *Bayley on Bills*, 15; *St.* of 1821, *c.* 88; 8 *Wheat.* 326; 6 *Wheat.* 572; 10 *Johns. R.* 490; 20 *Johns. R.* 372; 1 *Conn. R.* 329; 3 *Conn. R.* 89; 1 *Stark. R.* 314; *Colt* v. *Noble*, 5 *Mass. R.* 167; 2 *Johns. Cases*, 1; *Hussey* v. *Freeman*, 10 *Mass. R.* 84; *Whitwell* v. *Johnson*, 17 *Mass. R.* 453; 11 *Johns. R.* 187.

J. Appleton argued for the plaintiff, and cited 2 *Peters*, 586; *Phœnix Bank* v. *Hussey*, 12 *Pick.* 483; *Chitty on Bills*, Ed. of 1836, 14, 522, 528, and 642; 5 *Cowen*, 186; *ib.* 303; 18 *Johns.* 230.

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

Emery J. — This action is against the defendant, as indorser of a bill of exchange. A verdict has been rendered against him, and the case comes before us on exceptions. The whole evidence on the part of the plaintiff is detailed in the exceptions. In *Green* v. *Jackson*, in the county of *Washington*, not yet published, it was held, that an indorsee for value, or collection, possessed of a bill is regarded as a *bona fide* holder, unless there be evidence to the contrary, notwithstanding one or more indorsements in full, subsequent to the one to him, without producing receipt or indorsement to him of such indorser, whose name he may strike out or not as he thinks proper.

The payment of the bill by the indorsee, as stated by the Judge, to authorize him, the indorser, to maintain the action, was right.

The only question is as to the seasonableness of the notice. If we perceived the evidence that the notice was given seasonably, we should sustain the verdict, notwithstanding the turning over generally to the jury, to enquire whether "reasonable notice had been given."

The indorser, stipulating to be responsible only on the condition of due presentment and due notice given to him of nonpayment, may insist on critical proof, if he choose to do so. There is a defect of proof of notice to the defendant.

The testimony reported, is of uncertainty on the part of the witness when he gave the paper, or put it into the post-office. And it is fairly exposed to the criticism under this statement, that although he might honestly suppose it in season on the day he received it, as was his usual practice, yet it is not even stated, that he believed that even this equivocal mode was adopted on the day he received it, nor can he say at what time he received it. At another trial the plaintiff may be enabled to relieve the case from all difficulty. But under the present posture of the evidence the requested instruction, "that the evidence of the notice was not seasonable," ought to have been given.

Thus far we all agree. The exceptions are therefore sustained. The verdict is set aside, and a new trial granted.

SARAH BANISTER *vs.* HENRY HIGGINSON *& al.*

If the officer's return of an extent on land do not show by whom the appraisers were chosen, no title to the land passes thereby.

Parol proof is inadmissible to sustain such extent.

An amendment of the return, by stating by whom the appraisers were chosen, will not be permitted, if the rights of third persons are affected by such amendment.

Where the record of an extent is defective, no presumption that the requirements of law have been fully complied with can arise from a lapse of sixteen years.

A judgment of a court, having by law jurisdiction of a cause, cannot be impeached collaterally; but remains in force until reversed.

If an officer return an attachment of land as *supposed* to belong to the debtor, such qualifying term does not impair the effect of the attachment, where the land in fact is the property of the debtor.

THIS is a real action wherein the plaintiff demands a piece of land in *Bangor*, which is described in the writ. The parties agree

to submit the action to the decision of the court upon the following state of facts. The writ was dated the 18th of *Oct.* 1835, and counts on the seizin of *Moses Brown*, her grandfather, within twenty-five years. It is agreed that the plaintiff is the sole heir at law of said *Brown;* and that on the 17th of *Nov.* 1807, one *Samuel Greenleaf* owned the land demanded, with other land adjacent, and that on that day he conveyed by deed a part of the land demanded, to said *Moses Brown.* That on the first day of *May*, 1805, *Stephen Higginson, Jr.* and *Henry Higginson*, having a demand against said *Greenleaf*, sued out a writ against him and attached the demanded premises. Said suit was brought for the Court of Common Pleas, *August* term, 1805, *Hancock* county; was there entered and afterwards demurred to the Supreme Judicial Court, and there entered and judgment rendered on the third *Tuesday* of *June*, 1807, in favor of the plaintiffs, for 1310,35. Execution issued on the twenty-fourth of *June.* On the 2nd of *July*, said execution was levied on the premises demanded, by one *John Balch*, a deputy-sheriff. The said *John Balch* not having returned, by whom the appraisers named in said return, were appointed, the parties submit the question, whether the said *John Balch* shall, on motion of the defendants have leave to amend his said return, by inserting the fact, by whom said appraisers were appointed. The tenants also offer the depositions of *H. G. Balch* and *Joseph Treat*, two of the appraisers named in said return, stating by whom they were severally appointed, which if admissible, with or without said amendment being made, are to be considered as a part of the case. Also the deposition of said *John Balch*, stating by whom said appraisers were chosen, which if legally admissible, is also to be made part of the case. But if otherwise, they are to make no part of the case.

On the 23d of *December*, 1822, *Moses Brown* commenced an action against said *Greenleaf*, describing him as of *Cincinnati*, in the State of *Ohio*, returnable at the Court of Common Pleas for the county of *Hancock*, to be holden on the fourth *Tuesday* of *March*, 1823; on said writ, the officer returned an attachment of the premises demanded, as *supposed* to be the property of the said *Greenleaf.* Said action was entered at *March* term, and at the same term the court made the following order, as appears on the

docket under said action; "plaintiff to give notice to the defendant, to be communicated by the clerk, of the nature of the action sixty days previous to the next term." There is then the following entry, "notice issued *May* 8, 1823, and put into the post-office *May* 11, 1823, W. D. continued." The next term of the Common Pleas was holden on the 2nd *Tuesday* of *July*, at which term judgment was rendered on default of the defendant, he not having ever appeared, for $338,21 damage, and $14,79 costs. The declaration in the said suit described a note as made by said *Greenleaf* to said *Brown*, dated *April* 5, 1811, which was not witnessed.

Said *Greenleaf* had occupied the land until he removed from *Bangor*, his former residence, with his family to *Cincinnati*, in the State of *Ohio*, in the year 1813, and has never returned since. Execution issued on said judgment on the 5th of *August*, 1823, and on the 9th of *August* was extended on the premises demanded; which was recorded on same day in the registry of deeds for the county of *Penobscot*. This levy was in legal form. It is agreed that either party may take all legal exceptions to the evidence on the facts affecting the title of the other party. And it is further agreed, that the court may make all such legal inferences from the facts stated, as a jury might make, and decide upon the validity and effect of said judgment and previous proceeding *so far*, and in the same manner, as a Judge of this court might do in this cause were the same on trial before a jury, and said judgment and proceedings were offered in evidence and objected to by the parties.

It is agreed that the tenants are the legal representatives of the said *Stephen Higginson, Jr.* and *Henry Higginson*. And if upon the whole case, the court shall be of opinion, that said action is maintainable, either for the whole or any part of the premises demanded, said defendants are to be defaulted, and judgment rendered accordingly; otherwise the plaintiff is to become nonsuit, with costs for the prevailing party.

Several papers were referred to in the statement of facts, but which are not found necessary to a sufficient understanding of the case.

Mellen and *Abbott* argued for the demandants, contending: —

1. That the levy under which the tenants claimed was void, because the return does not show by whom the appraisers were ap-

pointed. *Williams* v. *Amory*, 14 *Mass. R.* 20; *Eddy* v. *Knapp*, 2 *Mass. R.* 154; *Whitman* v. *Tyler*, 8 *Mass. R.* 284; *Means* v. *Osgood*, 7 *Greenl.* 146.

2. Nor can an amendment be permitted, because it would disturb the rights of third persons already acquired. *Thacher* v. *Miller*, 13 *Mass. R.* 270; *Hall* v. *Williams*, 8 *Mass. R.* 240; *Means* v. *Osgood*, before cited; *Libby* v. *Copp*, 3 *N. H. Rep.* 45; *Howard* v. *Turner*, 6 *Greenl.* 106; *Freeman* v. *Paul*, 3 *Greenl.* 260. Even where in such case the amendment has been allowed, it does not alter the rights of the parties. *Emerson* v. *Upton*, 9 *Pick.* 167; *Putnam* v. *Hall*, 3 *Pick.* 445. Making such amendment dissolves an attachment. *Willis* v. *Crooker*, 1 *Pick.* 203.

3. Our deed conveyed a good title to that part of the premises, because the grantor was in possession, and the void levy of the tenants gave them no seizin.

4. Our judgment was a good and valid one. The defendant was not obliged to plead the statute of limitations, and if he had done so, there was evidence of a new promise. At all events, the judgment is good until reversed.

F. Allen argued for the tenants.

1. The levy of the tenants is good. At least, after the lapse of thirty years, it is to be presumed good, and that all the provisions of the statute have been complied with. *Williams* v. *Amory*, cited for the demandants.

2. The amendment ought to be permitted. The reason urged against it is, that rights of the demandant have intervened. But she has acquired no rights by the levy of her ancestor. A levy under a void judgment can give no title. The judgment should be regarded as a nullity, where the proceedings show, that the court had no jurisdiction, and a reversal is unnecessary. *St.* of 1821, *c.* 59, § 1; *Brackett* v. *Mountfort*, 2 *Fairf.* 117; *Chase* v. *Hathaway*, 14 *Mass. R.* 222; *Bissell* v. *Briggs*, 9 *Mass. R.* 462; *Hall* v. *Williams*, 6 *Pick.* 462; *Hall* v. *Williams*, 1 *Fairf.* 278; *Lawrence* v. *Smith*, 5 *Mass. R.* 362; *M'Rae* v. *Mattoon*, 13 *Pick.* 59; *Adams* v. *Rowe*, 2 *Fairf.* 89. As the judgment was void, as the case shows, there are no rights of third persons to prevent the amendment, which is mere matter of form, and we fur-

nish the strongest proof, that all the statute requirements were in fact performed in relation to the choice of appraisers, and the amendment should be allowed.

3. But the demandant, even if the judgment is good, and our levy is not, ought not to recover the land she claims by deed, because at the time it was made, we had the seizin in fact, and nothing passed by it.

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

Weston C. J. — The levy made in *July*, 1807, upon the demanded premises, in behalf of the tenants, is very clearly bad, it no where appearing, either in the return of the officer, or the accompanying documents, that the appraisers were appointed in conformity with the statute. The requirements of the law upon this point, are too important to be disregarded; and there being no legal evidence of a statute transfer of title from the debtor to the creditors, the fee remained in the former unaffected by the levy.

Parol proof has been offered, that the appraisers were appointed according to law, and a motion has been submitted, in behalf of the tenants, that the officer may be permitted to amend his return, in conformity to what is alleged to be the truth of the case. Without adverting to the danger of such a course in any case, after thirty years, in regard to facts resting in memory, we are of opinion, that it cannot be permitted, with a view to affect third persons. The propriety of such an amendment, was fully considered in the case of *Means & al.* v. *Osgood*, 7 *Greenl.* 146. It was there stated, that it could not be allowed to affect any other persons, than the original parties. It has even been held, that the interest of third persons could not be affected, where the amendment was allowed and made by leave of Court. *Emerson* v. *Upton*, 9 *Pick.* 167. And we are of opinion, that the parol proof cannot be received to sustain the levy, and that the officer cannot be permitted to make the amendment proposed.

It has been insisted, that it is too late to take this objection, after the lapse of so many years. To this we think it is a sufficient answer, that if presumptions, inconsistent with the record of a levy, could be allowed in any case to sustain it, they could not arise in

the period of little more than sixteen years, which intervened between the conflicting levies, in the case before us.

If the title of the tenants is fatally defective, it remains to determine, whether an equal infirmity does not attach to that of the demandant; for unless her title has been sustained, she cannot have judgment. It is based upon the seizin of her ancestor, derived from a levy of the demanded premises in *August*, 1823. No objection has been taken to this levy, in point of form; but it is urged that the tenants have a right to treat as a nullity the judgment, upon which the execution of the levying creditor issued. But we are of opinion, that it was rendered by a Court, having by law jurisdiction of the cause; and that it cannot be impeached collaterally; but remains in force, until reversed. We are not in this case, called upon to determine the force and effect of the judgment of another State, which was elaborately discussed in *Hall & al.* v. *Williams*, 1 *Fairf.* 278.

The debtor, having had his residence in this State, had removed therefrom, and had established his domicil elsewhere. But he left estate liable to be attached, of which he was not divested by the defective levy of the tenants. This estate the ancestor of the demandant attached. The officer, in his return, sets forth the attachment of the land in controversy, "supposed" to be the property of the defendant. The lien of the creditor, or the title of the debtor, was not impaired by the use of this qualifying term. It was a case then within the first section of the act regulating judicial process and proceedings. *Stat.* of 1821, *c.* 59. It is there provided, that if the goods or estate of a defendant out of the State are attached, "the officer shall return the writ, with his doings thereon; and such action being duly entered, the Court may order such notice to the defendant, as justice may require." It appears therefore, that the action was duly entered, and subject to the jurisdiction, direction and control of the Court. If in the subsequent exercise of this jurisdiction, they departed from the requirements of the same statute, so that there is manifest error upon the record, the law affords an appropriate remedy; but as in other cases, where error arises in the progress of a cause, the judgment remains in force, until reversed.

As to that part of the premises, which *Greenleaf*, the owner, conveyed by deed to the ancestor of the demandant in 1807, there can be no doubt that his title passed by that deed; as the grantor was then in the actual possession. Upon the facts agreed, the opinion of the Court is, that the demandant is entitled to judgment.

HENRY B. FARNHAM *vs.* GILMAN CRAM *& al.*

A declaration, averring that the plaintiff as an officer had attached goods on mesne process, and had delivered them to the defendant for safe keeping, taking his promise in writing to redeliver them, in consideration thereof, to the plaintiff on demand, and also averring a demand of the goods and a refusal to deliver them, is a good declaration.

THE declaration in case described the plaintiff, as a late deputy sheriff, and alleged, that the defendants at *Bangor*, on *May* 30, 1836, by their memorandum in writing of that date, in consideration that they had received of the plaintiff certain goods, wares and merchandize of the value of $400, the same having been attached by the plaintiff as the property of said *Cram*, on a writ in favor of *N. O. Pillsbury*, and for the further consideration of one dollar paid the defendants, they jointly and severally promised and agreed to keep the property safely and deliver the same free of expense to the plaintiff or his order, or his successor in office. The declaration then set forth a due demand of the property and refusal to deliver it, *July* 4, 1836. The defendants demurred to the declaration, assigning as special causes the following.

1. The plaintiff has not alleged, that any judgment had ever been rendered against said *Cram*, in favor of said *Pillsbury*.

2. That the declaration does not allege, that any execution had ever issued in favor of *Pillsbury* against *Cram*.

3. That the declaration does not allege, that the plaintiff had in his hands an execution in favor of *Pillsbury* against *Cram*, at the time of the alleged demand of the property.

There was a joinder in demurrer.

J. Godfrey argued in support of the special causes of demurrer.

M. L. Appleton, for the plaintiff, said that the action was not founded on any statute provision, but on a contract set out in the declaration with a breach of it alleged. The Reports are full of cases in which the legality of such contracts are recognized. The question of damages is not now before the Court. The only enquiry is whether the declaration sets forth a good cause of action. He cited *Miller* v. *Clark*, 8 *Pick.* 412; *Bond* v. *Padelford*, 13 *Mass. R.* 394; *Whittier* v. *Smith*, 11 *Mass. R.* 211.

The opinion of the Court was delivered by

WESTON C. J. — The execution of the instrument set forth in the writ, and the demand of the goods averred in the declaration, are admitted by the demurrer. This entitles the plaintiff to maintain his action. *Bond* v. *Padelford*, 13 *Mass. R.* 394. The contract was lawful; and both that and the breach are to be regarded as established. Upon a hearing in damages, if it shall appear that the receiptors acted in behalf of the debtor, and that the goods went to his use, the plaintiff will be entitled only to nominal damages, if the attachment has been dissolved, or the plaintiff is no longer liable to the attaching creditor. But if the attachment has been preserved, and the plaintiff is still liable, he will be entitled to judgment to the extent of his liability, not exceeding the value of the goods stated in the receipt.

OTIS NORCROSS *& al. vs.* RANSOM CLARK *& al.*

Where an action is brought by two, alleging themselves to be copartners under a particular name, pleading the general issue, *does not admit*, that the plaintiffs were the persons composing that partnership when the contract declared on was made; although it is an admission of the existence of some copartnership of that name.

EXCEPTIONS from the Court of Common Pleas.

Assumpsit by *Otis Norcross* and *Eliphalet Jones*, alleged to be copartners under the name of *Otis Norcross & Co.* The general issue was pleaded. The only evidence to support the declaration was a note signed by the defendants, of which the following is a copy.

"$301,06. *Bangor, August* 3, 1835.

For value received, we *Ransom Clark*, as principal, and *David Greely*, as surety, promise to pay *Otis Norcross & Co.*, or order, three hundred and one dollars, and six cents, in one year from date with interest. "*Ransom Clark.*

"*David Greely.*"

The defendants contended, that there was no evidence to prove that *Eliphalet Jones* composed one of the firm of *Otis Norcross & Co.*, and requested PERHAM J. presiding, so to instruct the jury. But the Judge ruled, that the defendants' plea of the general issue was an admission, that the action was rightly brought. The defendants also requested the Judge to charge the jury, that there was no evidence to prove, that *Jones* constituted one of the said firm, and that it was their duty to return a verdict for the defendants. But the Judge did not so charge the jury; but left the question to the jury with the writ and note read in evidence under the circumstances before stated. The verdict was for the plaintiffs, and the defendants filed exceptions.

Rogers, for the defendants, contended, that the plea of the general issue did not admit, that *Jones* was one of the partners of *Norcross & Co.* 1 *Chitty on Pl.* 8; *ib.* 469. The principles of the decisions in *Prop. Ken. Pur.* v. *Call*, 1 *Mass. R.* 483, and *Longley* v. *Potter*, 11 *Mass. R.* 313, cannot extend further, than that there was a company of that name, not that the persons named as plaintiffs, were members of it.

M. L. Appleton, for the plaintiffs, argued, that making the note and pleading the general issue admitted, that the suit was brought rightly, and that no evidence but the note was necessary to support the declaration. 1 *Brown*, 145; *Prop'rs Ken. Purchase* v. *Call*, 1 *Mass. R.* 483; *Sutton* v. *Cole*, 3 *Pick.* 332; 10 *Serg. & R.* 257. This action would be a bar to any other suit on the note. *Livermore* v. *Herschell*, 3 *Pick.* 33.

The opinion of the Court was delivered by

SHEPLEY J. — By pleading to the merits, the defendant admits the corporate capacity or name, or the official character of a plaintiff. So in the present case, the plea admits the existence of a

partnership of that name. When a corporation sues, it is not necessary to state, or prove the corporators. But in cases where the contract is made with persons acting in the name of a copartnership, the suit cannot be brought in the firm name, but the persons composing it must sue in their own names.

Partnerships may, and often do, exist, doing business under the same copartnership name, while the persons composing the firm are wholly changed. While the plea admits the existence of a firm of that name, it remained to be proved, that the plaintiffs were the persons composing that firm at the time the contract was made. The plea would not admit that *Otis Norcross* was one of the firm when the contract was made, because that firm name may be lawfully used by others after he has ceased to be one of the persons composing that firm.

Exceptions sustained, and a new trial granted.

Robert W. Traip *vs.* James B. N. Gould *& al.*

This Court has equity jurisdiction, where the bill charges a fraudulent conveyance of land, made to defeat and delay creditors.

In bills in equity, seeking relief, if any part of the relief sought be of an equitable nature, the Court will retain the bill for complete relief.

This was a bill in equity against *Gould, George C. Angier* and *Albert Dole. Gould* was defaulted, and *Angier* and *Dole* demurred to the bill. The allegations in the bill will be found in the opinion of the Court.

Bennett argued in support of the demurrer. The points made in support of the demurrer are found in the opinion. The following cases were cited. 1 *Fonb. Eq.* 66, *note R;* 1 *Burrow.* 396; 10 *Johns. R.* 457; 3 *Black. Com.* 431; *Mitford's Eq.* 87, *note; ib.* 245, *note* 3; 1 *Johns. Ch. R.* 543; 1 *Vernon,* 399; 4 *Johns. Ch. R.* 671, 684, 691; 5 *Johns. Ch. R.* 280; 20 *Johns. R.* 554.

T. P. Chandler, for the plaintiff, contended, in a written argument, that the following propositions were well grounded in law.

1. Chancery has power to assist an execution creditor to reach property of his debtor in whosesoever hands it has been placed,

out of the reach of an execution at law. 20 *Johns. R.* 554; 4 *Johns. Ch. R.* 687; *Gardiner Bank* v. *Wheaton*, 8 *Greenl.* 373; 2 *Johns. Ch. R.* 283; 2 *Mason*, 271; 1 *Paige*, 168; *ib.* 637.

2. A conveyance made to defeat creditors is void. *Stat.* 13 *Eliz. c.* 5.

3. A purchaser from a fraudulent grantee, without consideration and with notice, is in the same situation as his grantor. 4 *Randolph*, 282.

4. A purchaser of trust property, with notice of the trust and its violation, is himself a trustee. 1 *Brockenburgh's Va. Cas.* 339.

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

EMERY J. — The bill alleges that the plaintiff on the application of *Gould* to purchase a stock of cloths and other articles of merchandize suitable for carrying on a merchant tailor's establishment in *Bangor*, on the 26th of *October*, 1835, sold him goods to the value of $1234,77 on a credit of six months; that *Gould* opened such an establishment there immediately after, and continued in business till *June* 4, 1836. That on the 19th of *February*, 1836, *Gould* purchased of *John C. Burbank*, a house lot on the *Kenduskeag* river in *Bangor*, on which was a house frame partly boarded. That in three days after *Gould* purchased and took his deed of the lot, he conveyed it to *George C. Angier*, an Attorney at Law, without consideration, and at the same time *Angier* executed a deed of it to *Gould's* wife, and delivered it to him, and it was then agreed, that the deed to *Angier* should be recorded, but that the deed to *Gould's* wife should not be put on record, but should be kept secret, that it might appear to *Gould's* creditors, that he had no interest in the land. That *Gould* afterwards expended the proceeds of his business in finishing the house on the lot and other improvements, and when tenantable he moved into the house, and lived there till he broke up business in *Bangor* in *June*, 1836. That the lot and buildings are worth $1500. That though the plaintiff's debt was payable *April* 26, 1836, nothing was paid up to *June* 4, 1836. That *Gould* was frequently writing that he would be able in a short time to pay him. That calling on him on *June* 4, 1836, the plaintiff was surprised to find *Gould* had no vis-

ible property but a sick horse, which had been sent out of the county, and the remnant of goods bought of the plaintiff, which remnant *Angier* claimed by a bill of sale from *Gould.* That they were attached by plaintiff, and *Angier* gave up his claim on plaintiff's assuming a small liability, which *Angier* said he was under for *Gould,* and plaintiff also attached *Gould's* interest in the house lot, not knowing of the deed from *Angier* to *Gould's* wife. That *Angier* would give no information on which plaintiff could rely. That in *June,* 1836, notice was given to *Angier* not to convey. That the plaintiff would file a bill in equity, and *Angier* said the Court had no jurisdiction, and he afterwards, on *June* 30, 1836, conveyed the land by quitclaim deed to *Albert Dole,* without consideration, *Dole* having notice of plaintiff's claim. That at *Oct.* term, 1836, plaintiff recovered judgment against *Gould,* for $1266, 43, damage, and $10,82, cost, and that the execution was on *Oct.* 31, 1836, committed to a sheriff, who returned the proceeds of the goods attached $159,02, and could find no property of *Gould's* to satisfy the balance or any part of it. That the plaintiff did not know of the existence of the deed to *Gould's* wife till *November* 9, 1836, when *Gould,* having repented of his sins, delivered said deed to plaintiff and executed a deed to the plaintiff, which is recorded. That *Gould* is insolvent, and that the deeds to *Angier* and *Dole* are a fraud on the plaintiff. That he has applied to them to release their interest, and they refuse. The plaintiff prays they may answer and be compelled to convey to him, or that *Angier* may be compelled to pay the value of the land in money, and for further relief.

Gould is defaulted.

To this bill there is a demurrer on the part of *Angier* and *Dole.*

These two defendants contend, that the plaintiff has mistaken his remedy, and that this Court has not jurisdiction of the case; that if this was a case proper for chancery the Court would not interfere, because the plaintiff might have extended his execution, and if he could have proved the transaction fraudulent, on bringing his action he would have recovered; that the plaintiff has not alleged, that he cannot prove it, or that it is exclusively in the knowledge of the defendants; that the plaintiff does not show any specific lien on this property; and that the bill is very defectively

drawn. It is true, that the bill is not incumbered with all the verbiage which is too frequently introduced into bills. And we have abundant cause to regret the redundancy of unimportant repetition, to which we are often treated. Is not the plaintiff's case stated explicitly? Are any circumstances, material to be stated, omitted? Is not sufficient before us to give the Court such complete possession of the merits of the case, as would enable the Court to do effectual justice to the parties? It does not use the phraseology of combination, nor of pretences, though it speaks of contriving and confederating. But this is merely discretionary. Would those allegations, without other sufficient equitable matter alleged, give this Court jurisdiction? What is within the plaintiff's knowledge is stated distinctly and positively. The discovery to be made by the defendants is sought in calling them to answer to those allegations.

But we think, that we can discern in the bill a particular respect to the third and fourth rules of this Court, as to practice in chancery cases. All that is necessary, is for the plaintiff to make out such a case, by his bill, as will authorize the Court to take cognizance of his suit.

The case of *Jackson* v. *Burgott*, 10 *Johns. R.* 457, is cited for the purpose of shewing, that Courts of Law have concurrent jurisdiction in all cases of fraud.

To maintain the jurisdiction for relief it is said to be necessary to allege in the bill, that the facts are material to the plaintiff's case and that the discovery of them by the defendants is indispensable as proof; and that the plaintiff is unable to prove such facts by other testimony.

But the case here stated, shews a trust or equity binding on the conscience of the defendants. And in bills of discovery seeking relief, if any part of the relief sought be of an equitable nature, the Court will retain the bill for complete relief. 1 *Story's Eq.* 90.

Here the demurrer admits the truth of the bill. The plaintiff shews, that he has procured a judgment ignorant of the deed to *Gould's* wife, and has now become interested in the very property by the deed which has since been made to him.

By this deed we suppose, in the present state of the case, that he has derived as much as he would from a levy, and the expense of it is avoided. It is alleged in the bill, that the plaintiff can

only have adequate relief in the premises in a Court of Equity, and asks for answers from the defendants to all and singular the matters aforesaid.

We have heretofore expressed our reluctance to give encouragement to demurrers, unless for very indisputable causes. This was fully communicated in the case *Reed* v. *Noble*, and others pending in the county of *Cumberland*, to which we refer.

We overrule the demurrer.

George Lane *& al. vs.* Simon Nowell *& al. and* Thomas Nowell, *trustee.*

Where the trustee has the actual possession of personal property conveyed to him by the principal, or the right to the actual possession and the power to take immediate possession of it, he must be regarded as having it entrusted to him within the meaning of the trustee statute, and must be charged.

The facts appearing in the disclosure of *Thomas Nowell*, the trustee, will be found sufficiently in the opinion of the Court.

The question, whether the trustee should or should not be charged, was argued in writing, by *Rogers*, for the plaintiff, and by *Abbott*, for the trustee.

For the trustee, it was contended, that the goods were not in his hands and possession within the meaning of the statute. It was uncertain, whether any part of the sales would ever be paid by the vendees or by the auctioneers, or whether the amount would be sufficient to pay the debts for which the assignment was made. *Willard* v. *Sheafe & trustee*, 4 *Mass. R.* 235; *Williams* v. *Marston & trustee*, 3 *Pick.* 65; *Davis* v. *Ham & trustee*, 3 *Mass. R.* 33. Where the trustee is not the absolute debtor, or has not the effects of the principal in his hands, he cannot be charged. *Grant* v. *Shaw*, 16 *Mass. R.* 341. A trustee is not chargeable for personal property, of which he has only the constructive possession. *Andrews* v. *Ludlow*, 5 *Pick.* 30. In this case he could not turn out the property to be taken on the execution.

For the plaintiff, it was said, that the property by the assignment, passed absolutely into the hands of the trustee, and so the

possession of the auctioneers, by his assent, was his possession. *Man. Bank* v. *Osgood*, 3 *Fairf.* 117. The cases cited from 4 *Mass. R.* 235, 3 *Pick.* 65, and 16 *Mass. R.* 341, are cases deciding only, that the liability of the trustee must be absolute, and not conditional, and do not apply to this case.

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

SHEPLEY J. — From the answers of the trustee it appears, that on the eighth day of *January*, 1832, *Simon Nowell* and *Simon Nowell, jr.* conveyed to the trustee, and to certain other creditors, their stock of goods, stated in the answers to be of the value of about - - $2100,

The Brig *William*, valued at 2800,

And her cargo of lumber, valued at 1400,

$6300,

to secure the several persons the amount of their debts, said to have been $4800. Any surplus was to be accounted for to the vendors. On the second day of *February* following, the trustee and other creditors by a written contract agreed, that the trustee should have the possession of the property, which is stated to have been delivered to him; and he agreed to manage it according to the directions, which a majority of said creditors in interest should, from time to time, give.

The trustee in his answers states, that the brig and cargo were not sufficient to pay the amount due to the creditors; that the stock of goods had been by him, under the directions of the creditors, placed in the hands of auctioneers to be sold; and that a part thereof had been sold by them before the service was made upon him. That the goods never were actually in his possession, one of the debtors having kept the key of the store, and that an attachment had been made of part or all the goods by another creditor, and the officer had then taken the key, and before the service of the writ, the goods had been by the consent of the attaching creditor, placed in the hands of the auctioneers for sale, for the benefit of all interested. He states, that the proceeds of these goods were paid over to the creditors to whom they were convey-

ed, and that after payment of all their demands, he paid to the debtors over five hundred dollars, according to the terms of the conveyance.

He now claims to be discharged as trustee, because the stock of goods was never actually in his possession, and his counsel relies upon the case of *Andrews* v. *Ludlow*, 5 *Pick.* 30, as an authority in point. In that case, certain vessels conveyed, were not only at sea, but were mortgaged also to third persons, and the Court say, that the vendee "had no right of possession." And "that a trustee is not chargeable for personal property belonging to the principal of which he had only the constructive possession, but it must be in his actual possession, or within his control, so that he may be able to turn it out to be disposed of on execution."

In the case of *Ward* v. *Lamson & trustees*, 6 *Pick.* 358, the Court held, that the trustee was to be charged for certain property conveyed to him, which was never in his actual possession, and which was in the hands of certain merchants in *New-York*, and which was by the debtor sold after the service upon the trustees and the proceeds paid to them. The cases are not at variance. The principle is the same, that where the party has the actual possession or the right to the actual possession, and the power to take immediate possession, he must be regarded as having the property intrusted to him within the intention of the statute, and must be charged. The trustee in this case, admits in his written contract, that the goods had been delivered to him; and he engages to manage them and account for them. It appears also, that he actually controlled the goods, causing them to be placed in the hands of the auctioneers; and whoever held the key of the store, or had the actual possession must have done so in submission to him. Nor did the auctioneers become accountable to any other person, than the trustee, for the goods, or their proceeds. The trustee, it is true, was obliged to cause the goods to be sold according to the directions of the creditors, but that sale might have been made while he had the actual possession of the goods, if he had been pleased to have directed that manner of sale; and he might have reclaimed the goods from them, no other person having a right to interfere, and have delivered a portion of them to the officer, after paying the claims of the creditors. The attachment made by the officer, and

the delivery of the key to him cannot be regarded as dispossessing the trustee, as he appears to have prevailed and maintained his right to the property. It is also insisted, that the interest of the trustee was contingent, and the case of *Davis* v. *Ham & al. & trustees*, and other cases, are cited and relied upon.

The contingency in those cases was of such a character, that upon certain events happening, the trustee would not be indebted at all to the principal. The trustee was certainly indebted to the principals in the present case, if the amount, realized for the property conveyed, exceeded the amount of the debts secured; and such a contingency cannot prevent the trustee from being accountable for the amount actually received by him. *Hastings* v. *Baldwin*, 17 *Mass. R.* 553.

The trustee must be regarded as having the legal possession of the property at the time of the service of the writ upon him, and he is therefore adjudged trustee.

Caleb Titus *vs. The inhabitants of* Frankfort.

An action against a town to recover damages caused by defects in a highway, is a transitory action; and may be brought in the county where the plaintiff lives, if he live within the State.

This was an action on the case brought in the county of *Penobscot* by the plaintiff, an inhabitant of *Brewer* in that county, against the inhabitants of *Frankfort* in the county of *Waldo*, for damages alleged to have been sustained by reason of want of repair and defects in and obstructions placed upon a bridge, part of a highway within the town of *Frankfort*. The defendants pleaded in abatement, that the cause of action was local in its nature, and that therefore it could not be maintained in the county of *Penobscot*, but should have been brought in the county of *Waldo*. To this plea there was a demurrer.

The case was argued in writing, by *P. Chandler* and *A. W. Paine*, for the plaintiff, and orally, by *W. Kelley*, for the defendants.

The counsel for the plaintiff contended, in support of the demurrer: —

1. In all actions *ex delicto* for injuries to the person or to personal property, the venue is in general transitory. 1 *Chitty on Pl.* 271, 272; 1 *Com. Dig. Action, N* 12.

2. Personal actions, such as seek nothing more than the recovery of money or personal chattels of any kind, are in most cases transitory, whether they sound in tort or in contract. *Gould on Pl.* 119. Nor is this case one that can be included in the exception, "as arising out of some local subject," the nature of the action being determined by the right; and wherever that is *personal*, the action is transitory. It is like cases of imprisonment. *Gould on Pl.* 119; 1 *Chitty on Pl.* 272. Or like the case put by *Chitty* of an action for "setting a defamatory mark on plaintiff's house." 11 *East*, 227. Or in actions against sheriffs, the right affected being personal. *Marshall* v. *Hosmer*, 3 *Mass. R.* 23; *Foster* v. *Baldwin*, 2 *Mass. R.* 569; 1 *Caines*, 1. Or like pauper actions between towns.

3. This action is not a penal action, as it is not brought for any penalty, but for actual damages sustained by the culpable neglect of the defendants. But if the statute under which this action is brought be penal, still the action would be transitory. The *stat.* 21 *Jac.* 1, *c.* 4, § 2, of which our *stat. c.* 49, is a transcript, provides only, that such actions as are brought for the penalty *by an informer* shall be local. Actions brought by a party "aggrieved by the offence prohibited, are still transitory at common law." *Gould on Pl.* 130; 1 *Bac. Abr. Action qui tam, C;* 1 *Show.* 354. Nor does the language of the statute, giving the plaintiff this action, make the action local. Where the action is intended to be local, the statute makes it so in express terms, as in *stat.* 1821, *c.* 91, § 6; *stat. c.* 33, § 6.

4. Although this highway might have been a public nuisance, still the actions accruing in consequence of such nuisance is local only when the injury complained of is to houses and lands. *Gould on Pl.* 116; 2 *East*, 497. When the nuisance affects personal rights, the action is transitory. 1 *Chitty on Pl.* 272; *Gould on Pl.* 119; *Mostyn* v. *Fabrigas*, 1 *Cowper*, 160.

5. A strong argument arises from the fact, that similar cases have frequently occurred in practice, and have been ably contested, and

yet this question never before was raised. *Frost* v. *Portland*, 2 *Fairf.* 271; *Estes* v. *Troy*, 5 *Greenl.* 368.

For the defendants it was argued, that the action was local, and could be maintained only in the county of *Waldo*.

1. By the common law all actions were originally local, although a wrong venue would be cured by a verdict, and it was necessary to take advantage of it by plea in abatement. *Gould on Pl.* 136, 137, 149, 150. The statutes have changed the law only where the action is strictly personal.

2. The action is local, because it is for a *penalty* enforced upon the town. No action at the common law lies against a town for damages of the nature claimed in this case. *Mower* v. *Leicester*, 9 *Mass. R.* 247. The original act, giving double damages, was clearly penal. *Lobdell* v. *New-Bedford*, 1 *Mass. R.* 153; *Mower* v. *Leicester*, before cited. No particular sum is necessary to be mentioned to make a statute penal. 6 *Bac. Abr.* 390.

3. The action is local, because it arises out of a local subject. The cause of the alleged injury was a public nuisance, and actions for injuries sustained thereby are local. *Angel on Water Courses*, 84 *to* 88; *Gould on Pl.* 115, 116; 3 *Black. Com.* 167, 215, 218; *Mersey and Irwell Navigation Co.* v. *Douglass*, 2 *East*, 497; 1 *Chitty on Pl.* 270; 1 *Com. Dig.* 305; 5 *Bac. Abr.* 150, *Nuisance; Am. Jurist, No.* 27, *Opinion of Parsons C. J.*

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

Emery J. — It is apparent from the agreement signed by the counsel of the parties in this case, that it is presented to us with a view of obtaining a decision only on the point, whether the action is local. We are therefore relieved from any very particular examination of the declaration, or plea in abatement, and take it for granted, that they are all they should be in substance, and in form, to raise the question of locality. For the defendants, it is insisted, that the action is local, that damages given by the statute directing the method of laying out and making provision for the repair and amendment of highways, and an act in addition to the several acts now in force, respecting highways, are in the nature of a penalty, that penal actions are local by the common law, and by our law.

That the plaintiff seeks redress for a nuisance to his right of easement or passage, and that trespass or case for nuisance to land is confessedly local, and that therefore this is local.

By the statute of *Maine*, *c.* 118, *s.* 17, to which allusion is first made, the person injured through defect of necessary repair of any highway, causeway, or bridge, shall and may recover of the county, town, the person, or persons, who are by law obliged to keep the same in repair, in case they had reasonable notice of the defect, double the damages thereby sustained, by a special action of the case, before any court proper to hear and determine the same.

The statute *c.* 300, passed *Feb.* 23, 1825, vol. 3, of *Maine Laws*, 140, enacts that instead of double damages given by the seventh section of the act aforesaid, the party recovering damages in manner therein mentioned shall be entitled to single damages only. A mistake evidently occurred in naming the number of the section, *seventh*, instead of *seventeenth*. The *seventh* section provides that when the owner of land and a corporation both petition for an alteration of damages estimated for laying out a highway, the court may determine both applications by one jury or committee. This could not be the section intended. It was manifestly the *seventeenth*. And the practical construction has been so ever since, in giving single damages only in actions of this description.

By our statute regulating judicial process and proceedings, *c.* 59, *s.* 9, it is enacted, that when the plaintiff and defendant both live within the State, *all personal* or transitory actions shall be brought in the county where one of the parties lives. And when an action shall be commenced in any other county, than as above directed, the writ shall abate, and the defendants shall be allowed double costs. And in the 45th section of the same statute, it is further enacted, that in all informations to be exhibited, and in all actions or suits to be commenced, against any person or persons on the behalf of any *informer* for or in behalf of the State, and any informer for or concerning any offence committed or to be committed against any penal statute, the offence shall be laid and alleged to have been committed in the county, where such offence was in truth committed and not elsewhere. And on trial, if not proved as laid, the issue will be found for the defendant.

The implication is almost irresistable, that in all actions upon statutes brought in behalf of other persons, than an informer, or in behalf of the State and informer, the legislature intended, that the offence may be alleged in any place consistent with the rules of law applicable to personal actions. As defined by *Petersdorf*, 1 vol. 170, personal actions "are those brought for specific recovery of goods and chattels, or for damages, or other redress for breach of contract, or other injuries of whatever description, the specific recovery of lands, tenements, and hereditaments only excepted." Some personal actions may be local.

We have no provision for changing the venue, that is, the place from which the jury are to come for the trial of the action, either in personal or other actions, according to the discretion of the Court, as is practised in *England* and in *New-York*. In *England*, not in transitory only, but in local actions, the court will change the venue if there be an urgent call of justice, not otherwise to be answered. *Anon. Loft.* 49. And the plaintiff has been allowed to bring back the *venue* after plea pleaded. *Bruckshaw* v. *Hopkins, Cowp.* 409. The reason for this is stated in 3 *Black. Com.* 383. "A jury coming from the neighborhood has in some respects a great advantage; but is often liable to strong objections, especially in small jurisdictions, as in cities which are counties of themselves, and such where assizes are but seldom holden, or where the question in dispute has an extensive local tendency; where a cry has been raised, and the passions of the multitude inflamed, or where one of the parties is popular and the other a stranger, or obnoxious;" and he says, "there may be the strongest bias without any pecuniary interest. In all these cases to summon a jury, laboring under local prejudices, is laying a snare for their consciences. And though they should have virtue and vigor of mind sufficient to keep them upright, the parties will grow suspicious and resort under various pretences to another mode of trial."

In the full knowledge of all these difficulties, our statute was passed. And we may infer, that the legislature intended to leave it to the election of the plaintiff, living in the State, in all personal actions, to select his own county, or that of the defendant living in the State, as the theatre, in which he would bring his action to trial for redress, unless otherwise provided by law. It is to be noticed

that in the 10th section of the same act, *c.* 59, a little different phraseology is adopted. It is, "that any *local* or transitory action against the inhabitants of any county in this State shall be commenced either in the county where the plaintiff in such action lives, or in the county against which the action is brought, at the plaintiff's election;" but in such action if the county be plaintiff, it must be commenced where the defendant lives, unless he be of the same county, in which case, it is to be prosecuted in either of the adjoining counties. So the terms *local* or transitory action are used four times in the 10th, 12th and 13th sections of the act. In the 11th section, it is enacted, that when any corporation shall be a party in any action commenced by or against the inhabitants of any county in this State, in their corporate capacity, the action shall be commenced and prosecuted to final judgment and execution in one of the counties adjoining the county interested in the same.

If it should be conceded, that our act of the legislature, authorizing a recovery against the town, is in the nature of a penal statute, because it provides a suit against a *quasi* corporation of limited municipal powers, not given by the common law, and so being as for a penalty, is to be construed as within the statute of the 21 *James*, *c.* 4. We must still look to decisions under that, for our guidance in regard to actions upon statutes. It may be questionable, whether that statute was ever adopted in *Massachusetts*. Some of its provisions could not be. We do not find it as one so adopted on the list furnished by Mr. *Dane* in his abridgement.

But actions founded upon statutes are not necessarily considered penal, if the sum recovered in actions under such statutes be confined to what amounts to actual amends. And so is only the means of redress specifically given to the party grieved; they are actions purely remedial. *Rep. temp. Hardw.* 412. A penalty in the very term includes more than the real damages actually suffered. The authorities go so far as to state, that actions by the party grieved are deemed remedial, even when they seek to recover double damages. *Myddleton* v. *Wynn*, in error, *Willes' Rep.* 597; *Phillips* v. *Smith*, *Comyn's Rep.* 284. The damages are to be considered only as a satisfaction to the party. In *England*, that statute applies only to offences, the penalties of which are given to

common informers, and of course, could not apply to suits by the party grieved. *Allen* v. *Stear*, *Cro. Eliz.* 645. And the limitation imposed by that statute to the bringing of actions, applies to the case of common informers only, or suits for the benefit of the Crown, but does not restrict the party grieved from bringing his action after that time. 2 *Term Rep.* 155, in note, *Spiers* v. *Frederick*, cited in *Woodgate* v. *Knatchbull.* In *Ward* v. *Snell*, 1 *Hen. Black.* 10, which was debt for a penalty of the *habeas corpus* act for refusing the plaintiff, the party grieved, a copy of a warrant of commitment, *Gould J.* says, "This is not a popular action. A right of action vests in the party grieved as soon as the grievance is committed, but it is otherwise of a common informer, who has no interest till judgment." We are clear therefore in considering, that by our own statute, as provided in the 45th section, the prosecution of the action by the plaintiff, the party grieved or injured, is not limited by the terms of that section to be commenced in the county where the offence was committed. The restriction is only to suits by an informer and to informations and suits in behalf of the state, or in behalf of the State and informer. It still remains to ascertain, whether the other part of the objection to the maintenance of the action in this county be tenable. It is said by *Hargrave*, that either because the rules for laying the *venue* were in themselves vague, or because they were perverted by an overcurious interpretation, trivial objections to the *visne* not only became very common, but often succeeded. At length the grievance became so intolerable, that parliament interposed to relieve them by the *stat.* 21 *Jas. c.* 13; 16 *&* 17 *Cha.* 2, *c.* 8; and 4 *&* 5 *Anne*, *c.* 16, in civil cases, and 24 *Geo.* 2, *c.* 18, extended to actions on penal statutes. The practice, however, deviated from the law even as to crimes. And he complains against retaining the form of a *visne* from the particular place of the county in which a crime is alleged, as merely serving to create delay and embarrassment in the distribution of criminal justice. This related, in *England*, to challenges for defect of hundredors. It is true, we have certain statutes which render personal actions local. In *c.* 91 of *Maine Laws*, *vol.* 1, *p.* 400, *sec.* 6, it is enacted, that any persons aggrieved at the neglect or misdoings of any sheriff or his deputy, or of any coroner, and having first ascertained the amount of his damages

by judgment against the sheriff or coroner, may prosecute the bond of either, in the name of the treasurer; provided, that all such actions on the bonds shall be brought always in the county where the sheriff or coroner shall have been commissioned respectively to act. In *c.* 33, an act to prevent and punish trespasses, *vol.* 1, *Maine Laws, p.* 123, the penalties mentioned in the 1st, 2d, 5th and 6th sections are to be prosecuted in the county where the offence shall be committed. The 6th section also provides, that the person so offending shall be also liable to the party injured in a sum equal to three times the value of the grass, hay, fruit, vegetable, or shrub taken, to be recovered by action of the case, in any court of competent jurisdiction.

In the case cited from 2 *East*, 497, *The Company, &c. of the Mersey & Irwell Navigations* v. *Douglass*, which was an action of the case for a nuisance, for diverting the waters of a navigation, *Le Blanc J.* says, "neither is it necessary in actions of this kind to give a local description either to the property injured, or to the thing which caused the injury; but it is sufficient to state what the property injured was, and that it was so injured by the defendants. In this case therefore, it was not necessary to prove that the river *Irwell*, or any part of it, was within the town of *Preston*, or that the weir by which the obstruction was caused, was within the same place; but the whole may be referred to matter of *venue*." *Lord Ellenborough* said, "it is sufficient to describe the substance of the injury in order to give the other party notice of what he is to defend; and it is sufficient in the form of pleading to *allege* the gravamen at any place within the body of the county. Therefore the manner in which it is here stated ought rather to be referred to *venue* than to local description. If indeed local description were necessary to be laid in this species of action, it might be doubtful, whether this manner of laying it were to be referred to the one or the other, though I do not think it necessary to be so laid."

The argument of *Erskine* was, that what constitutes this a local action is the locality of the *plaintiff's possession* within the body of the county, and not the locality of the injury in this or that part of it. If before the *stat.* of *Anne*, it would have been necessary to have stated the particular vill, &c., it is no longer so since the statute, unless where local description is necessary.

In *Mostyn* v. *Fabrigas, Cowper*, 161, cited for the plaintiff, *Ld. Mansfield* says, " there is a formal, and a substantial distinction as to the locality of trials. The substantial is, where the proceeding is *in rem* where the effect of the judgment cannot be had, if it be laid in a wrong place. The law makes a distinction between transitory and local actions. If the matter which is the cause of a transitory action arises within the realm, it may be laid in any county. The place is not material, and if an imprisonment in *Middlesex*, it may be laid in *Surry*, and though proved to be done in *Middlesex*, the place not being material, it does not at all prevent the plaintiff recovering damages. The place of transitory actions is never material except where by particular acts of parliament it is made so."

In *Jeffries* v. *Duncombe*, 11 *East*, 225, cited by the plaintiff's counsel, which was an action of the case for setting up a certain lamp in front of and near adjoining to the dwellinghouse of te plaintiff, and causing the same to be lighted and kept burning in the daytime, &c., thereby intending to mark out the said dwellinghouse of the plaintiff, as a bawdy house, &c., *Lord Ellenborough* says, " this is not a local injury. The house indeed is local, but the imputation meant to be conveyed by the nuisance is not against the property, but against the man who occupies it. And the place mentioned is mere matter of *venue* and not of local description." This case serves to show, that there continued down to the time when it was decided, in 1809, a disposition to carp at the mode of presenting to the court a case of consequential injury to the person, when the cause of action arose in a particular place, though immaterial, and the readiness with which the court, in the pursuit of justice, discountenanced such objections.

In *Peirce* v. *Atwood*, 13 *Mass. R.* 354, *Parker C. J.* says, " we believe the legislature in the use of the phrase transitory actions had reference to the general common law division of actions into transitory and local, and not to such actions as by any particular statute of *England* were confined to particular counties. This general statute provision," referring to *stat.* of 1784, *c.* 28, *sec.* 13, of which our statute, *c.* 59, *sec.* 9, is a transcript, " for the bringing of actions, would of course repeal any preexisting *English* statute, which might have received force here by usage and adoption."

It is true, that the inhabitants of a town must be in some particular county. But there is no difference, for that cause, between an action by an individual, against an individual or against a corporation. It is true, that highways within a town must be local. It is equally true, that an injury to a traveller arising from defect of necessary repair in the highways, might occur in any county in the State. The right to pass in the road, if it be an easement, is just as perfect to the plaintiff, as to every inhabitant of the town. They may use it together. Yet they are not strictly tenants in common. Neither has a freehold in it. It may be discontinued. Neither seeks to establish a title to the land, nor does the plaintiff ask for compensation for any actual trespass on the land. But the law fixes on the defendants the obligation to repair this highway, just such a kind of obligation as is enjoined on the inhabitants of the town, in another county, of which the plaintiff is an inhabitant.

The neglect of the defendants to do their duty, as in this discussion we must suppose, which has occasioned the injury to the plaintiff, is of a transitory character, a nonfeasance. It constitutes a personal action *ex delicto* and is transitory. *Arch. Plead.* 62, 87; *Co. Lit.* 282; 1 *Wils.* 336. "Even where the offence against a penal statute is merely the omitting to do something prescribed by it; it should seem, that the offence is not local, and an action for the penalty given for the breach of it, may be brought any where."

The case of *Grimstone* v. *Molineaux*, *Hobart*, 251, is cited in support of this position. The case is not inserted at length in the valuable edition published under the supervision of Judge *Williams*, but through the politeness of a learned friend, who was possessed of one of the old publications of *Hobart*, I am enabled to present a verbatim copy of the whole report. It is, "Information *Grimstone* v. *Molineaux*, *Knight*, *& his Wife*, for the recusancy of his wife, upon the *stat.* 23 *Eliz.* The defendant prayed judgment of the information, and pleaded a *stat.* of 31 *Eliz.*, that for that offence, among others, the action should be brought in the county where the offence was committed, and avers, that the wife was inhabiting in *Lancaster* at the time, &c. *absque hoc*, &c. in *London.* Whereupon a demurrer. *Vide* 21 *Jac.* 1, *cap.* 4.

"NOTE. — This offence is not in committing, but in omitting, and nonfeazans."

"No judgment appears to be given, but the note added by the reporter," as suggested by *Espinasse*, on penal statutes, 83, "seems to indicate the opinion of *Lord Hobart*, as to the distinction of the nature of the offence." And the reasoning is, "The commission of an offence may be well ascertained or fixed to the county or place where committed; but when the offence is an omission only, that seems to be merely personal, of course no locality attached to it."

In the case, *Frost* v. *The Inhabitants of Portland*, speaking of the liability of towns to respond in damages for injuries of this sort, the present Chief Justice remarks, "Whether it might not have resulted from the section imposing the duty to repair need not be decided, as another section of the same statute gives the remedy to the party injured in express terms. The law has for adequate reasons, imposed upon towns both the duty and liability." It deserves notice too, that in that action, defended with the highest ability and perseverance, the learned counsel for the defendants did not consider it important to urge the objection to the maintenance of the action which has now been introduced. As soon as the injury was suffered, the law having made it the defendants' duty, which they omitted, to keep the highway in repair, safe and convenient for the citizens at all seasons of the year to pass and repass, there vested in the plaintiff the right to recover the damage, which he sustained. The action of debt would have been the proper remedy, had not an action of the case been prescribed by the statute. 6 *Mod. Rep.* 27, *Anon.* The right of action accrued to the plaintiff against the defendants on their liability, as of a personal and transitory nature. And we consider, that the plaintiff has rightly brought his action in the county in which he lives. Accordingly we adjudge, that the defendants answer over to the merits, as has been agreed.

The State *vs.* William Murray *& al.*

A conspiracy to commit a misdemeanor is not merged in the commission of it.

An informality in the process of commitment of a prisoner is no justification for breaking the prison to effect an escape.

Exceptions from the Court of Common Pleas, Perham J. presiding.

The nature of the indictment will be found in the opinion of this Court. At the trial, the counsel for the respondents contended, that the facts set forth in the indictment, if found to be true, did not constitute a conspiracy, but the crime of prison breach, and requested the Judge so to instruct the jury; but the Judge instructed the jury, that if they found the facts set forth in the indictment to be true, they would return a verdict of guilty. The County Attorney, for the purpose of showing that *Alexander*, one of the respondents, was lawfully in prison at the time, introduced a copy of the assessors' warrant, and collector's return, by virtue of which the commitment was made, which was objected to by the counsel for the respondents, but was admitted. This copy does not appear in the exceptions. To show that *W. Murray* was lawfully imprisoned, the County Attorney called *Isaac Hodsdon*, the former clerk of the Court, who testified, that his records were not then made up, but that from his minutes it appeared, that *Murray* had been convicted at a former term of the Court, of the crime of larceny, and that judgment was suspended until the next term, and *Murray* ordered by the Court to recognize for his appearance, and on his refusal, was committed to prison by order of the Court, but no mittimus was made out and left with the prison keeper. This evidence was objected to in behalf of the respondents, who contended that it did not show, that *Murray* was lawfully in prison. The Judge admitted the evidence, and ruled that no mittimus was necessary under the circumstances. The jury found all the respondents guilty, and they filed exceptions.

J. Appleton and *Cooley* for the respondents. The objections made by them to the conviction, will be found in the opinion of the Court. They cited *Arch. Crim. Pleading*. 254; 1 *Chitty's Cr. Law*, 138; 13 *East*, 228; *Commonwealth* v. *Kingsbury*, 5 *Mass.*

R. 106; 9 *Cowen*, 578; *St.* of 1821, *c.* 116, § 52; *Am. Jurist*, *No.* 33, 175, citing *Wright's R.*; 1 *Chitty's Cr. Law*, 89; *St.* of 1821, *c.* 64; *Randall* v. *Bridge*, 2 *Mass. R.* 552.

Clifford, Attorney General, for the State, contended, that if either of the respondents was lawfully imprisoned, it was sufficient. The authorities cited on this subject for the respondents apply only to commitments by magistrates. Where the commitment is by order of court, no mittimus is necessary. 2 *Hale's P. C.* 122; 1 *Hale's P. C.* 583, 610. No objection appears in the exceptions to the legality of the imprisonment of but two of the number, and the question is not open, as to the others. The objection however now raised, that the fees of commitment are not taxed, is only for the benefit of the party, as the officer is entitled to none where none are certified, and wholly groundless, as the taxation of illegal fees would not justify the acts of the respondents.

The indictment is good. This is an offence of itself, and is of the same grade of offences, as prison breach, and is not merged in it. The principle is, that where there is a conspiracy to commit a higher offence, and the offence is actually committed, the conspiracy is merged; but where both are of the same grade, there is no merger. 1 *Hawk. ch.* 21, § 15; 16 *East*, 362; 2 *Shower*, 1; 1 *Saund.* 300; 4 *T. R.* 285; 2 *Ld. Raym.* 65; 3 *Burr.* 1320; 1 *Ld. Raym.* 711; 2 *Russell on Cr.* 267; 3 *Chitty's Cr. Law*, 1150; 4 *Wend.* 229; 7 *Conn. R.* 54; *Commonwealth* v. *Judd*, 2 *Mass. R.* 329; *Commonwealth* v. *Tibbetts*, *ib.* 536; *Commonwealth* v. *Warren*, 6 *Mass. R.* 74; *Commonwealth* v. *Davis*, 9 *Mass. R.* 415; 3 *Sergt. & R.* 220; 7 *Sergt. & R.* 460; 3 *Burr.* 1221; 6 *T. R.* 636; 2 *Russel on Cr.* 556.

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

Emery J. — This comes before us on exceptions to the ruling and charge of the Court of Common Pleas. There are three counts in the indictment. The first charging that *Wm. Murray*, *David Terry*, *Charles Burlingham*, *James Alexander*, *Thomas H. Marten*, on the first of *April*, 1837, were persons lawfully confined in the county jail in *Bangor*, and then and there lawfully detained in the custody of the keeper of said prison, by divers legal pro-

cesses then in force against them, and that *Silas P. Murray*, on said fifth day of *April*, was not a prisoner in said jail. And that they all intending to break down and destroy a part of the floor and walls of the said jail, and thereby unlawfully to effect the escape of the said *William Murray*, *David Terry*, *Charles Burlingham*, and *James Alexander*, then lawfully confined in that prison in the custody of the keeper, did conspire to break down and destroy the floors and walls of the jail, and thereby effect the escape of those four; and in pursuance of this conspiracy, did unlawfully break down and destroy the floor and walls of said jail. 2d. Count. That intending to effect the escape of said *William*, *David*, *Charles* and *James*, did unlawfully conspire to effect their escape and did so in pursuance of the conspiracy. 3d. That they did conspire to injure and destroy the jail; and said *William*, *David*, *Charles*, *James*, *Thomas H.* and *Silas P.* in pursuance of the conspiracy, did unlawfully injure and destroy the jail.

It is objected first, that the indictment is bad, as it contains in each count a charge of two crimes. That it does not describe the crime with sufficient certainty, and one would not know whether he was to be tried for prison breach, or a conspiracy, and could not plead a conviction in bar of another prosecution. That a conspiracy to break jail is a mere civil trespass, and without prison breach to make escape, is not crime, and cites 13 *East*, 228. An indictment will not lie for conspiracy to commit a civil trespass upon property by agreeing to go, and by going, into a preserve for hares, the property of another, for the purpose of snaring them, although alleged to be done in the night time by the defendants, armed with offensive weapons for the purpose of opposing resistance to every endeavor to apprehend and obstruct them. That a conspiracy to commit a felony is merged in the felony. *Commonwealth* v. *Kingsbury & al.* 5 *Mass. R.* 106. That a conspiracy to commit a misdemeanor is a misdemeanor, and so is merged.

And the counsel enquires if the whole object will not be attained by punishing for prison breach, without the conspiracy, and he urged that all the previous acts are absorbed in the prison breach. It is also insisted, that *Alexander* was not lawfully in prison, because the legal fees were not certified.

Objection was also made to *Hodsdon's* testimony as to the cause for which *Burlingham* was imprisoned, and *Wright's R.* 208, cited. That entry on back of papers is no evidence. There should be records.

Whatever objection might have arisen on the writ of *habeas corpus* to bring up the body of *Murray*, we do not admit, that the parties could be justified in resort to the breach of prison to effect an escape. People are not to be encouraged in demolishing the prisons of the county, to obtain the liberation of prisoners, who are presumed to be lawfully in custody, till the cause of their commitment is regularly certified to the constituted authorities in the way pointed out by law. We overrule that objection.

Still less weight results from the circumstance that the fees were not certified in the case of *Alexander*. If there were no fees certified, none would be demanded for his liberation. If they were charged incorrectly and demanded and received, another remedy of a more peaceable character might be pursued. It is a rule, that a defendant in one count in an indictment is not to be charged with having committed two or more offences, as murder, robbery, or the like. But in cases of treason and conspiracy, overt acts are laid merely as evidence of the principal charges. And so we consider, that the principal charge here, is the conspiracy to effect the escape of the prisoners, and the breaking of the floors and walls of the prison are introduced as evidence of the consummation of the project. We do not apprehend that the doctrine of merger of a misdemeanor in a felony can justly apply to this case. No felony is charged, and we cannot extend it to misdemeanors.

In our examination of the exceptions, we are unable to discover satisfactory reasons for sustaining them. They are therefore overruled.

The State *vs.* Charles Burlingham *& al.*

On the trial of an indictment against several for a conspiracy to charge a married woman with the crime of adultery, the wife of one of the persons indicted cannot be a witness.

It is too late to sustain a motion to quash an indictment after the accused has been arraigned and pleaded not guilty.

Exceptions from the Court of Common Pleas, Perham J. presiding.

This was an indictment against the respondents for a conspiracy to charge the wife of one of them with the crime of adultery. The facts in the case, and the ruling of the Judge at the trial, appear in the opinion of the Court. No copy of the motion to quash the indictment is found with the exceptions, but it was understood on the argument to be founded on the allegations. 1. That the wife of one of the parties was a witness before the grand jury. 2. That some of the persons indicted were themselves witnesses on the hearing before the grand jury.

Rogers and *J. Appleton* argued for the respondents.

1. They contended, that the wife of *Rines* was incompetent as a witness against either of the respondents. The general rule, that the wife cannot be a witness for or against the husband, either in civil or criminal cases, is clearly established. The only exceptions in criminal proceedings are cases of personal violence by the husband, or threats of the commission of it. And even in the excepted cases, the wife is admitted to testify only from the necessity of the case, and where there is no other evidence. *Rep. Temp. Hardwick*, 264; *White* v. *Holman*, 3 *Fairf.* 157; 5 *Esp. Rep.* 107; 1 *Vesey, Jr.* 49; 21 *Com. L. Rep.* 453; *Woodruff* v. *Woodruff*, 2 *Fairf.* 475; 2 *Stark. Ev.* 402, 411; 1 *Root*, 485; *Commonwealth* v. *Easland*, 1 *Mass. R.* 15; 1 *McCord*, 285; *Rosc. on Ev.* 113; 1 *Rogers*, 177; 1 *Phil. Ev.* 70.

2. The indictment should have been quashed, on the motion of the respondents, because illegal testimony was admitted before the grand jury. The wife of one of the respondents was before the grand jury, and some of those were actually before the grand jury, against whom the bill was found. *Gilmore* v. *Bowden*, 3 *Fairf.*

412. 1 *Chitty on Cr. Law*, 84; 2 *Com. L. Rep.* 374; 12 *Wend.* 344; 1 *Phil. Ev.* 75; *Commonwealth* v. *Knapp*, 10 *Pick.* 491; 9 *Cowen*, 707; 1 *Hals.* 322; *Low's Case*, 4 *Greenl.* 439; 1 *Chitty's Cr. Law*, 318; 2 *Gall.* 367; *Russell & R. Cr. Cas.* 401; 25 *Com. L. Rep.* 297; 3 *Coke's Inst.* 26; 2 *Woodeson*, 559; 1 *Leach*, 514; 1 *Hawks' R.* 352; 2 *Hayw.* 840.

Clifford, Attorney General, for the State.

Humanity requires, that the wife should be admitted in this case to testify, as without her there can be no conviction. This is a conspiracy to convict her of a crime which would take away her liberty, and render her infamous. On principle then there is more reason for permitting her to testify, than where mere personal violence is threatened. It is a new case and should be decided on principle. There are no direct authorities, and those having an indirect bearing on the question are not uniform, but are on the whole rather in favor than opposed to the admission. Whereever the personal liberty of the wife is endangered, she may be a witness. *Soule's Case*, 5 *Greenl.* 407; 13 *East*, 171, *note*; *Rosc. Ev.* 114; 2 *Black. Com.* 209; 1 *East's P. C.* 454; 4 *Petersd. Ab.* 157; 2 *Yeates' R.* 114; 2 *Russell*, 605, and *notes*; 1 *Harr. Dig.* 750; 1 *Dallas*, 68; *Moulton, Lib.* v. *Moulton, Hancock* County, Supreme Judicial Court, *June* term, 1805.

2. It is a sufficient answer to the motion to quash the indictment, that it comes too late, after plea made. 5 *Carr. & P.* 530; 6 *Carr. and P.* 170; 1 *Leach*, 155; 1 *Cowper*, 331; *Commonwealth* v. *Knapp*, 10 *Pick.* 477; 4 *Hen. P. C.* 335. The motion should not have been granted, because it contemplated proving the facts by members of the grand jury. They are inadmissible for such purpose. 2 *Hals.* 347; *Rosc. on Ev.* 149; 2 *Stark. Ev.* 232, and *note* 1; 1 *T. R.* 1; *Taylor* v. *Greely*, 3 *Greenl.* 204; 1 *Wend.* 297. Nor if there had been legal evidence, and the motion had been made in season, it is no reason why a guilty man should escape punishment merely because he happened to be in before the grand jury. The prosecuting officer would not intentionally call such person to tell a story to clear himself, but it is novel law, that this should operate as a pardon to criminals.

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

EMERY J. — This is an indictment against the defendants, for a conspiracy to charge one *Julia W. Rines*, the wife of *Stover Rines*, one of the defendants, with the crime of adultery. At the Court of Common Pleas, *January* term, 1837, *Charles Burlingham*, *John T. Howard*, *Stover Rines*, *William Turns* and *Mary Ann Rines* were found guilty by the jury, and *Sarah Lane* not guilty. A bill of exceptions has been allowed, by which we learn that on the trial before the jury, the attorney for the government offered *Julia W. Rines*, the wife of one of the defendants, as a witness, to whose introduction the defendants' counsel objected, but she was sworn, and testified to certain conversations with her husband in *August* and subsequently, and his own conduct towards her, and certain acts of the other defendants towards her. The presiding Judge ruled, that this testimony must be voluntary on her part, which it was, and confined to such facts as could not be proved by other witnesses.

It is very probable, that such an allegation as is made in this indictment would be likely to enlist the sympathies of most people in favor of the person, who was said to be the object of such a conspiracy. It is remarked by a recent elementary writer, *Walker*, in his introduction to *American Law*, pages 221, 222, 223, that the law of husband and wife is common law. That the whole theory is a slavish one compared even with the civil law. The merging of her name in that of her husband is emblematic of the fate of all her legal rights. The torch of hymen serves but to light the pile on which those rights are offered up. The legal theory is, that marriage makes the husband and wife one person, and that person is the husband, that there may be an indissoluble union of interest between the parties. On this ground, and to prevent connubial harmony and confidence from being disturbed, it is a general rule of law, that neither the husband nor wife can in any case, civil or criminal, be a witness for or against each other, with two exceptions growing out of the necessity of the case. This rule sometimes produces hardship, but on the whole is supposed to be salutary. One of the exceptions is, where the wife has acted as the agent of her husband in matters of business. The other, where she has received personal violence from him. *Bul. N. P.* 286; 1

Hale, 201. In these cases, and these only, if there be no other witness, she is permitted to testify.

It is said, that though this rule exist, it ought very readily to be made to yield to those cases which are exceptions to its application. *Fenner* v. *Lewis*, 10 *Johns. R.* 38.

But we apprehend that the rule has not in this State been made of a shifting character. It is true, that in 1805, in a hearing on a libel for divorce for impotence, the affidavit of the husband was received, at *Castine*, in the case of *Rufus Moulton* v. *Polly Moulton*, his wife. Yet it is believed, that in criminal prosecutions, the admissibility of the husband or wife must be confined to cases seeking security of the peace, and cases of personal violence. Where several were indicted for a conspiracy, *Ld. Ellenborough* refused to allow the wife of one of them to give evidence in favor of some of the others. And the reason was, that if all the others were acquitted, the husband would necessarily have been acquitted also; for the crime could not be committed by one alone. *Rex* v. *Locker & al.* 5 *Esp. R.* 107.

And by the same reason, in conspiracy, the wife of one of the defendants ought not to be allowed to give evidence against any of the others, as to any act done by him, in furtherance of the common design, more particularly, after evidence given connecting the husband with that defendant in the general conspiracy. And in this case, by reason of the admission of the said *Julia W. Rines*, as a witness on the trial, the verdict must be set aside and a new trial granted.

As to the motion to go into the enquiry respecting the manner of finding the indictment, we think the motion came too late, after the defendants had pleaded not guilty. The proceedings exhibited to us show, that on the ninth day the defendants, except *Sarah Lane*, who was acquitted, and does not now appear, pleaded *not guilty*.

With the full recollection of the case, *United States* v. *Coolidge*, 2 *Gall.* 367, in *Low's case*, 4 *Greenl.* 439, great care was taken before any plea was interposed, to proceed by way of motion in writing, under oath of the defendant, to the Court, alleging he ought not to be held to answer to the indictment, because it was not found by any twelve of the grand jury, but simply by a majority of the grand jury panel, and returned by the foreman under

a mistaken idea, that it was only necessary that a majority should agree to a bill of indictment.

We gather from the opinions of the members of the Court, that "when an indictment is once verified by the attestation of the foreman of the grand jury, that it is a true bill, and as such has been presented to the court, and ordered to be put on file, it then becomes matter of record. There is, and always has been, and from the necessity of the case must be, a power in the court to vacate, or cause to be amended, a record which has been erroneously or falsely made, by inadvertence or otherwise, by any of its officers. It could only be in a very clear case; where it could be made to appear manifestly and beyond every reasonable doubt, that an indictment, apparently legal and formal, had not in fact the sanctions which the law and the constitution require, that the court would sustain a motion to quash or dismiss it, upon a suggestion of this kind. That it is clear as well on principle as on authority, that the objection cannot be taken by way of formal plea. The very nature of the objection is prior in order to that of a plea, for it is an objection to being held to answer or plead in any form. The defendant prayed the court to enquire into the fact, at the first moment he had an opportunity to be heard in court. No laches were therefore imputable to him. He lost no right by neglecting to avail himself of it in due season."

This view of the importance of regularity of proceedings in criminal trials, we are disposed to maintain. The defendants were aware, that it is the duty of the foreman of the grand jury to leave with the clerk of the court a list of all witnesses sworn before them. Any one can discover what witnesses have been heard before that tribunal, which has very important rights, independent of the court,* though, to a certain extent, under the supervision of the court. And if defendants do not avail themselves of necessary preliminary measures, in season, before pleading to the merits, they are considered to have waived them. All we feel justified in doing is, to set the verdict aside and grant a new trial.

* In questions relating to bail, if a man be found guilty of murder by a grand jury, the court cannot take notice of their evidence, which they by their oath are bound to conceal. *Ld. Mohun's case*, 1 *Salk.* 104.

JAMES EVELETH *vs.* NATHANIEL WILSON.

In equity as well as in law, the rule is well established, that parol evidence is not to be received to contradict, add to, or alter, a written contract.

But parol evidence tending to prove matters extrinsic to the terms of a written contract, for the purpose of applying it to the subject to which it relates, does not come within this rule.

An ambiguity arising from too great generality of description may be removed by parol evidence, which applies it to a single point.

THIS was a bill in equity, brought to compel the specific performance of a contract, and was argued on bill, answer and proof, at the close of the *June* term, in 1837, by

Kent and *Washburn*, for the plaintiff, and by

J. Appleton, for the defendant.

The material facts in the case appear in the opinion of the Court, which was delivered at the *June* term, 1838, by

SHEPLEY J. — The bill sets forth, that on the thirteenth day of *June*, 1834, the plaintiff made a verbal contract with *Charles Emerson*, for the purchase of a lot of land in *Orono*, and that by his consent, he entered into the possession of the lot, and during the same year built a house thereon; and that since it was built he has continued to occupy it; that on the twenty-fifth day of *May*, of the following year, *Emerson* conveyed a tract of land, including the lot thus occupied, to the defendant; and that on the same day, for the purpose of carrying into effect the bargain between *Emerson* and the plaintiff, the defendant agreed in writing with the plaintiff, upon certain terms stated in the contract, which is set forth, to convey the same lot to him by a deed of release. The bill sets forth the bounds of the lot, alleges a performance on the part of the plaintiff, and a request for a deed, and a refusal to convey; and prays for a specific performance.

The answer admits the written agreement; admits, that he took a deed of *Emerson* of a tract of land including the premises; that the plaintiff then occupied, the house by him built, and that he still does. It denies all knowledge of any verbal contract between *Emerson* and the plaintiff, differing from the written contract between the plaintiff and defendant; denies, that the bill correctly describes

the lot; that the defendant was informed, that there was a lot so marked and bounded, or that plaintiff claimed accordingly, until after a difference arose between them respecting it. And while it denies, that the plaintiff performed his contract within the time stipulated, it professes an entire willingness to deed to the plaintiff agreeably to the written contract. It alleges, that the lot agreed to be conveyed was the one third part of the lot conveyed to him by *Emerson*, being on the easterly end of said lot and including the plaintiff's house; and that on the second day of *January*, 1836, he made and executed, and on the fourth day of the same month tendered to the plaintiff, a deed so describing it, and that he has been at all times, and now is, ready so to convey.

By an amendment to the answer, the defendant alleges that he was ignorant of any survey of the lot; admits that he wrote a bond at the request of the plaintiff, obliging the plaintiff upon certain conditions never performed, to convey the lot to one *Freese*, and describing it as in the plaintiff's bill; and alleges that at the time he informed the plaintiff, that if there were differences between the boundaries as stated in the bond and in his contract, that he should not be bound by them.

The only description of the lot to be conveyed contained in the written contract between the parties is, that the defendant "agrees to give or cause to be given a quitclaim deed of the lot of land upon which the said *Eveleth* now lives."

It appears from the testimony taken in the case, that in the summer of 1834, *James H. Bennoch* run out a lot from *Emerson* to the plaintiff, which is described, and the boundaries of which agree in substance nearly with those set forth in the bill, and that plaintiff soon after built his house upon it. In the cross examination of *Myrick Emerson*, the defendant puts the following question, "were or were not your brother *Charles Emerson's* intentions to divide the lot bought by him of *McRuer* and *Ricker*, and the same by him sold to me, into three lots, and did he not so divide it?" Answer, "yes; that was his intention, and he did so divide it, *James H. Bennoch* run it out into three lots."

Charles Emerson says, "the lot that *Eveleth* occupied in *May*, A. D. 1835, was the lot run out by *Bennoch*." There is much other testimony taken by the parties, but it may be regarded as im-

properly in the case, and therefore not considered, or as immaterial.

How are the bounds of the lot "upon which the said *Eveleth* now lives" to be ascertained? The defendant insists, that parol evidence cannot be admitted for that purpose. The rule is fully admitted in equity, that parol evidence is not to be received to contradict, add to, or alter a written contract. But evidence tending to prove matters extrinsic to the terms of a written contract, for the purpose of applying it to the subject to which it relates, does not come within this rule. An ambiguity arising from too great generality of description may be removed by parol evidence, which applies it to a single object. 2 *Stark. Ev.* 558—9. In the case of *Doolittle* v. *Blakesly*, 4 *Day*, 265, the description in the deed was, "one half the farm on which the said *Moses* then dwelt, together with one half of the old dwellinghouse standing on said farm in *Wallingford* in *Cheshire* parish, that is, in quantity and quality." Parol evidence was held to have been legally admitted, that a tract of land separated from the farm only by a highway, was uncultivated and uninclosed, and that the grantor possessed and occupied it after the grant, for the purpose of showing, that it was not conveyed by that description.

Where there was a devise of "all that my *Briton Ferry* estate with all the manors," &c. it was proposed, for the purpose of showing what estates passed, to give in evidence stewards' account books, made by the stewards of the owners of the estates, "containing particulars thereof;" and that certain lands had gone by the name of the "*Briton Ferry* estate in the county of *Brecon*."

This evidence having been rejected, a bill of exceptions was taken, and a writ of error was brought before the House of Lords, and the question was finally sent to all the Judges, who decided, that the evidence was admissible, and that it ought to have been admitted. *Beach* v. *Earl of Jersey*, 3 *Barn. & Cres.* 870. These cases fully authorize the admission of the evidence before stated. And from it, one perceives, that the whole lot, which the defendant purchased, had before he purchased been run out and divided into three lots by *Bennoch*; that a lot on one end of the whole lot had been by the same person run out to the plaintiff; and that the plaintiff, according to the testimony of *Charles Emerson*, was in

actual occupation of "the lot run out by *Bennoch*," at the time the contract between these parties was made. The contract refers to *the lot* on which the plaintiff "now lives." Some definite lot must have been intended; and there is no evidence in the case, by which the lot can be ascertained and the bounds established, but by recurring to these surveys of the lot, and to the possession of the plaintiff. And although there is no evidence in the case, that the defendant knew, when he made the contract, of the existence of these surveys; yet the fair inference is, that he expected and contracted to convey a lot, the bounds of which were to be ascertained either by the possession of the plaintiff, or by some survey or boundaries thereafter to be discovered. There is proof of a survey and of a possession corresponding to it; and such proof in the absence of all other, must be regarded as satisfactory evidence of the bounds of the lot intended to be conveyed.

There is nothing in the contract, or in the proof, authorizing the conclusion, that by a conveyance of one third part in quantity of the whole lot, there would be a performance of the contract. The deed tendered does not therefore make out a defence; and there must be a decree for a specific performance.

This Court orders and decrees, that the defendant convey to the plaintiff, by quitclaim deed, the lot of land upon which the plaintiff lived on the twenty-fifth day of *May*, 1835, bounding the same as it was run out to him by *James H. Bennoch*; and that he pay the costs of this suit.

William S. Russell *& al. vs.* John Doyle.

The declarations of the payee of a note, who is not at the time the holder, and while it is actually held by another for value, are not admissible in evidence in a suit upon it against the maker by an indorsee.

The action was submitted for the opinion of the Court upon an agreed statement of facts. The action was by the plaintiffs as endorsees of a note given by the defendant to *James Howard*, dated *February* 23, 1832; payable to him or order, in eight months, for $100. On *March* 31, 1832, *Howard* pledged the note to *Charles*

Goodwin, in whose possession it remained till *April* 15, 1834, at which time the note was taken from *Goodwin's* hands and passed to the plaintiffs, who were innocent purchasers of the note. In *March*, 1833, *Howard* said to the defendant, that he left the note with *Goodwin*, to keep him easy until the time he had agreed to work for *Goodwin* was out, he having left *Goodwin's* employment before his time was out; that he had not indorsed the note and would not, and that the defendant had received no value for the note; and that he would get the note and return it to the defendant. If the following testimony is admissible, the defendant objecting thereto, it is agreed, that *March* 15, 1834, *Howard* made an assignment of his property for the benefit of his creditors, in which this note was not mentioned, and the plaintiffs, to whom *Howard* was indebted in an amount much exceeding the note, received it of *Howard*, and discharged him from all their demands. It did not appear in any other way from the statement, how or when the note was actually indorsed. The statement concluded with the agreement, that if the declarations of *Howard* under these circumstances were admissible in evidence, the plaintiffs were to become nonsuit; and if they were not, that the defendant should be defaulted.

The case was argued in writing by *Blake* for the plaintiffs, and by *Abbot* for the defendants.

Blake argued, that the declarations of *Howard* were not admissible.

1. Because at the time when they were made, whether the note was then indorsed or not, the beneficial interest in it was in *Goodwin*, and he had it in his possession. 4 *Barn. & Cr.* 325; 8 *Wend.* 490; *Hackett* v. *Martin*, 8 *Greenl.* 77.

2. Because that *Howard* could not be permitted to testify to any thing going to impeach the original validity of the note. Much less could his declarations be admitted for that purpose. *Churchill* v. *Suter*, 4 *Mass. R.* 156; 17 *Johns. R.* 176; *Butler* v. *Damon*, 15 *Mass. R.* 223; *Adams* v. *Carver*, 6 *Greenl*, 390; *Manning* v. *Wheatland*, 10 *Mass. R.* 502; 14 *Johns.* 270; *Houghton* v. *Page*, 1 *N. H. Rep.* 60.

3. The declarations are inadmissible, because if the facts can come from him, he should himself be called as a witness. His declarations are mere hearsay.

4. The declarations of *Howard* should be excluded as irrelevant, because they do not make out any defence to the note. 2 *Caines*, 247; *Bowers* v. *Hurd*, 10 *Mass. R.* 427.

Abbott contended, that where a note of hand is indorsed after it becomes due, the indorsee takes it upon the credit of the indorser, subject to any defence which might be set up to it, if the suit had been by the payee. 3 *T. R.* 80; *Thurston* v. *McKown*, 6 *Mass. R.* 428; *Tucker* v. *Smith*, 4 *Greenl.* 415. The acknowledgment by the indorser, that the defendant had received no value for the note, and would give it up to him, is admissible. *Hatch* v. *Dennis*, 1 *Fairf.* 244; *Shirley* v. *Todd*, 9 *Greenl.* 83. The declarations of a person, made while he is the owner of real estate, may be used against the person claiming title under him. 7 *Conn. R.* 319; 4 *Sergt. & R.* 174. The reason for the application of the principle to personal property is not less cogent. The true question is, whether *Howard* had *an interest* in the note at the time, not in whose hands it happened to be. The general property in the thing pledged, is in the pledger. *Story on Bailments*, 237. It is said, that the declarations of the payee are not admissible to show, that the maker had received no value for the note. That rule does not apply to notes negotiated after they become due. 4 *Sergt. & R.* 397; 1 *Conn. R.* 260. The declarations of *Howard* do not imply, that the note was originally without consideration. A party whose name is on a negotiable note is not from that cause excluded from proving a *failure* of consideration. *Parker* v. *Hanson*, 7 *Mass. R.* 470; 10 *Johns. R.* 231. The defendant is entitled to any defence he could have made to the note, if the suit had been brought by *Howard*, and is not compelled to make him a witness. *Hatch* v. *Dennis*, before cited; 1 *Barn. & Adol.* 89. Want of consideration is a good defence to a note. 7 *T. R.* 350; *Bliss* v. *Negus*, 8 *Mass. R.* 46; *Boutelle* v. *Cowdin*, 9 *Mass. R.* 254.

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

Weston C. J. — The defence depends on the legal admissibility of the declarations of *James Howard*, the payee of the note. At the time of these declarations, he was not the holder of the note, which had been previously passed to *Charles Goodwin*. He held it as security for certain liabilities, in which he was involved

for *Howard*. *Goodwin* then held it for value, it may be equal to, or exceeding the amount of the note; but if it was to a less amount, he was a *bona fide* holder, for value. *Bayley on Bills*, 350. *Bosanquet & als.* v. *Dudman*, 1 *Stark. Rep.* 1; *Smith* v. *Hiscock & al.* 14 *Maine Rep.* 449. When the note was indorsed does not appear, except from the declarations of *Howard*, which are not competent proof of that fact, although it might be proved by his testimony.

None of the cases, to which we have been referred, have gone the length to determine, that the declarations of a party to a note, who is not at the time the holder, and while it is then actually held by another for value, can be received in defence. The declarations admitted in evidence, in *Shirley* v. *Todd*, 9 *Greenl.* 83, were made by the payee, while he was the holder of the bill. In *Hatch* v. *Dennis*, 1 *Fairf.* 244, the declarations of the payee held admissible, were made by him, while he held the note, it having been first proved, that it was indorsed, after it was due. In that case, *Parris J.*, who delivered the opinion of the Court, says, "the current of *English* decisions show the declaration of the payee, *while he held the instrument*, and adverse to his own interest, to be admissible as evidence in favor of the maker." And again he says, "a number of cases are to be found, both in the *American* and *English* reports, where the declarations or admissions of the payee of a negotiable note, made *while the note remained in his possession*, were received as evidence for the maker, in a suit against him by an indorsee, it having been first proved, that the note was indorsed after it became due." And the cases cited by him sustain the position.

It does not appear to us, either upon principle or authority, that declarations of this sort ought to be received in evidence, except such as come from a party when in possession of the instrument, and having a complete and entire control over it, as his property. In this case, the note was at the time fairly held by another for value, and it depended upon contingencies, whether the payee would again become the holder.

The purposes of justice do not require a further extension of the rule. It would be dangerous receiving such declarations, if at the time, any other person was the holder and interested in the instru-

ment. The opinion of the Court accordingly is, that the defence has not been sustained.

Defendant defaulted.

Lucius Allen *vs.* Benjamin Kimball.

If one receive a fraudulent bill of sale of personal property from an intestate in his lifetime, and take and sell it after his decease, such fraudulent purchaser is chargeable to a prior creditor, as *executor de son tort*.

Exceptions from the Court of Common Pleas, Perham J. presiding.

The action was on a note of hand, dated *August* 7, 1833, given by *Joseph Kimball* to the plaintiff, against the defendant, as the executor of *Joseph*. The defendant in his pleading denied that he was executor. *Joseph Kimball* died in *November*, 1834. The plaintiff did not attempt to show, that the defendant was appointed executor, but relied on evidence tending to show, that the defendant after the death of *Joseph*, took and sold some horses belonging to him at the time of his decease, and which had been sent to pasture by *Joseph*, where they remained until after his death. The defendant then produced a bill of sale of the property, dated *May* 5, 1834, and the plaintiff introduced evidence to prove that it was fraudulent and void, as to creditors. The counsel for the defendant requested the Judge to instruct the jury, that in this action there must be an illegal and wrongful taking and conversion of the property after the decease of *Joseph*, and in his possession ; or of property which he or his legal representatives had the right to possess; that the conversion of the property specified in the bill of sale was not wrongful; and that the defendant was not liable in this action for any property taken under the bill of sale, whether the sale was *bona fide*, or but a pretended one. The Judge instructed the jury, that to maintain the action, the plaintiff must prove a wrongful intermeddling with the property of the deceased after his death; that if they found by the evidence, that the sale of the articles was *bona fide*, and the property in them to have passed to the defendant in the lifetime of *Joseph*, the action could not be maintained; that if

they found the sale not to have been *bona fide*, and the bill of sale fraudulently given to conceal the property from the creditors of *Joseph*, any possession or use of the property under the cover, during his life, would not constitute the defendant an executor in his own wrong; but that if after the decease of *Joseph*, the defendant had intermeddled with the property, and converted it to his own use, notwithstanding such fraudulent bill of sale, he would be liable in this action. The verdict was for the plaintiff and the defendant filed exceptions.

Rogers and *Ingersoll*, for the defendant, argued, that the property could not be approached in this way, which takes the whole to pay one creditor. The administrator may recover it, and distribute it according to law among all the creditors.

J. Appleton, for the plaintiff, cited 2 *T. R.* 587; 1 *Shep. Touch.* 487; *Toller on Exors.* 38.

The opinion of the Court was delivered by

WESTON C. J. — The plaintiff, a creditor, had a right to controvert the title set up by the defendant, on the ground of fraud. This he did successfully; and thus defeated the claim of property in himself, interposed by the defendant. The force of the proof then remained unimpaired, that he had taken and appropriated to his own use, without legal justification, the personal property of the deceased. This made him *executor de son tort*. It was such an intermeddling with the personal chattels, as very clearly rendered him liable as such. *Padget & al.* v. *Priest & al.* 2 *T. R.* 97; *Edwards* v. *Harbin*, 2 *T. R.* 587. The last case cannot be distinguished from the case before the Court.

Exceptions overruled.

JOHN M. C. BURBANK *vs.* JAMES B. N. GOULD.

The acknowledgment of payment of the consideration money in a deed of land, does not preclude the grantor from showing by parol testimony, that a part of the money was left in the hands of the grantee, to be paid by him to a third person, for the benefit of the grantor.

Where the plaintiff conveyed a tract of land in mortgage, to secure a note from him to W, and then conveyed the same land to the defendant by deed of warranty, therein acknowledging that the consideration thereof was paid; and the plaintiff received the defendant's note and mortgage for part of the consideration, and left the residue thereof in the hands of the defendant, who promised the plaintiff forthwith to pay the same to W, and take up the plaintiff's note and mortgage to W, of the same amount, but neglected and refused so to do; and the note and mortgage to W, remained wholly unpaid; although *it was held*, that the plaintiff was not estopped from showing these facts, yet it seems to *have been held*, that as neither party had paid or taken up the note and mortgage to W, that the plaintiff could not recover back the money thus placed in the hands of the defendant, but only nominal damages.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

Assumpsit for money had and received. To support his action, the plaintiff offered to prove by witnesses and by the deeds, that *February* 19, 1836, he made a deed of certain land to the defendant, for the consideration of $550. For part of this consideration, $363, the defendant gave his note to the plaintiff with a mortgage of the same premises, and promised to pay the balance, $187, forthwith to one *Wiggin*, and take up a note of the plaintiff's to *Wiggin* for that sum, secured by a mortgage of the premises conveyed; that the plaintiff left that sum in the hands of the defendant, in consideration of which he agreed to pay the same to *Wiggin*, and that the defendant neglected and refused so to do. To the admission of this evidence the defendant objected, on the ground that it contradicted the plaintiff's own acknowledgment in the deed. The Judge overruled the objection, and the evidence was admitted. It was proved, that the note and mortgage to *Wiggin* still remained unpaid; that *Wiggin's* mortgage was excepted in the deed to the defendant; that no security or writing was given for the $187; and that no money was produced at the time the deed was given. The defendant requested the Judge to instruct the jury, that the evidence offered, did not support the declaration.

The Judge declined to give the instruction. The verdict was for the plaintiff, and the defendant filed exceptions.

The argument was in writing.

Chandler & Paine, for the defendant.

1. The parol evidence was not admissible, inasmuch as it contradicted the plaintiff's own acknowledgment in his deed to the defendant. *Steele* v. *Adams*, 1 *Greenl.* 1; *Griswold* v. *Messinger*, 6 *Pick.* 517; *Powell* v. *Monson, &c. Mang. Co.* 3 *Mason*, 347; 1 *Barn. & Cr.* 704; 2 *Taunt.* 141; 5 *B. & Ald.* 606.

2. The evidence offered, even if admissible, was not sufficient to support the action for money had and received. Nothing is due to the plaintiff; he has paid nothing to *Wiggin;* and the defendant's land is still held to pay the amount. *Eddy* v. *Smith*, 13 *Wend.* 488; *Mowatt* v. *Wright*, 1 *Wend.* 360; *Hall* v. *Shultz*, 4 *Johns. R.* 249.

3. The defendant having assumed the debt to *Wiggin*, and money having been left in his hands to pay it, a privity in law immediately arises between the defendant and *Wiggin*, sufficient for him to sustain his action against the defendant for the amount; and this too, even though *Wiggin* was not made acquainted with the facts. 5 *Wend.* 235; 4 *Cowen*, 432; 10 *Johns. R.* 412; 12 *Johns. R.* 276; 3 *Johns. R.* 183; 10 *Mass. R.* 483; 17 *Mass. R.* 575.

4. The defendant is a *quasi* trustee, having the money in his hands to be applied to certain purposes; "and when money is paid to a trustee for a specific purpose, it cannot be recovered back in assumpsit for money had and received, until it be shown that the trust is closed, and a balance is left." *Holt's Rep.* 500; 1 *T. R.* 133.

5. Nor is the breach of the promise to pay *forthwith*, sufficient to support the action for money had and received. The plaintiff must prove, that he has himself discharged the incumbrance, or been damnified by the delay. *Prescott* v. *Trueman*, 4 *Mass. R.* 627. In money had and received, the Court will inquire which party has the strongest equity, and give judgment accordingly. 13 *Wend.* 488.

McDonald, for the plaintiff, denied, that the evidence contradicted the acknowledgment in the deed. The whole consideration of

the deed had been settled and arranged between the parties, and a sum left with the defendant, to be paid to a third person. He cited, as decisive in his favor, *Schillinger* v. *McCann*, 6 *Greenl.* 364. The money was left in the hands of the defendant by the plaintiff, to be appropriated immediately to pay *Wiggin*. On the defendant's misappropriating it, or refusing to perform his engagement in relation to it, the amount may be recovered back, as money in his hands, belonging to the plaintiff. The agreement was not to discharge a mortgage or assume a debt, but to take so much of the plaintiff's money and carry it to another man. It is but the common case, where one sends money by another to pay a debt. No one ever supposed, that if the carrier refused to pay the money, that the owner was without remedy. *Denny* v. *Lincoln*, 5 *Mass. R.* 385. The case of *Prescott* v. *Trueman*, has no application to this case. That was an action on the covenants of warranty, alleging an existing mortgage as an incumbrance. If the defendant had brought an action on the covenants of his deed, the case would have applied. But it is no authority in favor of withholding the plaintiff's money, and at the same time refusing to pay it over according to the plaintiff's direction and his own promise. *Schillinger* v. *McCann*, before cited, is a sufficient answer.

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

Weston C. J. — If the plaintiff, after receiving the consideration for which he sold his land, had left a portion of it to pay the amount due on the mortgage to *Wiggin*, and the defendant had received it, promising to pay it over, he would have been liable upon his promise, and in proving the consideration, there would have been nothing inconsistent with the deed. Such being the arrangement, contemplated by the parties for their mutual accommodation, if they chose to consider it as done, without the formality of a payment of that portion of the purchase money to the plaintiff, to be received back again by the defendant, we are not aware that such a ceremony is required, to give legal efficacy to his stipulation.

The plaintiff acknowledged in the deed the receipt of the consideration, which is not controverted by the admission of the de-

fendant, that he received a sum of money, which may have been part of the consideration, to be paid over to a third person. It was a deposit, appropriated for a special purpose. The defendant received it in trust, to be applied according to its destination, by appointment between them. In principle, it is like the case of *Schillinger* v. *McCann*, cited in the argument. It is true, the promise there was in writing; but the question was open as to the consideration, which depended altogether upon parol testimony. The objection here is not in relation to the promise, but to the consideration upon which it is based. It is urged, that it contradicts the acknowledgement in the deed. So it was there; but the objection was overruled, the Court being of opinion that what was there done, was equivalent to a deposit of part of the consideration money, to be applied according to the promise of the defendant. The parties did not in that case go through the ceremony of paying and repaying the money. A retainer of part of the consideration was regarded by the parties, and held by the Court, to have had the same legal effect. Nor was it necessary that the promise should be in writing. *Dearborn* v. *Parks*, 5 *Greenl.* 81. In *Baker* v. *Dewey*, 1 *Barn. & Cres.* 704, the Court manifestly incline to the opinion, that such an arrangement might be sustained, without contradicting the receipt of the consideration in the deed.

Upon the deposit and appointment of the plaintiff, and the promise of the defendant, we doubt not *Wiggin*, the mortgagee, could have maintained a personal action against the defendant for the money. The authorities cited by the defendant's counsel, as well as the case of *Dearborn* v. *Parks*, sustain this position. It would seem also, that the plaintiff, the immediate promissee, from whom the consideration moved, may maintain an action. 1 *Com. Dig. Assumpsit, E*; *Taylor* v. *Foster*, *Cro. Eliz.* 807. Yet where the breach is no damage to the promissee, it has been otherwise held. *Levet* v. *Hawes*, *Cro. Eliz.* 619, 652; *Rippon* v. *Norton*, *ib.* 849. In the case before us, the promise was not only directly made to the plaintiff, but he was to derive a benefit from its performance, as it was to pay a debt incurred by him, and for which he continued liable. But he has yet paid nothing to *Wiggin*, who may look to his collateral security, and not call upon him. If he takes the land, and enforces payment from the defendant to redeem it, the plaintiff

will be relieved from his liability. Until he pays, his damages can be only nominal. If he had paid, the defendant might be regarded as holding the money, deposited with him, to the plaintiff's use. Upon the facts it is questionable, whether the defendant can be answerable, even for nominal damages, in this form of action. Perhaps he might upon a count properly framed.

To say nothing of the interest *Wiggin* has in the fund and the promise made upon it, the defendant has an interest, at least as strong as that of the plaintiff, in its appropriation to the payment of the mortgage, by which his land is to be relieved from the incumbrance. If the plaintiff is suffered to retain his verdict, the defendant is compellable to pay, leaving his land still encumbered. The mortgagee may resort to the land, which he must either lose, or pay the money a second time. And under the peculiar circumstances of this case, we are very clearly of opinion, that the plaintiff cannot, in any form of action, recover any thing more than nominal damages, until he pays the money to the mortgagee. The exceptions are accordingly sustained, the verdict set aside, and a new trial granted.

The State *vs.* Nathaniel C. Bishop.

In an indictment on the Statute prohibiting the sale of lottery tickets, giving the accused the addition of *lottery vender*, when his proper addition was *broker*, furnishes good cause for abating the indictment.

Exceptions from the Court of Common Pleas, Perham J. presiding.

This was an indictment against *Bishop*, on the statute prohibiting the sale of lottery tickets. *Bishop* filed a plea in abatement to which the County Attorney demurred. The case will be sufficiently found in the opinion of the Court.

Cutting, for *Bishop*, to show that a proper addition is necessary, cited *Davis' Justice*, 22; 1 *Christ. Black. Com.* 407, *note; ib. vol.* 3, 302; *ib. vol.* 4, 306; *Rev. Stat. c.* 63; 2 *Ed. Story's Plead.* 92, and cases cited; *Stat. Hen.* 5, *c.* 5; *Gould's Pl.* 256; 1 *Kent's Com.* 472. But the addition in this indictment is no ad-

dition recognized in law. It is an epithet calculated to prejudice the jury, assuming as proved the very issue to be tried on the plea of not guilty. 1 *Chitty's Cr. Law*, 171.

Clifford, Attorney General, for the State, said, that he did not consider his duty required him to make any reply.

The opinion of the Court was drawn up by

EMERY J. — The defendant, instead of repelling the accusation by a denial of it, and proceeding to trial on the merits, has chosen to plead in abatement, that his true addition is that of a broker, and not a lottery vender, as he was styled in the indictment. To this plea there was a general demurrer in behalf of the State. The plea was overruled. The defendant was ordered to answer over; exceptions were made by his counsel, and the matter is before us on the exceptions.

We do not profess any particular solicitude to favor pleas of this description, because they are in their nature dilatory. In civil cases it has been said, that the Court cannot hold too strict a hand over them, as they are calculated to defeat the justice of the case. Yet when such pleas are regularly before us we must deal with them according to the settled principles of law.

It is necessary in indictments, that not only all the ingredients of the offence with which the defendant is charged should be set forth with certainty and precision, but that it should be certain as to the party indicted. Thus, if one's name be *Richard James*, and he be named in the indictment *James Richard*, it is a misnomer and may be pleaded in abatement. *Jones* v. *Macquillan*, 5 *T. R.* 195. The misplacing of the names makes them as different from the real names, as the substitution of any other instead of them.

The addition to be given to the defendant, of his estate, or degree, or mystery, is required by the *stat.* 1 *Hen.* 5, *c.* 5, and also the addition of the town, hamlet, or place, and county, of which the defendant was or is, or in which he is or was commorant.

According to old authorities, these additions should be added after the first name, and not after the *alias dictus*. 2 *Inst.* 699; 3 *Salk.* 20. Though, if an addition be given to the name after the *alias dictus*, it may be rejected as surplusage. *Hawk. b.* 2, *c.*

25, § 71. This statute, according to *Dane*, was adopted as part of our common law.

Estate and degree mean the same thing, the defendant's rank in life. And according to the decisions under that statute, a Duke, Marquis, Earl, Viscount, or Baron, was to be named by his christian name only, and his name of dignity, as *John*, Duke of M. 2 *Inst.* 669. But by some strange want of courtesy, notwithstanding their great love of titles, it did not extend to foreign noblemen, who were entitled in *England* only to the addition of Esquire. 2 *Leach*, 547; 2 *Hawk. c.* 23, § 109. Unless they should happen to be *knights*, in which case they should be named so. 2 *Inst.* 667.

Mystery means the defendant's trade, art or occupation; such as merchant, mercer, tailor, painter, clerk, schoolmaster, husbandman, laborer or the like. 2 *Hawk. c.* 23, § 111.

If a man have two trades, he may be named of either. And the degree or mystery must be stated as that to which the defendant was entitled at the time of the indictment. 2 *Inst.* 670.

The demurrer admits that the defendant was not a lottery vender. But the defendant complains principally, that "lottery vender is no addition recognized by the law, but is an *epithet* calculated to prejudice the jury; assuming as proved, the very issue which is to be tried, on the plea of not guilty."

If such addition be calculated to cast unjust opprobrium on the defendant, he would be justified in feeling sensitive on the occasion. He professes to think so. And as the demurrer admits the untruth of the description, and as we do not find the addition among those recognized in the law, we adjudge the plea in abatement good, and that the defendant go of this indictment without day.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF WASHINGTON, JUNE TERM, 1838.

JEREMIAH O'BRIEN *& al. vs.* MARY ELLIOT.

An allegation in an answer to a bill in equity, set up in avoidance, not responsive to the bill, and unsupported by proof, must be considered as untrue, and out of the case.

As the right of dower is a clear legal right, it cannot be regarded in equity as fraudulent to claim it at law, unless there has been some forfeiture, release, bar or satisfaction, which cannot be proved at law, but which may be established in equity.

To be a satisfaction of dower in equity, the equivalent must be designed and accepted in lieu of, or as an equivalent for dower.

Where a creditor levied his execution on land of his debtor, and after the right to redeem had expired, sold the land with warranty for a sum exceeding the amount of his debt, and paid the balance to the widow and children of the debtor after his decease; these facts do not furnish a bar in equity to the claim of the widow to dower in the premises.

THIS was a bill in equity, and was heard on bill, answer and proof. The case sufficiently appears in the opinion of the Court.

Mellen and *R. K. Porter* argued for the plaintiffs, and *Lowell* for the defendant.

Lowell cited *Dwight* v. *Pomeroy*, 17 *Mass. R.* 303; *Black* v. *Black*, 4 *Pick.* 234; *Pratt* v. *Bacon*, 10 *Pick.* 123; *Brooks* v. *Wheelock*, 11 *Pick.* 439; *Campbell* v. *Sheldon*, 13 *Pick.* 8; *Stearns* v. *Hubbard*, 8 *Greenl.* 320; *Given* v. *Simpson*, 5 *Greenl.* 303; *Elder* v. *Elder*, 1 *Fairf.* 80; 1 *Story's Eq.* 89.

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

SHEPLEY J. — The bill sets forth, that the plaintiffs are the heirs at law and devisees of *Gideon O'Brien* deceased; that said *Gideon* during his lifetime was seized of a certain messuage by virtue of the extent of an execution upon the same as the property of *Daniel Elliot*, the late husband of the defendant; that *Elliot* during his life, and after the right of redemption had expired, paid the debt; and that *O'Brien* was willing to convey to *Elliot* on request, but never did so convey during the life of *Elliot*. That on the 15th of *June*, 1820, *O'Brien* conveyed the premises by deed of warranty to *John Stuart*, for the consideration of five hundred dollars, being the full value, and received in payment a conveyance of a house and lot in *Machias*, valued at two hundred dollars, and three hundred dollars in money; that he paid to said *Daniel* during his life one hundred dollars, and after his death about twelve years ago he paid to the defendant, for the use of herself and children, two hundred dollars, and at her request conveyed to *Betsey Elliot*, their daughter, the house and lot received of *Stuart* in part payment; and that these payments were made on account of the sale of the messuage to *Stuart*, and that no consideration was paid to him by *Betsey Elliot* for the house and lot; and that defendant accepted these payments and the conveyance to her daughter as the full value of the messuage. That since the death of said *Gideon*, she has commenced her suit against said *Stuart* to recover her dower in the messuage conveyed by warranty to him, which suit is still pending at law; and that after having received and accepted full satisfaction for the estate as a discharge of said *O'Brien*, she is now fraudulently prosecuting her suit to obtain dower in the same premises. It alleges, that the plaintiffs being liable to *Stuart* on the warranty have taken upon themselves the defence of that suit; and that these facts not constituting a bar at common law, the bill is filed; and it concludes with a prayer for an injunction to stay all further proceedings at law.

The answer which is very defective, and badly drawn, and as it is said, without the advice of counsel, admits the sale from *O'Brien* to *Stuart* by the consent of her husband for five hundred dollars, denies any knowledge of the payment of one hundred dollars to

the husband during his life, and while it admits the conveyance of the house and lot to the daughter, denies it was by her request; admits that she received of *O'Brien* at different times two hundred dollars, and says, that she is fully satisfied with the amount paid by the said *O'Brien* so far as it relates to the land and dwellinghouse, but the said *Mary* says, that a store belonged to the premises of the said *Daniel* worth two hundred dollars, for which the said *Gideon* received rent for many years, and was finally sold by the heirs of the said *Gideon* without her consent, or any consideration received by her.

It appears from the testimony, that the store referred to in the answer was a small one story building of little value, and although built by *Elliot*, did not stand upon the land sold by *O'Brien* to *Stuart;* and so much of the answer as alleges it to have belonged to those premises is fully disproved, and the remaining part of the answer relating to it is not supported by any proof, and not being responsive to the bill, but set up in avoidance, it must be regarded as untrue and out of the case. *Briggs* v. *Penniman*, 8 *Cow.* 387.

As the right of dower is a clear legal right, it cannot be regarded as fraudulent to claim it at law, unless there has been some forfeiture, release, bar or satisfaction, which cannot be proved at law, but which may be established in equity. The bill proceeds upon the ground of a satisfaction by payment of the whole value of the land and of an equivalent for dower to the defendant.

Lord Coke says, that a jointure or estate made to the wife in satisfaction of dower is no bar at the common law, although dower *ad ostium ecclesiae* or *ex assensu patris* might be, "for a right or title that one hath to a freehold cannot be barred by acceptance of a collateral satisfaction." *Co. Lit.* 36, *b.* *Mr. Hargrave*, in note 224 upon this, says, that acceptance of a term of years, or a sum of money *in lieu of dower* is a good bar in equity. *Lord Eldon* says, that the idea that there must be a legal bar prevailed till *Lawrence* v. *Lawrence*, 2 *Vern.* 265. Now equitable bars are in daily practice. *Mundy* v. *Mundy*, 2 *Ves.* 129. But to be a satisfaction in equity it must be designed and accepted in lieu of, or as an equivalent for dower. *Couch* v. *Stratton*, 4 *Ves.* 391; *Larrabee & ux.* v. *Van Alstine*, 1 *Johns. Ch. R.* 307; *Adsit* v. *Adsit*, 2

Johns. Ch. R. 448; *Swaine* v. *Perine*, 5 *Johns. Ch. R.* 483; *Jones* v. *Powell*, 6 *ib.* 194.

Where real estate was sold in which a widow was entitled to dower, and the administrator by her consent and with her knowledge stated in the terms of sale, that a clear title would be given, and a full price for the land was paid without any disclosure by the widow of a claim to dower, it was held that she committed a fraud upon the purchaser, which precluded her from afterward setting up a title to dower. *Dougrey* v. *Fopping*, 4 *Paige*, 94.

In this case there is no allegation in the bill, that the money paid was in lieu of, or as an equivalent for, or in satisfaction of dower. Nor any allegation of an agreement not to claim it, or that she so received the money paid. Nor is there any proof of the kind, unless it is to be derived from her answer. That does say, she is fully satisfied so far as it relates to the land and dwellinghouse which are the only subjects of controversy; but this is not said in answer to a bill charging that it was received as compensation for or in satisfaction of dower. If it had been it might have been sufficient. As it now stands it may be fairly understood as having been said in consequence of her sense of having received all, that was payable to her and her children on account of the land sold to *Stuart*.

From the nature of the transactions, as stated in the bill and answer, it cannot be inferred, that the payments were made in satisfaction of dower. They would rather seem to have been made by *O'Brien* under a belief, that she was not entitled to dower, as it is not probable, that he would have conveyed with warranty if such had not been his impression. If she by her acts or declarations had induced the belief, that she had no claim to dower, and the sale had been made and payment received under that belief so produced, she might have been precluded, upon the principle of the case of *Dougrey* v. *Fopping*, from asserting her claim; but the case is without any such allegations or proofs.

The case seems to amount to this only, that *O'Brien* holding land in trust for *Elliot* in which his wife had a contingent right of dower, sells with warranty, before the death of the husband, disregarding, or overlooking her right, and pays the whole proceeds over after the right has become certain, without retaining any thing to compensate him for his responsibility upon the warranty. His heirs

may now suffer from such a misapprehension of right, or neglect in taking security; and the defendant may in consequence have received more for herself and children, than she otherwise would have done; but if so, all these facts do not constitute an equitable bar.

Bill dismissed, with costs for defendant.

EBENEZER GOOCH *& al. vs.* JESSE STEPHENSON *& al.*

The statute of 1835, *c.* 195, for the relief of poor debtors, does not apply to suits then commenced, or to process incident to them.

The statute of 1831, *c.* 520, for the abolition of imprisonment of honest debtors for debt, does not apply to actions founded on *tort*, or to process on judgments for costs.

Where a debtor is imprisoned on an execution issued on a judgment for costs, in a suit commenced prior to the passage of the statute of 1835, *c.* 195, the bond given to obtain the benefit of the prison limits should be made pursuant to the provisions of the statute of 1822, *c.* 209.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

The action was debt on a jail bond, the condition of which recited, that *Stephenson*, the principal in the bond, was imprisoned in the county jail, on an execution for the defendant's costs of suit, recovered by the now plaintiffs, against him, *July* 4, 1835, in a suit commenced before 1835, and for officer's fees and costs of commitment; and provided, that if *Stephenson* should remain a true prisoner within the limits of the jail yard until lawfully discharged, and if not so discharged within nine months, that he should surrender himself to the jail keeper, and go into close confinement. The penalty of the bond was for double the amount of the execution and fees. The judgment recovered was read at the trial. The defendants contended, that the first part of the condition of the bond was insensible and void, and that the other part of the condition was against the policy of the law, and so void. The Judge instructed the jury, that they might consider the bond to be a legal and valid contract, and that if they found for the plaintiffs, the damages would be for one half of the penalty of the bond, with interest from the date of the service of the writ. The verdict was for the plaintiffs, and the defendants filed exceptions.

J. Granger, for the defendants.

The jury should have been instructed, that the bond was void, the condition being in restraint of the liberty of the debtor not authorized by law. The proceedings should have been in pursuance of the *stat.* of 1835, *c.* 195, as the judgment was rendered after the act went into operation. *Const. Art.* 1, *sec.* 1; *stat.* of 1835, *c.* 195, *sec.* 1, 2, 7, 10. This statute repeals the common law of imprisonment for debt. The jailer had no authority to receive or detain the debtor, and such detention would have been false imprisonment. *Green* v. *Morse*, 5 *Greenl.* 291; *Harrington* v. *Dennie*, 13 *Mass. R.* 93. Where the consideration of a contract, or the act undertaken to be performed, is in violation of a statute, no action can be maintained for a breach of it. *Wheeler* v. *Russell*, 17 *Mass. R.* 258; *Dwight* v. *Brewster*, 1 *Pick.* 20. Contracts in restraint of trade are void as against public policy; and *a fortiori*, contracts in restraint of personal liberty. *Peirce* v. *Fuller*, 8 *Mass. R.* 223; *Perkins* v. *Lyman*, 9 *ib.* 522.

Chase, for the plaintiffs.

The bond is taken pursuant to the provisions of the *statute* of 1822, *c.* 209. The *statute* of 1831, does not repeal or affect the provisions of the former statute in actions of tort, as this was, or in executions for costs, as this is. The statute of 1835, repeals only such parts of former acts, as are inconsistent with its provisions, and expressly excepts suits already commenced, and rights vested under the former acts. The bond was therefore rightly taken under the first act. The bond is also good at common law. *Pease* v. *Norton*, 6 *Greenl.* 229; *Baker* v. *Haley*, 5 *Greenl.* 240.

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

Weston C. J. — By the last section of the act of 1835, *c.* 195, for the relief of poor debtors, it is provided, that the act shall not be so construed as to affect any suit or suits already commenced; and prior acts, in relation to the same subject matter, are repealed, only so far as they are inconsistent with that act. The meaning of the proviso undoubtedly is, that the act is not to apply to process, which might issue on suits then commenced. Such suits, and the process incident to them, are exempted from its operation.

The *stat.* of 1831, *c.* 520, for the abolition of imprisonment of honest debtors for debt, did not apply to actions founded on tort, or to process on judgments for costs. The bond in controversy then, must have been taken under the statute of 1822, *c.* 209, for the relief of poor debtors. Its condition conforms to the fourth and twenty-first sections of the act last cited; and is fully justified by it. The penal sum in the bond is by that law to be in double the amount, for which the execution debtor was imprisoned. He was imprisoned for the amount of the judgment, the cost of the execution, and the costs of commitment. These sums doubled, are exactly equal to the penalty of the bond in suit.

Exceptions overruled.

TIMOTHY C. KENDALL *& al. vs.* GEORGE I. GALVIN.

The acceptance of a bill of exchange by the drawee, is presumptive evidence that he had effects of the drawer in his hands.

A paper directed to certain persons, requesting them to pay a specified sum to a person named, and charge the same to account of the drawer, and dated and signed, is a bill of exchange; although it is neither made payable to order or bearer, nor has the words value received, nor is made payable at a day certain, nor at any particular place.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

The action was assumpsit, on an account, charging the amount paid *N. K. Seaton* on the defendant's order. The declaration also contained the money counts. On the trial the plaintiffs offered in evidence a paper, of which the following is a copy. "Messrs. *Kendall & Kingsbury*, Gents. — Please pay *N. K. Seaton* four hundred fifty-five dollars, thirty-six cents, and charge the same to my account. *Calais, June* 7, 1830. *Geo. I. Galvin.*" The plaintiffs also proved by *Seaton* the acceptance and payment of the order or bill by them. The defendant's counsel contended, that the plaintiffs had not entitled themselves to recover, and requested the Judge to instruct the jury, that the acceptance and payment of the order by the plaintiffs was *prima facie* evidence of funds of the defendant in their hands, and that it was incumbent

on the plaintiffs to rebut that presumption to entitle them to recover. The Judge refused to give this instruction, and did instruct them, that if the plaintiffs have shown an order drawn by the defendant on them, and that they accepted and paid it, that makes out their case; that the plaintiffs were not bound to show, that they had not funds of the defendant in their hands; and that if *Galvin* had funds in their hands, it was competent for him to show it. The verdict was for the plaintiffs, and the defendant excepted.

J. Granger, for the defendant, argued that the instrument relied on, was a bill of exchange. *Chitty on Bills*, 1, 50; *Bayley on Bills*, 1. The acceptance of a bill of exchange is *prima facie* evidence of effects of the drawer in the hands of the acceptor. *Chitty on Bills*, 365, 410; 3 *T. R.* 183; 1 *Wilson*, 185; 2 *Stark. Ev.* 276. Where the law presumes the affirmative of any fact, the negative of such fact must be proved by the party averring it. 2 *Harrison's Dig.* 1115; 3 *East*, 192; 3 *Campb.* 10; *Varrill* v. *Heald*, 2 *Greenl.* 91; 2 *Stark. Ev.* 276; *Chitty on Bills*, 399. And in an action for money paid, the acceptor must prove such facts as he ought to state in the special count. *Bayley on Bills*, 312.

Downes, for the plaintiffs, contended, that this was a mere order, or request, to pay a sum of money for the defendants, and not a bill of exchange. It wants the essential requisites of a bill. — 1. In not being payable to order or bearer. 2. It does not appear to be for value received. 3. No time is fixed for the payment. 4. It is not made payable at any particular place, nor is even the residence of the party on whom the order is drawn stated. The law does not require the negative to be proved, and yet the defendant's case requires it. *Chitty on Bills*, 212, *note* 1.

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

SHEPLEY J. — The acceptance of a bill of exchange by the drawee is presumptive evidence, that he had effects of the drawer in his hands. It is so stated by the elementary writers upon bills, and the authorities authorize it. 2 *Stark. Ev.* 167, 8; *Vere* v *Lewis*, 3 *Term R.* 183.

Whether the instructions given were correct must depend therefore upon the instrument offered in evidence by the plaintiffs. If

it is to be regarded as a bill of exchange, the instructions were erroneous, because no testimony was offered to rebut this presumption at law. If it can be regarded as an order or request to pay money, and not a bill of exchange, and so not within the rule applicable to them, then the instructions were correct.

No precise form of words are necessary in a bill of exchange. *Morris* v. *Lee*, *Ld. Ray.* 1396. There are certain essential requisites; such as, that it be payable at all events, not on a contingency, not out of a particular fund, that it be for the payment of money only, and that it exhibit so clearly the drawer, drawee, and amount, that these can be known to strangers into whose hands it may come.

The plaintiff's counsel contends, that the instrument in this case is defective in several particulars, and that it should not be regarded as a bill of exchange.

1. That it is not made payable to order or bearer. It is well settled however, that the words order or bearer are not essential. *Bayley*, 29; *Ld. Ray.* 1545; 6 *Term R.* 123; 9 *Johns. R.* 217.

2. That it has not the words value received. These words are not regarded as essential. *Bayley*, 33; *Ld. Ray.* 1481; 8 *Mod.* 267.

3. It is not payable at a day certain, or at any usance or time after date. It has been decided, that it is not necessary to constitute it a bill of exchange, that it should be.

In the case of *Boehm* v. *Sterling*, 7 *Term R.* 419, the writing declared on was in these words:

"*Bartholomew Lane*, *London*, 17 *February*, 1796.

"*Messrs. Down*, *Thornton*, *Free*, and *Cromwell*, pay to *Mr. Dobson* or bearer, 2444£ 14*s*.

"*Sterling*, *Hunters & Co.*"

Lord Kenyon says, "at the time of the trial, I thought there was a difference between banker's checks and bills of exchange; and that the rule adopted with regard to the latter did not apply to the former; but on further consideration, I do not think that, that distinction is well founded." It was held to be a bill of exchange and to be properly declared on as such.

4. It is not payable at any particular place or addressed to the drawee stating his residence.

In the case of *Shuttleworth* v. *Stephens*, 1 *Camp.* 407, the instrument declared on was in these words, "21*st October*, 1804. Two months after date pay to the order of *John Jenkins* 78£ 11s. value received. *Thos. Stephens.*" No place of payment or place of residence of any party is stated in this case or in the case of *Boehm* v. *Sterling*, yet they were held to be properly declared on as bills. A request to pay the amount of a note written underneath it, has been held to be a bill of exchange. *Leonard* v. *Mason*, 1 *Wend.* 522. The instrument in evidence in this case might have been declared on as a bill of exchange; and if so, and a recovery could have been had, then the rule of law respecting bills applied to it, although not declared on as such; for the law applicable to it cannot be different on account of the different manner in which it is presented in evidence.

It would seem, that requests, or orders, payable out of a particular fund, or upon a contingency, or not payable in money only, or which are liable to any other objection preventing them from being regarded as bills of exchange, do not come under the rule of law, that acceptance is *prima facie* evidence of effects of the drawer in hand. *Weston* v. *Penniman*, 1 *Mason*, 306.

To enable the plaintiff to maintain this suit, he must rebut the *prima facie* evidence arising from his acceptance.

Exceptions sustained, and new trial granted.

MATTHEW HASTINGS *vs.* DANIEL LANE *& al.*

It is a settled rule, in construing statutes, that they are to be considered as prospective, unless the intention to give a retrospective operation is clearly expressed.

The *stat.* of 1835, *c.* 195, for the relief of poor debtors, has no operation upon suits commenced before its passage, or upon any process or proceedings arising out of them.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

This was an action of debt on a bond. Several questions were made in the exceptions, and argued by counsel, which have become unimportant, as the decision rested on but one point, which was

conclusive of the whole case. The facts bearing upon it are found in the opinion of the Court. The verdict was for the plaintiff, and exceptions were filed by the defendants.

J. Granger, for the defendants.

A. G. Chandler, for the plaintiff.

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

SHEPLEY J. — The plaintiff recovered judgment against *Lane* at the *September* term of the Court of Common Pleas, 1830. A pluries execution issued thereon the 25th day of *December*, 1835, by which *Lane* was committed to prison on the 29th of *February*, 1836, and released on the same day upon executing the bond now in suit. On the 25th day of *November* following, he surrendered himself to the keeper of the jail and went into close confinement.

The bond appears to have been taken according to the provisions of the fourth section of the *stat.* of 1822, *c.* 209; and the twenty-first section provides for the surrender of the debtor within nine months and three days in discharge of his bond. The eighth section provides, that nothing shall be a breach of the bond, except the prisoner's passing beyond the exterior limits of the jail yard, and his neglecting to surrender himself, as provided by the twenty-first section.

If the final process issuing upon this judgment and the proceedings thereon are to be governed by the act of 1822, the debtor has not committed any breach of the bond. The plaintiff's counsel contends, that the proceedings upon the final process should have been in conformity to the act of 1835, and such were the instructions complained of in this bill of exceptions.

In the case of *Dash* v. *Van Kleeck*, 7 *Johns. R.* 477, *Kent C. J.* states it to be a principle in the *English* common law, as ancient as the law itself, that a statute, even of its omnipotent parliament, is not to have a retrospective effect. The same rule is recognized in *Whitman* v. *Hapgood*, 13 *Mass. R.* 464. And such must be regarded as the settled rule, unless the intention to have it operate retrospectively is clearly expressed. There is nothing in the language of the act of 1835 indicating the intention to have it operate upon any suits already commenced, or upon the process arising out of

them. The design seems to have been to exempt all such process and proceedings from its operation, as decided in *Gooch & al.* v. *Stephenson & al. ante p.* 129. The debtor having performed the condition of his bond, this suit cannot be maintained. Several other questions were made in this case, but the one now decided being conclusive, it is not necessary to consider them.

The exceptions are sustained and a new trial granted.

ELIJAH D. GREEN *vs.* JEREMIAH JACKSON.

A bill of exchange drawn by a person residing in one State of the Union upon a person residing in another, and payable there, is a foreign bill.

In an action upon a foreign bill, the protest is competent evidence to prove presentment of the bill to the acceptor and non-payment.

If a person who indorses a bill to another, for value or collection, shall again come to the possession thereof, he shall be regarded, unless the contrary appear in evidence, as the *bona fide* holder of the bill, and entitled to recover, although there may be upon it his own or a subsequent indorsement, which he may strike from the bill or not at his pleasure.

It is within the discretionary power of one Judge at the trial to permit an amendment of the declaration by adding to the number of dollars in the description of the note.

ASSUMPSIT against the defendant as acceptor of a bill of exchange of which the following is a copy. "$2010. *Calais*, 28 *November*, 1835. Four months after date pay to the order of *Elijah D. Green* two thousand and ten dollars, value received, which charge to account of, yours, &c. *Timothy Darling*. To Mr. *Jeremiah Jackson*, Merchant, No. 145, *Front Street, New-York City.*" The bill when read in evidence at the trial, had upon it the acceptance of *Jackson* and these indorsements, "Pay to *Gaylord & Hathaway* or order, *Elijah D. Green.*" "*Gaylord & Hathaway.*" To prove presentment of the bill to the acceptor and non-payment, the plaintiff offered a protest made in the city of *New-York*, by a Notary Public there, to the admission of which, the counsel of the defendant objected. EMERY J., presiding at the trial, overruled the objection, and admitted the protest in evidence. The protest stated, that the presentment was made at the request of *Gaylord & Hathaway, March* 31, 1836. The action was commenced *April*

1, 1836. The defendant's counsel objected to the reading of the bill, without proof that the plaintiff was the holder of the bill at the time the action was commenced. This objection was overruled, and the bill read in evidence. It appeared, that the plaintiff's counsel had entered on the docket leave to amend generally, and did amend by adding after the words "two thousand," in the description of the bill, the words "and ten." The counsel for the defendant objected to this amendment, but the objection was overruled. The verdict for the plaintiff was to be set aside, if the ruling of the Judge was wrong.

J. Granger, for the defendant, made the following points.

1. The evidence does not support the declaration. The plaintiff declares as payee, and the bill produced is indorsed to a third person. *Thornton* v. *Moody*, 2 *Fairf.* 253.

2. The plaintiff was not the legal holder of the bill at the time the action was commenced, and therefore cannot maintain it. *Chitty on Bills*, 398; *Butler* v. *Wright*, 20 *Johns. R.* 370; *Waggoner* v. *Colvin*, 11 *Wend.* 27.

3. The amendment of the declaration was improperly allowed. It introduced a new cause of action, which cannot be done. *Rules of Court*, 15; *Bond* v. *Cutler*, 7 *Mass. R.* 205; *Ball* v. *Claflin*, 5 *Pick.* 303; *Willis* v. *Crooker*, 1 *Pick.* 204; *Hill* v. *Hunnewell*, *ib.* 192; 2 *Johns. Cas.* 219; 1 *ib.* 248.

4. The bill is an inland bill, and therefore the protest was not proper evidence of its presentment for payment. *Stat.* of 1831, *c.* 88; *Bayley on Bills*, 164 *to* 170; *Chitty on Bills*, 218; *Miller* v. *Hackley*, 5 *Johns. R.* 375.

T. J. D. Fuller, for the plaintiff, argued that the granting of leave to amend was a mere discretionary power in the Judge at the trial, and not subject to correction by the whole Court. *Wyman* v. *Dorr*, 3 *Greenl.* 183; *Clapp* v. *Balch*, *ib.* 216; *Danielson* v. *Andrews*, 1 *Pick.* 156.

Possession of the bill by the drawee is *prima facie* evidence of his right to the bill, and to bring a suit upon it. It is immaterial whether his own name and the name of the indorsers after him remain on the bill or are stricken out. He had a right to strike them out at any time. 3 *Kent's Com.* 79; *Mauran* v. *Lamb*, 7 *Cowen*,

174; *Dugan* v. *United States*, 3 *Wheat.* 172; *Dean* v. *Hewit*, 5 *Wend.* 257.

The place where the bill is made payable determines whether it is to be considered foreign or inland. When made payable out of the State in which it is drawn, as in this case, it is a foreign bill. The protest was therefore rightly admitted in evidence. 3 *Kent's Com.* 94, *note b*; *Buckner* v. *Finley*, 2 *Peters*, 586; *Phenix Bank* v. *Hussey*, 12 *Mass. R.* 483. The title to a statute is no part of it. 1 *Swift's Dig.* 12; 1 *Ld. Raym.* 77. The statute itself says nothing bearing on the subject.

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

WESTON C. J. — The amendment objected to, although in a matter of substance, was within the discretion of the Judge to grant. It introduced no new count into the declaration. The count, when amended, there is no reason to doubt, was for the same cause of action, originally intended. The date of the bill, the parties, and the time of payment, remained the same.

It is very desirable, that the law in relation to bills of exchange should be uniform through the Union. In *Buckner* v. *Finley*, 2 *Peters*, 586, the Supreme Court of the *United States*, upon full consideration, decided, that a bill of exchange drawn by a person residing in one State of the Union, upon a person residing in another, is a foreign bill. The same doctrine was laid down in the *Phenix Bank* v. *Hussey*, 12 *Pick.* 483. There had previously been some diversity of opinion upon this point; and there is reason to believe, from the title to the act, that such bills may have been regarded as inland, by the committee who prepared the statute of 1821, *c.* 88, regulating damages on bills of exchange, drawn or indorsed in this state, but payable at any other place within the *United States*. A similar statute, with the same title, existed in *Massachusetts*. *Stat.* of 1819, *c.* 166. This was not considered there, as it cannot be here, as a legislative determination of the question. The term, inland, is not to be found in the enacting part of either statute. We adopt the opinion, that the bill in question is a foreign bill; and the protest therefore was properly admissible in evidence.

The bill had been indorsed in full to *Gaylord & Hathaway*, and

was protested at their request; but it might have been sent to them for collection, or in trust for the plaintiff. The return of the bill by them to the plaintiff, with the protest for non-payment, is presumptive evidence, that they acted as his agent. The same inference was drawn, from the same facts, in *Dugan* v. *United States*, 3 *Wheat.* 172. That was a bill which had been indorsed in full to the agents, who returned it, after causing it to be protested. Such being the presumption, the plaintiff was entitled to his action against the acceptor, immediately upon the protest, although the bill might not have been in his actual possession.

And in our judgment, he might well bring the action as payee, disregarding, or striking off, the indorsements. The case of *Dugan* v. *United States*, before cited, is an authority in point. *Livingston J.* who delivered the opinion of the Court in that case, says, "after examining the cases on this subject, which cannot all of them be reconciled, the Court is of opinion, that if any person, who indorses a bill of exchange to another, whether for value, or for the purposes of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appears in evidence, as the *bona fide* holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full, subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsers, whose names he may strike from the bill, or not, as he may think proper."

Judgment on the verdict.

Elijah D. Green *vs.* Timothy Darling.

Although the holder of a bill is entitled to an action against the drawer or indorser, immediately after due diligence has been used to give them notice; yet no suit against them, commenced before enough has been done to render them absolutely liable, can be maintained.

This action, commenced *April* 1, 1836, was against the defendant as drawer of the same bill described in *Green* v. *Jackson*, *ante*, *p.* 136. In addition to the facts appearing in that case, the plaintiff offered evidence tending to show, that on the *eighth* day

of *April*, 1836, he gave notice to the defendant of the presentment of the bill to the acceptor, and non-payment by him. The defendant's counsel objected to the admissibility of the testimony, and also contended, that if the notice was sufficient at that time, being given seven days after the action was commenced, *this action* could not be maintained. EMERY J., presiding at the trial, overruled the objections, and directed a verdict for the plaintiff, which was to be set aside, if the rulings or direction were erroneous.

J. Granger, for the defendant, among other objections, contended, that notice after the commencement of the action was too late. The action must be supported or fail on the state of facts existing at the time it was commenced. *Greeley* v. *Thurston*, 4 *Greenl.* 479; *New-Eng. Bank* v. *Lewis*, 2 *Pick.* 125; 5 *Serg. & Rawle*, 318; 2 *W. Black.* 647. Presentment and notice are conditions precedent to the right to recover. 2 *Conn. R.* 654; 3 *ib.* 101.

T. J. D. Fuller, for the plaintiff, contended, that although there is some conflict in the authorities, the true principle is, that on due presentment to the acceptor, and refusal by him to pay, a right of action against the drawer immediately accrues, subject only to be defeated by neglect to give due notice; and that it is wholly immaterial whether the letter was put into the post-office or not, when the writ was made, provided that it went by the first mail. *Chitty on Bills*, 6*th Ed.* 107, 230, and note 298; *Stanton* v. *Blossom*, 14 *Mass. R.* 116; *Shed* v. *Brett*, 1 *Pick.* 401; 3 *East*, 481.

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

WESTON C. J. — We have decided in the case of *Green* v. *Jackson*, *ante*, *p.* 136, which was an action against the acceptor upon the same bill, that it was within the discretion of the Judge, to permit the amendment, which was objected to in this case. We further decided, that the bill in question is a foreign bill; and that the protest therefore was properly admissible in evidence.

It appears that the action here was brought, before any attempt was made to give notice to the defendant, the drawer. And this we regard as a fatal objection to the action. It is true, that in *Stanton & al.* v. *Blossom & al.*, 14 *Mass. R.* 116, it is intimated by *Putnam J.*, who delivered the opinion of the Court, that an action may be brought against the drawer, before any attempt to give him

notice is made, if there is afterwards due and reasonable diligence to do so, on the part of the holder. But the point decided in that case was, that notice of non-acceptance from the drawee to the drawer was insufficient.

In *Shed* v. *Brett*, 1 *Pick.* 401; *City Bank* v. *Cutter & als.*, 3 *Pick.* 414, and in *Greely & al.* v. *Thurston*, 4 *Greenl.* 479, the doctrine seems well established, that the holder is entitled to an action, against the drawer or indorser, immediately after he has used due diligence to give them notice. And the implication necessarily is, not before; for the liability of the drawer or indorser, which is conditional, depends upon due diligence on the part of the holder; and no action can be brought against either, until his liability becomes absolute. This point has been directly decided, in the case of the *New-England Bank* v. *Lewis & al.*, 2 *Pick.* 125, where it was held that no action could be maintained against an indorser, until due diligence had been used to give him notice; and the Court repudiate the correctness of the intimation in *Stanton* v. *Blossom.*

It would have been sufficient, if notice previous to the action, had been sent to the defendant from *New-York*, where the bill was protested. But upon the evidence as it stands, we are very clear that the action cannot be supported. The verdict is accordingly set aside, and a new trial granted, in which however the plaintiff must fail, unless he shows due diligence to give notice, prior to the action.

Elijah D. Green *vs.* Timothy Darling.

Where the residence of the holder of a bill and of the party to be notified is in the same town, it is not sufficient to put a notice into the post-office; personal notice must be given, or the notice must be left at his residence or place of business.

Where the parties reside in the same town, notice of the dishonor of a bill on the nineteenth day after receiving information thereof is too late.

This was an action against *Darling*, as the drawer of two bills of exchange, drawn by him at *Calais*, *November* 28, 1835, on *Jeremiah Jackson*, of the city of *New-York*, and by him accepted,

payable in *three* months from date, to the order of the plaintiff. The same objections to proof of demand and notice were made, as in *Green* v. *Jackson*, *ante*, *p.* 136. The note was presented to the acceptor, in the city of *New-York*, and payment refused by him, on the third day of *March*, 1836. The mail from the city of *New-York* then reached *Calais* in about eight days. The plaintiff proved, that on *Saturday* evening, *March* 12, 1836, he received from *New-York* notice that these bills had been protested for non-payment by the acceptor, and in the afternoon of *Monday*, *March* 14, put a notice in the post-office at *Calais*, directed to *Timothy Darling*, *Calais*. The dates of the bills were given in the notice, but not the amounts. A notice of the dishonor of the bills by the acceptor, was left at the house of the defendant's father in *Calais*, on the first day of *April*, 1836. The defendant was born at *Calais*, and did not appear to have had any regular place of abode other than that; but had been engaged in speculation, and had frequently been absent, and was not in town when the notice was put in the post-office. The plaintiff resided at *Calais* at the time the notice was put in the post-office, and but a few rods from the house of the father of the defendant, with whom he resided when in *Calais*; and the defendant's residence could easily have been ascertained by inquiry. The counsel for the defendant, among other objections, contended, that the defendant had not had legal notice of the non-payment of the bills. EMERY J. instructed the jury to return a verdict for the plaintiff, which was to be set aside, if the Judge erred in the instruction given.

J. Granger, for the defendant.

The parties living in the same town, the notice should have been personal, or left at the defendant's dwellinghouse, or place of business. *Hartford Bank* v. *Stedman*, 3 *Conn. R.* 489; *Ireland* v. *Kip*, 10 *Johns. R.* 490; *same case*, 11 *Johns. R.* 231. The notice left at the dwellinghouse, *April* 1, was not in season. *Bayley on Bills*, 175; *Harrison's Dig.* 501.

T. J. D. Fuller, for plaintiff, contended, that the testimony of the several witnesses, set forth at length in the report, showed that the plaintiff had used due diligence to give notice to the defendant

of the non-payment of the bills. He cited 2 *Pick.* 413; 1 *Johns. R.* 274; 2 *Stark. Ev.* 257; 11 *Wheat.* 431; 9 *Wheat.* 598.

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

WESTON C. J. — The liability of a drawer to the holder of a bill is conditional, depending on due presentment for acceptance or for payment, and upon due diligence to give him notice, if the bill is dishonored. The affirmative is on the holder, to prove these facts, before the drawer can be charged. The defendant, though temporarily absent, had his residence in the same town, and in the same village, with the plaintiff. This fact could hardly have been unknown to the latter, who had lived there for more than a year. But if not known to him, the evidence is, that it might have been at once ascertained upon inquiry. Where the residence of the holder, and of the party to be notified, is in the same town, he should receive notice in person, or it should be left at his residence or place of business. It cannot be given through the post-office, unless he lives in a different town. *Ireland* v. *Kip*, 10 *Johns.* 490; *same case*, 11 *Johns.* 372. The same rule was recognized in the *New-England Bank* v. *Lewis & al.* 2 *Pick.* 125.

Notice should have been left at the house of the defendant's father, which was his usual residence in *Calais*. This was not seasonably done; and upon this ground, there is a failure of proof on the part of the plaintiff. The notice left at the defendant's residence on the first of *April*, was clearly too late. Upon the evidence reported, the liability of the defendant is not, in our opinion, legally made out. The verdict for the plaintiff is therefore set aside.

New trial granted.

Benjamin F. Waite *vs.* William Delesdernier.

An officer, having in his hands a writ for service, has no authority in his official capacity to settle the demand, and to receive the money of the debtor.

Where an officer undertakes to settle the demand and receive the money of a debtor against whom he had a writ, and pay it over to the creditor, but neglects so to do for a year, and the debtor is again sued, and pays the money to the creditor; the debtor may maintain an action against the officer to recover back the money paid, with interest, without any previous demand.

And if the writ be against several defendants, and the officer make service only on one, who pays the money, he can support his action without joining the others.

The declaration contained the money counts, and two counts alleging, that the defendant received of the plaintiff one hundred and thirty dollars, which he undertook to pay to the treasurer of the State of *Maine* for a debt which the plaintiff then owed to the State, and to take up and deliver to the plaintiff his notes, and that the defendant neglected so to do, whereby the plaintiff was put to great additional expense, trouble and cost. The plaintiff proved, that in *May* preceding the commencement of the present suit, the then sheriff of the County had a writ against the plaintiff and others in favor of the State, and that the defendant requested the sheriff to permit him to see that writ, and on giving it to him, he compared it with a writ in his possession, and remarked, that about a year before he had a writ in favor of the State against the plaintiff and others on the same demand, that the plaintiff paid the demand sued to him, that he wrote to the land agent from whom he received the writ, that the plaintiff had paid the demand to him, that if the land agent would draw on him for the amount he would answer the draft, but whether the land agent had drawn on him or not, he did not know, and that the note was paid, and ought not to have been sued again. The plaintiff also proved, that before the commencement of this suit, he had paid the amount of the note to the agent of the State. On the call of the plaintiff's counsel, the first writ was produced by the defendant on which was found the following indorsement. "I certify that *B. F. Waite* has paid me one hundred and twenty-six dollars and fifty-four cents for principal and interest, on the demand and in full of the same, and three dollars for this writ and also my fees. *W. Delesdernier, Sheriff.*"

At the trial, the counsel of the defendant contended, that he acted as the agent of the State, in receiving the money of the plaintiff, and as the receipt on the writ states it to have been received in full for the demand and costs, the payment was a discharge of the claim of the State, and that if the plaintiff paid the money again, it was a voluntary payment to a party not entitled to demand it of him, and therefore no right of action accrued against the defendant, especially as no demand was made before the suit was commenced; and also, that the money paid by the plaintiff to the defendant must be considered as the money of the plaintiff and the other defendants in the suit in favor of the State, and that the plaintiff alone could not maintain this action. EMERY J., instructed the jury, that it was incumbent on the defendant to show, that he had authority from the State to receive the money to entitle him to hold it against the plaintiff; and that although the plaintiff must satisfy them, that the money was demanded by the plaintiff of the defendant prior to the commencement of the action, yet they were at liberty to infer such demand from the facts proved; and that as it appeared by the defendant's return on the writ, that he could not find the property or residence of the other defendants in the suit, and that as *Waite* paid the money, it was to be considered his money, and he could maintain the action alone; and that if they found for the plaintiff, they must allow him the amount paid for debt and costs, and interest thereon from the time of payment. The jury returned a verdict for debt, costs and interest, and the defendant filed exceptions to the instructions of the Judge.

Bridges, for the defendant, argued in support of the points made at the trial and also urged, that no interest could be allowed before a demand made; and cited *Bulfinch* v. *Balch*, 8 *Greenl.* 133; 1 *Saund.* 43, *note* 2; 1 *Chitty on Pl.* 322, 325; *Hill* v. *Green*, 4 *Pick.* 114.

Chase, for the plaintiff, argued in support of the verdict, and cited *Coffin* v. *Coffin*, 7 *Greenl.* 298; *Ulmer* v. *Cunningham*, 2 *Greenl.* 117; *Hastings* v. *Lovering*, 2 *Pick.* 214.

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

WESTON C. J. — The defendant was required, as sheriff of the county, to serve and return the writ in behalf of the State, against

the plaintiff and others. When that was done, he had performed his duty. He was not authorized, in his official capacity, to receive the money; nor has he shown, that there was confided to him any trust or agency whatever, except what resulted from his relation as an officer. He did however receive from the plaintiff, and has so certified upon the writ, the principal and interest of the demand sued for in that action, together with the costs, which had then accrued. He undertook, that the payment then made was the amount "in full" declared for in that suit. There did thence arise, by implication of law, an obligation on his part, that the sum so received should be applied in discharge of the demand, within a reasonable time. This he neglected, for a period far beyond what could be deemed reasonable, and at the end of a year from the first payment, the plaintiff was charged in a second suit, for the same cause of action. It was contended, that having once paid, he might have resisted successfully that suit. But this could not have been done, unless he had paid to an authorized agent, which does not appear.

The defendant, having failed to fulfil his engagement, was liable to an action without any further demand. It was not necessary, for the purpose of hastening the performance of the duty, which the defendant had assumed. As well might a common carrier, who had failed to deliver goods at the place of destination, according to his contract, insist that he was not liable to an action, until the goods had been demanded. Where a positive duty exists, or is assumed, no demand is necessary. 1 *Saunders*, 33.

Upon the first writ, there being no service upon the other defendants, the plaintiff paid the money received by the defendant, and he alone therefore is entitled to bring the action.

The verdict was returned for the precise amount of the plaintiff's damage, which was the direct consequence of the violation of the defendant's undertaking; and we are aware of no legal reason, why it should be reduced.

Exceptions overruled.

WILLIAM F. W. OWEN *vs.* JAMES BOYLE.

A printed volume of the laws of a *British* Province, proved by witnesses to have received the sanction of the executive and judicial officers of the Province, as containing its laws, is admissible in evidence in a case where the title to land, situated within that province, is in question.

The unwritten or common law of a foreign country or province must be proved as a fact.

The Court cannot presume without evidence, that the common law of *England* is also the common law of her colonies.

Nor can the Court presume, that all property upon the land, however circumstanced, is liable to distress for rent in arrear, as there are many and important exceptions made in favor of trade and commerce.

A mere certificate that a certain fact appears of record, without the production of an authenticated copy of the record, is not evidence of the existence of the fact.

REPLEVIN for six hundred bushels of salt, which the defendant in his brief statement alleged to be his property. The salt had been placed in a store on the island of *Campo Bello* in the Province of *New-Brunswick*, but for what purpose it was placed there did not appear. The facts necessary for a proper understanding of the case, will be found in the opinion of the Court. The admission of the title deed of the plaintiff was objected to, but admitted by the Judge. The certificate offered, to prove the appointment of the constable, was as follows. "*Charlotte* to wit. I hereby certify unto all whom it may concern, that *James M. Parker* was duly appointed at the General Sessions of the Peace, holden at *Saint Andrews*, in and for the county of *Charlotte*, on the second *Tuesday* in *April*, one thousand eight hundred and thirty-five, one of the constables for the parish of *Campo Bello* in the said county, as it appears from a record of the same, remaining on file in the office of the clerk of the peace of said county. Dated this 21st *June*, 1836. *H. Hatch*, clerk of the peace for the county of *Charlotte*, Province of *New-Brunswick*." The warrant of distress, signed by the plaintiff for himself, and as attorney of other owners, was as follows. "To *Isaac B. Mather*, our Bailiff, *Greeting*. Distrain the goods and chattels of *William McLane*, on the premises in his possession, situate in the parish of *Campo Bello*,

for fifty-six pounds and fifteen shillings, being rent due to us for the same, at the first day of *May* last, and for your so doing, this shall be your sufficient warrant and authority. Dated the twenty-first day of *September*, in the year of our Lord, one thousand eight hundred and thirty-five." The certificate was objected to by the counsel for the defendant, but admitted by EMERY J. presiding at the trial. The defendant's counsel objected also to the admission of the volume of Province statutes, but it was admitted by the Judge. The counsel for the defendant also contended, that the plaintiff had no right to distrain for rent, unless there was some contract stipulating the amount of rent which should be paid, and fixing the rent at some certain sum per year, or *pro rata*, for a less time; also that some law authorizing the appointment of a constable should be shown. The Judge ruled them to be unnecessary. The counsel for the defendant requested the Judge to charge the jury, that if they believed the store in which the salt was deposited was built for and used as a warehouse, or place for the deposit or storage of goods, the plaintiff had no right to distrain the salt deposited there for rent arrear. This instruction the Judge declined to give. The verdict was for the plaintiff, and was to be set aside, if the rulings of the Judge were erroneous.

F. Allen & Hobbs, argued for the defendant, supporting the objections made at the trial, and citing 2 *Stark. Ev.* 568; *Story's Con. of Laws*, 34, 232, 253, 529; 2 *Black. Com.* 41; *Phil. Ev.* 343; 1 *Johns. R.* 94; 14 *John. R.* 338; 3 *Johns. R.* 263; 7 *Johns. R.* 117.

Mellen & S. S. Rawson, argued for the plaintiff, and cited *Story's Con. of Laws*, § 444, 445, 641; 2 *Cranch*, 237; 2 *Stark. Ev.* 366; *Raynham* v. *Canton*, 3 *Pick.* 293; *Bailey* v. *Foster*, 9 *Pick.* 139; 1 *Dallas*, 462; 4 *Cranch*, 388; 6 *Binney*, 327; 2 *Hayw.* 173; 1 *Peter's Cir. R.* 225; *Bucknam* v. *Ruggles*, 15 *Mass. R.* 180.

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

SHEPLEY J. — The defendant was the owner of the property replevied, and still is the owner unless the right of property has been changed by the proceedings in the Province of *New-Bruns-*

wick. He has a right to insist, that the plaintiff shall show, that by the laws and proceedings there, he acquired a right to the property. Yet if such facts are shown, and the laws applicable to them, as prove a change of property there, the defendant when he voluntarily places his property under the protection or control of foreign laws, cannot justly complain, that by their operation his property is taken from him without any compensation, to pay the debts of another. The plaintiff claims as the purchaser of the property at an auction sale, alleging that it had been lawfully seized under a warrant of distress, for the payment of the rent of a store on the island of *Campo Bello*, in the county of *Charlotte*, due from *William McLane* to him. To prove, that he was the owner of the estate occupied by *McLane*, the plaintiff read a deed of indenture between himself and others bearing date on the 16th day of *April*, 1835, which was objected to, as not legally proved. The proof was made by the testimony of the subscribing witnesses before the Lord Mayor of *London*, and is by him certified under his official signature and seal of office. Such an authentication would be sufficient to authorize the deed to be read as evidence of title, by the laws of that Province, if they are properly proved in the case. And as the estate is situated in that Province, if it is sufficient to pass the title there, it should be so regarded here.

Were the written or statute laws of that Province legally proved and admitted? The general rule is, that foreign laws are to be proved as a matter of fact; and the mode of proof of the written law is to be, by the production of a duly authenticated copy. An exception to the rule respecting the mode of proof, has been allowed in the courts of the *United States* and in those of several of the States, by receiving the printed volumes of the laws of the States of the Union, as *prima facie* evidence. But in the 3 *Pick*. 293, the court say, that they "do not mean to decide, that the law of any country merely foreign may be so proved." Another exception may be said to be established by the case of *Talbot* v. *Seeman*, 1 *Cranch*, 38, allowing foreign laws, which have been promulgated as such by our own government, to be read without other proof. The only case at common law, noticed, allowing a printed volume to be read as evidence of a foreign law, is the case of *Lacon* v. *Higgins*, 3 *Stark. R.* 178. In that case the French vice consul,

being called as a witness, produced a book which he stated, contained the French code of laws upon which he acted at his office; that there was an office called the royal printing office, where the laws were printed by the authority of the French government; the book purported to have been printed at that office; and the witness stated, that the book would have been acted upon in any of the French courts. Upon this testimony *C. J. Abbott* admitted the book to be read as proof of the law, and seemed to rely upon the case of the *King* v. *Picton*, 30 *Howell's State Trials*, 514. In this latter case the objection to the book of *Spanish Laws* is said to have been waived.

In the present case the books admitted purported to contain the laws of the Province, and to have been printed by the printer to his Majesty, and it was proved, that the laws thus printed, were distributed by the government to its officers, and that they had been cited and read in the courts there as laws in force, and as regulating the administration of justice. These books have received the sanction of the executive and judicial officers of the Province as containing its laws; and this is proved upon the oath of witnesses. It is difficult to say, that it is not as satisfactory to the mind as the exemplification of a roll found in the possession of the *custos rotulorum* would be, accompanied by the oath of the person making it. It can hardly be said to be a departure from the rule requiring the best evidence; because the present proof does afford evidence, that, if these books were offered in the courts of the Province where the estate is situated, the laws, which they contain, would be allowed to operate upon that estate. And this is the very object to be attained; to allow them the same efficiency, which they would have where the estate is situated. And that is all, that can reasonably be required, where the *lex rei sitae* governs the case.

The laws being admitted, what is their influence upon the case? They authorize the deed to be read, which proves the title of the plaintiff. They also prove the mode of proceeding "when any goods or chattels shall be distrained for any rent reserved and due upon any demise, lease, or contract whatsoever." *Province Laws*, 50 *Geo.* 3, *c.* 21, § 4. And the seventh section provides, that the distress shall not be deemed unlawful for any irregularity in the proceedings. But the laws do not provide when a distress for rent

may be lawfully made, or what, or whose, property may be lawfully taken. Nor is there any proof introduced into the case, in any mode to ascertain these most important matters. It is said in argument, that the common law of *England* prevails in that Province. But can that be assumed by this Court without any proof? The unwritten foreign law is to be proved as a fact; and the *English* courts will not presume, that the law of *Scotland* agrees with that of *England* upon any particular point. 2 *Stark. Ev.* 331. It is true, that *C. J. Abbott* held, in *Brown* v. *Gracey*, *Dow. & Ry. N. P. Cases*, 38, that where the defendant would set up a defence to a promissory note by the laws of *Scotland*, not apparent by the laws of *England*, he must shew it; but such a rule cannot be applied in this case, because the plaintiff is obliged to prove his right to distrain the defendants' property as a part of his title, which it is incumbent upon him to make out. *Starkie* says, the statement of text writers may be admitted to prove, whether the law of the mother country be the law of the colony. 1 *Stark. Ev.* 249; but still the proof must be introduced by the exhibition of such text writers.

The usual course is to make the proof by competent witnesses learned in those laws. *Story's Con. of Laws, c.* 17, § 642. *Blackstone* says, it has been held, that if an uninhabited country be discovered and planted by *English* subjects, all the *English* laws then in being are immediately there in force; but this, he says, must be understood with many and great restrictions. And speaking of the *American* plantations generally, he says, "the common law of *England*, as such, has no allowance or authority there." 1 *Com.* 107. This language may be thought to need many restrictions, as well as the doctrine commented upon by him; but it is sufficient to prove, that it would be quite rash for a court here to presume, that all the common law of *England* was in force in her colonies.

We are in the habit of taking notice of the common law of *England* without proof; not however because it is the common law of a foreign country, but because that common law has become a law to us, and we look to it without proof, as to our own law.

Nor can this be regarded as a technical difficulty, for it is very possible to conceive, when the plaintiff is required to establish by

proof, his right by the laws of the Province to take the defendant's property, as then situated, for the rent due from *McLane*, that this may prove to be a matter, entering vitally into the merits of the case. The statement of the report is, that the defendant had placed his property in that store, but under what circumstances, or for what purposes, does not appear.

There are many and important exceptions to the general law of distress, made in favor of trade and commerce. In a case in which the whole doctrine was much examined, it was decided, that goods of the principal in the hands of his factor were not liable to be distrained for the factor's rent. *Gilman* v. *Elton*, 3 *Brod. & Bing.* 75. For like reasons, it has been held, that property deposited by a broker, in a warehouse upon a wharf for safe custody, to wait an opportunity to sell, was not liable to be distrained for rent due from the wharfinger. *Thompson* v. *Mashitee*, 1 *Bing.* 283. And the same rule of exemption has been decided to apply to goods in a common warehouse. *Mathias* v. *Mesnard*, 2 *C. & P.* 353. This is not the proper occasion to examine into the extent of the exemption in favor of trade and commerce further, than to shew, that it may be important to a just decision of the rights of these parties, that the law should be proved by those, who are competent to speak with a full knowledge of it. It is said, however, that the title of the plaintiff cannot be drawn into question for want of proof of the legal right to distrain. As that matter, although argued at the bar, does not properly arise out of the report, the decision is not placed upon it.

The certificate of the appointment of the constable was objected to. It does not purport to be an attested copy of the record, while it states the existence of one. A record or public document is made evidence in such a case, by the production of a copy proved by the oath of the person comparing it; or by an office copy attested and duly authenticated. The certificate cannot be regarded as legal evidence. 1 *Stark. Ev.* 188, 191, *Metcalf's Ed.*

Verdict set aside and new trial granted.

EDMUND MUNROE *vs.* EBENEZER REDING.

In an extent on land, it must appear of record, that there has been a substantial compliance with the requirements of the statute; and if it do not so appear, the defect cannot be supplied by parol proof.

Where an officer's return of an extent on land states that all three of the appraisers viewed the land, and also states at its conclusion, "all which appears by his receipt and the writing above," but at the same time states material facts not noticed in the certificates; the levy is not void because it appears, that but two of the appraisers signed the certificate.

If the appraisers are duly sworn to appraise such real estate as shall be shown to them, "to satisfy the within execution," the oath is sufficient without adding, "all fees and charges."

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

This was a writ of entry brought to recover a tract of land in *Calais*, and was tried on the general issue.

The demandant claimed a tract of land, once the property of the defendant, deriving title by virtue of an extent of an execution thereon in favor of *Abiel Wood*, deceased, and a deed thereof from the administrator of *Wood*. At the trial, several objections to the validity of the administrator's sale were made, but abandoned in the argument. It becomes therefore unimportant to state them. The objections made to the levy at the trial, the ruling of the Judge of the Court of Common Pleas, and the points made in argument in this Court, appear in the opinion of the Court.

Chase, for the defendant, contended, that the levy was void, because the statute provisions were not complied with; and cited *Whitman* v. *Tyler*, 8 *Mass. R.* 284; *Barrett* v. *Porter*, 14 *Mass. R.* 143; *Moffitt* v. *Jaquins*, 2 *Pick.* 331; *U. States* v. *Slade*, 2 *Mason*, 71; *Sturdivant* v. *Frothingham*, 1 *Fairf.* 100. To show, that the deposition was improperly admitted, he cited *Williams* v. *Amory*, 14 *Mass. R.* 20.

Cooper, for the plaintiff, argued, that every fact required by the statute to make the levy good was found in the return of the officer, and cited *Barrett* v. *Porter*, and *Moffitt* v. *Jaquins*, cited for the defendant.

The opinion of the Court was drawn up by

SHEPLEY J. — The plaintiff derived title from *Abiel Wood*, deceased, by a conveyance made by his administrator, who was licensed to sell at public or private sale. Exceptions were taken to the authority of the administrator to convey, which were waived at the argument; and it is not therefore necessary to consider them.

To prove *Wood's* title, a copy of the record of the proceedings in the levy of an execution, issued on a judgment recovered by *Wood* against the tenant, were read. The counsel for the tenant objected to the sufficiency of these proceedings to convey the title, because it appeared, that but two of the appraisers had signed the certificate of their doings. To obviate this objection, the plaintiff was erroneously permitted to read the deposition of *Lewis Wilson*, to prove that the appraiser, who did not sign, was present and viewed the premises, and did not sign because he did not agree with the others in estimating the value of the premises. To transfer the title, there must appear of record to have been a substantial compliance with the requirements of the statute; and if it does not so appear, the defect cannot be supplied by parol proof. Where by the return of the officer it did not appear, that the appraisers were discreet and disinterested men, that defect could not be supplied by parol testimony, as decided in *Williams* v. *Amory*, 14 *Mass. R.* 20. The validity of the levy must depend upon its sufficiency without such proof. The officer's return, speaking of all three of the appraisers, says, "who afterwards viewed the above described lands and tenements." The argument is, that this language does not prove, that all the appraisers acted, because the officer, at the close of his return, says, "all which appears by his receipt and the writing above;" and thereby refers to the preceding certificates for the facts; and by such certificates it does not appear, that all acted. But the officer does state in his return other material facts not noticed in such certificates. Such as the facts by whom the appraisers were selected, that they were freeholders, and that they were "indifferent discreet persons," as it is expressed.

It does not appear, from an examination of the whole return, that the officer intended to state facts not appearing, except by his own return; and the particular statement therein made of material facts, cannot be impaired by the general language used at the close of it.

There being evidence that all the appraisers acted and viewed; the levy cannot be regarded as void because one omitted or refused to sign. *Barrett* v. *Porter*, 14 *Mass. R.* 143; *Moffitt* v. *Jaquins*, 2 *Pick.* 331.

It is objected, that the levy is defective, because the appraisers were not sworn to satisfy the execution and "*all fees and charges.*" But it has been decided, that the levy is not for that cause void. *Sturdivant* v. *Sweetser & al.* 3 *Fairf.* 520. The officer's return and the proceedings being sufficient to convey the title by statute, there must be judgment on the verdict.

Inhabitants of EASTPORT *vs.* MICAJAH HAWKES.

An action cannot be maintained against any person, under the provisions of the *stat.* of 1821, *c.* 125, for the penalty for neglecting to perform the duty of keeping watch, unless the Justices and Selectmen establishing the watch, "shall appoint the number of persons whereof the same shall consist."

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

Debt, originally commenced before a magistrate, to recover a penalty of one dollar of the defendant, an inhabitant of *Eastport*, for not having done, or procured another to have done, the duty of watch in that town, *Dec.* 28, 1835, as provided by *stat.* of 1821, *c.* 125. One of a large number of objections made at the trial in the Court of Common Pleas, was to the admission and sufficiency of the warrant from the justices and selectmen, because it was wholly defective in many particulars, and especially because it did not provide or appoint the number of persons of which the watch should consist. The Judge overruled the objection, and held the warrant to be sufficient without such appointment. As this was the only objection considered by the Court, the facts and arguments pertinent to the others are omitted. The verdict was for the plaintiffs, and the defendant filed exceptions.

Chase & S. S. Rawson, for the defendant, insisted that the warrant for the watch was fatally defective. It should show the number of which the watch should consist, and who should be sum-

moned by the constable. He is here at perfect liberty to summon the whole town, or but a single individual, at his pleasure.

Hobbs & D. T. Granger argued, that the statute was merely directory, as to the mode of action in setting the watch. It was wholly impracticable, when the warrant issued, to settle and determine the number necessary and proper to compose the watch. No oppressive use is pretended to have been made of the warrant by the constable, and the defendant cannot object to this informality, if it be one. The warrant may be good in part, if not for the whole. 10 *Johns. R.* 293. The justices and selectmen are constituted a tribunal to determine this question, and their decision is final — certainly until reversed.

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

WESTON C. J. — A number of objections are taken to the course of proceeding in this case. We are constrained to regard one of them as fatal. The statute for the keeping of watch and ward, *stat.* of 1821, *c.* 125, provides, that the justices and selectmen, to whom the power of establishing a watch is confided, should "appoint the number of persons, whereof the same shall consist." This is an authority, to be exercised by them; and which they cannot depute to the constable. He is upon this point to take their commands; and has no discretion of his own. It is essential to the legal appointment of a watch, that the number should be prescribed. This was not done in the case before us; and in our judgment therefore, the forfeiture, sought to be recovered in this action, has not been incurred. The exceptions are accordingly sustained, and the verdict set aside. As the objection is not of a nature to be removed upon another trial, the plaintiffs are to become nonsuit.

Robert Aiken *& al. vs.* Matthew J. Medex.

An attachment of the interest of a debtor, by virtue of a bond for the conveyance of real estate, is dissolved by a failure *to sell the right* in the mode and within the time prescribed by the *stat.* of 1829, *c.* 431.

Where the debtor, after the attachment and before judgment, pays the money due on the bond, takes a conveyance to himself, and instantly conveys to a third person, the remedy of the creditor, if any, is by making sale of the right of the debtor, in the manner prescribed by the statute, and not by an extent of his execution upon the land.

This was a process of forcible entry and detainer under the statute, and the defendant pleaded title to the premises in *B. B. Leavitt,* under whom he claimed the right to be in possession. On the twenty-third of *April,* 1833, one *Patch,* being then the owner of the premises, gave a bond for a deed of the same, on the payment of certain sums in one, two, and three years, to one *Florence Sullivan.* The plaintiff attached all the right and interest of *Sullivan* in the land by reason of the bond, *January* 1, 1835, as provided by the *stat.* of 1829, *c.* 431. On the 17th of *March,* 1835, *Leavitt,* without any knowledge of the attachment, and for the purpose of securing a debt due from *Sullivan* to him, paid the balance then due from *Sullivan* to *Patch* on the bond, and *Patch* executed a deed of the land to *Sullivan,* and received back his bond. At the same time, *Sullivan* executed and delivered a deed of the premises to *Leavitt,* and both deeds were immediately recorded. The plaintiff entered his action at the *March* term of the Court of Common Pleas, 1835, and at the *September* term recovered judgment against *Sullivan,* and within thirty days duly levied his execution on the land in controversy, being a part of the premises described in the bond, but did not sell *Sullivan's* right by virtue of the bond, in the manner required by law for the sale of an equity of redemption, the mode pointed out by the statute. The parties made a statement of all the facts, and submitted to the determination of the Court the question, whether the complainant was entitled to the possession of the premises against one claiming under *Leavitt.*

D. T. Granger, for the plaintiffs, contended, that this was the right and only mode in which the plaintiffs, under the circumstances, could avail themselves of the interest of *Sullivan,* by the bond, to

pay their debt. When judgment was obtained, *Sullivan's* equitable right under the bond had been changed to a legal title from *Patch.* The lien continued on the fee acquired by him, and the plaintiff's remedy was by levying his execution, and not by selling an equity of redemption which did not exist. *Sullivan* could and did pay the amount due on the bond, which we could not prevent, but this did not dissolve the attachment. No act of his could do this, but he could and did acquire a title, and we were bound to levy, and not sell the equity. Where a right in equity is attached, and pending the suit the mortgage is redeemed, the lien attaches to the fee. *Forster* v. *Mellen,* 10 *Mass. R.* 421. Unless this be the remedy, the debtor may at any time defeat an attachment by procuring some one to redeem for him.

Mellen and *S. S. Rawson,* for the defendant, contended, that the plaintiffs, by neglecting to pursue the mode pointed out by the statute, had lost all benefit by their attachment; that the lien created by it was dissolved; and that the lessor of the respondent had acquired a perfect title. *Chickering* v. *Lovejoy,* 13 *Mass. R.* 51; *Stat.* of 1829, *c.* 431; *Shaw* v. *Wise,* 1 *Fairf.* 113.

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

Weston C. J. — The *statute* of 1829, *c.* 431, being an additional act respecting the attachment of property, first gave to a creditor the right to attach such an interest, as *Sullivan* had in relation to the estate in controversy, when the plaintiffs caused their writ to be served, in the action against him. The statute has pointed out a special mode, to render the attachment effectual, by directing a sale of the interest attached, on the execution, in the same manner required by law for the sale of an equity of redemption on execution; and by providing a remedy for the purchaser, by a bill in equity.

The statute mode was not pursued, upon the ground, that if it had been, it would have been defeated, by the course of proceedings, subsequent to the attachment. That is assuming more, than has yet been decided. If the course required by the statute, had been pursued, the right thus acquired would have been entitled to legal protection, and would have been held available, unless the law should be found to be so radically defective, that it could not

be carried into effect in such a case. Justice might be done, by making the purchaser under the debtor, or under the obligor in the bond, a party to the bill in equity, and by decreeing, that he should convey the title to the purchaser under the execution, upon receiving, if he had paid it, the sum due on the bond, at the time of the attachment. But upon this point, we reserve ourselves, until such a case shall be legally presented to our consideration.

It is however our opinion, that the plaintiffs, not having pursued the requirements of the statute, have lost the lien, created by their attachment. If the debtor ever had such a fee in the land, as could have been attached, or taken on execution, by a creditor, he had parted with it long prior to their levy. According to the case of *Chickering* v. *Lovejoy & al.*, 13 *Mass. R.* 51, he never had such a seizin, as could have been subject to attachment. But however that may be, there was no attachment upon the land, or at least none which was legally continued, at the time of the transit of the fee, through him to the defendant. The attachment of the interest of the debtor, under the bond, was dissolved, by a failure on the part of the plaintiffs, to make it effectual, in the mode prescribed by the statute, by which it was authorized.

Upon the facts agreed, we are of opinion, that the respondent is entitled to judgment.

JOSEPH CUTLER *vs.* EBENEZER GROVER.

If a Judge of the Court of Common Pleas reject a report of referees, appointed under a rule of that Court, because of improper management with them by a party, and discharge the rule; these are discretionary acts, and furnish no cause for exceptions.

EXCEPTIONS from the Court of Common Pleas, SMITH J. presiding.

The parties referred their demands by rule of Court, and when the report came in, which was in favor of the defendant, its acceptance was opposed by the plaintiff on the ground of improper management with the referees by the defendant. Several witnesses were examined, whose testimony was given at length in the excep-

tions; and thereupon the Judge refused to accept the report, and discharged the rule. To this the defendant excepted.

Hobbs, for the defendant, cited *Graves* v. *Fisher*, 5 *Greenl.* 69.

R. K. Porter, for the plaintiff, contended, that this was not matter for exceptions, and that if it was, that the Judge decided rightly; and cited *Knight* v. *Freeport*, 13 *Mass. R.* 218.

The opinion of the Court was drawn up by

WESTON C. J.—Whether the report should be accepted or rejected, upon the evidence adduced in the Court below, depended upon the discretion of the Judge. There is no proper ground, upon which we can set aside his judgment, and substitute our own. *Walker* v. *Sanborn*, 8 *Greenl.* 288.

Exceptions overruled.

MARY ELLIOT *vs.* JOHN STUART.

If the demandant in a writ of dower do not directly allege in her declaration that her late husband was seized of the premises during the coverture, but does aver, that she was by law dowable of the endowment of her late husband; the defect is cured by a verdict in her favor.

Where a material fact is omitted in a declaration, the defect is cured, if the pleadings directly put in issue the fact omitted.

THIS case will be sufficiently understood from the opinion of the Court. The argument was in writing.

Mellen & R. K. Porter, for the defendant, argued, that on a motion in arrest of judgment, the declaration was fatally defective, inasmuch as there was no allegation that the deceased husband was ever seized of the lands during the marriage. It may be laid down as an axiom, that all independent facts which the plaintiff is bound to prove, must be averred in the declaration; and that the omission of such averments is as fatal in arrest of judgment as on demurrer. *Little* v. *Thompson*, 2 *Greenl.* 231; 1 *T. R.* 141; *Williams* v. *Hing. & Q. T. Cor.* 4 *Pick.* 341; *Smith* v. *Moore*, 6 *Greenl.* 274; 1 *Chit. Pl.* 216; *Potter* v. *Titcomb*, 7 *Greenl.* 303; *Holden* v. *Eaton*, 7 *Pick.* 15; *Harrington* v. *Brown*, *ib.* 232;

Gould's Pl. 497, 503; *Dudley* v. *Sumner*, 5 *Mass. R.* 438; *Oystead* v. *Shed*, 12 *ib.* 506; *Kingsley* v. *Bill*, 9 *ib.* 108; *Oliver's Prec.* 554, 555, 556; *Jackson on Real Actions*, 310.

Lowell, for the plaintiff, commented on the cases cited, and denied their application to the present case; remarking that most of them were actions to recover a sum given by statute, wherein the rules are different, and where greater strictness is required than in actions at common law. He contended, that the declaration did substantially allege the marriage, seizin during the coverture, and death of the husband. The declaration is an exact transcript of the form in *Oliver's Precedents*, 555, with the mere substitution of the word *freehold* for *inheritance*. 3 *Chitty on Pl.* 5*th Amer.* from 4*th Lond. Ed.* 1312. But if the declaration be defective, it is cured by the verdict. *Ward* v. *Bartholomew*, 6 *Pick.* 409; 1 *Chitty's Pl.* 360. The seizin of the husband during the coverture is directly put in issue by the brief statement, and must have been proved, or the verdict could not have been obtained. The declaration at the worst shows a good title defectively set out; and all the authorities agree, that in such case a verdict will cure the defect. 2 *Mass. R.* 521; 3 *ib.* 160; 4 *ib.* 67; *ib.* 498; 5 *ib.* 306; 10 *ib.* 316; 12 *ib.* 505, 4 *Pick.* 444; 1 *Greenl.* 202; 2 *ib.* 228.

The opinion of the Court was drawn up by

Weston C. J. — The counsel for the tenant move the Court to arrest judgment in this case, because it is not alleged in the declaration, that the late husband of the demandant was, during her coverture by him, or at any time, seized of the premises, whereof she demands dower. In her declaration, she demands her dower in a certain messuage described, whereof, as she avers, "the demandant is by law dowable, according to the true intendment of the law, as of the endowment of the said *Elliot*, her late husband." It is no doubt a rule of pleading, that facts, essential to sustain a prosecution or defence, should be stated directly, and not by way of argument or inference; and if this rule is not observed, it is good cause of special demurrer. But after verdict, all defects of mere form, and many which would be fatal upon general demurrer, are cured.

The principles, by which Courts are governed in determining motions in arrest of judgment, have been so often the subject of

discussion, that there can be no occasion to examine them at length, or the authorities from which they are deduced. For their general illustration, we refer to *Little* v. *Thompson*, 2 *Greenl.* 228, and to *Farrington* v. *Blish & als.* 14 *Maine R.* 423, decided recently by this Court. After verdict, that is presumed to have been proved, which is expressly stated in the declaration, or which is necessarily implied from the facts which are stated.

The demandant could not be dowable, as of the endowment of her late husband, unless he had been seized during the coverture. This averment in the declaration, could not otherwise have been proved. And this we hold to be decisive against the motion, upon the authorities, which will be found stated or referred to, in the cases before cited. It further appears, from the record, that the seizin of the husband was directly in issue before the jury, that being a point taken, under the brief statement, which is a substitute for special pleading. In *Slack* v. *Lyon & al.* 9 *Pick*, 62, it was held, upon a motion in arrest, that the entire want of the averment of material facts in the declaration, is cured by the plea, in which the facts omitted are set forth. Here the seizin of the husband was denied in the brief statement; but that denial was traversed by joining the general issue, to which the brief statement was appended. The seizin of the husband during the coverture, was affirmed by necessary implication in the declaration; and it was expressly put in issue by the pleadings. The jury could not have returned a verdict for the demandant, without finding that fact.

Motion in arrest overruled.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF HANCOCK, JUNE TERM, 1838.

Mem. — SHEPLEY J. was employed in holding the term for jury trials in the county of *Washington*, and did not hear the arguments or assist at the determination of this and the four following cases.

CHARLES FRENCH *& al. vs.* WILLIAM GRINDLE.

The sale of a negotiable note, free from usury when made, and available as a good note before the sale, at a greater discount than legal interest, is not usurious, although indorsed by the party making the sale; and on non-payment by the maker, the *indorsee* may maintain an action against the *indorser*.

The sum which the indorsee is entitled to recover from the *indorser* is the amount of the money paid for the note with interest.

ASSUMPSIT against the defendant as indorser of a promissory note, made to him by one *Henry C. Sullivan*, dated *September* 30, 1833, for $431, in four months with interest. With the plea of the general issue, there was a brief statement, that the note, indorsed by the defendant to the plaintiff, was void for usury in the transfer. The note was given by *Sullivan* to the defendant for the balance due him on the sale of a cargo of lumber. After receiving the note, and on the same day, at *Newburyport* in *Massachusetts*, the defendant "procured the plaintiffs to cash the note, who thereupon gave him therefor the sum of four hundred and fifteen dollars, the plaintiffs requiring that the defendant should indorse the note, which he did." WESTON C. J., at the trial, was requested by the counsel for the defendant to instruct the jury, that upon

these facts the plaintiffs could not recover, on the ground, that in its negotiation it was tainted with usury. The Court declined to give this instruction. The verdict for the plaintiffs, for the full amount of the note, was to be set aside, if the instruction requested ought to have been given.

Hathaway and *H. Williams*, for the defendant, contended: —

1. That the note was void on account of usury. *Stat.* of 1821, *c.* 19; *Churchill* v. *Suter*, 4 *Mass. R.* 156; *Chandler* v. *Morton*, 5 *Greenl.* 374; *Manning* v. *Wheatland*, 10 *Mass. R.* 502; *Knights* v. *Putnam*, 3 *Pick.* 184; 1 *East*, 92; 5 *Dane*, 337; *Cowper*, 115; *ib.* 796; *Doug.* 712; *ib.* 470; *Strange*, 1243; 4 *Petersd. Ab.* 339; *Bayley on Bills*, 575; *Van Shaick* v. *Stafford*, 12 *Pick.* 565; *Warren* v. *Crabtree*, 1 *Greenl.* 167; 2 *T. R.* 52; *Doug.* 235; *Thompson* v. *Thompson*, 8 *Mass. R.* 135; *Wilkie* v. *Roosevelt*, 3 *Johns. Cas.* 66.

2. That a new trial should be granted, because it should have been submitted to the jury to say, whether the transaction was a loan, a sale, or a device to avoid the statute against usury. *Truesdale* v. *Wallis*, 4 *Pick.* 63.

3. A new trial should be granted, because the verdict was for the whole amount of the note. In any view of the case, the plaintiffs can recover only the money paid and interest, and not the usury, against the indorser. *Cram* v. *Hendricks*, 7 *Wend.* 569; *Munn* v. *Commission Co.* 15 *Johns. R.* 44.

W. Abbott, for the plaintiffs, argued, that as this was a note taken in the ordinary course of business, and sold in the market before due, for what it would bring, and not a contrivance to evade the statute, the transaction was not usurious. *Powell* v. *Waters*, 8 *Cowen*, 669; *Braman* v. *Hess*, 13 *Johns. R.* 52; *Munn* v. *Commission Co.* 15 *Johns. R.* 44; *Cram* v. *Hendricks*, 7 *Wend.* 569; *Brown* v. *Mott*, 7 *Johns. R.* 361; *Nichols* v. *Fearson*, 7 *Peters*, 103.

The plaintiffs claim only to recover the money actually paid and interest, and are ready and willing to release the balance.

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

WESTON C. J. — In *Churchill* v. *Suter*, 4 *Mass. R.* 156, the sale of a negotiable note, at a greater discount than legal interest, if indorsed by the party making the sale, was held by *Parsons C. J.* to be usurious. It was not however the point, upon which the cause turned. And in *Manning* v. *Wheatland*, 10 *Mass. R.* 502, and in *Knights* v. *Putnam*, 3 *Pick.* 184, the court assume or admit, that there may be usury between the indorser and the indorsee, in a transfer like the one under consideration; but in neither case was that point directly decided. In the first, it was held, that usury in the transfer could not be proved by the indorser; and in the second, that if there was usury in the transfer, it afforded no ground of defence in behalf of the maker. In *Parr* v. *Eliason & als.*, 1 *East*, 92, it was decided, that if a bill of exchange was free from usury when drawn, it could not be avoided on that ground in the hands of a *bona fide* holder, notwithstanding there may have been usury in some intermediate transfer.

In the state of *New-York*, the settled doctrine is, that the sale of a negotiable note, free from usury when made, and available as a good note before the sale, at a greater discount than legal interest, is not usurious; although indorsed by the party making the sale. *Braman* v. *Hess*, 13 *Johns. R.* 52, was an action upon a negotiable note, by an indorsee against the indorser, which had been discounted at a greater rate than legal interest; and the consideration actually paid with interest was recovered. In *Munn* v. *The Commission Company*, 15 *Johns. R.* 44, *Spencer J.*, held, that such a transfer was not usurious, but that it would be, if it was not available in the hands of the holder, until discounted. The same opinion was given by *Chancellor Jones*, in *Powell* v. *Waters*, 8 *Cowen*, 669. And in *Cram* v. *Hendricks*, 7 *Wendell*, 569, it was decided, upon great consideration, both in the Supreme Court, and in the Court of Errors, that the transfer by the payee of a valid available note, upon which when due, he might have maintained an action against the maker, and which he parts with at a discount beyond the legal rate of interest, is not an usurious transaction, although the payee on such transfer indorses the note; and

that on non-payment by the maker, the indorsee may maintain an action against the indorser.

The case before us, is precisely of that character. The plaintiff purchased of the defendant a note, which was good and available in the hands of the latter, at a greater discount than legal interest. The defendant having indorsed it, and having thus given his own security upon the sale of the note, the intimations are very strong in the cases cited from *Massachusetts*, that the transfer was usurious; although there have not been there any direct decisions to that point. As it has been otherwise directly and repeatedly adjudged, in the great commercial state of *New-York*, the weight of authority is on that side. The policy of avoiding contracts altogether, upon the ground of usury, no longer prevails in this State. The claim of the creditor can now only be defeated, to the amount of the excess, beyond the legal interest.

The defendant by his indorsement, upon due demand and notice promised to pay, in default of the maker. He did not obtain a loan of money of the plaintiff, but sold him a note, for the payment of which he was willing to assume a conditional liability. It was not a device got up to avoid the statute of usury, but the sale of a note free from that objection, made in the due course of business; and we are not satisfied, that the defendant can avail himself of the defence of usury, upon which he relies. We are of opinion however, that the plaintiff has no just claim to recover, beyond the sum by him paid to the defendant for the note, with interest. The plaintiff has offered to release the excess; and this being done, judgment is to be rendered upon the verdict.

BENJAMIN JORDAN *vs.* JONATHAN ROBINSON.

A foreign judgment is *prima facie* evidence of the debt sought to be recovered.

The *statute* of 1821 *c.* 62, § 7, limiting "all actions of debt, grounded upon any lending or contract, without specialty," does not extend to actions of debt on contracts raised by implication of law.

That statute is no bar to an action of debt, on a foreign judgment, founded upon a promissory note for the payment of money, attested by a witness.

THE nature of the action, and the facts in the case, appear in the opinion of the Court. At the trial before WESTON C. J. the defendant was defaulted, and it was agreed, that if the action could not, in the opinion of the Court, be maintained, the default was to be taken off, and the plaintiff become nonsuit.

J. Godfrey for the plaintiff, contended, that the foreign judgment was not conclusive evidence of indebtedness, but merely *prima facie* evidence of a promise. *Buttrick* v. *Allen*, 8 *Mass. R.* 273; 14 *Johns. R.* 479; *Douglas*, 1. This promise is barred by the statute of limitations. *Blanchard* v. *Russell*, 13 *Mass. R.* 1; *Byrne* v. *Crowninshield*, 17 *Mass. R.* 55; *Pearsall* v. *Dwight*, 2 *Mass. R.* 84; *Le Roy* v. *Crowninshield*, 2 *Mason*, 151.

Hathaway for the plaintiff. The judgment ought to be held conclusive evidence, as consonant to the comity which one nation owes to another. *Story's Conflict of Laws*, 506, 507, 508, 515. But if this judgment is but *prima facie* evidence, and subject to be impeached, the burthen of proof is on the defendant. 2 *Kent's Com.* 120; 2 *Stark. Ev.* 214, *note* 1. Wherever the statute of limitations would be a bad plea in the original suit, it would also be bad in a suit on the judgment. 5 *Johns. R.* 122; 11 *Johns. R.* 168; 2 *Stark. Ev.* 264, *note;* 13 *Sergt. & Rawle*, 395; 2 *Saund. Plead. & Ev.* 526.

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

WESTON C. J. — This is an action of debt on a judgment of the Supreme Court of Judicature of the *British* Province of *New-Brunswick*, rendered in 1818; with a profert of an exemplification of the judgment, which forms the basis of the action. The

defendant has pleaded the general issue, and filed a brief statement, relying upon the statute of limitations.

Whatever objection may be made to the conclusive character of the judgment, by the practice and course of decisions in this country, there can be no question, but the judgment is *prima facie* evidence of the debt, sought to be recovered. No evidence or suggestion, impeaching the original validity of the judgment, has been offered by the defendant. Whether barred or not, therefore, must depend upon the statute of limitations. If it is an action of debt, grounded upon any lending or contract, without specialty, it is within the statute, unless excluded from its operation, by an exception, which will be noticed hereafter. The statute does not apply to all actions of debt, without specialty, but to such as are grounded upon any lending or contract. Our statute does in this respect conform to the *English* statute of the twentieth of *Charles the second.* And the *English* statute has been construed to apply to a lending or contract, actually and expressly made, and not to contracts, raised by implication of law. *Hodsden* v. *Harridge*, 2 *Saunders*, 64. The generality of the limitation was there held to be qualified by the words, "grounded upon any lending or contract," to the exclusion of such, as the law might raise or imply.

The obligation of a debt on judgment, does not arise from any express contract, made by the party, charged by it. *Judicium redditur in invitum.* Upon a refined and artificial view of the obligations, imposed by law upon every individual, they may be resolved into a contract, which he makes with society to obey the laws, by which he is protected. And the force of legal obligation, has, by some elementary writers, been attempted to be strengthened upon this principle. 3 *Bl. Com.* 160. But contracts of this description are not barred by this part of the statute; otherwise the qualifying words would be without effect or operation; for all actions of debt are founded upon contracts, expressed or implied, in this broad sense of the term. Upon this view of the statute, which in *Pennsylvania* corresponds with our own, the Supreme Court of that State, in *Richards* v. *Bickley*, 13 *Serg. & Rawle*, 395, were of opinion, that debt on a foreign judgment was not barred by the statute, at least unless it appeared to be based upon a lending or contract, without specialty. And as the foreign judg-

ment was there rendered upon a specialty, it was held not to be a case within the statute.

It was understood for some time, that debt could not be brought upon a foreign judgment; and that assumpsit alone was the proper remedy. Thus *Buller J.*, in *Walker* v. *Witter*, *Douglas* 1, says, "that we meet with no instance in the books of an action of debt, brought on a foreign judgment." That was the first instance in which the action had been sustained. And the bar may attach, when that form of action is resorted to, when it would not attach upon an action of debt. Some of the cases may be reconciled with each other, upon this distinction.

We are satisfied, that if we look to the judgment alone, as the basis of the action, without regard to the consideration, upon which it is founded, the obligation thence arising is not a debt, grounded upon any lending or contract, within the meaning of the statute. And if we look to the consideration of the judgment, we find it founded upon an express contract, but upon one excepted from the operation of the statute, being rendered upon a note in writing, for the payment of money, attested by a witness. The default is accordingly to stand; and judgment is to be rendered thereon.

The inhabitants of DOVER, *in review, vs. Inhabitants of* DEER ISLE.

A notice under the *stat.* 1821, *c.* 122, § 11, is sufficient, if it be signed by one overseer of the poor, in behalf of all.

Testimony that a messenger, sent by one town to another to deliver a notice, was upon inquiry, within the latter town, referred to certain individuals by name as overseers of the poor, and that those individuals assumed to be and acted as overseers, is competent evidence to be submitted to the jury to prove them to be overseers of the poor of that town.

THIS was a review of an action brought by *Deer Isle* against *Dover*, for the support and funeral expenses of one *Mary French*. The settlement of the pauper in *Dover* was not contested at the trial. In *July*, 1832, the year when the supplies were furnished, two of the three selectmen and overseers of the poor of *Deer Isle* conferred together, and one of them wrote a notice to *Dover*, signed

by him in behalf of the whole, and sent it. It was proved by parol, that on the 24th of *September*, the same two overseers were again together, and fearing that they had no proof, that the first notice had reached *Dover*, they agreed, that one of them should prepare a notice, and carry it himself, or send a special messenger with it, to *Dover*, and on that day, one of them authorized and requested the other to prepare and sign for the whole, a new notice. The notice, a copy of which was produced, was signed thus.

"*Robert Campbell,* } *Overseers of the poor of Deer Isle.*"

The counsel for *Dover*, objected to the admission of the parol evidence of authority given by one overseer to the other to sign, and also that the notice thus signed was not sufficient. WESTON C. J. presiding at the trial, admitted the evidence, and ruled, that the notice was sufficient. The special messenger sent with the notice, testified, that on the 24th of *September*, 1832, he carried the notice to *Dover*, and there inquired for the selectmen and overseers of the poor of that town, and was referred to Messrs. *Moore* and *Patten*; that he went to the store of the latter, who had a sign over his door, and there found a man who answered to that name, and claimed to be a selectman and overseer of the poor of that town; that he found a man, who called himself *Moore*, and who claimed to hold the same office in *Dover*; that he gave the notice to these men and requested payment of the bill, sent also by him; and that they made no objection to the form of the notice, but complained that the bill was too high, and offered to pay a part, which he declined to receive. It was objected by the counsel for *Dover*, that there was no competent proof, that the persons to whom the notice was delivered, were overseers of *Dover*. The Chief Justice ruled, that it was competent evidence to go to the jury for that purpose. A default was entered by consent, it being agreed, that if in the opinion of the Court, it had not been made to appear by competent proof, that *Campbell* was authorized to make out and sign the notice, and if on that account, or from any defect in its terms, the notice should be held insufficient; or if the proof of its delivery to an overseer of *Dover* should be deemed incompetent or insufficient, the default was to be taken off.

Rogers, for the plaintiffs in review, contended, that the notice was insufficient, because signed by one overseer only. The notice should be in writing, and should show on its face, that it came from the overseers, or a majority of them. Here it is signed only by one, who does not profess to act for the others, nor to sign in an official character. *Stat.* of 1821, *c.* 122, § 17; *Dalton* v. *Hinsdale*, 6 *Mass. R.* 501. It has been decided, that a notice signed by one, acting in the name of the whole, is sufficient; but these very decisions imply, that one alone, is wholly insufficient. An answer may cure a defective notice, but here, there was no answer whatever, and of course no waiver. The parol evidence, that one overseer authorized the other to sign, cannot aid the defective notice, which must be in writing.

There is no legal or sufficient evidence, either that *Moore* or *Patten* were overseers, or that the individuals conversed with, were *Moore* and *Patten*. *Gorham* v. *Calais*, 4 *Greenl.* 475.

There is no distinction, as to the notice, whether the pauper be living or dead. *Stat. c.* 122, § 11; *Belmont* v. *Pittston*, 3 *Greenl.* 453; *Blakesburg* v. *Jefferson*, 7 *Greenl.* 125. If notice be not necessary, when may the town sue?

W. Abbott and *C. J. Abbott*, for *Deer Isle*, argued, that the notice being throughout in the plural number, and the plural placed against the name of the overseer signing the notice, that it must be considered as a signing for the whole; and that is sufficient. *Bridgewater* v. *Dartmouth*, 4 *Mass. R.* 273; *York* v. *Penobscot*, 2 *Greenl.* 1; *Westminster* v. *Bernardston*, 8 *Mass. R.* 104; *Garland* v. *Brewer*, 3 *Greenl.* 197. The parol evidence, in relation to the authority to sign, was properly introduced, not to add to the notice, but to show that the overseer was authorized to act, as he did, for the whole. The eleventh section, under which this notice was given, does not require that a majority should sign the notice.

If any objection had been intended to have been raised, whether the persons with whom the notice was left were overseers of *Dover*, it should have been left to the jury. The proceedings at *Dover*, when the notice was carried there, were a waiver of any irregularity in the notice. The only objection made was to the amount of the

charges. *Embden* v. *Augusta*, 12 *Mass. R.* 307; *Paris* v. *Hiram*, *ib.* 262; *Shutesbury* v. *Oxford*, 16 *Mass. R.* 102; *York* v. *Penobscot*, 2 *Greenl.* 1. But no notice was necessary, as the pauper had deceased, and the reason for giving it no longer existed. *Dalton* v. *Hinsdale*, 6 *Mass. R.* 501; *Bath* v. *Freeport*, 5 *Mass. R.* 325.

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

WESTON C. J. — It has been decided in several cases, cited in the argument, that a notice signed by one overseer, in behalf or by order of the board, is sufficient. In *Garland* v. *Brewer*, 3 *Greenl.* 197, a notice signed by the chairman of the selectmen was held good, it being presumed that they acted as overseers of the poor. In the case before us, we think that it is to be understood, that the overseer, who signed the notice, acted in behalf of the board. The plural number is used; and against his name are the words, "overseers of the poor of *Deer Isle*." *Bridgewater* v. *Dartmouth*, 4 *Mass. R.* 273, was a case exactly like this, except that the answer, and not the notice, was under consideration; and the court there held, that the plural being used, and "selectmen of *Dartmouth*" being written against the name of the one who signed, his subscription should be considered, as having been made in behalf of the selectmen. There is precisely the same reason for considering the subscription here made in behalf of the overseers.

The special messenger, sent by *Deer Isle*, was upon inquiry, referred to two persons by name, as overseers of the poor of *Dover*. He was sent to find them. His inquiry, and the answer he received, was certainly a part of the *res gesta*. So were the admissions of those upon whom he called, upon his inquiry, that they were the persons, to whom he was referred. They assumed to act as the overseers of *Dover*, and negotiated with him in behalf of their town, in relation to the business, confided to his care. This was, in our opinion, evidence proper to be left to the jury, that the notice sent by *Deer Isle* was delivered to the overseers of *Dover*. If the persons claiming that character, were not entitled to it, it was very easy for the plaintiffs in review to prove the fact. Upon the case,

as reported, judgment is to be rendered for the defendants in review for their costs.

Andrew Blake *vs.* Moses Patten *& al.*

In an action by one of the crew of a vessel, against the owner, for his share of the salvage money, paid by the owner of goods saved from a wreck, without any deduction for embezzlement, the owner of the vessel cannot set up in defence, that the plaintiff had embezzled a portion of the goods.

Exceptions from the Court of Common Pleas, Perham J. presiding.

The action was for money had and received. The schooner *Warwick*, of which the defendants were owners, and the plaintiff one of the crew, fell in with the wreck of a vessel, having no person on board but the mate, and took from it and put on board the *Warwick* a quantity of goods, and landed them in safety. The defendants received of the owners of the cargo taken from the wreck, as salvage, by compromise, seven hundred and fifty dollars. At the trial of this action, the defendants offered evidence tending to prove, that the plaintiff had embezzled part of the goods taken from the wreck; and the counsel for the defendants requested the Judge to instruct the jury, that if they should find, that the plaintiff had embezzled any part of the goods taken from the wreck and put on board the *Warwick*, they ought to find their verdict for the defendants. The Judge declined to give this instruction, but did instruct them, that if they found the plaintiff had embezzled any part of the goods, to inquire also if the defendants had been injured by it, in having the salvage money thereby diminished, and if so to deduct the amount from any share of the salvage they might find due to the plaintiff, in the hands of the defendants. The defendants' counsel requested the Judge to direct the jury to inquire "if it had been proved, that the plaintiff had embezzled any part of the cargo taken from the wreck and put on board the *Warwick*; and he so directed them." The jury returned their verdict for the plaintiff; and being asked by the Judge, if they found that the plaintiff had embezzled any part of the cargo or fare, the foreman

answered that they did not — that there was no evidence of it. At a subsequent day of the term, at the request of the defendants' counsel, the foreman was again inquired of, " and he is believed to have stated, that the jury did not consider, that they were directed to inquire about any part of the cargo except what was taken as such and put on board the *Warwick* by her crew, and not whether the plaintiff might not have taken or concealed any other part of it." The defendants filed exceptions.

W. Abbott, for the defendants, contended, that the instruction requested, ought to have been given, because that the embezzlement of any part of the goods destroys all claim to salvage. *Schooner Boston*, 1 *Sumner*, 328; 6 *Wheat.* 152; 2 *Cranch*, 240. The reason is the same, as if the question was between those claiming salvage, and the owners of the goods.

C. J. Abbott, for the plaintiff, contended, that the question whether the plaintiff had, or had not, embezzled the goods was wholly irrelevant. The owners of the goods voluntarily paid this money for salvage, and the plaintiff is entitled to his share, and these defendants cannot set up any such defence. But the jury, at the request of the defendants, have settled the question, and found, that there was no embezzlement by the plaintiff. What was said afterwards by the foreman showed, that the answer to the inquiry covered the whole request made by the defendants. But the inquiry was illegal, and had the answer been otherwise, it would not affect the case. When the jury have once separated, no further inquiry can be made. *Little* v. *Larrabee*, 2 *Greenl.* 37.

Pond, on the same side, cited *Freeman* v. *Walker*, 6 *Greenl.* 68.

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

WESTON C. J. — The party injured by the alleged embezzlement, has started no objection to the right of salvage, but has actually paid the sum, which the parties in interest agreed to accept; and as the jury have found, without any diminution, on account of any supposed misconduct in the plaintiff. We think then, that the defendants must be held to have received his portion of the salvage in trust for him, and for his use. Upon these facts, we cannot dis-

cern the equity of the defence now set up. The question of salvage has been settled and liquidated, without deduction. It does not appear to us, that the defendants have any just right to open it, in order to secure to themselves a greater interest in the proceeds, at the plaintiff's expense.

We have besides great doubts, whether the facts, upon which the defence is placed, have not been negatived by the jury. The instructions of the Judge, and the answer of the jury, when their verdict was returned, are stated in very intelligible language; and it would be of dangerous tendency, to suffer the facts to be disturbed, by the avowed misapprehension of a juror, some days after the verdict was affirmed.

Exceptions overruled.

GEORGE W. DARLING *& al. vs.* JABEZ SIMPSON *& als.*

Where expense has been incurred by the joint order of the fish committee, in pursuance of the provisions of the statute of *Feb.* 28, 1833, entitled, "An act to prevent the destruction of fish in the town of *Sullivan*," the action to recover it of those made liable by the statute must be brought in the name of the whole committee; and one of the number cannot defeat the action, if payment be made to him of his share.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

The action was assumpsit, brought in the name of *George W. Darling*, and *Joshua Wilkinson*, as surviving members of a fish committee, consisting of three, chosen by the town of *Sullivan* in pursuance of the statute of *February* 28, 1833, entitled, "An act to prevent the destruction of fish in the town of *Sullivan*," for money jointly expended, against the defendants as owners of the mill referred to in the statute. *Wilkinson* appeared by his counsel, and filed a motion, in which he set forth that he had no claim against the defendants, having been employed and paid by the town of *Sullivan*, that the suit was commenced without his knowledge, and moved that the action be discontinued. The counsel for the defendants insisted that the action for that cause ought not to be suffered to proceed further, and that the Court ought to order a

nonsuit. The counsel for the plaintiff offered to indemnify *Wilkinson* against any costs in consequence of that action, and opposed the motion to dismiss the action. The Court overruled the motion, and permitted the action to stand for trial. The jury found for the plaintiffs, and the defendants filed exceptions.

T. Robinson, for the defendants. The powers given by statute to a fish committee, like this, can be exercised only by a majority. *Stephenson* v. *Gooch*, 7 *Greenl.* 152. If a majority acted in incurring the expenses, they did not in commencing the action. One of the two disclaims the suit, and it ought to have been dismissed.

The action should have been brought by *Darling* alone. The payment to *Wilkinson* operated as a severance of the cause of action, as did also the death of the other member of the committee.

J. A. Wood, for the plaintiffs. The fifth section of the act, referred to in the report, authorizes the committee, as such, to recover the money expended, in an action of assumpsit. The action must be brought, by the terms of the act, by the committee in their official character. All acted in incurring the expenses, and in performing the services, and all must join in bringing the suit. It is a joint, and not a several right, and is a mode beneficial to the defendants, as they are entitled to have all they have paid to either, deducted. If this view be correct, it furnishes an answer to the whole argument.

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

WESTON C. J. — From the case as presented, we are to understand, that the fish committee, for the town of *Sullivan*, incurred expense, in causing to be kept open a sufficient sluice way for the passage of fish, with which the defendants were liable to be charged, in an action of assumpsit, to be brought by the committee. After money had been expended by their joint order and procurement, it would be inequitable to permit one of them, by a separate adjustment, to deprive his colleague of all remedy, for what he has a right to claim. Uniting in the authority to perform the duty, and make the expenditure, that authority may be taken to be a continuing one, until the business is consummated. The statute gives the action to the committee, so that there can be no such severance of the claim, as will sustain the action of one alone, or of

less than a majority. No injustice is done to the defendants, who were allowed what they have already paid. And the member of the committee, who attempts to defeat the action, is fully indemnified from all liability, arising from the use of his name. On the other hand, to sustain his motion for a nonsuit, would occasion a failure of justice, to the prejudice of his colleague, without any benefit to himself.

It having been made to appear, that the committee were sworn, that ground of exception, according to the agreement of the parties, has been removed.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF WALDO, JULY TERM, 1838.

HOLLIS MONROE *vs.* JAMES CONNER *& al.*

If one partner give actual notice, that he will not be holden as partner, he is not bound for debts contracted by another partner, after such notice, without his consent.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

Assumpsit against *James Conner* and *William Coleman*. *Conner* lived at *Gardiner*, and owned a carding and fulling mill at *Unity*. The business of carding wool and dressing cloth, was carried on at that mill by *Coleman*, and the articles charged were furnished by the plaintiff, and delivered at the mill. The plaintiff claimed to recover against both, on the ground, that *Conner* and *Coleman* were partners in the business carried on at that mill. No articles of copartnership were produced, or proved to have been made, and the plaintiff relied on other evidence tending to prove the partnership. *Conner* denied the partnership, and offered evidence tending to prove, that he had given notice to the plaintiff, that he would not be holden on any contracts made by *Coleman*. The counsel for *Conner*, requested the Judge to instruct the jury, that if *Conner* notified the plaintiff's agent, who delivered all the articles, before the delivery, that he, *Conner*, would not be holden for any thing, unless delivered by his order, then *Conner* is not holden for any thing delivered to *Coleman* after such notice. The Judge

did not give this instruction, but did instruct them, that if from the evidence in the case, they were satisfied, that the defendants were copartners, such notice would not discharge *Conner* from further liabilities, unless he should show them that by the conditions of the copartnership, such power was reserved to *Conner*. At the request of *Conner's* counsel, the jury were directed to find, whether such notice was or was not given. The jury found a verdict for the plaintiff, and also found, that such notice had been given. *Conner* filed exceptions.

Evans argued for *Conner*, that where there is no express promise, as in this case, none can be implied against the express declarations of the party attempted to be charged. *Whiting* v. *Sullivan*, 7 *Mass. R.* 107. One partner may contract alone, and be alone responsible for articles used in the partnership business. *Sylvester* v. *Smith*, 9 *Mass. R.* 119. And on the same principle may refuse to be bound without his consent. If one partner expressly forbids the delivery of articles on joint account, he is not bound after such notice, even where the partnership is not dissolved. 3 *Kent's Com.* 45; *Collyer on Part.* 213, 214; 3 *Conn. R.* 124; 11 *East*, 264; 12 *Johns. R.* 409.

W. G. Crosby, for the plaintiff. One partner has the right to bind the firm to any extent, in contracts for the use of the partnership. *Man. & Mech. Bank* v. *Gore*, 15 *Mass. R.* 75; *Boardman* v. *Gore*, *ib.* 331. The better opinion is, that a notice like this does not exempt the party giving it from liability as a partner. The question is discussed, and the cases reviewed in *Gow on Part.* 75, *note* 3; 3 *Johns. Ch. R.* 400. But to avail himself of the defence, *Conner* should have gone further, and have shown, that the articles went to *Coleman's* private use. Being delivered at the mill, the presumption is, that the goods went to the use of the partners. *Etheridge* v. *Binney*, 9 *Pick.* 272; *Walden* v. *Sherburne*, 15 *Johns. R.* 422.

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

SHEPLEY J. — The question presented in this bill of exceptions is one of no inconsiderable importance in a mercantile community, and there is found to be some difference of opinion respecting it.

The general rule is, that the contract of one partner binds all, in transactions relating to the partnership; and this rule prevails, when the partner making the contract applies the fruits of it to his own private use, if the contract is made in the usual course of business, and the appropriation be unknown to the other party to the contract. So one partner can make purchases; and can sell, pledge, and assign the partnership goods; and in these acts bind all the partners.

When a partnership becomes known and its course of dealing has been established, all are at liberty to regard one as acting for the benefit of all the partners in this accustomed course of dealing. If it were not so, there could be no safety in commercial contracts of this character. But the right of one partner to bind all rests upon the principle, that all have agreed, that he should do so.

This agreement is either expressed, or implied by law from the nature of the association, or from the customary course of dealing. There is nothing inconsistent with this rule in allowing one of the partners to dissolve the contract of partnership, giving due notice, that such power to bind him has ceased to exist. This he may, without doubt, do, where there is no special agreement, that the partnership shall continue for a definite period, which is yet unexpired. Whether one partner may dissolve the partnership before the agreed time expires, may admit of doubt. Upon principle however, it would seem, that it was only for the other party to that contract to complain, it being of no importance to others, whether they violate contracts between themselves, if full notice is given, so that others may understand to whom they are to give credit. *Kent* evidently inclines to the opinion, that the dissolution may take place. 3 *Com.* 54. And such is the law in *New-York.* 17 *Johns. R.* 525; 19 *Johns. R.* 538; while the law would appear to be different in *England.* 16 *Vesey,* 56; 1 *Swanst.* 495. It does not, however, become necessary to express any opinion upon this point, as there is no proof in the present case, that the partnership was formed for any definite period. In such cases it is admitted, that one partner may by notice dissolve; and thus prevent those having such notice from making further contracts to bind the partnership. If such a power exist, as to all persons, it would be difficult to deny, that one partner could protect himself against a

particular contract by actual notice, that he dissented from it, before it was concluded. Such a notice removes the foundation upon which the right rests, to charge all the partners upon the contract of one. It leaves no longer the presumption, that one acts for all, by the consent of all. And if, after such actual notice, a person will give credit, he cannot reasonably complain, that he cannot obtain payment from him, who has notified him not to give the credit. The only difficulty arises in relieving the partner giving such notice from the payment, when the fruits of the contract have been enjoyed by the partnership of which he still continues to be a member. In *Willis* v. *Dyson*, 1 *Stark. R.* 164, *Ld. Ellenborough* held, that "it would be necessary for the party sending goods after such notice, to prove some act of adoption by the partner who gave the notice, *or that he had derived some benefit from the goods.*" *Gow* states, 69, that "to recover in an action for goods sold after such countermand, he must show, that the sale was adopted by the dissentient partner, *or that he derived a benefit from the delivery.*" *Kent, vol.* 3, 45, remarks, "that the seller must show a subsequent assent of the other partners, or that the *goods came to the use of the firm.*" Both these jurists refer to the case of *Willis* v. *Dyson* as authority. It is quite obvious, that there may be a difference between the goods coming to the use of the firm, and a benefit derived to the dissenting partner from their delivery to the firm. The bargain may have proved to be a very losing one, and this may have been foreseen by the dissenting partner, and have been the very cause of the notice; and why should he be held to pay, perhaps from his private property, for goods the purchase and sale of which may have absorbed the whole partnership stock, when he had provided against such a calamity by expressing his dissent from the contract before it was consummated?

In the case of *Galway* v. *Matthew & al.* 10 *East*, 264, one partner, after the other partner had given notice of his dissent, signed a note with the name of the partnership, and received the money and applied most of it to the payment of the partnership debts; and the decision was against the right to charge the dissenting partner.

In the case of *Leavett* v. *Peck*, 3 *Conn. R.* 124, the fruits of the contract went to the partnership, and yet the dissenting partner was held not to be liable.

Gow states, that in negotiable instruments, one partner cannot bind another, who dissents, and gives notice of it; and alludes to no qualification, where the fruits of the contract are applied to the use of the partnership. *Gow*, 65. *Collyer*, 214, says, "it seems also, that the mere disclaimer by one partner of the future contracts of his copartner will be binding on third persons, whatever be the effect of such an act between themselves, or whether it be, or be not in conformity to the partnership agreement." He afterwards also states the case of *Willis* v. *Dyson*, in the language of the Court. *Kent*, after making the remark before stated, examines the cases, and as the result of it says, "it seems also to be the better opinion, that it is in the power of any one partner to interfere and arrest the firm from the obligation of an inchoate purchase, which is deemed injurious." This he could not do if he were bound by the goods coming to the use of the firm. It appears to be more in accordance with the general principles of law, and with good faith and fair dealing to hold, that a partner is not bound by a contract after he has given notice to the party proposing to make it, that he would not be bound by it.

Exceptions sustained and new trial granted.

Inhabitants of UNITY *vs. Inhabitants of* THORNDIKE.

With regard to the poor, the overseers are the authorized agents of their town, and may waive any objection arising from informality in a notice or answer; and may receive as legal, a verbal, instead of a written answer to a notice.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

In assumpsit to recover supplies furnished to one *Sally Severance*, alleged to have a settlement in *Thorndike*, it was proved by the plaintiffs, that a written notice, as required by law, was seasonably given by them to the defendants; that the supplies were furnished as charged; and that when furnished to her, *Sally Sever-*

ance had fallen into distress in *Unity*, and stood in need of immediate relief. The defendants then proved, that within two months from the receipt of the notice from the plaintiffs, two of the overseers of the poor of *Thorndike* verbally notified two of the overseers of the poor of *Unity*, that *Sally Severance* had not her residence in their town, and that they should do nothing about it, and asked the overseers of *Unity*, if they would receive a verbal answer as a legal one, and the reply was, that they would. The overseers of *Thorndike* further stated to the overseers of *Unity*, that they would give the answer in writing if required, the reply to which was, that they would not require a written answer, and that it was not best to be difficult about such matters. The Judge instructed the jury, that the overseers of the poor of *Unity* had authority to waive any objection to the answer not being in writing, required by the language of the statute, and to accept a verbal answer, as a legal one. On the return of the verdict for the defendants on the whole case, the plaintiffs filed exceptions to this ruling of the Judge.

Farley and *Lowney*, for the plaintiffs. The *stat. c.* 122, positively requires the answer of the town to be given in writing, and the overseers of the poor have no power to give up or waive the rights of the town. The overseers have no power but such as is given by statute, and that does not extend to bringing actions or settling suits. *Peru* v. *Brunswick*, 5 *Greenl.* 31; *Furbish* v. *Hall*, 8 *Greenl.* 315. It has been decided, that the overseers have no right to make bargains to change the settlement of paupers. This is doing it, indirectly if not directly. *Peru* v. *Turner*, 1 *Fairf.* 185.

W. G. Crosby, for the defendants. Had the answer been in writing it would have been sufficient. Notice that a pauper has not a *residence* is equivalent to notice that he had not a *settlement*. *Westminster* v. *Bernardston*, 8 *Mass. R.* 104. The language made use of shows fully the intention to waive all objection to the notice not being in writing; and to suppose otherwise, would be to charge the overseers of *Unity* with intentional fraud. The overseers of the poor of a town have authority to waive any objection to the notice given, or to the answer to the notice. *Embden* v. *Augusta*, 12 *Mass. R.* 307; *Shutesbury* v. *Oxford*, 16 *ib.* 102;

York v. *Penobscot*, 2 *Greenl.* 1; *Page* v. *Plummer*, 1 *Fairf.* 334. Overseers of the poor of a town, have authority to bind such town in any matter relating to the support of paupers. *Belfast* v. *Leominster*, 1 *Pick.* 123. And they may bind the town by a contract not to take advantage of any defects in a notice. *Hanover* v. *Eaton*, 3 *N. H. Rep.* 38.

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

WESTON C. J. — The statute requires, that the answer from the overseers of the poor of a town, to whom notice has been given, that relief has been afforded to a pauper, whose settlement is alleged to be in their town, should be in writing. But an answer defective in form or substance, may be accepted, and the objections which might otherwise be raised against it, waived. This has been held in *Embden* v. *Augusta*, 12 *Mass. R.* 307; *Shutesbury* v. *Oxford*, 16 *ib.* 102; and in *York* v. *Penobscot*, 2 *Greenl.* 1. In all these cases, the waiver of objections, deduced by fair implication, to defective notices, was made by the overseers of the poor of the towns notified.

They are in regard to the poor, the authorized agents of their respective towns. And as such, they direct suits to be brought or defended, and negotiate with other towns, in reference to claims of this description. Not indeed with unlimited powers; for they cannot by their acts or admissions, change the settlement of a pauper. *Peru* v. *Turner*, 1 *Fairf.* 185; but their authority extends to the adjustment of all claims of this sort, and to all preliminary proceedings. And in the discharge of these duties, a promise made by them, in behalf of their towns, is binding. *Belfast* v. *Leominster*, 1 *Pick.* 123.

In the case of the town of *Hanover* v. *Eaton & al.* 3 *N. H. Rep.* 38, it was held that the selectmen of a town, being *ex officio* overseers of the poor, may bind the town, by a contract, not to take advantage of any defects in a notice, given by another town, that a pauper has been relieved.

In this case, the overseers of the poor of the towns, now litigating, communicated officially, in regard to the support of the pauper in controversy. The notice and answer were preliminary to the

suit, prosecuted under the direction of the overseers of *Unity*. They were advised by the answer, that the overseers of *Thorndike* stood upon their rights, and denied the settlement of the pauper to be in their town. The overseers of *Unity* could have derived no benefit from a written answer; and they expressly and directly waived it. They may indeed be said to have prevented one from being written. And upon the facts, we are of opinion, that the plaintiffs ought not to be permitted, to take advantage of an objection, waived by their authorized agents.

Exceptions overruled.

Reuben Sibley *& al. vs.* James P. Brown.

If one man let to another personal chattels for an indefinite time, and the latter, for the purpose of using them to greater advantage, put with them chattels of his own, and while thus in his possession, the whole are attached, taken away and sold as his property by an officer; the owner of the chattels thus let, may maintain trespass for them against the officer.

Exceptions from the Court of Common Pleas, Perham J. presiding.

The facts in this case, the questions raised at the Court of Common Pleas, and the instructions and rulings of the Judge, may be found in the opinion of the Court. The verdict was for the defendant, and the plaintiffs filed exceptions.

Heath argued for the plaintiffs, and cited 1 *Gall.* 419; 2 *Black. Com.* 405; 2 *Camp.* 575; *Walcot* v. *Pomeroy*, 2 *Pick.* 121.

Thayer, for the defendant, supported the ruling of the Judge, and cited *Bond* v. *Ward*, 7 *Mass. R.* 123.

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

Emery J. — In this case exceptions were taken in the Court of Common Pleas. The action is trespass against a constable for taking and converting the plaintiff's ox wagon wheels, four in number, on a writ against one *Bennet*, to whom they were let on hire without any time being agreed upon. On the execution, *Bennet's* right was sold, the purchaser receiving the wheels from

the officer. We must review the actual instruction of the Judge to the jury, and the requested instructions which he did not give.

He did instruct the jury, that if the defendants sold only the right of said *Bennet*, and the plaintiffs' had neglected to give notice of their property in the wheels, the defendant was not guilty. He also stated to the jury, that if the defendant had wrongfully intermeddled with the plaintiff's property, the action was maintainable. If these instructions were such as fairly and fully to meet the exigence of the case, the exceptions ought to be overruled. *Bennet* added to the wheels, the necessary apparatus for a wagon, and while in *Bennet's* possession, the defendant took the wagon upon a writ against *Bennet*, and disposed of it, withdrawing it from the possession of *Bennet*. And it was in evidence from the defendant, that when he advertised the wagon on the execution issuing on the judgment recovered against *Bennet* on the original writ, on which the wagon was attached, he advertised only the right of *Bennet*, and at the sale of it, sold *Bennet's* right upon the execution, but without specifying what that right was; the purchaser receiving from said officer the wheels aforesaid, as well as the rest of said ox wagon, and has ever since held the same.

We apprehend, that the first instruction did not sufficiently place before the jury the full merits of the case. The property is shown most decisively to be the plaintiffs'. Whenever an officer invades the property of another by attaching or seizing it for the debt of a third person, he does it at his peril. He may insist on the creditor's shewing the goods of the debtor, and require indemnity for the violation of any one's right, which he may commit by conforming to the creditor's directions. If an officer has reasonable ground to induce a belief that in making an attachment or seizure on execution, he may mistake and expose himself to an action for damages by attaching or seizing goods not the property of the debtor, he acts without due caution, if he omits to secure himself. When things are so mixed that on due inquiry he cannot distinguish them, the owner can maintain no action against the officer, until notice and a demand of his goods and a refusal or delay of the officer to deliver them. *Bond* v. *Ward*, 7 *Mass. R.* 123.

The inquiry ought always to be made by the officer, as to the

ownership of the property which he attaches. *Shumway & al.* v. *Rutter*, 8 *Pick.* 443.

In this case it does not appear, that he made any, nor that the plaintiffs were apprised of the seizure and sale, so that they could give notice to the officer of their claim. But there is in the evidence introduced by the defendant, that he advertised only *Bennet's* right for sale, strong internal evidence from that fact, that he must have been apprized of the defect of *Bennet's* title in the wheels.

The instruction then was incorrect, because the mode of advertising followed by his delivering over the wheels to the purchaser would not prove that he was not guilty. Nor is the general statement, "that if the defendant had wrongfully intermeddled with the plaintiffs' property, the action was maintainable," enough, to dispense with the requested instructions, that, "if the jury were satisfied from the evidence, that the defendant took the wheels aforesaid upon the original writ aforesaid, and by his act deprived the plaintiffs of the possession of these wheels, he was liable in this action."

That instruction was fairly required, because there was no lease of the property proved for any distinct time. And no action could have been maintained by *Bennet* against the plaintiffs for retaking their wheels at any time. *Walcot* v. *Pomeroy & al.* 2 *Pick.* 121.

They are proved to have been withdrawn by the officer from *Bennet's* possession by the attachment on the original writ. In that instant the letting was determined, and by the defendant's act the plaintiffs were deprived of the possession. The sale of *Bennet's* right, without any specification of what it was, and the purchasers receiving the wheels from the officer, shews of itself a wrongful intermeddling with the plaintiffs' property. *Stevens* v. *Briggs*, 5 *Pick.* 177.

When property is intermixed with that of another without his approbation or knowledge, the law to guard against fraud, gives the entire property without any account to him whose original dominion is invaded and endeavored to be rendered uncertain, without his own consent. 2 *Black. Com.* 405. If the intermixture be by consent, the proprietors have an interest in common in proportion to their respective interests.

But these wheels were easily to be severed from the axles at any moment.

The property of the plaintiffs in the wheels draws with it the constructive possession. For *Bennet* could not resist it, and even if a factor have a lien on goods left for sale, if they be forcibly taken from him, the principal may maintain trespass. His constructive possession remains notwithstanding the lien. *Holly* v. *Huggerford*, 8 *Pick.* 73.

Exceptions sustained, verdict set aside, and a new trial granted.

Bryant Morton *vs.* Stephen T. Chase.

Local actions may be brought before a justice of the peace in the county where the defendant lives, although the cause of action accrued from an injury done to real estate within a different county.

Exceptions from the Court of Common Pleas, Perham J. presiding.

The action was case, for diverting the water from the plaintiff's mill, situated within the county of *Penobscot*, and was originally brought before a justice of the peace, in the county of *Waldo*, in which county the defendant resided. The damages demanded were twenty dollars. When the action was opened for trial in the Court of Common Pleas, the counsel for the defendant moved in writing, that the Court should order a nonsuit, because it appeared by the plaintiff's declaration, that his cause of action, if any, accrued to him within the county of *Penobscot*, and that the action should have been brought there. The Judge ruled, that inasmuch as it appeared by the declaration, that the plaintiff's mill was situated in the county of *Penobscot*, that the action could not be maintained in the county of *Waldo*, and directed a nonsuit. The plaintiff's counsel filed exceptions.

A. Johnson, for the plaintiff, contended, that the action was clearly brought in the right county, and cited *stat.* of 1821, *c.* 76, § 8; *Sumner* v. *Finnegan*, 15 *Mass. R.* 280; and *Pitman* v *Flint*, 10 *Pick.* 504.

W. G. Crosby, for the defendant, contended, that the nonsuit was properly ordered, because the cause of action was local, and accrued within the county of *Waldo*. Where it appears by the

plaintiff's own showing, that the action cannot be supported, it is proper to order a nonsuit. 1 *Cowper*, 409; 7 *Mass. R.* 461; 10 *Mass. R.* 176.

The opinion of the Court was drawn up by

SHEPLEY J. — It is provided by statute, that all civil actions wherein the debt or damage does not exceed twenty dollars, and the title of real estate is not in question, shall be heard and tried by any justice of the peace within his county. *c.* 76, § 8. And in the act regulating judicial process and proceedings, *c.* 59, § 9, it is declared, that all personal and transitory actions shall be brought in the county where one of the parties lives. Enactments very similar had existed in *Massachusetts*, while her laws were in force here, and it had been decided there, in the case of *Sumner* v. *Finnegan*, 15 *Mass. R.* 280, that an action in its nature local might be brought before a justice, if no more than twenty dollars were claimed, in any county where the defendant resided.

In the case of *Pitman* v. *Flint*, 10 *Pick.* 504, it was decided, that the Court of Common Pleas had jurisdiction of an action thus commenced and carried into that Court by appeal. In both of those cases the defendant pleaded to the jurisdiction. No such plea appears in this case to have been put in, or any objection to have been made to the jurisdiction until the cause was on trial in the Common Pleas, when a written motion was made for a nonsuit on the ground, that the cause of action appeared by the writ to be local. *Chitty* states, that in local actions, if the venue be laid in the wrong county and the objection appear upon the record, the defendant may *demur*; and if it do not appear on record, may, under the general issue, avail himself of it as the ground of nonsuit. 1 *Chitty Pl.* 284. It appearing upon the record, and not being demurred to, the case is not within the rule as stated by *Chitty*; and in such case it is cured by statute after verdict. 16 & 17 *Car.* 2, *c.* 8. But it is not necessary to inquire whether the objection was properly taken, because local actions may be brought before a justice of the peace in the county where the defendant resides.

Exceptions sustained, and new trial granted.

Asa Bean *vs.* Silas Lane, 2*d.*

By the militia acts, *stat.* of 1834, *c.* 121, and *stat.* of 1837, *c.* 276, the captain of a company is *not* made a competent witness, if he acquire or assume any interest not imposed upon him by his official situation.

Where an action to recover a fine is prosecuted by the clerk of a company of militia, the captain is not a competent witness, if he have made himself personally liable for the costs of the suit.

This was a writ of error, to reverse a judgment rendered by a justice of the peace in an action of debt, brought by *Lane* as clerk of a company of militia, against *Bean* to recover a fine for non-appearance at the annual inspection.

The third of seven errors assigned, was, that the Justice admitted as a witness for the clerk, *H. S. Black*, the captain of said company, he having declared on oath that he had a direct personal pecuniary interest in the result of the suit, the defendant objecting. The record stated, that *Black*, the captain of the company, was introduced as a witness for the clerk; that the defendant objected to his being sworn; that being sworn, he testified that he and the other two officers were personally liable for the costs of the action, if it failed; that the defendant renewed his objection; and that the captain was admitted to testify generally in the case. As the opinion of the Court has relation to this error alone, the facts and arguments bearing on the others are immaterial.

W. Kelley, for the original defendant, argued, that the statute made the officers competent witnesses only when they had no other interest than what necessarily resulted from their official character, but did not extend to cases, where the officer made himself interested by his own acts. His liability for costs did not arise from his office, but was voluntarily assumed.

Burrill, for the original plaintiff, submitted the case without argument.

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

Weston C. J. — By the *stat.* of 1834, *c.* 121, to organize, govern and discipline the militia of this State, section forty-five, it is made the duty of clerks of companies respectively, to prosecute

for all fines and forfeitures, incurred by non-commissioned officers and privates. And if there be no clerk to prosecute, it is to be done by the captain or commanding officer of the company. By the forty-sixth section, the clerk is to retain one fourth part of what may be thus recovered to his own use. The residue is to be paid to the commanding officer, and such part of it appropriated to defray company expenses, as a majority of the commissioned officers may judge to be necessary. By the additional act of 1837, *c.* 276, the captain is directed to assume and prosecute any action commenced by the clerk for such fine or forfeiture, where the clerk may die, resign or refuse further to prosecute, pending the action. And the act last cited, makes the commanding officers, subaltern officers, and all clerks of companies competent witnesses, in such prosecutions, to all or any facts, within their knowledge. The clerk is interested directly in a part of the forfeitures, and the officers indirectly, in the appropriation of a part to company expenses, notwithstanding which, they were to be received as competent witnesses. But if they, or either of them, acquire or assume any other interest, not imposed by their official situation, it constitutes an objection, which the statute does not remove. The captain and the other two officers had become responsible for the costs, which they would not have been officially. This in our opinion rendered the captain an incompetent witness; and the third error is therefore well assigned.

Judgment reversed.

Manley Ellis *vs.* Herbert R. Grant.

A notice to appear and perform militia duty, given by one non-commissioned officer or private to another, is not legal, under the militia acts of 1834, and 1837, unless the person giving the notice has written or printed orders therefor from the commanding officer of the company.

Error to reverse a judgment of a justice of the peace in an action of debt, brought by *Grant* as clerk of a company of militia, against *Ellis*, to recover a fine for neglecting to appear at a company training at the annual inspection. The fifth error assigned was this. That no proof was offered, that said *Ellis* was legally warn-

ed to attend the inspection. The facts in relation to this error were as follows. To prove the warning, the plaintiff offered one *Daniel French*, by whom it was proved, that the defendant was notified by a printed notice delivered to him by *French*, in obedience to a verbal order from the captain. This was received as sufficient evidence, that the defendant was legally warned, although the defendant objected thereto.

W. Kelley, for the original defendant. The *stat.* of 1834, *c.* 121, § 21, makes it the duty of the commanding officer *to issue his orders* for a company training, and the non-commissioned officer or private *so ordered as aforesaid*, is to warn the members of the company. The same statute, § 12, requires that the clerk shall record all such orders in the orderly book. The only case in which the company can be warned by the captain, by verbal orders, is when the company is paraded and under his command. This then was a mere warning by an individual without authority, which the private is not bound to notice.

Pond, for the original plaintiff, contended, that a verbal order was sufficient, so far as it respected the privates warned. He has no means of telling what order the person warning him has. It is enough that the captain directed the warning, and recognizes it. If this had been a suit against a private for refusing to warn under a verbal order, there might have been more force in the objection. The clerk is to record all orders which are in writing, and there are clearly some which are not in writing.

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

Weston C. J. — The militia law requires, that every commanding officer shall parade his company, on the first *Tuesday* of *May* annually. And to this end, he is to issue his orders to some one or more of the non-commissioned officers or privates of his company, requiring him or them to notify the men belonging to his company, to appear at the time and place appointed. And the service of such notice may be proved by the non-commissioned officer or private "who shall have received orders to notify." *Stat.* of 1834, *c.* 121, § 21. We are of opinion, that these orders, which are to be thus "issued" and "received," should be in writing; and that such is the military usage. That such orders should

be written or printed, is apparent from the 32d section of the same act, where it is provided, that the Adjutant General shall furnish blank orders, for the commanding officers of companies to order their non-commissioned officers and privates to notify their men to attend all the inspections, trainings and reviews, and meetings for the choice of officers, which shall be ordered.

In the section first referred to, it is provided, that those whose duty it is to notify, may give notice verbally, but there is no such provision in regard to the orders. By the seventh section of the additional act of 1837, *c.* 276, it is provided, that whenever a company shall be paraded, the commanding officer may notify the men thus paraded verbally, to appear at some future time, within thirty days, for any military purpose, required by law. Company orders are to be registered by the clerk. If they are in writing, he is furnished with the means of performing this duty, with certainty and precision. In the instance before stated, where it is specially provided that they may be verbal, they are given in his hearing, and are a part of the proceedings, while the company is on duty.

There is then in the case before us, a failure of proof, that orders had issued in pursuance of law, that the company should assemble for inspection on the day, when the original defendant is charged with having been delinquent, from which it results, that he was not warned under competent authority. We are therefore of opinion, that the fifth error is well assigned.

Judgment reversed.

JOHN RUSSELL *vs.* NATHAN ELDEN *& al.*

A devise of uncultivated lands, without words of inheritance, carries a fee in them.

Where the testator *gave and bequeathed* to one grandson certain lands, and also a note of hand and different articles of personal property; and if that grandson should die under age and without issue, directed, "that the several *legacies therein bequeathed*" to that grandson "should be paid or given" to another grandson; *it was held*, that upon the death of the first grandson, under age and without issue, the second grandson should take the lands.

THIS was a writ of entry, and the case came before the Court on a statement made by the parties. On the second day of *June*,

1823, *Henry Fossett*, being then and until his death seized of the demanded premises and other valuable real and personal estate, made his last will and testament, and soon after died, and the will was duly proved. Among several devises and legacies was the following. "I give and bequeath unto my grandson, *Henry Fossett Russell*, son of *John Russell*, a certain lot of land in *Appleton* plantation which I purchased of *David Grafton;* also another lot which is situated in said *Appleton* plantation which I purchased of *Henry Fossett* of *Union.* I also give unto my said grandson, *Henry Fossett Russell*, a note of hand which I hold against *Henry Ewing*, for one hundred dollars. Also I give unto my said grandson, *Henry F. Russell*, half a dozen silver table spoons, one gun and one chest, and in case the aforesaid *Henry Fossett Russell* should not live to arrive to the age of twenty-one years, then the several legacies therein bequeathed to the said *Henry F. Russell*, I will and direct shall be paid or given to *Henry Fossett*, 2*d*, son of *Henry Fossett* of *Union.*" The provisions of the will in relation to others, sufficiently appear in the opinion of the Court. The tracts of land at the time the will was made were, and until the present time have been, in a state of nature, uncultivated, and covered with timber and wood. *Henry Fossett Russell*, after the death of the testator, died under the age of twenty-one years, intestate, and without issue. The demandant is the father of *Henry Fossett Russell. Henry Fossett*, 2*d*, is yet alive, and the tenants claim under him. A nonsuit or default was to be entered according to the rights of the parties.

The arguments were in writing.

Mellen and *Barnard*, for the demandant, argued: — 1. That *Henry Fossett Russell* took a fee simple estate in the *Appleton* lands devised to him from the terms used. It was the intention of the testator to distribute his estate among his descendants, and the fee was intended to be given in this case. But however this may be, as the lands were in a state of nature, wild and uncultivated, the fee passed by the devise. *Sargent* v. *Towne*, 10 *Mass. R.* 303, and *Ridgway* v. *Parker*, cited in a note to the same case.

2. In giving a construction to wills, the intention of the testator is to govern. *Com. Dig. Devise, N* 24; 4 *Kent's Com.* 534. The condition at the close of the devise to *Henry Fossett Russell*

has relation exclusively to the *personal property* given to him, and the real estate was devised to him without condition, and on his death came to the demandant as next of kin. The word *paid* applied to the note, and the word *given* to the articles of personal property, and they are insensible and absurd, if applied to real estate.

F. Allen and *I. G. Reed*, for the tenants, contended, that the grandson of the testator, *Henry Fossett Russell*, took but a qualified estate in the *Appleton* lands, during his own life. But if the words would have passed a fee, if there had been no devise over, still the intention of the testator clearly appears, that *Henry Fossett*, 2*d*, should take the same estate by way of executory devise, if *Henry Fossett Russell* should die under the age of twenty-one years without issue. The objection that a fee cannot be limited upon a fee has long since been done away as it regards wills. *Bac. Ab. Devise, I; Fearne on Con. Rem.* 355, 411, 418, 420; *Ide* v. *Ide*, 5 *Mass. R.* 500; *Ray* v. *Enslin*, 2 *ib.* 554. The devise over, being manifestly in the words of one unacquainted with technical terms and legal precision, extends to lands as well as personal estate. *Cook* v. *Holmes*, 11 *Mass. R.* 528.

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

Weston C. J. — We are satisfied, that *Henry Fossett Russell*, grandson of the testator, took a fee in the two lots of land, devised to him. Upon any other construction, it being wild and uncultivated, he could derive little or no benefit from the devise; and the beneficial interest would go to swell the estate of the residuary legatee, who had otherwise participated largely in the bounty of the testator. A devise of uncultivated land, without words of inheritance, was held to carry a fee in *Sargent & als.* v. *Towne*, 10 *Mass. R.* 303, and it is an authority exactly in point.

The decision of the cause will depend upon the question, whether this estate has been given over, by way of executory devise, upon a contingency, which has happened, the death of the first devisee, before he attained the age of twenty-one years. In addition to the two lots of land, there was given to him, in the same clause in the will, a note of one hundred dollars, and certain other specific

bequests of personal property, of no great value, to which is subjoined this provision; "and in case the aforesaid *Henry Fossett Russell* should not live to arrive to the age of twenty-one years, then the several legacies therein bequeathed to the said *Henry F. Russell,* I will and direct shall be paid or given to *Henry Fossett, 2d,* son of *Henry Fossett* of *Union.*" The former was the grandson, and the latter the son of the testator.

The leading rule of construction in regard to wills, is, that effect is to be given to the lawful intentions therein expressed. The several legacies are equivalent to all the legacies; and these were given over, upon the contingency limited. Without giving to the language used a technical construction, in which the testator was manifestly unskilful, the obvious meaning is, that the second grandson named was to succeed to all, which had been before given to the first. Strictly, a legacy refers to personal property; but it may be, and it is believed often is, used in a more extended sense, by persons unacquainted with the precise meaning of legal terms. And in the connection, in which it stands, it seems to us, that the word legacies, was intended to embrace the real, as well as the personal estate. The several legacies bequeathed, were given over. In that clause, the testator had used the term, bequeath, only in reference to the land.

The bounty of the testator was bestowed upon his own blood, his children and grandchildren. He took into consideration the contingency of the decease of his grandchild, *Russell,* before he attained to full age, in which case another grandchild is substituted. The construction contended for, by the counsel for the demandant, would leave the second grandchild the recipient of the personal bequests, comparatively of inconsiderable value, while the more important, the fee of the land, would go to an heir, not of the blood of the testator.

It is insisted, that it is apparent, from other parts of the will, that in the mind of the testator, the term, legacies, was understood to refer only to personal property. It occurs in the first clause in the will, and in that, which immediately precedes the residuary clause. In the first, he speaks of the payment of debts, and the discharge of legacies, as soon as circumstances will permit, in which he seems to have contemplated such as were pecuniary. And in the last, he

speaks specially of those, which were appointed to be paid by his son *Alexander*. The argument does not appear to us sufficiently strong to show, that the term, legacies, in the clause under consideration, was not used in a more extended sense.

The devise over was to be paid and given, upon the happening of the contingency. This, it is urged, indicates something to be done by the executor, to give it effect, which could not apply to real estate, passing by way of executory devise. The testator, having reference to a future contingent event, appoints in that case, that the estate "shall be paid or given" over. He might have said, upon that contingency, "I give," but although he uses the future tense, the force and effect of the devise depends upon the appointment, then made by the testator.

Upon the whole, we are of opinion, that upon a just construction of the will, *Henry F. Russell* took a fee, in the land in controversy, subject to the contingency of his dying, before he attained the age of twenty-one years, in which case, it was limited over to the other grandson, *Henry Fossett*, by an executory devise.

Demandant nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF YORK, APRIL TERM, 1839.

Mem. — SHEPLEY J. having been of Counsel during the pendency of this and the four following cases did not sit in the hearing, or determination thereof.

MOSES HUBBARD *vs.* JAMES HUBBARD.

On a recovery in an action for cutting wood and timber without notice, brought by one tenant in common against another, under statute of 1821, *c.* 35, to prevent tenants in common, &c. from committing waste, the plaintiff is entitled to treble the whole amount of the damage done to the land, inclusive of that done to the share therein owned by the defendant.

On the trial of such action, it is not necessary for the plaintiff to prove who the other co-tenants are.

TRESPASS by one tenant in common against another for strip and waste, under the *stat.* 1821, *c.* 35, § 2. On the trial before WESTON C. J., it appeared that the land had been divided into sixteen and an half shares. The plaintiff failed in showing title in himself to but four shares, and the defendant failed of proving title in himself to more than ten and an half shares. Each party claimed to be the owner of the other two shares, and it did not appear that any other person made any claim or had any title thereto. The defendant contended, that the plaintiff must show who were the owners of the other two shares, or they must be considered as the property of the defendant under this issue, and requested the Chief Justice so to charge the jury. The instruction was not given. The defendant also contended, that if the verdict should be for the plaintiff, that he was not entitled to recover any damages for an injury done

by the defendant to his own land, and that there should be a deduction from the amount of the damages to the whole land equal to the proportion of the premises owned by the defendant. The Chief Justice directed a verdict to be returned for single damages for all the injury to the whole land owned in common, including the shares owned by the defendant. The jury returned a verdict for the plaintiff assessing the damages at fifty dollars, which was to be amended by the Court by deducting ten and an half out of sixteen and an half parts, or the verdict set entirely aside, if the justice of the case required.

J. Shepley and *Burleigh*, for the defendant, argued:—

1. That although the statute provides, that the plaintiff need not name the other co-tenants in the writ, it does not dispense with the necessity of proving who they are, and how much they own on the trial. The construction contended for by the plaintiff in its practical operation would take the value of the land in the possession of the defendant, and transfer it to the plaintiff, who had never been in possession, and who owned but a small share. Shall the man who first sues, have this advantage? The general principles are against it, and the statute does not give it. The plaintiff should be holden to prove, that there are other co-tenants.

2. The very term *damages* in the statute implies, that the amount to be recovered, cannot include the defendant's own interest therein. The statute is a highly penal one even on our construction, and should be construed strictly. Neither the language, nor the spirit, of the statute justify the extremely iniquitous and absurd consequences which would follow from adopting the construction contended for against us. On their principle, where one party owns four hundred ninety-nine five hundredths, and the other one five hundredth, and the principal owner cuts timber without notice to the value of $500, which would *damage* the other owner to the amount of $1; if the action be brought by the latter he would recover and receive to his own use $1500, for an injury of one dollar. Reverse the parties, and let the action be brought by the principal proprietor, and he recovers no more.

Hayes & Cogswell, and *J. Hubbard*, for the plaintiff.

As to the first objection, the statute says expressly, that it shall not be necessary to name the other co-tenants in the writ. It fol-

lows from this, that they are not bound to prove who they are, for it is only necessary to prove the allegations in the writ to support the action.

As to the second, the words, "forfeit and pay treble damages," apply to the whole injury done to the land, and is intended as a punishment for cutting under such circumstances. The various colonial and *Massachusetts* statutes on this subject were cited and commented on, and from thence they drew the conclusion, that the tenant in common thus cutting was to be considered a trespasser throughout. *Reed* v. *Davis,* 8 *Pick.* 514; *Newcombe* v. *Butterfield,* 8 *Johns. R.* 342.

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

WESTON C. J. — The statute of 1821, *c.* 35, gives this action to any one of the tenants in common injured, in his own name; and relieves him from the necessity of stating in his declaration the co-tenants, other than the defendant. And we think, that as he need not aver who the other co-tenants are, he cannot be required to furnish proof upon this point. This provision of the statute must have been intended to obviate any difficulty, which he might have to encounter, in deducing and establishing the title of the other co-tenants.

The statute is penal, and therefore not to be extended by construction, but effect is to be given to it, according to the plain and obvious meaning of the language used, however severely it may operate upon the delinquent party. By the treble damages, we are of opinion, must be understood three times the injury, done to the common property by the strip and waste made by the defendant. He is expressly by statute, as the wrongdoer, excluded from receiving any part of these damages. One moiety is given to the tenant, who brings the action, and the residue to the co-tenants, other than the defendant, according to their respective proportions in the common property. A tenant may enter upon and use the common property, by giving due notice to his co-tenants, without incurring a penalty. If he presumes to strip the land, without giving such notice, he does it at the peril of being held to pay the penal damages, imposed by the statute.

The jury having settled the single damages, judgment is to be rendered for the plaintiff for three times that amount.

SAMUEL LINSCOTT *vs.* JEREMIAH McINTIRE.

Where a contract for the sale of land, which when made was within the statute of frauds and might have been avoided thereby, has been fully executed, and nothing remains but to pay over the money received, the statute furnishes no defence.

If the thing promised *may be performed* within the year, the contract is not within the provision of the statute in relation to time of performance.

Where one has an interest in land, and procures it to be conveyed to another on his parol promise to sell the land and pay over the proceeds of the sale; this constitutes a good consideration for the promise.

ASSUMPSIT for money had and received. On *October* 5, 1826, the plaintiff had conveyed to *E. Grover* a farm, receiving back from him an instrument of the same date, not under seal, whereby he promised to reconvey, at any time within three years, upon being paid five hundred dollars with interest. A few days before the expiration of the three years, the plaintiff applied to the defendant to pay the sum due to *Grover*, and take a deed to himself, to which the defendant assented, paid the money, and took an absolute deed from *Grover* to himself. The plaintiff proved, that it was verbally agreed, at the time, between the plaintiff and defendant, that the latter should sell the farm to the best advantage, and if any thing remained after refunding his advances, and paying him for his trouble, he would pay it over to the plaintiff. The defendant objected to the admission of this testimony, but the objection was overruled by WESTON C. J., before whom the trial was had. Before the commencement of the action, in *November*, 1830, the defendant sold the farm for $800. The verdict was for the plaintiff for the balance, deducting sufficient to indemnify him, and pay him for his trouble, and was to be set aside, if the testimony objected to was inadmissible.

D. Goodenow, for the defendant, argued, that the evidence objected to was rendered inadmissible by the statute of frauds.

1. There was no consideration for the promise, the defendant having received nothing from the plaintiff, unless the sale of an interest in land by parol.

2. Because the contract sought to be enforced by parol was one for the conveyance of real estate.

3. Because the contract was not to be performed within one year.

And besides, the evidence was inadmissible, because there was no mutuality in the contract. If the land had not sold for half the sum paid for it by the defendant, he had no remedy against the plaintiff for the balance. He cited *Boyd* v. *Stone*, 11 *Mass. R.* 342; *Sherburne* v. *Fuller*, 5 *Mass. R.* 133; *Freeport* v. *Bartol*, 3 *Greenl.* 340; *Bishop* v. *Little*, 5 *Greenl.* 362; *Patterson* v. *Cunningham*, 3 *Fairf.* 506.

Hayes & Cogswell, and *J. Shepley*, for the plaintiff.

If this had been an action on the original parol agreement, to recover damages for the non-performance of his contract, the statute of frauds might have protected the defendant in his fraud. But here the contract is not executory, but fully executed, and nothing remains but to pay over the money belonging to the plaintiff; and for that our action is brought.

Where a contract for the sale of lands, which might have been avoided by the reason of the statute of frauds, has been fully executed, and nothing remains but to pay over the consideration money, received therefor, the statute furnishes no defence. *Holbrook* v. *Armstrong*, 1 *Fairf.* 40; *Hess* v. *Fox*, 10 *Wend.* 436; *Brown* v. *Bellows*, 4 *Pick.* 179; *Richards* v. *Allen*, 8 *Pick.* 405; *Bunnell* v. *Taintor's Admr.*, 4 *Conn. R.* 568; *Boyd* v. *Graves*, 4 *Wheat.* 513. This well settled principle alone furnishes a complete answer to every objection raised in the argument for the defendant. Every case cited, applies to executory, and not to executed contracts. But the objection, that there was no consideration has been directly decided against the defendant in *Dillingham* v. *Runnels*, 4 *Mass. R.* 400. And the objection, that the contract was not to be performed within one year, could not avail him even in an executory contract. If the thing promised may be performed within the year, it is not within the statute. *Moore* v. *Fox*, 10 *Johns. R.* 244.

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

WESTON C. J. — The consideration for the promise, upon which the plaintiff relies, was the sale by him of a certain interest in real estate to the defendant. If this contract of sale had been an executory agreement, there being no note or memorandum in writing, signed by the party to be charged, it would have been void by the statute of frauds, and would therefore have constituted no legal consideration for the defendant's promise. But the consideration was executed. The plaintiff having a legal and effectual right to the reconveyance by his grantee of certain land, put the defendant by substitution in his place, and thereupon the grantee of the plaintiff, by his appointment, conveyed the land to the defendant, in pursuance of a written agreement between the plaintiff and his grantee. This was a valuable interest available to the plaintiff, which thus actually passed to the defendant, and constituted a legal consideration for his promise. If he had agreed to pay therefor a gross sum, there could be no doubt that such a promise could be enforced at law. And the promise might be contingent or qualified, at the pleasure of the parties. In this case what the defendant was to pay for the interest, which the plaintiff had caused to be conveyed to him, depended upon the amount, which the former might realize, upon a sale of the premises. That being done, the amount to be paid became a matter of calculation, which has been settled by the jury. The sale of land, if executed, is as valid a consideration for the promise, as the payment of money. *Dillingham* v. *Runnels*, 4 *Mass. R.* 400.

In the case of *Bunnel* v. *Taintor*, 4 *Conn. R.* 568, the parties had entered into a parol agreement, by virtue of which they were to be jointly interested in the purchase and sale of real estate, and the profits were to be equally divided between them, whereupon certain estates having been bought and sold at a profit, the plaintiff sustained an action for his moiety; and it was held not to be a case within the statute of frauds.

The case of *Hess* v. *Fox*, 10 *Wend.* 436, is not distinguishable in principle from the one before us. The defendant's testator was mortgagee of certain real estate, which had been conveyed to him by deed, conditioned to be void upon the payment of a certain

bond. The plaintiff subsequently executed an absolute deed, and surrendered the premises, upon a parol agreement by the defendant's testator, to pay to the plaintiff the excess, which he might realize upon a sale of the land, beyond the amount of his debt. Upon a sale by the defendant, his executor, under lawful authority, for a greater sum, the plaintiff sustained an action for the excess; and the Court held the statute of frauds no legal objection.

It is insisted, that the agreement was not to be performed within the space of one year, and not being in writing, was void under another clause of the same statute. The sale did not happen to be made until a year had expired; but it might have taken place at an earlier period, and there is nothing in the case from which it appears, that in the contemplation of the parties at the time, it was to be delayed beyond a year. This clause of the statute has been limited to cases, where by the express terms of the agreement, the contract was not to be performed within the space of a year. And it has been held to be no objection, that it depended on a contingency, which might not and did not happen, until after that time. *Fenton* v. *Emblers*, 3 *Burr.* 1278; *Anon.* 1 *Salk.* 280.

There was in the agreement all the mutuality, the defendant thought proper to require. He stipulated to pay for the land, which he purchased of the plaintiff, the amount due from him to *Grover*, his grantee, and such further sum as it might sell for, beyond what was necessary for his indemnity, assuming himself the hazard, if any there was, that it might not possibly sell for as much, as would be wanted for this purpose. But as it was known to be more valuable than the sum for which it was pledged, this was a contingency, hardly within the contemplation of the parties.

Judgment on the verdict.

MEHITABEL H. MOODY *vs.* EDMUND MOODY.

Prior to the *stat.* 1835, *c.* 191, when an intestate died insolvent, one tenant in common of land descending to the heirs of such intestate, might, under the *stat.* 1821, *c.* 35, recover of another treble damages for strip and waste committed thereon, after the decease of the intestate, and before the sale by the administrator for payment of debts.

TRESPASS by one tenant in common against another for strip and waste, under the statute. *Edmund Moody* the elder, died seized of the *locus in quo*, which descended to the plaintiff, defendant, and four other children. The estate was insolvent, and the assets finally paid only sixty-eight per cent. of the claims allowed. There had been a sale of the land for the payment of debts by the administrator, and distribution made among the creditors upon the basis of that sale. This sale was afterwards declared void, from a neglect to file a bond, as required by the then recent statute, and a new sale ordered, at which the land sold at about the same price as at the former sale. After the first sale and before the second, and prior to the year 1835, the defendant, who was not the administrator, cut the wood and timber as alleged in the declaration. It was thereupon insisted by the counsel for the defendant, that the trespass complained of was no injury to the plaintiff and the other cotenants, but only to the creditors of the estate of the elder *Moody*, and requested the Chief Justice, holding the Court, so to instruct the jury. The instruction was not given, and the verdict for the plaintiff was to be set aside, if it should have been.

D. Goodenow, for the defendant, argued, that the plaintiff had no interest in the land, as the estate was insolvent, and that the value of the wood and timber taken should go to the creditors. Besides, the defendant must be considered as a disseizor, claiming the whole, and not as tenant in common. Under these circumstances the plaintiff cannot maintain the action.

J. Shepley, for the defendant, remarked, that the law was well settled, that the administrator had only the mere naked right to sell, and that until the sale was made, the land as much belonged to the heirs, when the estate was insolvent, as when no debt against it existed. When this waste was committed the *statute* 1835, *c.*

191, on this subject had not passed, and was occasioned partly by this very case. There then existed no mode of obtaining from an heir at law, who stripped the land of its wood and timber, its value for the benefit of the estate. He cited *Fuller* v. *Young*, 1 *Fairf.* 373; *Moody* v. *Moody*, 2 *Fairf.* 251.

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

Weston C. J. — The first sale, made by the administrator, not being warranted by law, and having for that reason been declared void, cannot affect the rights of the parties. The real estate of an intestate descends to his heirs, subject to the contingency of being taken from them, if wanted to pay the debts of the deceased. Until thus taken, the heirs have a right to enjoy the inheritance and are entitled for its protection to all the remedies, which the law affords to a tenant. No trespasser, or other wrongdoer, can defend himself against their suit, or the suit of either of them, upon the ground that the land will probably, or even inevitably, be wanted to satisfy the just claims of creditors. The title of the heirs is good, until defeated by due operation of law; and we are therefore of opinion, that the point taken by the defendant cannot avail him.

Judgment on the verdict for treble damages.

OLIVER WALKER, *Appellant, vs.* CHARLES BRADBURY *& ux., & als.*

Where lands specifically devised have been sold on license, and the proceeds have been appropriated to the payment of debts, by law and by the will chargeable upon the personal estate, the devisees are entitled to be first paid the value of the land, thus taken from them, out of the personal estate subsequently received; and the balance only is subject to distribution as personal estate.

A petition in writing, is not essential to the validity of a decree of the Judge of Probate, distributing the balance found in the hands of an executor or administrator on settlement of his account.

If the deceased die testate, still the distribution of undevised personal estate is within the jurisdiction of the Probate Court.

And it is immaterial whether it is to be regarded as intestate estate, because the will never operated upon it, or because it was relinquished by the widow to whom it was bequeathed.

THIS was an appeal from a decree of the Judge of Probate directing the executor of the will of *Daniel Walker* deceased, to pay over a balance in his hands to the devisees in the will of certain real estate, to repay them, as far as the same would go, for real estate devised to them, and sold by the executor by license of Court to pay the debts of the testator. *Daniel Walker* by his last will, gave legacies to his five eldest children to be paid from the personal estate "in full of their respective shares in his estate;" he gave all the personal property to the widow, subject to the payment of the debts and legacies; and devised his real estate to his four youngest children, who are the now respondents. The widow relinquished the provision made for her in the will, and the Judge of Probate made an allowance to her out of the personal estate. The executor obtained license to sell real estate *for the payment of debts*, and sold all the real estate, and from it paid the debts, the allowance to the widow, *and the money legacies in full.* Recently the executor received a sum of money as a portion of the *French* indemnity, on a claim in favor of the estate for a vessel lost. The executor then renders his account, and claims to have the balance distributed among all the heirs, of whom his wife was one. The Judge of Probate refuses, and orders it to be paid over to the devisees of the real estate, from which an appeal is taken in behalf

of the other heirs at law. The will was approved *July* 12, 1819; the real estate was sold in 1820, and 1821; the third account was rendered in *October*, 1822; and the fourth and last account was rendered in *August*, 1836, and settled, and the decree made in 1837.

The argument was in writing, by *D. Goodenow*, for the appellants and heirs at law, and by *J. Shepley*, for the devisees and respondents.

For the appellants, it was argued, that the decree should be reversed: —

1. There is no petition or motion in writing, setting forth the facts upon which the decree is founded.

2. Because the Judge of Probate had no jurisdiction of the question; either at common law, or by the statutes of the State.

3. The will was never intended to operate on this *French* claim, and it is, and always was undevised property, and ought to be distributed among the heirs at law in the same manner as if *Daniel Walker* had died intestate.

4. If this claim was intended to pass by the will, it was the fund out of which the debts were to be first paid; and the debts having been long since all paid with the proceeds of property in his hands it cannot now be taken to pay these debts over again. We rely upon the statute of limitations. The land was rightly taken to pay the debts, and the devisees had not then, nor have they now any just cause of complaint against the executor, or against the other heirs, and cannot lawfully or equitably claim all this property. *Carter* v. *Thomas*, 4 *Greenl.* 344; *Small* v. *Small*, *ib.* 225; *Brigham* v. *Cheever*, 10 *Mass. R.* 453; *Houghton* v. *Hapgood*, 13 *Pick.* 154; 4 *Kent's Com.* 542; *Willes*, 293; 3 *M. & Selw.* 300; *Sargent* v. *Simpson*, 8 *Greenl.* 151; 1 *Story's Eq.* 539; 1 *Peters*, 217.

For the respondents, it was contended, that as the real estate of the devisees had been taken to pay the debts, when the personal estate was the fund specially designed for that purpose, the devisees were entitled to be substituted in the place of the creditors, and to receive this personal estate. It is wholly immaterial whether this claim was devised to the widow and by her relinquished, or whether

it was property undevised. In either case the result would be the same. This question is not a new one, but has been decided *in principle* in several cases. *Hancock* v. *Minot*, 8 *Pick.* 29; *Houghton* v. *Hapgood*, 13 *Pick.* 154; *Grant* v. *Hapgood*, *ib.* 159; *Silver Lake Bank* v. *North*, 4 *Johns. Ch. R.* 370; *Cheeseborough* v. *Millard*, 1 *Johns. Ch. R.* 409; *Toller on Ex.* 420; 1 *Cov. & Rand's Powell on Mort.* 323, *note* 2; *same*, *vol.* 2, 871. This is the rule in equity. 1 *Story's Eq.* 533, 536, 537. This Court, sitting as the Supreme Court of Probate, has equity powers in all cases coming before them in that capacity. *Hancock* v. *Minot*, before cited.

It is objected, that there was no written request to the Judge of Probate to order distribution. There is no law requiring a written, or even verbal petition to order distribution of a balance found on settlement of an account, and it is the universal practice to do it without this formality. But the request to distribute the property in this case was made by the executor, to divide it between all the heirs, and not by the devisees.

It is also objected, that the Judge of Probate has no jurisdiction. If this were so, then the decree was a nullity, there was nothing to appeal from, and the appeal should be dismissed. But the distribution of undevised personal estate is exclusively within the jurisdiction of the Probate Court. Had we brought an action at law for a legacy, we should have been met with a far more formidable objection, that by the will, the personal property was given to the widow, and real estate alone to the children.

It is further objected, that the *French* claim was never devised to the widow. If it was "personal estate," it was given to her. But were it undevised personal estate, it was liable to the payment of debts before a specific devise of lands, and the result would be the same.

The fourth objection amounts to this, that because land specifically devised was sold to pay debts and money legacies, more than six years since, that therefore the appellants should become entitled to personal property, which had it been received earlier, most certainly would not have belonged to them. It is not perceived how the statute of limitations can possibly apply here. When the decree was made, the money had not been received a single year.

But no limitation runs against distributing personal property, found in the hands of an executor or administrator, to those who are legally entitled to it.

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

WESTON C. J. — Executors are to account with the Judge of Probate, who is authorized by law to examine and allow his accounts. *Statute* of 1821, *c.* 51, § 1. As incidental to this power, he has a right to direct the payment and distribution of moneys remaining in his hands, according to law. The first objection to the decree, from which this appeal is made is, that it is not based upon any petition or written motion, setting forth the facts, upon which it is founded. We do not hold that to have been necessary. The will, the probate, and subsequent proceedings in relation to the estate, remained of record in the probate office. These, which were under the eye and inspection of the Judge, would enable him to determine what ought to be the legal distribution of funds, which the executor had unexpectedly realized from a source, which had long been unavailable.

It is further insisted, that he had no jurisdiction of the subject matter. We think otherwise. Whatever may be said of the rights of legatees, in intestate estates it belongs to the Judge of Probate to order and decree, to each person legally entitled, his distributive share in the personal estate. And all the estate, which does not pass by will, is to be distributed in the same manner, as if the estate were intestate. *Daniel Walker*, the testator, after the payment of his just debts and certain legacies, gave his personal estate to *Mary*, his wife. She relinquished the provision made for her by the will, so that whatever would have otherwise come to her, is to be distributed as intestate estate. If there is any such estate to be distributed, it is the duty of the Judge to decree distribution. But it was within his jurisdiction to determine, whether there was any such estate. His decree excludes from distribution the funds in controversy, and if this is erroneous, the appeal is rightfully interposed. So far as the appellant is concerned, the question is, whether this estate ought to be distributed; and this is a question of probate jurisdiction. How far, if distribution

had been ordered, the devisees would have been concluded, or whether they would have had a right to claim the money, as received in trust for them, we are not called upon to determine.

It is contended, that the *French* claim was of so hopeless a character, that it could not have been regarded by the testator as available property, but that he must therefore have intended, that the real estate, although specifically devised, should, if necessary, be taken for the payment of his debts; and hence that they have no right of reclamation from this fund. But it does not appear to us to make any difference, whether this is to be regarded as intestate property, because the will was not intended to operate upon it, or because the widow has relinquished her right under the will. We entertain no doubt however, that this property would have passed to his widow, but for her relinquishment. He gave to her his whole personal property, subject to debts and legacies. This would have carried the whole, whatever might have been the contingencies, and however unexpected, by which it might have been affected.

It remains to be decided, whether this is estate, which ought to be distributed, or whether the devisees have the better title to it. And we are of opinion, that the estate of the devisees having been taken to pay debts, for which the personal estate was legally charged, they have a right of reclamation upon the personal estate, which was subsequently received. They stood, by substitution, in the place of the creditors, as a surety does, who pays for the principal. The equity and justice of the case is precisely the same. The right of substitution is examined and recognized in *Cheeseborough* v. *Millard*, 1 *Johns. Ch. R.* 409. So it is also in *Hancock* v. *Minot*, 8 *Pick.* 29. *Wilde J.* there says, that when heirs pay a debt of the deceased, to prevent an execution from being levied on the real estate, which they inherited from him, or where the land of the intestate is sold by the administrators, for the payment of debts, the heirs have a right to be substituted in the place of the creditors. And there can be no difference in principle between heirs and devisees. From a deficiency in the personal assets, which was then supposed to exist, the estate of the devisees was taken from them, by a license from the Probate Court. It is now ascertained in the same Court, either that there is no deficiency, or that

it was less than it appeared to be. We entertain no doubt, that the same court may well sanction the payment to them of the personal assets, subsequently received, until they are remunerated for payments made from their funds for debts chargeable upon the personal estate. It is thus administered as it ought to be, for the payment of debts to the devisees, who are the substitutes of the creditors.

CHARLES BRADBURY, *Appellant*, *vs.* WILLIAM JEFFERDS, *Executor.*

Where the personal estate of a testator proves insufficient for the payment of his debts, and the executor sells real estate specifically devised, on license for the payment of debts, and pays the money legacies in full, which, as well as the debts, by the terms of the will were directed to be paid from the personal estate, and renders an account, which is allowed by the Judge of Probate, wherein the payment of these legacies is charged; and where, after the lapse of fourteen years, personal estate comes into the hands of the executor, and he renders another account; the executor is not bound to account for the amount of the money legacies thus paid, to repay the devisees for the loss of their real estate.

THIS was an appeal from a decree of the Judge of Probate that the executor should not be held to account for the benefit of the devisees of the real estate under the will of *Daniel Walker*, for a balance arising from the sale of the devised real estate, on license *for the payment of debts*, and appropriated by him to the payment of the money legacies directed in the will to be paid from the personal estate, and to the payment of a sum allowed by the former Judge of Probate, to the widow, on her relinquishing the provision made for her in the will. There never was any decree directing the payment of this money to the legatees, or to the widow, but the sums thus paid were charged as paid in the account of the executor, allowed by the Judge of Probate, after notice by publication in a paper, in *January*, 1822. The appellants were then minors, but had a guardian. The facts in the case, *Walker* v. *Bradbury*, *ante*, *p.* 207, are to be considered as in this case. The relinquishment by the widow of the provision for her in the will, and the allowance made to her by the Judge, was in 1820.

The case was argued in writing.

J. Shepley, for the appellant, remarked, that as the executor had chosen to resist the legal and equitable right of the devisees to the acknowledged balance, and had entered an appeal from the decree of the Judge, he ought not now to complain, if he is held to account strictly according to law for the other property in his hands.

It is as well settled as any law in the books, that when money legacies are given in a will, to be paid out of the personal estate, and when real estate is specifically devised, that the real estate cannot lawfully be held to pay, or to contribute the payment of those money legacies. *Hayes J.* v. *Seaver*, 7 *Greenl.* 237; *Humes* v. *Wood*, 8 *Pick.* 478; 2 *C. & Rand's Powell on Mort.* 861. No decree of the Judge of Probate was made, that these legacies should be paid, and if there had been, it would have been void, as the remedy for a legacy is solely by an action at law, or on the probate bond. Where the Judge of Probate has no power to act, no writ of error is necessary to reverse the proceedings; but where on their face they are erroneous, the acts are merely void. *Davoll* v. *Davoll*, 13 *Mass. R.* 264; *Smith* v. *Rice*, 11 *ib.* 513. Nor is the charge of the amount thus paid in the account any protection. It would be strange, if this could have greater power than a regular decree. The case of *Cowdin* v. *Perry*, 11 *Pick.* 511, is directly in point. There had been in that case, a decree, that the legacy should be paid; the executor had paid it, and charged it in his account, and his account had been allowed; and the person entitled to the money by law was actually present and entered no appeal, and expressed no dissent. And yet the Court required the executor to pay the money again to the person rightfully entitled to it. So far as this principle is in question, *Field* v. *Hitchcock*, 14 *Pick.* 405, is in accordance with *Cowdin* v. *Perry*. On the presentment of a new account, also, any errors in former ones may be corrected. *Saxton* v. *Chamberlain*, 6 *Pick.* 422; *Jennison* v. *Hapgood*, 7 *Pick.* 1.

The payment to the widow, though less unjust, is no more legal than the payment of the legacies. As the law then was, the Judge of Probate had no power to make an allowance to the widow of a testator, who waived the provision made for her in the will. *Mass. stat. Ed.* of 1807, *p.* 111, § 8; *Currier's Case*, 3

Pick. 375. Mere lapse of time gives the executor no right to retain this property. There is no limitation to his accountability, although the sale has become valid by lapse of time.

D. Goodenow, for the executor, argued: —

1. The legatees stand before the devisees in order in the will, and were in some degree in the condition of residuary devisees. It was no more the intention of the testator, that these legacies should remain unpaid, than that those who had already received their portions should pay them back. And so all parties understood it, and acquiesced for fourteen years.

2. The payment was charged in the executor's account and not appealed from, and all parties must be considered as assenting to it.

3. The decision in *Currier's* case, cited on the other side, is not supported by reason or authority, and is such a narrow and technical construction, and so contrary to common understanding, that it has since been abrogated by the legislature. The Judge of Probate had discretionary power to make the allowance. But the payment was allowed to the executor on notice, and not appealed from, and it is now too late to agitate the question.

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

Weston C. J. — It is objected, that a sum of money, paid by the executor, to the widow of the deceased, in virtue of an allowance made to her by the Judge of Probate, was not warranted by law. If it was not, being paid out of the personal estate, it occasioned the sale of a greater part of the real estate, which was specifically devised. The payment of the pecuniary legacies, which is also objected to, had the same effect.

There was a final settlement of all the estate of the deceased, then known to be available, by the executor in the Probate office, after due notice, under the sanction of a former Judge of Probate, more than fourteen years before this appeal was claimed. It is insisted, that the license in 1820, for the sale of the real estate, was for a greater sum than was warranted by law, by the amount of the legacies and the allowance to the widow. If the license was unauthorized, the law allowed the devisees five years to assert their title, from the time they became of full age, after which they can-

not impeach a sale made under such license, it being the policy of the law, that objections of this sort should not be sustained, unless interposed within a reasonable time.

Executors and administrators are by law to account with the Judge of Probate, to whom jurisdiction is expressly given for this purpose. *Statute* of 1821, *c.* 51, § 1. And in all matters of this kind, they ought as it seems to us, to be protected, where they act under the advice, direction and sanction of that court. The Judge may err as to the legal rights of parties before him, as well as in the discharge of his own duties, to correct which an appeal lies, if seasonably made, to the Supreme Court of Probate. This is the regular, and perhaps the only mode of revision, in regard to a matter within his jurisdiction.

If a court of common law, in certain cases, may treat the act or decree of a Court of Probate as a nullity, it does not follow, that the Judge of Probate may treat in the same manner the act or decree of his predecessor, in regard to a matter long since closed, because in his judgment he acted erroneously. One Judge of Probate has no authority to correct the errors of another, nor can he reverse or alter his own decrees, in regard to a past transaction. If it were so, executors, administrators and others, who act under the supervision of that court, could never trust to its sanctions, or be secure from having their proceedings unravelled at a future day.

All the former known assets of this estate had been settled. After the lapse of many years, other assets unexpectedly accrued. Of these the executor rendered an account to the Judge of Probate, as it was his duty to do. This could not in our judgment have the effect to open the former accounts, which had been adjusted long before. And the question before us is, whether the Judge was bound to require the executor to account again, for a part of what had been previously settled. We are of opinion, that the Judge was right in refusing to do so; and this part of his decree is accordingly affirmed.

Ivory Hovey *vs.* John G. Deane.

Where a township of land was conveyed by the State to an individual, with a reservation, that each person who had settled thereon before a certain day, should receive a deed of a hundred acre lot, including his improvement, from the grantee of the State, on payment of a certain sum before a fixed day; it was held: —

First, that the State could not elect to be disseized by a settler thereon at the time of the conveyance, when it would violate the declared intention of the parties; —

And second, that it was the duty of the settler first to make known his election to take the land, and his readiness to pay the money on the assignment and conveyance of his lot, or that he had been prevented from so doing by the acts of the other party, before he could demand a deed.

This action was tried once before, and a report of the case then reserved will be found in 13 *Maine R.* 31. The facts in that case are to be considered, as in the present one, with the exception, that at this trial, before the Chief Justice, it appeared, that *John Black*, under whom the defendant acted, was the duly authorized attorney of the owners of township No. 14. It was insisted by the counsel for the plaintiff, that the defence was not sustained, unless it was made to appear, that the owners of the township offered the deed, and thereupon exacted the payment, or were ready to receive, within the State, the sums required to be paid by the settlers, and thereupon to execute deeds, or that they had for this purpose an agent within the State. A nonsuit was entered by consent, it being agreed, that if the Court should be of opinion that such proof was essential to the defence, the nonsuit should be taken off.

J. Holmes, for the plaintiff, argued in writing. The points made are stated in the opinion of the Court, and need not be repeated here. On the first point, he cited *stat.* 1821, *c.* 108, § 5; *Shapleigh* v. *Pilsbury*, 1 *Greenl.* 271. On the second, 1 *T. R.* 645; 3 *Atk.* 364; 2 *Peere Wms.* 419; 2 *Burr.* 899; 4 *Burr.* 1930. On the third, *Co. Lit.* 218.

D. Goodenow, for the defendant, concisely replied in writing, citing on the first point made in the opening, *Dunlap* v. *Stetson*, 4 *Mason*, 349; *Hovey* v. *Deane*, 13 *Maine R.* 31; and *Bank* of *Columbia* v. *Hagner*, 1 *Peters*, 465; saying that the second point

was only a corollary from an erroneous position, erroneous in law and fact, premises and conclusion; and that the question raised under the third point was decided in the former case between these parties.

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

Shepley J. — This case having been again opened to the jury, the plaintiff submitted to a nonsuit, subject to certain exceptions taken to the title under which the defendant justified. He first alleges, that the *Commonwealth*, by the reservation in the deed elected to be disseized so far as relates to the settlers' lots; and that the title did not pass to the grantee. This position is inconsistent with the language of the deed and the intention of the parties, which required, that the title should vest in the grantee, and that he, or his heirs, should upon payment of the stipulated sum, convey the title to the settler. No such election can be admitted to violate the declared intention of the parties.

The second is, that the conveyance was upon a condition precedent. And it is said, that the settler could not be dispossessed until after the time limited for the payment. And it may be so, and yet the fee might pass subsequent to his tenancy for that period. The former case decided, that the fee did pass immediately to the grantee.

The third is, that the settler took an estate "defeasible on condition subsequent," liable to be defeated by neglect to perform what was required of him. And it is insisted, that he might remain passive until the grantee or his heirs located the lot, and was ready within the State to execute the deed upon payment by the settler. By the terms of the conveyance, the settler had an election, whether he would accept the title upon the terms offered. And it was his duty first to make known his pleasure by giving notice of his desire to purchase and of his readiness to pay upon an assignment of the lot, and an execution of the conveyance. It would then be in season for the other party to perform. If the settler had shewn due diligence and an inability to find the grantee or his agent within the State, and a readines on his own part to perform, he may not have been obliged to do more; and the grantee under such

circumstances might be under obligation to convey after the appointed time. The settler in this case has not proved performance, nor that he has been prevented by the act of the grantee. This objection requires of the grantee in substance proof, that he assigned the lot and presented himself ready to convey and receive payment, before the settler signified his election to purchase.

Nonsuit confirmed.

PATIENCE MADDOX *vs.* JOHN GODDARD *& als.*

One tenant in common of a sawmill and mill privilege may maintain an action of trespass *quare clausum*, against a co-tenant for the destruction of the mill.

By the conveyance of a sawmill and the privileges and appurtenances thereunto belonging, the land whereon the mill stands, as well as so much as is necessary to the use of it, passes with the mill.

THE writ contained one count, *trespass quare clausum*, for breaking and entering the plaintiff's close in *Cornish*, called the *Durgin* mill privilege, and tearing down, and destroying the plaintiff's sawmill, and carrying away the materials thereof and converting the same to their own use; and another count, *trespass de bonis asportatis*, for tearing down the plaintiff's sawmill, and destroying and carrying away the materials of the same. On the trial it was proved, that the defendants entered upon the premises and cut and tore down and prostrated the mill, and carried away the materials thereof; but at the same time it appeared, that *Goddard*, under whom the other defendants acted, was a tenant in common with the plaintiff and others of the same mill and mill privilege. There was however an objection made to the title of the plaintiff, because a deed under which she claimed, described the property as "one quarter of the *Durgin* sawmill and one quarter of the privileges and appurtenances thereunto belonging." EMERY J. instructed the jury, that for the purposes of that trial, they might consider, that the plaintiff had produced evidence of a title in herself of one eighth of the mill and privilege during her life and the minority of her son; and that although a tenant in common with *Goddard*, one

of the defendants, she might maintain the suit for the destruction of her share of the sawmill. The verdict, which was for the plaintiff, was to be set aside, if the instructions were erroneous, or if the plaintiff could not maintain her action.

The arguments were in writing.

Howard, for the defendants.

One tenant in common cannot maintain *trespass quare clausum*, against his co-tenant for breaking or entering the common close, or for an injury to the common property. *Co. Lit.* 199, *b*; *Bac. Ab. Joint Tenants, &c. L*; 1 *Chitty on Pl.* 66, 172, 174; *Keay* v. *Goodwin*, 16 *Mass. R.* 1; *Cutting* v. *Rockwood*, 2 *Pick.* 444; 4 *Kent's Com.* 370. And under the general issue may show, that he is tenant in common, and that will prove him not guilty. 3 *Stark. Ev.* 1456; *Gilbert's Ev.* 204; 1 *Leon.* 301; 2 *Leon.* 83, 94; 8 *T. R.* 403; 1 *Chitty's Pl.* 492; 1 *Phil. Ev.* 134; *Rawson* v. *Morse*, 4 *Pick.* 127. If one tenant in common commit waste, the other shall have a remedy by an action of waste against him, but not trespass. *Co. Lit.* 200, *b*; 1 *Chitty Pl.* 180; 1 *Ld. Raym.* 737. A remedy is also furnished in trespass for mesne profits by one tenant in common against another, after a recovery in ejectment. But trespass *quare clausum*, by one tenant in common against another, cannot be maintained. 3 *Wilson*, 118; 1 *Chitty Pl.* 66; 2 *ib.* 435; *Stearns on Real Actions*, 389, 400, 404; *Cummings* v. *Noyes*, 10 *Mass. R.* 435; *Hylton* v. *Brown*, 2 *Wash. C. C. R.* 165; *Chirac* v. *Reinicker*, 11 *Wheat.* 280; *Emerson* v. *Thompson*, 2 *Pick.* 473; *Cox* v. *Callender*, 9 *Mass. R.* 533; *Wilder* v. *Houghton*, 1 *Pick.* 89; *Jackson* v. *Stone*, 13 *Johns. R.* 447.

The doctrine that one tenant in common can maintain an action of trover, or trespass, if *trespass* in any case can be maintained, against another for the destruction of the joint property, applies exclusively to personal property. 1 *Chitty Pl.* 66, 170, 172; *Co. Lit.* 199, 200; 2 *Johns. R.* 468; 3 *Johns. R.* 175; 15 *Johns. R.* 179. The mill and gearings were real estate, and the action cannot be maintained on the counts *de bonis asportatis*. *Farrar* v. *Stackpole*, 6 *Greenl.* 154; *Goddard* v. *Bolster*, *ib.* 427.

But the plaintiff had no title to the mill or mill privilege. The first deed under which she attempts to derive title, conveys only

" one quarter of the *Durgin* sawmill, standing, &c." and " one quarter of the privileges and appurtenances thereunto belonging." No real estate was intended to be conveyed, but merely the mill and its appendages, which was taken down and another built. *Farrar* v. *Stackpole*, 6 *Greenl.* 154.

J. Shepley and *Clifford*, for the plaintiff.

The main, and indeed the only real question is; can one tenant in common of a mill and mill privilege maintain an action against another for the wilful and forcible destruction of the mill? And this resolves itself into another; is there any remedy for such wrong? Trover for the value of the materials, after the mill has been demolished, will afford no adequate one, as the principal injury arises from its destruction.

The true principle, extending to houses and mills as well as to personal chattels, is believed to be this. Where property is owned in common, each has an equal right to the use of it, and no action lies by one against another for the mere exclusive use. But where one tenant in common goes beyond the rights in relation to the common property, which the law gives him, then his character of tenant in common cannot protect him, and he is as much liable to his co-tenant for the wrong done, in the proper form of action, as a stranger. Where the injury is to real estate the proper form of action is trespass *quare clausum*, and when to personal property, trespass, trover, or case will lie, as the circumstances under which the act was committed render the one or the other proper.

Our writ contains counts in trespass *quare clausum* and *de bonis asportatis*, and if we can recover under either count, we prevail. Where the injury is to real estate, the party may waive the injury to his land, and bring his action for the damage done by the conversion of real into personal estate by the wrongful acts of the defendant. *Loomis* v. *Green*, 7 *Greenl.* 386. As the acts were forcible, trespass is proper. If then one tenant in common can maintain an action against a co-tenant for the forcible destruction of either real or personal property, our case is made out. He can maintain one when property of either description is forcibly destroyed, or materially injured.

Where the injury is to personal property, it is admitted that an action lies in some cases, but it is denied, that it does in this. We

cite but few of the cases where the principle is settled in our favor in relation to personal property. *Co. Lit.* 200, *b*; *Martyn* v. *Knowllys*, 8 *T. R.* 145; *Heath* v. *Hubbard*, 4 *East*, 110; *Farr* v. *Smith*, 9 *Wend.* 338; *Daniels* v. *Daniels*, 7 *Mass. R.* 137; *Herrin* v. *Eaton*, 13 *Maine R.* 193.

The law is clearly with us, that trespass *quare clausum* will lie, by one tenant in common against another, for the destruction of a mill, which until the destruction was real estate. *Co. Lit.* 200, *b*; *Cubitt* v. *Porter*, 8 *Barn. & Cress.* 257; *Erwin* v. *Olmstead*, 7 *Cowen*, 229; *Chesley* v. *Thompson*, 3 *N. H. Rep.* 9; *Blanchard* v. *Baker*, 8 *Greenl.* 270.

The conveyance of a mill and mill privilege and appurtenances, carries land, mill, use of the water, and the appurtenances attached to the mill. *Blake* v. *Clark*, 6 *Greenl.* 436; *Farrar* v. *Stackpole*, *ib.* 154.

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

SHEPLEY J. — The argument for each party admits the general and well established rule, that trespass cannot be maintained by a tenant in common, against his co-tenant; and that it can in certain cases be maintained, when the common property has been destroyed.

It is contended for the plaintiff, that the right to maintain this action for the destruction of the common property applies as well to houses, mills and other matters, which are portions of the realty, as to personal property. While it is contended for the defendants, that it is limited to personal property.

It rarely happens, that one cannot discover the reason and principle, upon which the rules of the common law are based; and the grounds upon which even the early decisions were made. Why cannot trespass be maintained as stated by *Littleton*, § 322, for breaking into the common close and treading down and consuming the herbage? Each tenant in common has a right to enter upon, occupy and take the profits, and the act is lawful. Trespass will not lie against a co-tenant, who obtains and holds the entire property of a personal chattel, for the obvious reason, that each has an equal and lawful right of possession; and it being often impossible,

from the nature of the property, that each should possess at the same time, no action lies, though one tenant may be deprived of the use of it.

All the tenants in common of real estate may possess and improve at the same time, and hence the rule does not apply as in personal property, that one may occupy exclusively and deprive the others of the right of occupation without legal cause of complaint, or legal redress. In this case the law affords a remedy by *ejectione firmae*, assize upon a disseizin, ejectment or other appropriate remedy according to the time, place, and country in which the remedy is sought. And the whole wrong may be redressed by following up the recovery of possession by an action for the profits while so kept out. So if one tenant in common committed waste, the other was provided with a remedy by writ of waste; and to do exact justice, *Coke* says, the wrongdoer may make choice of a certain place to improve, and if he does, he shall take the place wasted. *Co. Lit.* 200, *b.* One tenant in common might be compelled to repair so as to prevent a common destruction.

Coke gives examples where a tenant in common may have his remedy for a loss of his property by the act of his co-tenant by an action of trespass, and refers to the year books for his authority.

In the case from 47 *E.* 3, 22, the action was trespass for breaking the dove house, and destroying certain doves, whereby the whole flight was destroyed. The case relating to the destruction of the deer in the park, appears to be of the same character. The case relating to the disturbance of the "folding," or sheep-fold, exhibits the same principle of a wrong committed by one tenant in common against his co-tenant redressed by action of trespass. So the redress by one against the other for a wrong in corrupting the common river, is by action of the case, that being the appropriate remedy. The case in 1 *H.* 5. 1, relating to the "mete stones," is stated by *Coke*, as if the parties were tenants in common of the lands, as well as of the monuments. The case is, "trespass *quare vi et armis certos lapides pro metis et bundis inter le pl. et le terre le defend, cepit*," and it would seem to indicate, that the monuments were between the separate lands of the parties; yet the land upon which the monuments stood may have been in common, and it seems to have been treated as a tenancy in common, for judg-

ment is demanded of the writ, because they were tenants in common, and it is answered, if there be two joint tenants, and one disseize, the other shall have assize; and the case of the dove house, appears also to have been referred to as authority.

One general principle may be clearly discerned in all these authorities, that where a tenant in common does an unlawful act, whereby his co-tenant is injured, the law affords the appropriate remedy arising out of the nature of the property or estate, and the character of the wrongful act.

In the case of *Barnardiston* v. *Chapman & al.*, reported by *Abbott*, in argument, from *Lord King's Manuscript*, 4 *East*, 121, the doctrine is laid down by the Court, "that if one tenant in common destroy the said thing in common, the other tenant in common may bring trespass or trover against him." The reason for seeking and giving redress is as urgent when the destruction is of property constituting a part of the realty, as when it is of personal property; and the act is equally illegal and unjustifiable. Upon both principle and authority the law, as we have seen, protects the estate against destruction, and preserves the legal rights of the respective tenants; and the question becomes reduced to an inquiry into the proper mode of redress, or form of action.

The case of *Erwin* v. *Olmstead*, 7 *Cow.* 229, was an action of trespass *quare clausum*, for turning the plaintiff out of his house and destroying his goods. The plaintiff's wife was a tenant in common and the defendant acted for the other co-tenants; the plaintiff was nonsuited, but the nonsuit was set aside, the Court observing, "that the defendant's interest, if any, was not greater than the plaintiff's. The defendant therefore had no right to dispossess the plaintiff." Ejectment for the ouster would not in that case have afforded adequate redress, because nothing could have been recovered in that action, or in an action for the mesne profits for the injury of turning out. The redress by ejectment is for keeping out; not for the injury of violently thrusting out.

What is the appropriate remedy for the plaintiff in the present case? The action of waste in its general acceptation does not apply; and the one spoken of by *Coke* as a remedy between tenants, is upon the statute of *Westminster* the second; would afford no sufficient remedy; and is not known to have been adopted in this

State. The interests of the parties in the property, and the character of the act do not indicate, that an action upon the case — or case in the nature of waste, is a more suitable remedy.

The case of *Cubitt* v. *Porter*, 8 *B. & C.* 257, seems to warrant the plaintiff in bringing *trespass quare clausum.* The plaintiff in that case did not prevail, there being no proof of destruction; yet the right to maintain the action upon such proof is substantially admitted by all the Judges; and no intimation is given of any distinction between the destruction of personal property, and of matters pertaining to the realty. The case of *Matts* v. *Hawkins*, 5 *Taunt.* 20, in which a contrary opinion is intimated was cited and commented upon in that case. The case of *Rawson* v. *Morse*, 4 *Pick.* 127, is referred to as opposed to this doctrine, but it cannot justly be so regarded; for that case proceeds upon the principle that each tenant in common has a lawful right to cut the trees growing upon the common estate.

An objection is made to the title of the plaintiff. The deed from *Stanley* to *Trafton* conveyed one fourth part of the mill and privilege. When a conveyance speaks of the mill only without naming the privilege, it has been decided, that any easement which has been used with the mill, will pass. *Blake* v. *Clark*, 6 *Greenl.* 436. And a still more extended signification has been given to similar language in a devise. *Whitney* v. *Olney*, 3 *Mason*, 280. It was not unusual in our early history to find mill privileges conveyed without any exact bounds, and such deeds have been held to convey so much land as was necessary, and customarily used with the mill. The occupation by *Durgin* of the lot on which the mill stood, claiming title, was not inconsistent with the occupation at the same time by others of the mill privilege, which the case finds. The act of *Maddox*, in endeavoring to strengthen his title by obtaining a deed from *Durgin*, does not impair the title which he then had; and from the evidence in the case he appears to have had a good title to one eighth of the mill and privilege, which he devised to the plaintiff during her widowhood and the minority of his son. It was the duty of the Court so to decide and instruct the jury.

Judgment on the verdict.

MOSES MCDONALD *vs.* SAMUEL TRAFTON.

To render a sale void by reason of false representations, there must be proof not only that they were untrue, but that they were made by the vendor with the design to deceive, and that the other party was thereby deceived and injured; and such design must be proved by other evidence than the mere fact, that the representations were not true.

Whether there be fraud or not is a question for the jury to decide; but if a Judge of the Common Pleas himself decide, that upon the facts in evidence there is no fraud; and if the testimony on which the decision was made will not authorize a jury to find that there was fraud; a new trial will not be ordered.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

15 225
94 420

Assumpsit on a promissory note, dated *Sept.* 9, 1835, for $100, payable to *John A. Morrill*, or order, and by him indorsed. The defence was grounded on the alleged false and fraudulent representation of *Morrill*, in regard to a lot of timber land of which he held a bond. The transfer of the bond was the consideration of the note, and it was alleged, that the defendant was induced to make the purchase and give the note by those representations. The defendant proved, that the plaintiff before the indorsement knew on what account the note was given, and that the defendant refused to pay the note. The evidence given is fully reported in the bill of exceptions, and tended to prove that the representations made by *Morrill* to the defendant with respect to the timber, were incorrect, but there was no evidence, that the defendant knew, or had reason to believe, they were not correct. The Judge ruled, "that the foregoing facts did not constitute such evidence of fraud as would vitiate the note, and directed the jury to return a verdict for the plaintiff." They did so, and the defendant filed exceptions.

The arguments were in writing.

Fairfield and *Jameson*, for the defendant.

1. The same defence may be set up to this action, as if it had been brought in the name of the payee.

2. The law in cases of this description requires no proof of a *scienter*. If the representations made by *Morrill* to the defendant, in relation to the timber, were not true in fact, it is a good defence against the note. The cases it is true, are contradictory upon this

point; but those denying the necessity of such proof seem to carry the better reason with them. They cited the following authorities, and commented upon several of them. 2 *East*, 107; 1 *ib.* 318; *Allen* v. *Addington*, 7 *Wend.* 9; *Bostwick* v. *Lewis*, 2 *Day's Cases*, 250; *Sherwood* v. *Salmon*, 5 *Day*, 439; *Young* v. *Covell*, 8 *Johns. R.* 23; 12 *East*, 633; *Herrick* v. *Kingsley*, 3 *Fairf.* 278.

3. But if it be necessary to show a *scienter*, and consequently that the representations were fraudulent, whether the evidence did or did not show it, was a question entirely and peculiarly within the province of the jury to answer. 5 *Wheeler's Ab.* 467; 3 *Conn. R.* 483; 2 *Bay*, 520; 2 *Conn. R.* 371; 2 *Stark. Ev.* 267; *Sill* v. *Rood*, 15 *Johns. R.* 230; *Sherwood* v. *Marwick*, 5 *Greenl.* 303.

Howard, for the plaintiff.

Fraud is not to be presumed; and to sustain the defence, there must have been proof of actual fraud, and the *scienter* on the part of the plaintiff. 3 *Stark. Ev.* 1634; *Sugd. Vend.* 5; *Hepburn* v. *Dunlop*, 1 *Wheat.* 179; *Herrick* v. *Kingsley*, 3 *Fairf.* 278, cited for the defendant.

Whether the decision is made by the Court or the jury is unimportant, if made right. Should the jury return a verdict against evidence, the Court would set it aside as often as returned. *Bryant* v. *Com. Ins. Co.*, 13 *Pick.* 543. The Court will not set aside a verdict, when it appears that a different verdict would be against the evidence at the trial. 8 *Mass. R.* 336; 17 *ib.* 30; 5 *Pick.* 240; *ib.* 244. The Court can and do set aside verdicts which are manifestly against evidence, or the weight of evidence; and of course are the judges of the weight of evidence. 5 *Mass. R.* 353; 7 *ib.* 261; 8 *ib.* 336; 13 *ib.* 513; 13 *Pick.* 543. If the jury are misdirected by the Judge, a new trial will not be granted, when it appears, that the verdict is right, and that justice had been done. 5 *Mass. R.* 10; *ib.* 104; 7 *Greenl.* 442; *ib.* 141; 6 *Cowen*, 118; 7 *Mass. R.* 507.

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

Shepley J. — The plaintiff in this case is in no better condition, than the payee of the note. Does the case prove such fraud

in the payee as to prevent a recovery by him? And was the Judge in error in instructing the jury, that such fraud was not proved? There is no evidence tending to prove, that the payee knew, that his representations were not true. And the counsel for the defendant contend, that such proof is not necessary to avoid the note. Fraud in such cases consists in an intention to deceive. Where the evidence does not prove, that the party making the representation knew it to be untrue, the fraud can be established only by proof of a design to deceive by making statements of which the party knows nothing, and that the other was thereby deceived and injured. And such design must be proved by other evidence, than the mere fact, that the representation was not true. *Early* v. *Garrett*, 9 *B. & C.* 928; *Herrick* v. *Kingsley*, 3 *Fairf.* 278.

It is also insisted, that the evidence should have been submitted to the consideration of the jury. Fraud, being a question of intention usually, is in such cases for the jury. It must always necessarily be a question of fact for the jury, where the law affords no general rule or principle, by which the court can be guided; for a court cannot in the absence of legal rules, as a jury can, draw conclusions from the ordinary rules of honest and fair dealing.

It might have been more regular to have informed the jury, what the law required to be proved to avoid the note, and to have called their attention to the testimony, by which they would have perceived, that the fraud was not proved; but as it appears from the testimony reported, that the jury would not have been authorized to find a verdict for the defendant, there is no reason for setting it aside. *Young* v. *Covell*, 8 *Johns. R.* 23.

Exceptions overruled.

JOHN WORTH *vs.* ESTHER CURTIS *& als.*

The contract of a guardian to sell the real estate of his minor ward, although in writing, made when he has no authority to make the sale, is illegal and void.

If the guardian of a minor, owning an undivided share of real estate, and the owners of the remaining interest therein, promise in writing to convey the same at a stipulated time, "if the guardian can lawfully sell and convey the premises belonging to his ward;" the contract is not binding upon either of the promisors, if the guardian have no power to convey within the time fixed by the parties.

THIS action was brought to recover damages for the non-performance of the following written agreement, not under seal. "The condition of this obligation is such, that whereas the said *Esther Curtis, Mehitabel Curtis, Eliza Curtis* and *Tobias Walker*, as guardian of *Jane S. Curtis*, (if he can lawfully sell and convey the hereafter described premises, belonging to his said ward,) have agreed to sell and convey to *John Worth*, a certain farm in *Kennebunkport*, which was the homestead farm of *Jacob Curtis*, deceased," particularly described. "And I the said *John Worth* in consideration thereof have agreed to pay the said *Esther Curtis*, the sum of $3,500, to be paid when he shall have a good and lawful deed of the same, which deed we agree to give within fourteen days. Received five dollars in part.

"*Kennebunkport, March* 23, 1836.

"*Esther Curtis,*
"*Mehitabel Curtis,*
"*Eliza Curtis,*
"*Tobias Walker, guardian to J. S. C.*"

A Probate Court for the county, was holden on the fourth day of *April*, 1836, and *Walker* made no application for license to sell the real estate of his ward, but did apply for and obtain a license to sell in *September* following, and the farm was actually sold soon afterwards at auction for $4,243. The plaintiff proved by one witness, that he and the witness went to the house of *Esther Curtis*, who was the widow of *Jacob Curtis*, a few days before the expiration of the fourteen days mentioned in the agreement, where *Worth* told her, that he was ready to comply with the agreement,

and she refused to give any deed, saying *Mr. Walker* could not convey. The witness had offered *Worth* $250 for his bargain, and would have taken the farm could he have had a deed. He had no money with him at the time, but would have had the whole of it within the fourteen days, if he could have had a deed. He did not know, that *Worth* had any money there. Another witness testified, that *Mrs. Curtis* told the plaintiff, that she should not comply with the agreement; that *Walker* could not convey, and that she should not have the interest of the money as she did the use of the farm; and that *Walker* refused to comply with the agreement, and said that, "his bondsman objected to his selling, and that he had no power to sell." This was before the expiration of the fourteen days. There was no proof that any money was offered. At the trial before the *Chief Justice*, a nonsuit was entered by consent, which was to be set aside, if in the opinion of the Court the action could be maintained against the defendants, or any of them.

A. G. Goodwin, for the plaintiff, argued:—

1. *Walker* is personally liable on this contract. *Forster* v. *Fuller*, 6 *Mass. R.* 58. All the defendants are therefore bound by it.

2. An agreement to sell binds the party to execute a proper deed of conveyance. *Smith* v. *Haynes*, 9 *Greenl.* 128.

3. The plaintiff has done in this case, all that was incumbent on him to perform. Where there are mutual and dependent covenants, if one party be prevented from performing his covenants by the neglect or fault of the other party, it is equivalent to a performance by the former. *Couch* v. *Ingersol*, 2 *Pick.* 292. On the refusal to convey, the plaintiff was under no necessity to make a tender of the money. *Howland* v. *Leach*, 11 *Pick.* 151; *Nourse* v. *Snow*, 6 *Greenl.* 208; *Smith* v. *Jones*, 3 *Fairf.* 332. If a purchaser has paid any part of the purchase money, and the seller refuses to complete the contract, the purchaser may affirm the contract, and bring an action for damages. 2 *Phillip's Ev.* 65; 8 *Johns. R.* 257.

4. The defendants, by selling to others, have disabled themselves to perform. *Newcomb* v. *Brackett*, 16 *Mass. R.* 161; *Clark* v. *Moody*, 17 *Mass. R.* 149.

5. *Walker* has no legal excuse for the non-performance of his contract, or at least such part of it as was within his power to perform. 3 *Com. Dig., Condition, G.* 10; 1 *Wheat. Selw.* 339.

D. Goodenow and *Bourne*, for the defendants, contended, that by a fair construction of the contract, there was not to be a conveyance of any part of the estate, if *Walker* had not power to convey the interest of his ward. It was impossible to obtain a license and sell this share within the fourteen days. This was a joint contract, and there was to be a joint conveyance, if any. If *Walker* therefore was discharged, all were discharged. The contract, as it is called, is *nudum pactum*, only one party, if either, being bound, as the plaintiff did not sign the paper. But it is a sufficient answer to the action, that the plaintiff made no tender of payment, or offer of any money, at any time. Unless this was done within the fourteen days, the contract was at an end, and they might afterwards do as they pleased with the land. 18 *Johns. R.* 459; 3 *Salk.* 75; *Bean* v. *Parker*, 17 *Mass. R.* 591; 4 *Munf.* 63; *Whitefield* v. *Longfellow*, 13 *Maine R.* 146; *Wood* v. *Washburn*, 2 *Pick.* 24; *Powell on Con.* 160, 179; 3 *Johns. Ch. R.* 409; 8 *T. R.* 89; 1 *Dane*, 656; 9 *Dane*, 10; 3 *Johns. Ch. R.* 29; 6 *Johns. R.* 194; 2 *B. & Cr.* 661; 3 *T. R.* 653; 12 *Johns. R.* 190; 1 *Caines'*, 583; 2 *Hals.* 145; 6 *Johns. R.* 94; *Bank of Columbia* v. *Hagner*, 1 *Peters*, 455; *Eaton* v. *Emerson*, 14 *Maine R.* 335; *Smith* v. *Moore*, 6 *Greenl.* 274; 2 *Johns. R.* 193; 3 *Cranch*, 242; 4 *Dallas*, 269.

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

Emery J. — The plaintiff contends, that as *Esther Curtis* had a life estate in the property about which the question arises, all the defendants having signed the contract, the action may be sustained against all or one of them. That having agreed to sell, the defendants are bound to give a proper deed. That, as *Worth* told *Mrs. Curtis* he was ready to perform, and she and *Mr. Walker* refused, he has a right to sustain his action. For he insists, that the contract was a valid one; that he had paid five dollars in part; that the refusal excused him from making a tender of the money, and that if *Walker* had not a license, he should have shown it.

Afterwards he obtained one, and the parties have since disabled themselves from performing their agreement, by selling to another, and ought to respond in damages.

In regard to contracts in relation to things which are not physically impossible, but the impossibility of which arises from circumstances peculiar to the party contracting, as if a man contract to sell an estate the title to which is in another person; though equity will not enforce a specific execution, that will not discharge the person contracting to sell, from paying damages to the party, for any loss he may sustain, by reason of his being imposed upon or disappointed; but will not bind him to any damages as a compensation for the non-performance of the thing contracted for itself, that, as being impracticable to the party, not requiring any. And though a contract be a foolish one, yet it will hold in law, and the person so contracting, it is said, ought to pay something for his folly. As where one in consideration of 2*s.* 6*d.* paid, and of £4, 17*s.* 6*d.* to be paid to him upon his performance of the agreement, contracted to deliver to B. two grains of rye corn on the *Monday* following, and so on progressively doubling the quantity on every *Monday*, during the year; it was objected, that it was impossible on its face, as it would amount to such a quantity as all the rye in the world was not sufficient to produce. Certainly the result could not be determined without a process of careful arithmetical calculation. But the law was against the improvident contractor, and the cause was compromised, on repayment of the half crown and costs. *Powell on Contracts*, 161, 162, 163.

If the contract be such as the plaintiff contends, it would seem that "neither party intended to trust to the personal security of the other, and that neither party was obliged to perform his part of the agreement, unless the other party was ready and willing at the same time to perform his part also." *Howland* v. *Leach & al.* 11 *Pick.* 155.

The defendant's counsel have urged upon our notice, that the contract on which the suit is founded was not signed by *Worth*, that he does not bind himself to take the property, though the paper must have been written with the expectation that he was to sign, unless he was willing to let the subject lay at loose ends, till *Mr. Walker* could ascertain whether he lawfully could convey his

ward's property. And this would seem to be that construction, which would place the parties on the most honorable ground. On examination, it may prove to be not very variant from the legal ground.

The first step for the plaintiff, for the purpose of fixing blame upon *Walker*, would be, one would imagine, to show that at the time of the contract he was duly licensed to sell and convey the property at private sale.

But according to the plaintiff's own proof in the case he goes on to extract and exhibit evidence from *Walker's* mouth, calculated, not to impeach his willingness, under different circumstances to perform, *but to justify his refusal to comply* with the agreement, as his bondsman objected to his selling; *and that he had no power to sell.* Though the first reason, without the last, might be insufficient. Yet in establishing the last, *the plaintiff proves a complete justification of the defendants, by the terms of the contract, in proving that Walker had no power to sell.*

The parties were dealing for the whole farm of about 100 acres, in which *Esther Curtis* had rights, and the heirs of her husband had rights. But there is no allusion to the separate rights of either *Esther*, *Mehitabel*, *Eliza*, or *Jane*, the infant, as to extent and distinct value of either, in the contract. They made the whole dependent on the fact of *Walker's* lawful ability to convey. The widow's reason for refusal, in presence of *Mr. Bradbury*, was, that *Walker could not convey. Mr. Simpson* "heard her give *Mr. Worth* to understand, that she should not comply with their agreement, and she said, he must not hold on to the contract too hard, *that Walker could not convey*, and she did not wish to, as she could not have the interest of the money, as she did the use of the farm." The first reason she assigned was sufficient for her protection; and we are not to turn against her the simple, honest confession of her disinclination to lose the use of the farm, out of which she was to support some of the children, unless by law, we are compelled to do so.

In the case cited by the plaintiff, *Forster* v. *Fuller*, 6 *Mass. R.* 58, *Parsons C. J.* says, "as an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward."

The construction to be put upon this contract, as it appears to us, is, that no portion of the agreement was to go into operation unless *Tobias Walker*, the guardian of *Jane S. Curtis*, can lawfully, within the 14 days, convey the part of the premises belonging to his said ward. And we are satisfied, that a guardian so situated cannot be holden, on principles of public policy, by such an agreement, more than an executor or administrator could.

There is full danger enough of sacrificing the interest of minors, with all the guards which the law can throw about them.

Such a contract by an administrator, before a license obtained for that purpose, is void. It could not be enforced at law nor in equity. It is calculated to repress all fair competition for obtaining the best price for the infant's property. *Bridgewater* v. *Brookfield*, 3 *Cowen*, 299.

The nonsuit is confirmed.

CHARLES LEWIS *vs.* CHARLES LITTLEFIELD.

Infancy is no bar to an action of trover, where the goods converted by the minor came into his hands under a prior illegal contract.

All wagers in this State are unlawful.

TROVER to recover an amount of specie and bank bills, which were deposited in the hands of the defendant, to abide the issue of a foot race to be run between *Saco* and *Portland* by *Lewis*, the plaintiff. The general issue was pleaded, with a brief statement of the infancy of the defendant. It was proved, that the defendant was under the age of twenty-one years when the transaction took place. It was also proved, that *Lewis* demanded the money, and notified *Littlefield* not to pay it over to the winner before it was paid, and that *Littlefield*, after being so notified, did pay over the money. WESTON C. J. presiding at the trial, instructed the jury that infancy was no bar to the maintenance of the suit. The verdict was for the plaintiff, and the defendant excepted to the instruction.

Leland, for the defendant, contended: —

1. That to maintain this action against a minor, it must be shown that the defendant, *at the time the money was put into his hands*, intended to defraud the plaintiff of it, or wrongfully convert it to his own use. *Campbell* v. *Stakes*, 2 *Wend.* 137; 2 *Kent's Com.* 241.

2. The defendant here was liable, if any liability existed, only on the contract made when the money was put into his hands; and the plaintiff has no right to turn an action of contract into an action of tort, to avoid the defence of infancy. Where assumpsit would lie, if of age, trover will not, if a minor. *Jennings* v. *Rundall*, 8 *T. R.* 335; *Story on Bailments*, 35; *Bristow* v. *Eastman*, 1 *Esp. Rep.* 172; *Green* v. *Greenbank*, 2 *Marsh.* 485; *Smith* v. *Bickmore*, 4 *Taunt.* 474; *Curtin* v. *Patton*, 11 *Serg. & R.* 310; *Penrose* v. *Curren*, 3 *Rawle*, 351.

J. Shepley, for the plaintiff.

The argument for the defendant, admits, that the wager was illegal and void, and that an action of assumpsit might have been maintained for the money, had not the plea of infancy been interposed; but insists, that because an action for money had and received might have been brought, infancy is a good defence to this. The well settled principle, that where trespass *quare clausum* will lie for cutting and carrying away timber, assumpsit will also lie, if the timber have been converted into money, is sufficient to show this position untenable. It will not be pretended, that infancy would furnish a defence in trespass *quare clausum*. But the money did not come into the hands of the defendant by virtue of any valid contract, as the authorities abundantly show, and as is admitted. Trover would have been the proper action, had the defendant been of full age. It is brought for the conversion of money belonging to the plaintiff, which came into the hands of the defendant without any legal authority, and which he had no legal right to retain for a moment. Here was no violation of any contract, because there was no contract, or none but an illegal one, but a wrongful act in converting the plaintiff's property. If therefore the *New-York* and *Pennsylvania* cases relied on in relation to the misuse of an hired horse, be better law than that of *Massachusetts* on the same subject, which is much doubted, still it does not touch this

case. The case from 3 *Rawle*, cited for defendant, is in favor of the plaintiff. *Mills* v. *Graham*, 4 *Bos. & P.* 140; *Vasse* v. *Smith*, 6 *Cranch*, 226; 1 *Chitty on Pl.* 137; 2 *Kent's Com.* 241; *Wheelock* v. *Wheelwright*, 5 *Mass. R.* 104; *Homer* v. *Thwing*, 3 *Pick.* 492.

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

SHEPLEY J. — While the general rule is admitted, that a contract cannot be converted into a tort by the form of action to charge an infant, a difference of opinion in the application of it will be found in the decided cases.

It has been decided, that an action on the case for deceit cannot be maintained against an infant for knowingly and falsely warranting a horse to be sound. 2 *Marshall*, 485. And *Gibbs C. J.* in that case, cites the case of *Cross* v. *Andrews*, which decided, that an infant was not liable for the loss of goods, committed to his care as an innkeeper. And it has been decided, that such an action cannot be maintained against an infant for selling as his own the goods of another. 1 *Keb.* 778; *Curtin* v. *Patton*, 11 *S. & R.* 310. And yet such an action seems to have been sustained upon similar principles. 1 *Nott & McCord*, 197.

A difference of opinion has arisen also under what circumstances and in what form of action an infant is chargeable for the abuse, or misuse of a horse hired. In *Jennings* v. *Rundall*, 8 *T. R.* 335, it was decided, that case or trover would not lie against an infant, for immoderately riding a horse so that it was damaged, when hired for use. And in the case of *Campbell* v. *Stakes*, 2 *Wend.* 137, where an infant drove a hired horse with such violence, that it died, it was decided, that case would not lie, as it supposed the defendant to have a rightful possession, but that trespass would lie for a wilful or intentional injury.

In the case of *Homer* v. *Thwing*, 3 *Pick.* 492, it was decided, that an infant was liable in trover where he hired a horse to go to one place and went to another and injured the horse.

In a like case of hiring and use, where the horse was killed, it was decided, that an action on the case for damages could not be maintained; and the case of *Homer* v. *Thwing*, was regarded as

erroneous. *Penrose* v. *Curren*, 3 *Rawle*, 351, *Rogers J.* remarks, that, "the fundamental error in the case, consists in considering the conduct of the infant as a violation of the contract, whereas there was no contract, that could be enforced."

In the case of *Campbell* v. *Stakes*, it is said, that if the infant should sell the horse, trover would lie. And in *Penrose* v. *Curren*, it is said, "whenever a person has not parted with his property then he can assert his right as well against an infant as an adult, as in every kind of bailment; and if the conversion had been the non-delivery of the horse and carriage hired, the owner might have maintained detinue, replevin or trover."

Where goods were delivered to a mate of a vessel, a minor, to be delivered to a foreign merchant, and he sold them and used the money, it was decided, that a special action on the case would lie. *Peigne* v. *Sutcliffe*, 4 *McCord*, 387.

So detinue will lie against an infant, where goods were delivered for a special purpose not accomplished. *Mills* v. *Graham*, 4 *B. & P.* 140.

In the case of *Vasse* v. *Smith*, 6 *Cranch*, 226, *Marshall C. J.* says, "this Court is of opinion, that infancy is no complete bar to an action of trover, although the goods converted be in his possession in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission but of commission, and within that class of offences for which infancy cannot afford protection."

Mr. Justice Story, in his treatise on bailments, says, "if an infant receive a deposit, he is bound by the general principles of law to restore it, if it is in his possession or control; but he is not responsible if he loses it." *Story on Bailments*, 35. And *Kent* says of an infant, "he is liable in trover for tortously converting goods intrusted to him." 2 *Kent*, 241.

It will be perceived, that the general rule, that an infant is liable for goods entrusted to his care and converted by him, is not questioned in any of these cases. What amounts to proof of conversion has occasioned the difference between the courts of *Massachusetts* and *Pennsylvania*. And if it be difficult to perceive, that a violation of a contract, which the law does not regard as binding, would amount to a conversion of the property; there may be equal

difficulty in understanding why there has not been a conversion when a horse has been hired and killed by bad usage. And it would seem, that in the cases of *Campbell* v. *Stakes*, and of *Penrose* v. *Curren*, the plaintiffs might have recovered upon a count in trover. For that form of action does not suppose, that a contract has existed; and the infant could not be excused for not delivering the horse by alleging his own misconduct.

All wagers in this State being unlawful, no question is raised in the present case, except upon the liability of the defendant in this form of action for refusing to deliver property entrusted to his care, after a demand and refusal, and in such a case there does not appear to be any doubt, that the action may be maintained.

Exceptions overruled.

THOMAS CUTTS *vs.* JOHN C. HUSSEY.

The lands of individuals, lying in common and uninclosed, cannot be understood to be "*commons of the town*," within the meaning of the *stat.* 1834, *c.* 137, concerning pounds and beasts impounded.

The common law right to impound cattle, damage feasant, is taken away by the *stat.* of 1834, *c.* 137.

The Provincial *stat.* of 1749, prohibiting cattle from running at large on *Winter-harbor beach*, and charging a committee, to be appointed by the town of *Biddeford*, with the execution of the law, gives to the town no title to the beach, and cannot be considered as evidence that it was then in the town.

Nor can the acts of the committee under the law, give any title in the land to the town.

By the word *beach*, in that statute, is intended the space between the high and low water mark.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Replevin of two cows, alleged to be the property of the plaintiff, and impounded by the defendant in the town pound in *Biddeford.* The defendant justified the impounding as a fence viewer and field driver of that town, because the cows were taken up running at large, not under the care of a keeper, on *Winter-harbor beach,* alleged to be *commons of Biddeford;* and also because

they were taken up on the commons, and highway, and townway. The plaintiff denied, that the place of taking was commons of the town of *Biddeford*, and insisted that it was the property of individuals. The whole evidence in the case appears in the exceptions, but sufficient will be found in the opinion of the Court, for the proper understanding of the questions of law raised on the exceptions. The Judge ruled, that upon the evidence, that the place of taking by the defendant did not appear to be town commons, or commons, or highway, or townways, and so directed the jury. The verdict was for the plaintiff, and the defendant filed exceptions.

A. G. Goodwin, for the defendant.

The justification was good and sufficient, either by force of the *stat.* of 1834, *c.* 137, or on the principles of the common law.

The place where the cattle were taken were *commons of the town of Biddeford.* The meaning and intention of the Legislature was, that the commons of the town should be all lands within the town, unimproved and not enclosed by fences. To show what rules the Courts are governed by in the construction of statutes, these cases were cited. *Terry* v. *Foster*, 1 *Mass. R.* 146; *Church* v. *Crocker*, 3 *Mass. R.* 21; *Holland* v. *Makepeace*, 8 *Mass. R.* 423; *Thomas* v. *Mahan*, 4 *Greenl.* 561; *Richards* v. *Daggett*, 4 *Mass. R.* 534; *Somerset* v. *Dighton*, 12 *Mass. R.* 383; *Holbrook* v. *Holbrook*, 1 *Pick.* 254; *Taylor* v. *Delancey*, 2 *Caines' Cases*, 143; 4 *Johns. R.* 359; 15 *Johns. R.* 358; 3 *Tomlin's Jac. Law Dic.* 520. To show that the word *commons* embraces all lands not under improvement, and not enclosed by fences, the following Colonial, Province, and State statutes were cited and commented upon. *Colony Laws, stat. c.* 19 & 78; *Province Laws, stat.* 51, 160, 220, 242; *Mass. stat.* of 1788, 1789, 1800, 1804; *Maine stat.* 1821, *c.* 128, 129, 44; *stat.* 1825, *c.* 317; *Mass. Rev. Stat. c.* 19, § 22. The *stat.* of 1834, *c.* 137, is equally extensive. Statutes made for the public good are to be so construed as to attain their end. 3 *Jacob's Law Dic.* 524. It is as much for the public good to restrain cattle from all commons, as from such as are owned by the town.

But if this construction be not correct, still the defence is made out, because the *locus in quo* was the town's property. This appears, because the land was originally the town's property, and

there is no evidence of a conveyance; from the Provincial statute of 1749, and the votes of the town, and acts of the committees under them; from acts of ownership by the town, showing title by occupancy. Title is not necessary; mere occupancy is sufficient to justify impounding under the 6th section of the statute of 1834.

But if the statute provisions do not afford a justification, the statute does not repeal the common law; and by the principles of the common law, every person must keep his cattle on his own land. *Rust* v. *Low*, 6 *Mass. R.* 90; *Stackpole* v. *Healey*, 16 *Mass. R.* 33; *Little* v. *Lathrop*, 5 *Greenl.* 356; *Heath* v. *Ricker*, 2 *Greenl.* 408.

Fairfield & Haines, for the plaintiff.

The only question in this case is, whether the place of taking is the property of the town of *Biddeford*, or the property of individuals; whether commons of the town, or private property. To constitute land *town commons*, it must be property of the town, to remain common and for public use. The cattle were taken up on the sea wall, which cannot properly be denominated *beach*. Beach is synonymous with *seashore*, and embraces only the land between ordinary high water mark, and low water mark. *Storer* v. *Freeman*, 6 *Mass. R.* 439; 5 *B. & Ald.* 91; *Angell on Tide Waters*, *app.* 95, 162, 166. But if the place of taking was within the limits of the beach, the question then returns, was this the property of the town of *Biddeford*, or of individuals. It is of no importance to what individuals, or whether the plaintiff be one of them or not. First, because the impounding was not for damage to individuals; and second, there was no fence whatever, and by reference to the *stat.* of 1834, *c.* 137, it will be perceived, that the right to impound depends upon the land being enclosed with "*a legal and sufficient fence.*" *Gooch* v. *Stephenson*, 1 *Shepley*, 371; 3 *Kent's Com.* 438, *note*, remarking on a statute of *Alabama*, similar to our own; *Avery* v. *Maxwell*, 4 *N. H. Rep.* 37, relative to the construction of a similar statute. The *locus in quo* is private property, because it is appurtenant to the upland. The owner of land bounded on the sea owns to low water mark, where the tide does not ebb and flow more than one hundred rods. *Storer* v. *Freeman*, 6 *Mass. R.* 435; *Emerson* v. *Taylor*, 9 *Greenl.* 43. Not only was the title in individuals, but they have possessed the

land for many years, in as full and ample manner, as the nature of the property would admit. *Cook* v. *Godfrey*, 16 *Pick.* 186; *Angell on Tide Waters*, 105. The mere fact of the passing of a statute giving governmental power over the rights and property of individuals, which was submitted to without complaint, could give neither to the State nor the town any title to the land. It is against common right for the legislature to give to the town a property in the beach. *Gooch* v. *Stephenson*, 1 *Shepley*, 371; *Thomas* v. *Marshfield*, 10 *Pick.* 364; 4 *N. H. Rep.* 566; *Angell's Tide Waters*, 27. That neither the statute relied on, nor the choosing of officers under it, nor the action of such officers, if any there has been, could prove the property in the beach to be in the town, was recently decided in *Massachusetts*. *Sale* v. *Pratt*, published in the papers.

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

Weston C. J.—We do not, upon examination, perceive any sufficient evidence, that the title to the *locus in quo* was in the town of *Biddeford*. It appears, that more than an hundred years ago, *Pendleton Fletcher* conveyed to *Bachelder Hussey* the one half of *Pendleton's* neck, the south side of which is the beach in question, with the marsh and beach. Soon after, *Pendleton* conveyed to his son the remaining half, as far as *Booth's* mill, which included the *locus in quo*. And it appears that the plaintiff, who owns a part of the land derived from the same title, has claimed and exercised over the contiguous beach all the ownership, of which the nature of the property is susceptible. Lots of land were located by the town surveyor, for several succeeding years after 1720, but whether any residuum remained to the town does not appear.

In the division of *Bachelder Hussey's* estate in 1764, certain thatch beds, on the neck, were set off to the heirs by lines, which might exclude the beach, but this did not divest the heirs of their right to any portion of the beach, of which their ancestor died seized. The right of the town is principally based upon a Provincial statute of 1749, prohibiting cattle from running at large on *Winter-harbor* beach, and charging a committee, to be appointed by the town of *Biddeford*, with the execution of this law. Some public

object was doubtless intended to be promoted by this regulation. It may have been for the better security of the sea wall, which it may have been apprehended might be injured, by the free range of cattle over and upon it. This was within the scope of legislative power; especially as it does not appear, that any valuable private right was impaired by it. The committee, although elected by the town, acted under public authority, in the discharge of the duties confided to them. The statute certainly gave to the town no title to the beach, nor can we regard it as evidence, that it was their property at the time of its passage. The statute of 1749, expired by its own limitation in 1771, and has not since been renewed. And although the town have continued to choose the committee, required by that law, ever since, and it was proved at the trial, that in a few instances individuals had submitted to their authority, we are unable to discover any legal ground, upon which it can be supported, after the expiration of the statute.

Besides, we do not see how the *locus in quo* can be considered as a part of the beach. It was above high water mark, and within the sea wall. By a beach, is to be understood the shore or strand; and it has been decided, that the seashore is the space between high and low water mark. *Storer* v. *Freeman*, 6 *Mass. R.* 435.

But although the *locus in quo* was not in the highway, or on any common belonging to the town, it is insisted, that being uninclosed ground, it was a common of the town, within the true intent and meaning of the *statute* of 1834, *c.* 137, under which the defendant justifies. His counsel has, with great industry and ingenuity, gone into an examination of a wide range of statutes in *Massachusetts*, Colonial, Provincial, and under the Commonwealth; together with some passed in our own State. They relate to common fields, to lands lying common and unenclosed, to cattle going at large generally, or going at large on the highways and commons. We have examined them with care; but they do not, in our judgment, justify the conclusion, that by "commons of the town," in the statute of 1834, can be understood the lands of individuals, lying common and unenclosed. It would subject to the penalty of the statute, the cattle of the owner of the land, or the cattle of others, put there by his permission. And if there without permission, it is an invasion of a private right, rather than of a public

regulation. That regulation would be sufficiently vindicated by seizing them, when they stray upon the highways, or commons properly so called. In an earlier stage of the settlement of the country, large tracts belonging to towns, may have remained unappropriated and undivided, to which this term might properly be applied.

As to any right to seize and impound the cattle in controversy, damage feasant, existing at common law, it is expressly abrogated by the statute of 1834, *c.* 137, when the land is unenclosed. *Gooch* v. *Stephenson*, 13 *Maine R.* 371.

With regard to the title of the town, it does not appear that any facts were in controversy, upon which it depended. Whether upon the evidence exhibited, it was legally made out, was a question of law, which was properly decided by the presiding Judge.

Exceptions overruled.

Harrison Lowell *vs.* Robert Shaw *& al. Adm'rs.*

Under the statute for the support and regulation of mills, *stat.* 1821, *c.* 45, the owner of the dam at the time when the yearly damage by flowing becomes due is liable to pay it for the whole of that year.

And the mortgagee in possession for this purpose must be regarded as the owner.

From the statement of facts on which the case was submitted for decision, it appeared, that the action was debt on a judgment in favor of *Sylvanus Lowell*, whose title to the land, *Sept.* 1, 1831, was, and now is, in the plaintiff, recovered against *Seth Spring*, in *September*, 1814. The judgment was founded on a complaint for flowing lands, under the act entitled, "an act for the support and regulation of mills," *stat.* of 1821, *c.* 45, wherein the yearly damages sustained by the complainant were estimated at the sum of fifty-five dollars, and which sum has not since been altered. *Seth Spring* conveyed to *John Spring*, who before *Sept.* 1, 1831, conveyed the same in mortgage to the defendants' intestate, who, on the 5th of *July*, 1832, by virtue of a writ of possession issued upon a judgment on that mortgage, entered into the possession of

the same, and have since retained the possession thereof. Before that day, the owner of the equity of redemption had the possession. The commencement of the year for which the annual damages were to be paid was *Sept.* 12. If the plaintiff is entitled to recover damages for the whole year ending *Sept.* 12, 1832, or any part thereof, the defendants are to be defaulted for the amount and interest; otherwise the plaintiff is to become nonsuit.

J. Shepley, for the plaintiff.

The only question is, whether the mortgagee, who entered into actual possession under the mortgage, before the expiration of the year for which damage is to be paid, is liable to pay for the year.

By the terms of the statute of flowing, there is to be but one action for the damages for one year. The owner cannot maintain an action until the end of the year, and has not the right to bring as many suits, as there were occupants. Whoever chooses to enter into the actual occupation of the land, subject to pay damage, and holds it at the end of the year, is subject to pay the yearly damages for that year. This liability exists, with much less reason for it, in case of leases. 2 *Cruise's Dig.* 114, § 14; 1 *Cov. & R. Powell on Mort.*, 181, *note L*; 7 *East*, 335; 2 *Car. & P.* 370; 2 *Pick.* 267; 12 *Johns. R.* 165; 13 *ib.* 94; 19 *ib.* 337; 4 *Kent's Com.* 473.

W. P. Haines, for the defendants, submitted without argument.

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

Shepley J. — By the provisions of the *stat. ch.* 45, § 4, there is to be an "appraisement of the yearly damage done to the complainant by so flowing his lands;" and a return is also to be made of "what portion of the year the said lands ought not to be flowed." The judgment rendered upon these proceedings, is to "be the measure of the yearly damages," until the owner or occupant shall by a new process vacate such judgment; and an action of debt upon the record is given to the party, or to his legal representatives, or assigns. The injury is to be compensated by a yearly damage, although the lands may be flowed only for a part of the year. The intention appears to have been, that the yearly damage should become attached to the estate of the mill-dam so as to make

any owner or occupant liable to pay it. It is a burthen upon the estate imposed by the law as a remuneration for the injury occasioned by it. Whoever becomes the owner must take the estate *cum onere*, and the owner of the land flowed will be entitled to call upon him to pay whatever may be due from the land, unless he has been guilty of laches in collecting of the former owner or occupant. The sum payable, is ascertained by a judgment for a definite amount, and is an entirety. There is nothing in the statute indicating, that a part of this entire judgment or sum may be recovered before the whole becomes payable. If the owner of the land should convey it before the expiration of the year, could he claim to have the annual sum apportioned, and to subject the owner of the dam to as many claims or suits as there might be owners of the land during the year? The ninth section provides for a tender "within one month after the past years damages shall have become due," thereby clearly indicating, that at a certain time the yearly damages become due.

Upon what principles could an apportionment be made upon time? Could the person, who should be owner during that portion of the year, when the lands are not to be flowed, be chargeable? Or must the damage be apportioned upon those months and parts of months during which the land may be flowed? And upon what principles can an action be maintained for a part of a judgment, unless claimed as the whole amount which is due upon it? Any attempt at such an apportionment would be attended with serious difficulties and would be liable to the objection, that it would be giving other rights, and imposing other burdens than those contemplated by the statute.

By the common law a rent or annuity payable yearly or quarter yearly so long as the party receiving or the party paying should live could not be apportioned on time. Until the statute, 11 *Geo.* 2, *ch.* 19, *sec.* 15, otherwise provided, whatever might have accrued between one day of payment and another was lost. *William Clun's Case*, 10 *Coke*, 128; *Price* v. *Williams*, *Cro. Eliz.* 380; *Hawkins* v. *Kelley*, 8 *Ves.* 307. In *Clun's* case, it is said, "if tenant for life makes a lease for years rendering rent at the feast of *Easter*, and the lessee occupies for three quarters of a year, and in the last quarter before the feast of *Easter*, the tenant for life dies,

here shall be no apportionment of the rent for three quarters of the year, because no rent was due till the feast of *Easter*, and no apportionment shall be in respect of time." So where the tenant for life died during the year and before the land tax, quitrents, and other annual charges upon the land became payable, it was decided, that the whole must be borne by the remainder-man, and that he could claim no contribution in equity from the estate of the tenant for life. *Sutton* v. *Chaplin*, 10 *Ves.* 66. The assignee of the lessee is not liable for any rent, which has not become due before he has assigned to others. *Paul* v. *Nurse*, 8 *B. & C.* 486. In annuity for a pension issuing out of a church, it was resolved, "that it lay against the incumbent as well for the arrearages due in the time of his predecessor as in his own time, for the church itself is charged in whosoever's hand it comes." *Trinity College* v. *Tunstal, Cro. Eliz.* 810.

Whether guided by cases in some degree analogous, or by the provisions of the statute, the conclusion is, that the owner of the dam at the time when the yearly damage becomes due is liable to pay it. A mortgagee in possession must be regarded as the owner. According to the agreement, defendants are to be defaulted.

JAMES MCARTHUR *vs.* THOMAS K. LANE.

It is good cause for the abatement of a writ of replevin, that *at the time of the taking* by the defendant, the chattels were the joint property of the plaintiff, and of another person.

If the plea in abatement contain no prayer for a return of the property replevied, still a return may be ordered on a written suggestion, that the property was attached by the defendant as an officer, and that he is still responsible for its safe keeping.

But when the return is ordered on such suggestion, no damages can be allowed.

REPLEVIN for a quantity of board logs.

The plea in abatement was filed at the term at which the action was entered; the demurrer was put in at the next succeeding term; and the suggestion for a return was made at the next law term,

when the case stood for argument. The case is sufficiently understood from the opinion of the Court.

McArthur, for the plaintiff, cited *Gould* v. *Barnard*, 3 *Mass. R.* 301.

Bradley, for the defendant, cited *Quincy* v. *Hall*, 1 *Pick.* 360.

The opinion of the Court was drawn up by

SHEPLEY J. — The plea in abatement, alleges the property at the time of taking to have been jointly in the plaintiff and another. The objection to the plea is, that it would be sufficient for the plaintiff to prove property in himself at the time of suing out the writ. But the settled rule seems to be, that it must be at the time of the taking. *Co. Lit.* 145, *b.* As the property was then in the plaintiff and another, the plea in abatement is good. *Hart* v. *Fitzgerald*, 2 *Mass. R.* 509.

The plea contains no prayer for a return of the property; but a petition is filed and a suggestion made, that the property was attached by the defendant, as a sheriff, by virtue of a writ against the joint owner other than the plaintiff; and he prays for a return, that it may be held to respond that attachment. If it did not appear, that the defendant had a legal right to have possession, a return would not be awarded. *Gould* v. *Barnard*, 3 *Mass. R.* 201. The defendant might lawfully attach the share of the other joint owner, and having done so, is entitled upon his petition and suggestion to a return of the property. *Quincy* v. *Hall*, 1 *Pick.* 360. But no damages can be allowed, as there is no issue upon which they can be estimated.

Writ abated. Judgment for a return, and costs without damages.

JOHN DEARING *vs.* JAMES HEARD, JR.

A surveyor of highways has no power to make distress for the non-payment of a highway tax committed to him, until after the time limited in the warrant to pay in labor and materials has expired.

And the surveyor cannot, in a case not falling within the exception in the statute, justify the making such distress, unless his return upon the warrant shows, that he gave to the party, to be charged with the payment of money, forty-eight hours notice of the time and place appointed for the payment of the tax in materials and labor.

TRESPASS, for taking and selling the plaintiff's horse. The defendant justified as highway surveyor of the town of *Sanford.* The material facts will be found in the opinion of the Court. At the trial before the Chief Justice, after the case was opened, the opinion of the Court was requested upon the following questions.

1. Whether the warrant and return on the same are sufficient to constitute a justification, if true ?

2. Whether the return of the defendant is conclusive and incontrovertible in this action ?

If the opinion of the Court should be, that the warrant and return are a sufficient justification, if true, and that the return cannot be controverted as the action stands, the plaintiff is to become nonsuit ; but if in their opinion, the justification is not made out, or that the return on the warrant may be controverted in the action as it stands, the action is to stand for trial.

The case was argued in writing, but as the opinion of the Court is based only on the first question reserved, no notice will be taken of the other.

D. Goodenow and *I. S. Kimball,* for the plaintiff, cited *stat.* of 1821, *c.* 118, § 13, 16 ; *Davis* v. *Maynard,* 9 *Mass. R.* 246; *Eddy* v. *Knapp,* 2 *Mass. R.* 154 ; *Purrington* v. *Loring,* 7 *Mass. R.* 388.

N. D. Appleton and *J. T. Paine,* for the defendant, cited the same statute, and the same sections, and contended, that the warrant, and the return thereon as it now stands, were a complete and perfect justification.

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

WESTON C. J. — The plaintiff was delinquent but a few cents, in the payment of his highway taxes, on account of which he has been subjected to considerable expense and sacrifice of property. The defendant, in his return to his warrant, has given his own account of his proceedings; and the principal question is, whether they afford him a sufficient justification.

By the *statute* of 1821, *c.* 118, *sec.* 16, it is provided, that if highway taxes are not paid by the time limited by law, or at such periods, as may be agreed upon by the town, the assessors may deliver to the surveyors of highways, warrants of distress, in the form prescribed by law for collecting other town taxes.

In *May*, 1836, the assessors committed to the defendant, as such surveyor, assessments of the highway tax in his district, bearing the name of the plaintiff, and his proportion of the tax of two thousand dollars, voted by the town to be expended in repairing the highways, the one half of which he was to cause to be expended thereon before the first of *July*, and the other half before the first of *April*, next following. For the collection of this tax, they gave him a warrant, requiring him to obtain by distress, what was not paid in labor and materials. Prior to the distress, of which the plaintiff complains, he had paid the first half of his proportion of this tax, and the far greater part of the other half. The distress was made on the second day of *February;* but the time limited for the expenditure of the tax then due did not expire, until the first of *April* following. Now until the time limited for paying in labor and materials has expired, the distress is not legally authorized. It is urged, that the season for repairing highways, for all practical purposes, was over in *February*. It is a sufficient answer, that the time appointed was further extended, until the expiration of which a distress was not warranted.

By the thirteenth section of the same statute, the surveyor is required to give, to each person on his list, forty-eight hours notice of the times and places, by him appointed, for providing materials and laboring. Such notice is indispensable, to fix the delinquency of the party, attempted to be charged. No such notice appears in the return of the warrant, by this defendant. He states, that the

plaintiff, though requested, neglected and refused to pay in labor or otherwise; but whether he had the notice of the times and places, when and where he was to labor, to which he was by law entitled, does not appear. And we are of opinion, that the justification set up by the defendant has failed, first, because he made the distress before the time limited to pay in labor and materials had expired; secondly, because it does not appear, that the plaintiff had the notice prescribed by the statute. The nonsuit is accordingly set aside, and a new trial granted.

JESSE PAGE *vs.* DAVID WEBSTER.

Where a note is made payable at either of the banks in a city or town, it is not the duty of the holder to give notice to the maker at which of the banks the note will be presented for payment, when it falls due.

Mere delay to enforce the collection of a note against the maker, does not discharge an indorser, once made liable, where the holder does not so bind himself to give time to the maker, that an action against him on the note cannot be maintained.

Nor is such liability discharged by the neglect of the holder to commence a suit against the maker, when so requested by the indorser.

Nor is the indorser discharged by the neglect of the holder to enter an action against the maker, thereby releasing property attached on the writ, which was afterwards conveyed.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The action was against the defendant, as indorser of a note, for $1,000, dated *Nov.* 11, 1835, made by *Phinehas Eastman* and *Lane & Usher*, to the defendant or his order, payable in one year from date with interest, at either of the banks in *Portland*, and indorsed to the plaintiff. The plaintiff read in evidence the protest of a notary public in *Portland*, it having been agreed to be admitted in evidence in place of his testimony, from which it appeared, that *Nov.* 14, 1837, he took the note from the *Canal* Bank in *Portland*, then claiming to be the holders, and presented it at that Bank in business hours, and demanded payment, the time of pay-

ment and grace expiring on that day, "notice having been issued, that it was payable at said Bank," and that payment was refused because no funds were there for that purpose; that on the same day he presented the note to the defendant, the indorser, and informed him, that it had not been paid, and demanded payment of him, to which he replied, "the makers must take care of it." He also sent notices to the makers by mail. The defendant then proved, that after the maturity of the note, and before any suit thereon, the defendant requested the plaintiff to commence a suit against the principals, and told him, if the note could not be collected of them, he, the defendant, would give him a bond to pay it; that suits had been commenced against the defendant and the principals, for *February Term*, 1837, and their real estate attached; that in consequence of an agreement between the plaintiff and *Lane*, one of the makers, the suit against them was withdrawn, and not entered at the return term thereof; that *Lane* then paid one hundred dollars on the note, and took the plaintiff's receipt therefor; and agreed to see the note paid before the next *May Term*, and that the suit then pending against the defendant should be prosecuted to judgment; that at the time the suit against the makers was stopped, *Lane & Usher* had a large visible property, which could be attached, and that in *June* following, they conveyed all their real estate to their sons, and had no visible property to be attached, the consideration in the deeds being twenty-four thousand dollars, the sons being young men within the age of twenty-four years, and without property before the conveyance to them. The plaintiff proved, that the note had been some months in a bank for collection before it fell due. Upon this evidence the defendant's counsel requested the Judge to charge the jury, that the action could not be maintained, unless it was proved that the plaintiff gave notice to the signers of the note where it was to be found, and in what bank at its maturity, and that the notice should be given previous to its maturity; also, that the facts proved exonerated the defendant from his liability as indorser of the note; that by the agreement between the plaintiff and *Lane*, and by the payment made by *Lane*, and by the withdrawal and discontinuance of the suit against the makers, and by the neglect of the plaintiff to commence suits, as requested by the defendant, he was released from his liability as in-

dorser. The Judge declined to give the instructions, and the jury found a verdict for the plaintiff. The defendant excepted to the refusal to give the instructions.

S. Bradley, for the defendant.

1. The first request for instruction should have been complied with. Due notice should have been given to the promissors at which bank in *Portland* the note was left, before it came to maturity. *Berkshire Bank* v. *Jones*, 6 *Mass. R.* 524; *Woodbridge* v. *Brigham*, 12 *ib.* 405; *Same case*, 13 *Mass. R.* 556; *North Bank* v. *Abbott*, 13 *Pick.* 465.

2. The second request should have been granted. Either the neglect to enter the action and prosecute the suit, thereby relinquishing the attachment; or the refusal to sue and collect of the principal on request; or the delay on receiving a partial payment; discharged the defendant from all liability as indorser. *Kennebec Bank* v. *Tuckerman*, 5 *Greenl.* 130; *Hunt* v. *Bridgham*, 2 *Pick.* 585; *Baker* v. *Briggs*, 8 *Pick.* 122; *Pain* v. *Packard*, 13 *Johns. R.* 174; *King* v. *Baldwin*, 17 *Johns. R.* 384; *Strafford Bank* v. *Crosby*, 8 *Greenl.* 194; *Bank of U. States* v. *Hatch*, 6 *Peters*, 250; *Chitty on Bills*, 290, 292; 3 *Bos. & P.* 365.

J. Shepley, for the plaintiff.

It was not necessary for the plaintiff to give notice to the makers of the note at which bank in *Portland* it would be presented for payment. If this were required, instead of its being a benefit to the holder, it would be an injury. It would be more troublesome to prove the notice, than the presentment for payment. If a note or bill be payable at two or more places, the holder has the option at which place to present it, and the party first liable must have funds at each place. *Bayley on Bills*, 232, and note 52, same page, by *Phillips & Sewall*, citing *Beeching* v. *Gower*, *Holt*, 313. But the principle contended for, if correct, did not excuse the defendant from showing that the money was ready at some one of the places. *Baldwin* v. *Farnsworth*, 1 *Fairf.* 416; *Bacon* v. *Dyer*, 3 *Fairf.* 19. The defendant's counsel relies alone on *North Bank* v. *Abbott* in support of his position. The remark is professedly a mere dictum of the learned Judge, who delivered the opinion; the decision was not founded on this principle; and it is believed,

furnishes another example of the impropriety and impolicy of throwing out superfluous learning by any Judge, however learned. If the Judge were called on at a trial to determine, whether *Portland* were a large or a small city, or how many banks would bring the place within his rule, would he decide himself, or leave it to the jury? The reasoning of the Judge in the same case, is perfectly conclusive against the dictum. But to have had the dictum applicable, the defendant should have shown, that *Portland* was a large city, which was not done.

The second request for instructions was properly withheld. The several particulars embraced in it are of the same class, and depend on the same principle, or rather want of principle. The original and correct doctrine is, that so far as it respects the holder of the note, there is no difference between principal and sureties. No transaction with one then, which would not discharge the other parties, were they all principals, would discharge a surety. This principle was departed from in *Pain* v. *Packard*, cited for the defendant, and has found some countenance in other cases, one of which has been cited from our own reports. It was much narrowed in *Fulton* v. *Matthews*, 15 *Johns. R.* 433, carried by but the single vote of a Senator in *King* v. *Baldwin*, and repudiated, in the State where it had its origin, in *Warner* v. *Beardsley*, 8 *Wend.* 194. All that now remains of it is, that the surety is discharged, if the holder for a sufficient consideration, so bind himself to give time to the principal, that he cannot bring a suit to enforce the payment of the note. The doctrine was, that the surety was merely liable in the last resort, after all means of getting the debt from the principal had been tried with all possible despatch, and exhausted, however expensive the process. Its brief existence has lasted long enough. *Freeman's Bank* v. *Rollins*, 13 *Maine R.* 202; *Frye* v. *Barker*, 4 *Pick.* 382; *Oxford Bank* v. *Lewis*, 8 *Pick.* 458; *M'Lemore* v. *Powell*, 12 *Wheat.* 554; *Lenox* v. *Prout*, 3 *Wheat.* 520. The facts in this case would not have discharged the defendant, had he been a surety; much less when an indorser and once charged.

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

SHEPLEY J. — The note was made payable "at either of the banks in *Portland*;" and the question arises under the first request, whether it was the duty of the plaintiff, before the note became due, to give notice to the makers, in what bank it might be found when due. The intention of the parties to the contract, if it can be ascertained, is to be carried into effect. Obligations are not to be imposed upon the holder, nor liabilities upon the indorser, which were never designed. This form of a note has been introduced into this part of the country within a few years; and it may aid in determining the rights and duties of the parti[illegible] to inquire at whose instance the note must have been so formed. It is not easy to perceive what benefit the maker would derive from a note in that form, unless it were made by a banker or banking house, in which case there might be hope of advantage from an increased circulation. While the maker ordinarily could derive no advantage from such a form, he might justly apprehend some inconvenience in looking up the note to pay it. For as it regards him it is quite clear, that the holder by the law in this, and most of the other States, is not obliged to have it at the place where payable. A readiness to pay at the appointed place is matter in defence only. *Bacon* v. *Dyer*, 3 *Fairf.* 19, and cases cited in *Bayley on Bills*, 203, *note* 15. It is not therefore probable, that it was so formed for his interest or accommodation. To the payee it might be of advantage. He might be desirous of making use of the note in the market, or at a banking house to obtain the money before it became due. It would be convenient to have it payable at a bank to save the risk and trouble of a presentment to the maker. And if made payable at a particular bank it would not be so readily received at other banks, because it would subject them to the risk and trouble of being watchful for the day of payment, and of sending it to the bank where payable for presentment. It would be natural for business men to endeavor to obviate this difficulty so as to enable them the most readily to obtain cash for the note at any bank, not being limited to one, where funds were to be loaned. A note payable at any bank in a place would therefore be desirable to the payee, and it is but reasonable to conclude, that such a form was introduced for his

convenience and interest. And if so, does it not shew, that the intention of the parties was to relieve the payee or holder from risks and troubles to which he might be subjected, if made payable at any one bank only? And if such were the intentions of the parties, they can only be carried into effect by requiring the maker to look for his note at all the places where he promises to pay it. For to require the holder to give the previous notice now insisted upon would not only defeat the object of relieving from trouble and risk, but would subject to much greater, than if made payable at one bank only. The maker's express promise to pay at any one of several places would indicate to a common mind the duty to act according to what is supposed to have been the intention of the parties, and to look at all the places for it, or have funds there when it became due. And as respects his own liabilities, it has already been seen, that he must do it to relieve himself from the danger of costs, or at least must shew in defence a readiness at some place named. The payee never could have designed by receiving a note in that form to have incurred the responsibilities now supposed to attach to it, yet if there is any rule of law so clearly settled and well established as to decide the legal construction, which ought to be given to a contract in that form, the parties must be supposed to intend to conform to it.

Pothier discusses the duties of debtor and creditor when payment is to be made at a certain place, as a town or city, and the creditor has no domicil there; and decides, that the creditor must notify the debtor, where he will receive payment before he can put him in fault. And if he does not, and the debtor wishes to pay, he should assign or require him to do it, and upon his refusal the debtor will be allowed to appoint the place. He then says, "it remains to be observed, that if the agreement contains two different places for payment, and they are connected by a conjunctive particle, the payment ought to be made by a moiety in each place." "If by a disjunctive the payment ought to be made altogether, in either, at the election of the debtor; *generaliter definit Scaevola petitorem habere electionem ubi petat, reum ubi solvat scilicit ante petitionem.*" *Pothier, part* 2, *ch.* 3, *art.* 4. § 241. Where payment is to be made at either of several places, according to the *Roman* lawyer *Scaevola,* as quoted with approbation by *Pothier,*

the debtor may before demand, pay at either of the places; if he does not, and demand is to be made, the creditor may make it at either place. No intimation is made of a duty on the part of the creditor to notify before it becomes due, where the debtor may pay; and the duty required of the debtor before that time to elect his place of payment would not be consistent with such a requisition. And *Gibbs C. J.* seems so to have understood the creditor's rights, where he says, "I am of opinion as the note was payable at two places, that the plaintiffs had an option to present it at either." *Beeching* v. *Gower*, 1 *Holt*, 317. And that was a case to charge an indorser. This is adopted by Mr. Justice *Bayley* in his treatise on *Bills*, 232.

The case of the *North Bank* v. *Abbott*, 13 *Pick.* 465, is relied upon as requiring the creditor to give such a notice. Having the highest respect for that court, if a decision to that effect had been made, it would necessarily have had much weight. The Chief Justice, speaking of such a note, says, "it would seem to follow from other established rules, that in such case the holder should give notice to the promisor, where the note is. But it is not necessary to give any opinion in the present case." This cannot be regarded as settling the law in that State. And even if it were so settled, when a note is payable in cities so large, that there might be difficulty in ascertaining the number and place of business of the banks within the business hours of the day, there is no necessity for adopting such a rule in this State where all the banks in any one place can be visited in ten or fifteen minutes.

The next request relates to the neglect to enter and prosecute the suit commenced against the principals, or makers of the note. The plaintiff does not appear to have made any such contract for delay as precluded him from immediately commencing another suit; but it is said, that the effect must necessarily have been to delay. Mere delay after the indorser is once charged does not discharge him. It is only by such a contract for delay as binds the holder and disables him from proceeding, that the indorser is discharged. In the case of the *Bank of the United States* v. *Hatch*, 6 *Peters*, 250, which is relied upon by the counsel, this doctrine is clearly stated; and the decision in that case was not based upon the mere fact of the continuance, but upon the agreement made, by which

he disabled himself from commencing again until the next term. The true inquiry is stated to be "whether the parties did or did not intend a surceasing of all legal proceedings during that period;" and the conclusion was, that the agreement suspended the right to recover the debt until the next term. And it appears from the reasoning, that if the right to commence anew had remained, the plaintiff might have recovered.

In the case of *Lenox* v. *Prout*, 3 *Wheat.* 520, it was decided that an indorser was not discharged by a countermanding by the holder of an execution, on which the debt might have been collected of the maker, when the indorser offered to point out property to the officer and to indemnify him for selling it.

And in the case of *Fulton* v. *Matthews*, 15 *Johns. R.* 433, it was decided, that a discontinuance of a suit against the principal, without consent of the surety did not discharge him.

Another part of the request relates to the neglect of the plaintiff to commence suits against the makers as requested by the defendant. This doctrine may be said to have had its origin in the case of *Pain* v. *Packard*, 13 *Johns. R.* 174, where it appears to have been admitted, because it was supposed to have been the doctrine of chancery, as it would seem from the remarks of *Spencer C. J.* when giving his opinion in the case of *King* v. *Baldwin*, 17 *Johns. R.* 384, where he continues to adhere to it upon that ground. He says, "the doctrine is, that it is inequitable and unjust for the creditor, by delaying to sue, to expose the surety to the hazards arising from a prolongation of the credit, and that the surety has an equity sufficient to invoke the interposition of the powers of a Court of Chancery for his protection." Here the ground of interposition is said to be in chancery, the exposing of the surety to the hazard arising from a prolongation of the credit. And yet there is no point more perfectly settled, than that mere delay is not a cause of complaint. It is believed, that upon an examination of all the cases, it will be found, that chancery had never admitted any such principle, as was supposed. It is not upon a request simply without an offer of indemnity against the risk, delay and expense, that the holder is required to proceed against the principal to the exclusion of the surety. *Wright* v. *Simpson*, 6 *Ves.* 734; *Hayes* v. *Ward*, 4 *Johns. Ch. R.* 123. The rule in equity commends itself

to the judgment as reasonable and just. But to hold, that the payee or indorsee must proceed on request against the principal at whatever risk of loss by a change in the responsibility of the surety or indorser, and at expense, delay, and risk in endeavoring to obtain payment from him or from his property, the title to which may prove to be doubtful, is allowing the surety to throw upon the holder much of the risk and trouble, which by the contract he assumes and engages to free the holder from. Hence it was, that in chancery the doctrine of *Pain* v. *Packard* was repudiated, as setting up a rule unknown to it. And the Chancellor says, "there is no case, however, in the *English* law in which the personal application of the surety to the creditor was held to be compulsory on the creditor, at the hazard of discharging the surety." *King* v. *Baldwin*, 2 *Johns. Ch. R.* 554. It is true, that the Chancellor's decision was reversed in the Court of Errors by a casting vote; but instead of adding strength to the former decision, it exhibited a part of the same Judges as satisfied, that it was erroneous. And whatever of authority existed in those cases may be regarded as destroyed by the case of *Warner* v. *Beardsley*, 8 *Wend.* 194, where the cases in accordance with and opposed to it are referred to, and the doctrine of chancery is again stated, requiring in such case an indemnity from the surety. In *Massachusetts* the doctrine of *Pain* v. *Packard*, seemed to find some countenance in the case of *Hunt* v. *Bridgham*, as well as in this State, in *Kennebec Bank* v. *Tuckerman*, 5 *Greenl.* 130. It was doubted in *Crane* v. *Newhall*, 2 *Pick.* 612, and in *Frye* v. *Barker*, it is said never to have been adopted there. And in the case of the *Freeman's Bank* v. *Rollins*, 13 *Maine R.* 202, it is left in this State, as an undecided question. Upon examining the origin of the doctrine, and the opinions of eminent Judges in various cases, since decided, the impression is left, that the doctrine arose out of a misconception of the true rule in chancery; that the reasons upon which it rests are unsound; and that it places the rights of the parties to the contract upon a basis never contemplated or designed by them, and that it ought not to be received as a rule of law in this State.

Another point made in the defence was, that property attached was released, and that the principals have since conveyed.

Where the creditor has available property of the principal in his hands, from which without loss, expense, or injury to himself, he can obtain the debt, it is his duty to do so. And when he has collateral security, he should not surrender it to the principal without the consent of the surety who has an equitable right of substitution, that upon payment he may have the like advantage of such collateral or additional security. And it may be, that by giving a bond of indemnity without going into chancery, he may require the creditor to sell any property attached, and make the money out of it. But a creditor cannot be expected at his own expense and risk to prosecute a suit to judgment, and upon the execution take either personal or real estate, the title to which may be doubtful, for the sake of relieving a surety, who instead of doing his own duty by paying the debt, stands by and assumes no risk to save himself from the consequences, which are the result of his contract.

This is the doctrine of the cases of best authority, and it is not at variance with that of the case of *Baker* v. *Briggs*. In that case, the instruction was predicated upon the position, that the plaintiff had personal property of the principal in his hands, as security for the debt, and delivered it back without the consent of the surety. But the debtor has no just cause of complaint, when the property is not in his own hands, that the creditor prefers looking to his surety in preference to taking upon himself the risk of endeavoring to obtain payment from property, over which he has no more control, than the debtor might have by paying the debt and commencing a suit in his own behalf.

Exceptions overruled.

Abiel G. Trafton *vs. Inhabitants of* Alfred.

No action can be maintained against a town for the assessment and collection of an illegal school district tax.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

The action was *trespass*. The plaintiff proposed to prove, that the assessors of the town assessed a tax upon him and others for

the purpose of defraying the expense of building a schoolhouse in a supposed school district in the town; that the assessors issued their warrant to the collector, who distrained the plaintiff's property, and collected of him the amount of the tax; that the tax was illegally made, because the supposed school district, for which the tax was assessed, was not legally formed by territorial limits; and because the meeting of the supposed school district, at which the money assessed on the plaintiff was raised, was not legally convened, the legal voters not having been notified of the meeting in manner required by law; and also because the assessors did not assess all the property in the district, liable to assessment. The Judge ordered a nonsuit, on the principle that an action could not be maintained against the town for an illegal assessment by the assessors of a school district tax. The plaintiff filed exceptions.

N. D. Appleton, for the plaintiff, contended, that the only remedy for the plaintiff for the wrong done him, was against the town; that an action would lie neither against the assessors, nor the district; but would lie against the town. He cited, *stat.* 1821, *c.* 117, § 9; *stat.* 1826, *c.* 337, § 1; 7 *Pick.* 106; 14 *Pick.* 365; 13 *Mass. R.* 272; 15 *Mass. R.* 144; 5 *Mass. R.* 427; 10 *Pick.* 547; *School Dis. in Greene*, v. *Bailey*, 3 *Fairf.* 254; 4 *Pick.* 399.

D. Goodenow argued for the defendants, that as there was no allegation in the writ, and no offer to prove, that the assessors acted with personal faithfulness and integrity, it did not appear but that they were personally liable. The exception in the statute should have been negatived in the writ. *Smith* v. *Moore*, 6 *Greenl.* 278. The whole record is to be examined. *Farrar* v. *Merrill*, 1 *Greenl.* 17. If there was no school district, the assessors were *not required by law* to assess the tax, and acted in their own wrong, and they only are liable. The statute does not apply to school districts. It could never have been intended, that a town should be held answerable for any improper proceedings, wilful or otherwise, on the part of a school district. *School Dis. in Greene* v. *Bailey*, 3 *Fairf.* 259; *Little* v. *Merrill*, 10 *Pick.* 543.

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

EMERY J. — "The plaintiff proposed to prove," among other things, "that the school district was not legally formed by territorial limits. That the meeting at which the money was raised, which was assessed on the plaintiff, was not legally convened, the legal voters of the school district not having been notified as the law requires, and because the assessors did not assess all the property liable to assessment situated in that supposed district. Upon these exceptions, we must consider that the plaintiff could do all this, because the Judge who presided at the trial, ordered a nonsuit, on the ground that an action could not be maintained against the town for an illegal assessment by its assessors of a school district tax."

Previous to the act of *March* 6, 1826, *c.* 337, actions of trespass, or trespass on the case were the usual remedy against assessors for an illegal assessment by which a person's property had been taken, or his body arrested under a warrant from the assessors, directed to a collector, for the purpose of enforcing the collection of the money.

It often proved greivous to men of irreproachable characters, elected to serve the towns, or parishes, &c. that they should be harrassed with lawsuits arising, generally, from a desire to execute the duty assigned to them.

A conviction of this truth, induced the legislature to pass that statute.

The statute of *March* 21, 1821, *c.* 116, of 64 sections, had not provided a safeguard to the officer.

The *stat. c.* 337, in the first section, declares, that the assessors of towns, plantations, parishes and religious societies shall not hereafter be made responsible for the assessment of any tax, *which they are by law required to assess*, but the liability, if any, shall rest solely with said towns, plantations, parishes and religious societies; and the assessors shall be responsible only for their own personal faithfulness and integrity. After this, our *statute, c.* 518, passed *March* 31, 1831, an additional act regulating elections, *sec.* 5, declares, that in no case, shall any town or plantation officer incur a penalty, or be made to suffer in damages, by reason of his official

acts, or neglects, unless the same shall be unreasonable, corrupt or wilfully oppressive; provided, however, that the neglect to prepare the list of voters, to deposit it in the town clerk's office, or to post it up as by that act is required, and the neglect to call town or plantation meetings for elections, or to cause returns of votes to be delivered into the office of the secretary of State, as required by the constitution, and laws of the State, or to make the records by law required, shall be deemed unreasonable, unless the contrary shall be made to appear.

By this last statute, made manifestly with reference to elections, the legislature have described their views of what may be thought unreasonable in the conduct of any town or plantation officer, leaving to the common law to settle what is corrupt or wilfully oppressive. There is nothing in this act throwing especial responsibility on the town for the errors of its officers, and whatever of liability there is must result from the provisions of the *stat. c.* 337.

It is insisted for the defendants, that as the inhabitants of towns are obliged by law to choose assessors or selectmen, who must be assessors, if others be not chosen, the town is not liable by common law to such a suit, and could become so only by the provisions of the statute. And that care should be taken so to describe the right of the plaintiff to sue as to bring his case within the pale of that law recently enacted.

The case of *Farrar* v. *Merrill*, 1 *Greenl.* 17, has been cited, and the late Chief Justice there says, "it is our duty, in deciding on the exceptions, to look to the whole evidence." In *Smith* v. *Moore*, 6 *Greenl.* 274, he says, "neither a report of a Judge, nor an exception alleged by a party according to our statute constitute any part of the record. Whether all the facts necessary to the maintenance of the action were averred in the declaration was not part of the case reserved." In the case under consideration reference is made in the exceptions to the declaration by the statement, that, "this is an action of trespass as set forth in the writ," and a copy of that writ has been shewn as one of the papers in the case. It is not certified by the clerk, but a deputy-sheriff. In the drawing of the exceptions, it is not made specifically a part of the case, and it is not the practice to look into the declaration unless it be so described. Nor is it necessary here. For the generality of the

terms used by the Judge, "an action could not be maintained," must be understood to be *such* as was then before him, — an action of trespass. And we are of opinion, that the remedy cannot be sought against the inhabitants of *Alfred*, either in an action of trespass, or on the case.

It is urged, that unless this action can be sustained, the plaintiff will be remediless. We have heard this assigned as a reason for sustaining an action against assessors. This reasoning does not lead us to the conclusion, *that the present defendants are legally answerable.* The statute has not said, that *in all cases where assessments shall be made*, the remedy in trespass, or other form of action, shall be pursued against the inhabitants of the town. And that they shall have their remedy over against the assessors by whose act the injury may have occurred. If there was no school district by territorial limits, the tax was not such an one as the assessors were by *law required to assess*, and the liability in such a case, does not rest solely with the town. If the statute of *March* 1831, will protect the assessors, it does not follow that the town must suffer.

The question as to the construction of the statute of 1826, *c.* 337, has once before incidentally arisen, in the case, *Inhabitants of School District No.* 1, *in Greene* v. *Bailey*, 3 *Fairf.* 254, in error. And in delivering the opinion of the Court, in that case, the Chief Justice observed, "It could never have been intended that a town should be held answerable for any improper proceedings, wilful or otherwise, on the part of the majority of a school district. In *Little* v. *Merill & al.* 10 *Pick.* 543, the Supreme Court of *Massachusetts* took the same view of the subject, when commenting on a similar statute."

After this direct expression of the opinion of the Court as to the intent of the Legislature, no further advance having been made by that body indicating a disposition to do more on the subject, we see no sufficient ground for changing the construction then given, though it may be very desirable that some more distinct modification should be made respecting the remedy for a person improperly affected by the proceedings in school districts.

The exceptions are overruled.

GREENLEAF THORN *vs.* WILLIAM RICE.

In an action against the indorser of a note, when the facts have been ascertained, whether legal notice has or has not been given, and whether due diligence has or has not been used, are questions of law to be decided by the Court.

Where the evidence to prove notice to an indorser is too loose, deficient and uncertain to authorize a jury to find in the affirmative, a Judge of the Common Pleas may rightly decide, that the action is not maintained, without submitting the case to a jury.

Where the usage of a bank, in relation to giving notice to an indorser, is so loose and variable, and so different from what the law requires, as to leave it uncertain, whether any notice was given to the indorser, *at any time or place*, or put into the post-office for him, such indorser is not bound by such usage by doing business with the bank.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The cashier of the *Manufacturer's* bank testified, that, "it is the universal or general practice at said bank to make out the notices or demands of the promisors and endorsers in *Buxton* and *Hollis*, and up *Saco River*, a day or two before the last day of grace, and send them by persons down from those places, bearing date the last day of grace; and if no one is down, that then, on the last day of grace, to put the notice into the post-office. Sometimes notices have been sent by the driver of the *Ossipee* stage, which is not a mail stage. This has been for the last eight or ten years the general and universal practice of making demands and notices to the promisors and indorsers living at *Buxton* and *Hollis*, and up *Saco River*, and *Abbott* and *Rice* and *Eastman* have been notified in that way on their notes before this was left at the bank and since." The other facts in the case are given in the opinion of the Court.

A. G. Goodwin, for the plaintiff.

1. A note payable at a bank must be at the bank, when due and payable, in order to hold the indorsers. *Woodbridge* v. *Brigham*, 12 *Mass. R.* 403; *Berkshire Bank* v. *Jones*, 6 *Mass. R.* 524; *Bayley on Bills*, 201, and *note*.

2. The maker and indorser of a note, payable at a bank, tacitly assent to be subject to such regulations, as are customary at that

bank, when they are acquainted with the usages of the bank. 4 *Mass. R.* 245; 6 *Mass. R.* 449; 17 *Mass. R.* 449; 9 *Mass. R.* 155; 9 *Pick.* 420; *Bayley on Bills,* 233, 242; 12 *Mass. R.* 6.

3. The plaintiff was under no obligation to notify the maker of the note, that it was left at the *Manufacturer's* bank in *Saco. Bayley on Bills,* 232, 79. On a note payable at a particular place and time, it is matter of defence to show, that the promisor was then and there ready to pay, and still ready, with a profert in court. *Bacon* v. *Dyer,* 3 *Fairf.* 19; *Remick* v. *O'Kyle, ib.* 340.

4. If the plaintiff was under obligations to notify the maker, he has done it conformably to the usages of the *Manufacturer's* bank. If the case of *North Bank* v. *Abbott,* 13 *Pick.*465, be good law, as to the necessity of giving notice at which bank the note is left, it is good law to show that *Rice* is bound by the usages of the bank.

5. Due notice was given to the defendant. Notice to an indorser must be given on the last day of grace, or on the following day. *Bayley on Bills,* 262; *Whitwell* v. *Johnson,* 17 *Mass. R.* 449. Notice put in the post-office on the day of payment, or the day after, is in season when the indorser lives out of the town. *Munn* v. *Baldwin,* 6 *Mass. R.* 316; *Whitwell* v. *Johnson,* 17 *Mass. R.* 449; *Shed* v. *Brett,* 1 *Pick.* 401. Notice according to the usages of the bank is sufficient, the indorser well knowing the usages. 4 *Mass. R.* 245; 6 *Mass. R.* 449; 3 *Pick.* 414; 9 *Pick.* 420; 2 *Fairf.* 489. Such notice was sent by the agent of the indorser, and therefore whether delivered or not is immaterial, the same as if sent by mail. 1 *Pick.* 401; 6 *Mass. R.* 316; *Bayley,* 275. It is sufficient, because it was the wish of *Rice,* or at least with his assent, as he knew the practice of the bank. 12 *Mass. R.* 172; *Bayley,* 208; 9 *Mass. R.* 155.

6. If the notice was not sufficient of itself to charge the indorser, it should have been left to the jury to infer a waiver of demand and notice. *Taunton Bank* v. *Richardson,* 5 *Pick.* 436; *Fuller* v. *McDonald,* 8 *Greenl.* 213.

Bradley, for the defendant.

Where there is no controversy about the facts, and the testimony is such as will not fairly warrant the jury in presuming notice from

the facts proved, it is a question of law to be decided by the Court, and the Court is bound to decide that there was not notice. *Bank U. S.* v. *Corcoran*, 2 *Peters*, 121; *Hussey* v. *Freeman*, 10 *Mass. R.* 84; *Whitwell* v. *Johnson*, 17 *Mass. R.* 449; *Bank of Columbia* v. *Lawrence*, 1 *Peters*, 578.

There was no evidence of a demand, as no notice was given to the maker of the note at which bank it was left. *North Bank* v. *Abbott*, 13 *Pick.* 465.

There was no notice whatever to the defendant, of the demand and non-payment, and nothing in the case showing due diligence to give notice. *Williams* v. *Bank of U. S.* 2 *Peters*, 101; *Lincoln and Ken. Bank* v. *Page*, 9 *Mass. R.* 155; 3 *Kent's Com.* 107; *Hartford Bank* v. *Stedman*, 3 *Conn. Rep.* 497. It is not pretended that there was any usage of the *Manufacturer's* bank not to send notices on the right day, and it does not appear, but that the notice was sent before the note was due, and indeed that seems most probable, if sent it was. There is no evidence even, that a notice was sent by any person. The evidence to prove a usage binding on any one is too loose and uncertain to prove any thing whatever. The only usage allowed in the cases goes merely to the substitution of a certain time, or a fixed place, for that required by law.

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

Emery J. — This is an action against the defendant, as indorser of a note made by *Philbrook B. Abbott*, payable to *Daniel Eastman, Jr.*, or order, dated at *Portland, June* 1, 1836, for $416,37 in 60 days from date, at either of the banks in *Portland* or *Saco*, and interest after. It was indorsed by said *Eastman*, and by the defendant to the plaintiff. About ten days after the date, it was left by the plaintiff at the *Manufacturer's* Bank, for discount, but was not discounted, and the plaintiff then left it there for collection, where it remained till *November*, 1836. Upon the facts proved at the Court of Common Pleas, the Judge being of opinion, that the action was not maintainable, ordered and entered a nonsuit. Against that order and entry, the plaintiff excepted, and the case comes before us on those exceptions. Granting that the holder had

done sufficient in leaving his note at the *Manufacturers'* Bank, which seems tacitly to be admitted, though in the exceptions, it does not directly appear to be a bank in *Saco*, and that what was done there amounted to what was equivalent to a demand on *Abbott. City Bank* v. *Cutter*, 3 *Pick.* 414; *Jones* v. *Fales*, 4 *Mass. R.* 245. The question remains, was there legal notice given to the indorser of the maker's failing to pay? It appears, "that a few days after the note became due, *Mr. Abbott* came to the bank, inquired for the note, and wanted to renew for part, and was told, that it was the property of the plaintiff.

In the afternoon on the last day of grace on said note, the cashier made out a written notice to the defendant, directed to him, of the non-payment of said note, and requesting payment of him, which notice he either gave to some individual living near said *Rice*, to give to him, or he put the same in the post-office, he knows not which; and he does not recollect by whom he sent, if sent by an individual, one or the other he did on the last day of grace, or the day following." "The defendant has transacted business at said bank for several years before that time, and has always been notified in that manner. And was well knowing of the practice of making demands, and giving notices at said bank. Many of the persons, if not all, who live in *Buxton* and *Hollis*, and who transact business at said bank, have expressed to the cashier, their wish to be notified by sending the demand or notice by some individual, down from their neighborhood, in preference to being sent them by mail, in order to save postage. The cashier did not recollect, whether *Abbott* or *Rice* ever expressed such wish, but that had been the practice of said bank in notifying said *Abbott* and *Rice*."

Wherever the indorser may have recourse to the maker, the indorser is entitled to strict notice. *Warder & al.* v. *Tucker*, 7 *Mass. R.* 449.

C. J. Marshall says, no principle is better settled in commercial transactions, than that the undertaking of the indorser is conditional. If due dilligence be used to obtain payment from the maker without success, and notice of non-payment be given to him in time, his undertaking becomes absolute, not otherwise. *Magruder* v. *The Union Bank of Georgetown*, 3 *Peters*, 91.

The meaning however of this, is not that it should in all cases be actual notice. Though if a notice actually came to the hand of the indorser in proper time, though the letter containing the notice was not properly directed, or sent by the most expeditious or direct route, it would be good. The fact of notice, and its reception in due time are the only matters material to the indorser of an unpaid note. The holder in legal estimation, gives this strict notice by performing his own duty, by sending notice by a messenger in proper time, or by putting a letter rightly directed to the defendant in the post-office, giving notice of the demand and non-payment by the maker on the last day of grace or the next day. This is legal diligence on the part of the holder, whether the letter come to hand in season or not. When all the facts are ascertained, diligence is a question of law. If the evidence is doubtful or contradictory, it is for the jury to decide.

The facts here come all from one witness. And it is attempted to hold the defendant by the proof that the usage of the bank as to the making demand, and giving notice, such as has been recited, was so well understood by the defendant that he must be presumed to have assented to it, and that he must be bound by it.

The very statement of a practice so loose in relation to subjects of such importance to the well being of a commercial community, cannot fail of exciting attention. The usages of banks upon this matter, which have been adjudicated upon, as having effect to bind its customers, are those as to *the time* in which demands or notices shall be made, *or places* at which they should be left by the consent or agreement of those interested. But it is going far beyond what we consider has been decided, to hold what has been done here as a compliance with the requisitions of law.

Delivering the letter of notice, to an individual living near, and how near not known, or how long he had been living near to the defendant, or what his habits of punctuality in delivering letters were, or whether he were friendly or unfriendly to the defendant, whether the defendant ever knew the individual selected, or would in any way adopt him as an agent, all alike unknown, is too uncertain a course, on which to place reliance, without proof that it was rightly left with or for the defendant. Whether too in fact the no-

tice was ever delivered to such an individual, and to whom it was delivered, if it was done, is not recollected by the witness.

If a messenger be selected by the holder of the note, or his agent, that messenger must give the notice personally, or leave it at the indorser's dwellinghouse, or place of business, unless a different place be appointed by the indorser for that purpose.

Had the notice been placed in the post-office in season, rightly directed to the defendant, as that is a mode of conveyance established by the laws of the land, it would have been sufficient. But it is entirely equivocal whether it was ever placed there. No legal excuse is proved.

Upon such evidence as was produced, we apprehend that the Court of Common Pleas was justified in ordering the nonsuit, and directing the entry as stated in the exceptions. *Smith* v. *Frye*, 14 *Maine Rep.* 457.

Exceptions overruled.

Abigail Banks *vs.* Dominicus Pike *& al.*

In an action against two defendants, they are not entitled to set off a demand against the plaintiff in favor of one of them.

This was an action on a note of hand, and came before the Court on a statement of facts. The note was made to the plaintiff, or her order, by *Dominicus Pike*, as principal, and by the other defendant as surety. *D. Pike* filed in set-off his own individual account against the plaintiff, claiming an amount exceeding the note. The question submitted, was whether the defendants were entitled to the set-off.

Fairfield & Haines, for the plaintiff.

At common law there was no set-off allowed, of unconnected claims. Each party was driven to his action. The law of set-off before judgment, is regulated entirely by statute. The *stat.* of 1821, *c.* 59, *sec.* 19, speaks only of demands between the parties to the suit; and by this is intended the identical parties to the action; a mutuality of demands. The statute also provides, that in

such case the defendant shall have judgment for any balance found in his favor, in the same manner as if he had brought his action therefor. The consequence would be, that if this set-off be allowed, that one of the defendants would recover a sum of money against the plaintiff, when she was never indebted to him. *Walker* v. *Leighton*, 11 *Mass. R.* 140; *Sherman* v. *Crosby*, 11 *Johns. R.* 70; *Palmer* v. *Green*, 6 *Conn. R.* 14; *Ross* v. *Knight*, 4 *N. H. Rep.* 236; *Osborne* v. *Etheridge*, 13 *Wend.* 339.

J. & W. B. Holmes, for the defendants.

The justice of the case requires the set-off to be allowed. The account may have been suffered to run up for payment of the note. Either defendant might pay the note in money, and either is entitled to pay by offsetting a demand of his. A fair construction of the words of the statute shows such to have been the intention of the legislature. There is no necessity of rendering a judgment for the balance, and no claim is made for it in this case. *Lyman* v. *Estes*, 1 *Greenl.* 182; *Barney* v. *Norton*, 2 *Fairf.* 350.

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

WESTON C. J. — The provisions of the law in respect to accounts in offset, *stat.* of 1821, *c.* 59, § 19, cannot be carried out, unless the parties having cross demands are identical. The party defendant is to recover the balance, if his demand proves to be greater than that of the plaintiff, in the same manner, as if he had brought an action therefor. One of the defendants has no interest in the account filed here, which overbalances the note sued; and there would be no propriety in rendering judgment for that balance, in favor of both defendants. This is admitted; and the counsel for the defendants claim therefore the allowance of the account only to the amount of the note. But the manifest intention of the statute was, to make an end of the whole matter, and not to split up the account, and leave the balance open to future litigation. This case is precisely like that of *Walker* v. *Leighton & al.* cited in the argument, where the offset, under a similar statute in *Massachusetts*, was disallowed. The claim of offset is not sustained; and upon the facts agreed, there must be judgment for the plaintiff.

Daniel W. Lord *vs.* John Appleton.

When a bill is drawn, accepted and indorsed, possession is *prima facie* evidence of ownership.

A notice left in the office and usual place of business of the indorser of a bill, with a person in charge of the office, is sufficient.

When a notice to an indorser is regularly deposited in the post-office, the risk of delay rests upon the party to be notified.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

At the trial, when the evidence was out, of which the material parts are found in the opinion of this Court, the defendant insisted, that the jury might find, that no sufficient notice to charge the indorser had been shown; and that from the facts apparent in the case, the jury might find, that the plaintiff had no interest in the draft in suit, and requested the Judge so to instruct the jury. The Judge declined to give such instructions, and did charge the jury, that the evidence produced, if believed by them, would be sufficient to prove a demand on the maker, and such notice to the indorser as would charge him in this action, and that the draft produced, being in the possession of the plaintiff, in the form in which it appears, was *prima facie* evidence of ownership in him. On the return of a verdict for the plaintiff, the defendant excepted.

N. D. Appleton, for the defendant.

1. The plaintiff has no interest in the bill in suit, and therefore cannot sustain an action upon it. 3 *Kent*, 79; *Thacher* v. *Winslow*, 5 *Mason*, 58; 9 *Conn. R.* 94; *Sherwood* v. *Roys*, 14 *Pick.* 172; *Bradford* v. *Bucknam*, 3 *Fairf.* 15; 11 *Wend.* 27.

2. There was no sufficient notice to the defendant to charge him as indorser. 3 *Kent*, 106, 107; *Talbot* v. *Clark*, 8 *Pick.* 54; 6 *East*, 3; *Granite Bank* v. *Ayers*, 16 *Pick.* 393; *Bank U. S.* v. *Corcoran*, 2 *Peters*, 121; *Bank U. S.* v. *Hatch*, 6 *Peters*, 250; *Bayley on Bills*, 268. Where two indorse a bill, but not as partners, both must be notified. 1 *Conn. R.* 367; *Chenango Bank* v. *Root*, 4 *Cowen*, 126.

3. The question, whether the note belonged to the plaintiff, was for the decision of the jury. 3 *Kent*, 105, *and notes;* 1 *Dane*, *c.* 20, *a.* 10, § 26.

Howard, for the plaintiff.

Possession is *prima facie* evidence of ownership. 2 *Stark. Ev.* 250; *Fisher* v. *Bradford*, 7 *Greenl.* 28; *Marr* v. *Plummer*, 3 *Greenl.* 73; 3 *Cranch*, 207; *Lovell* v. *Evertson*, 11 *Johns. R.* 52; *Gage* v. *Kendall*, 15 *Wend.* 640; *Bowman* v. *Wood*, 15 *Mass. R.* 534.

Due diligence used, and proper measures taken, are sufficient to charge the indorser, whether the notice actually reaches him or not. A failure to receive the notice, whether occasioned by miscarriage or delay in the mail, or any cause whatever, is the misfortune of the indorser, for which the holder is not answerable. *Bayley on Bills*, 275, 279; *Shed* v. *Brett*, 1 *Pick.* 401; *Munn* v. *Baldwin*, 6 *Mass. R.* 316; 5 *Johns. R.* 384; 2 *Camp.* 633; 2 *H. Black.* 509; 3 *Esp. R.* 54; 3 *Kent*, 106; *Whittier* v. *Graffam*, 3 *Greenl.* 82; *Bank of Utica* v. *Smith*, 18 *Johns. R.* 230.

And the notice was properly sent to the Cashier of the *Bangor Bank*, the last indorser, although the notice might not reach the defendant so early as if sent directly to him. *Bayley on Bills*, 269, 276; *Church* v. *Barlow*, 9 *Pick.* 547; *Talbot* v. *Clark*, 8 *Pick.* 51. Each indorser has a reasonable time to give notice to the next indorser. 3 *B.* & *Pul.* 599; *U. S. Bank* v. *Goddard*, 5 *Mason*, 366; 2 *Johns. Cas.* 1; *Colt* v. *Noble*, 5 *Mass. R.* 167; 3 *Dane*, 128; 3 *Kent*, 128.

Due notice, given by any party on the bill, is sufficient to charge in favor of all subsequent parties, and enures to the benefit of the holder. *Bayley on Bills*, 249; *Stafford* v. *Yates*, 18 *Johns. R.* 327; *U. S. Bank* v. *Goddard*, 5 *Mason*, 366; *Williams* v. *Matthews*, 3 *Cowen*, 252.

Notice left as this was, in the defendant's office, is sufficient. *U. S. Bank* v. *Hatch*, 6 *Peters*, 257; *Cross* v. *Smith*, 1 *M.* & *S.* 545; *Cuyler* v. *Stevens*, 4 *Wend.* 566.

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

SHEPLEY J. — This bill of exceptions states, that the action was upon a bill of exchange, dated *June* 23, 1836, payable in ninety days, at the *Suffolk* Bank, *Boston*, drawn by *J. B. Hill*, upon *C. Hayes*, and by him accepted, in favor of the defendant and by him

indorsed. It was afterward indorsed by *Lord & Veazie*, and by the cashier of the *Bangor* Bank, and transmitted to the *Suffolk* Bank.

Upon the last day of grace, being the 24th of *September*, a demand was made by a notary at the *Suffolk* Bank, and notices were by him made and directed to the respective parties and enclosed in a letter to the cashier of the *Bangor* Bank, which was directed to him, and put into the post-office in *Boston* on the same day. The cashier of the *Bangor* Bank testified, that the letter did not arrive in *Bangor* until the 29th, although by due course of mail, it should have arrived sooner. On that day the letter and notices were received, and the notice directed to the defendant was left by the messenger of the bank at the defendant's office and place of business, with a person then in the office, supposed by the messenger to be a partner; but in this supposition, the messenger seems to have been in an error; and it does not appear, who the person was. It appears, that *Lord & Veazie* took the bill out of the *Bangor* Bank; the name of the cashier was erased, and on the 30th day of *January*, 1837, this suit was commenced by the plaintiff. Complaint is made, that the *Chief Justice* of the Common Pleas, instructed the jury, that the bill "produced, being in the possession of the plaintiff, in the form in which it appears, was *prima facie* evidence of ownership in him." The law is correctly stated by the Judge, and is consistent with the cases cited for the defendant. Nor is there any reason to complain, that the instructions withdrew the evidence of property from the consideration of the jury. It is a necessary inference from them, that the jury were at liberty to find the property out of the plaintiff, if the evidence would authorize them to do so.

The Judge also instructed the jury, "that the evidence produced, if believed by them, would be sufficient to prove demand on the maker and notice to the indorser, such as would charge him in this action."

It is objected that the notice was left with a stranger, and therefore not good. If the notice had been left in the office instead of being handed to the person found in it, no question could have arisen. So if notice had been sent to the dwellinghouse, or place of business, although closed, so that no notice could be deposited

there, it would have been good, being sent at the proper time to expect admittance. The office being open, the person found in it must be presumed to be lawfully there until the contrary is proved, and the defendant cannot object, that a notice left with a person, lawfully in charge of the office, is not as effectual, as it would have been, if left in the office, no person being present; or if not left at all, the office being closed.

It is also insisted, that the notice was not legal on account of the delay beyond the usual course of the mail.

When notices are regularly deposited in the post-office, the risk of delay, or of an entire failure rests upon the party to be notified.

The exceptions are overruled.

JOHN GOWEN *vs.* ANSEL GERRISH.

The lawful intention of the parties, in a case free from fraud, where it can be ascertained, must have a decisive influence, in determining whether the sum stated in the instrument is to be regarded as a penalty, or as liquidated damages.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Debt upon a sealed instrument of which the following is a copy. "Know all men by these presents, that whereas *John Gowen* of *Shapleigh* has given me a bond to convey certain real estate of the amount of $6000, a long day of payment given, and no mortgage conveyance for security, that I, *Ansel Gerrish* of *Shapleigh*, do bind myself and am firmly held unto said *Gowen* in the full and just sum of seven thousand dollars well and truly to be paid unto the said *Gowen*. Dated and sealed with my seal, the 27th day of *May*, 1835. The condition of this obligation is such, that if the said *Gerrish* does not become surety to any person in any sum of money, or any kind of obligatory writing, except for said *Gowen*, until said six thousand dollars and interest are fully paid, then this obligation shall be void, otherwise on the first liability of the least magnitude, this obligation to be in full force for the sum of seven thousand dollars forthwith by suit against me." The bond was in

the handwriting of one of the parties. On the trial it was shown, that on the same 27th of *May*, 1835, the land was conveyed by the plaintiff to the defendant; that the notes given for the consideration money were unpaid; and that before the commencement of this suit, the defendant had become surety for others than the plaintiff. At the trial, and at the argument of the case, the notes were offered to be delivered up to the defendant. The counsel for the plaintiff contended, that they were entitled to recover the sum of seven thousand dollars, as damages liquidated by the parties in the bond. The Chief Justice of the Common Pleas instructed the jury, that this was to be considered a bond with a penalty, and subject to chancery; and that the plaintiff was entitled to recover only the damages actually sustained, which in this case were merely nominal. The verdict for the plaintiff was for but one dollar, and he filed exceptions.

Hayes and *J. Shepley* for the plaintiff, and *D. Goodenow* for the defendant, in addition to their argument relative to the intention of the parties, made some legal points, and cited several authorities; but it is deemed unnecessary to give them.

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

Weston C. J. — The language of the instrument, upon which this action is brought, is peculiar; but we think it is not difficult to understand what the parties intended. The defendant had obtained from the plaintiff a long credit, upon a contract for the purchase of real estate. His ability to pay might be greatly impaired, by his becoming surety for others. To relieve the plaintiff from the hazard thence arising, the defendant obligated himself, that if he did become surety for any one, while the purchase money remained unpaid, the term of credit given to him should cease, and the plaintiff might enforce immediate payment, by means of the bond. This it appears to us, is what the parties must have designed. The sum secured by the bond, exceeded by one sixth part the price agreed to be given for the estate; but this must have been intended to secure the accruing interest. Upon this view of the case, the parties have afforded a measure of damages, susceptible of exact calculation, from which neither the Court nor the jury are at

liberty to depart. The bond when enforced, is a substitute for the other security, given upon the extended credit. And it is to be limited to the original price, with the interest, which may have accrued. The obligation of the other security will no longer remain in force; and it should be given up to be cancelled.

If the subsequent renewal of a liability, existing at the date of the bond, might not be a breach of its condition, the amount for which the defendant became surety, in *January*, 1836, was for a greater sum, than that which he had before assumed, by which the defendant became liable to an action on the bond, by its express terms.

The lawful intention of the parties, in a case free from fraud, where it can be ascertained, must have a decisive influence in determining, whether the sum stated is to be regarded as a penalty, or as stipulated damages. We had occasion to consider the cases upon this question in *Gammon* v. *Howe*, 14 *Maine Rep.* 250.

In our opinion the jury were not properly instructed by the presiding Judge, as to the rule of damages. The exceptions are accordingly sustained, the verdict set aside, and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1839.

WILLIAM H. WINSLOW *& al. vs.* BENJAMIN F. COPELAND *& al.*

Where the condition of a bond provides, that the obligors shall sell and convey a tract of land to the obligees by good and sufficient deeds of warranty within four months from a day fixed, provided the obligees pay or cause to be paid their indorsed notes and drafts, dated on the same day, and payable to their own order in four months from date, according to their tenor; and provided also, that within said term of four months, they pay, or secure to be paid, a further sum in four equal annual payments; payment, or unconditional tender of payment, of the notes and drafts, is a condition precedent to the right of the obligees to maintain an action on the bond.

If the terms of a contract require, that payment for land to be conveyed shall be made, "by good notes, secured by mortgage on the premises," the notes must be good without the mortgage, and the mortgage is to be additional security.

DEBT on a bond, dated *July* 21, 1835. The condition of the bond was, "that whereas for a valuable consideration, we have agreed with and promised the said obligees, to sell and convey to them by good and sufficient deeds of warranty, within four months from *July* 17, 1835, township No. one," called the *Fowler* and *Ely* township, and described in the bond, "provided they pay or cause to be paid their drafts and notes, dated *July* 17, 1835, payable to their own order with interest in four months from date, as follows, viz. one draft each by said *Winslow* and *Bugbee*, for the

sum of $3795, and one note each, by said *Cahoon*, *Cutter*, *Tinkham* and *Gardner*, for the sum of $1897,50, according to their tenor; and provided also, that within said term of four months, they pay or secure to be paid the further sum of $68,310, as follows, viz.: by good notes secured by mortgage on the premises for the above mentioned sum payable in four equal annual payments, in one, two, three and four years from *July* 17, 1835, with interest annually. We being hereby bound to convey to said obligees according to their interest in said premises, viz. one quarter each to said *W. & B.*, and one eighth each to said *C.*, *C.*, *T.*, *& G.*, and to take separate notes secured by mortgage as aforesaid; and it being further understood and agreed, that we are hereby bound to convey our several proportions in said township, according as we now hold the same. Now therefore if on performance of said conditions, we shall well and truly keep and perform our said agreement, then, &c." The pleadings appear in the opinion of the Court. The parties met at *Augusta* on the seventeenth day of *November*, 1835, and the transactions there are sufficiently given in the opinion. *Gardner*, one of the plaintiffs, did not sign any of the notes offered under the second proviso, and those offered, were payable in *Portland*. The first set of drafts and notes mentioned in the condition of the bond had not all been paid when the trial of this action took place, nor had any tender of payment of them been made at the place where they were payable. Several objections were made to the title of the defendants, which need not be stated, as the new trial was granted by reason of failure of performance on the part of the plaintiffs. The report of the case, extending to eighty-five pages, shows, that eighteen instructions to the jury were requested by the counsel for the defendants, at the trial before EMERY J., and also the instructions actually given by the Judge. The first requested instruction was, "that it was the duty of the plaintiffs to pay or tender payment of all their notes and drafts mentioned in the first proviso of the bond, according to their tenor, before they were entitled to offer notes and mortgages as mentioned in the second proviso, or to call on the defendants for a deed, or question defendants' title, or sustain this action." The second was, "that the payment of said notes and drafts according to their tenor was a condition precedent to the plaintiffs' right to purchase or have the

land upon the terms and conditions mentioned in the second proviso." The tenth was, "that it was incumbent on the plaintiffs to offer good notes and the mortgages of each, and all the obligees in the bond according to the proportions in which the land was stipulated to be conveyed to them." The thirteenth was, "that by good notes, as mentioned in the bond, is meant notes signed by one or more persons possessed at the time of giving them of sufficient property to pay the amount promised, with such habits of business, as that prudent men would feel safe in taking, payable in four equal annual payments; or notes signed by responsible men, such as a prudent man might reasonably rely upon for payment at maturity." And the fifteenth was, "that by the term good notes secured by mortgage on the premises, is meant such notes as would be considered good in the ordinary business sense of the term, as applicable to property of that description, and that the defendants were entitled to a mortgage on the premises as additional security, and that such notes as would not be good separate from the security afforded by the mortgage would not answer the meaning and intent of the parties." The Judge declined giving the instructions requested, and for the purposes of this trial, did instruct them, among other things, that the defendants had a right to expect from the plaintiffs the money stipulated, and good notes and mortgages of the premises upon giving to the plaintiffs a clear and unincumbered title to the land; that the engagements were for concurrent acts to be performed by the parties; the plaintiffs were not bound to part with their money without a clear title, nor the defendants to give such title without the money, notes and mortgages. That it was only necessary for the plaintiffs, so far as the performance of conditions in the first proviso of the bond is concerned, to have the money to pay said notes and drafts, when and where the deed was to be given, ready to be paid upon condition, that the defendants should give such a deed as they were entitled to receive. That it was incumbent on the defendants to give the plaintiffs a clear and unincumbered title to the land. That the plaintiffs had no right to make the notes payable in *Portland*, without the consent of the defendants, but that the jury would judge from the evidence, whether the defendants had not waived that objection, either expressly or impliedly. That the plaintiffs were bound to offer good

notes and mortgages upon receiving a deed with an unincumbered title to the land; and upon the whole evidence submitted to them, they would judge whether the notes offered by the plaintiffs were good notes within the terms of the bond; that it was not necessary they should be bankable paper; that the character, habits, credit, intelligence, activity and integrity of the signers were to be taken into consideration, and their value in connection with the property mortgaged; that it was not necessary, that they should be good separate from the mortgages, and they would inquire whether those notes made in the form they are, and payable as they are, were good notes within the meaning of good notes, as understood by the parties.

The verdict of the jury was for the plaintiffs, and was to be set aside, if the instructions requested ought to have been given, or those given were erroneous, or if the verdict is against law, or is not warranted by the evidence in the case.

There was also a motion made by the defendants to set aside the verdict, as against law and evidence.

The case was argued on *April* 10, 11, and 13, 1838; but many of the points argued are not considered in the opinion of the Court, and therefore are not given.

W. P. Fessenden, for the defendants.

Before the plaintiffs could demand a deed, they must absolutely pay or make an unconditional tender of payment, of the notes and drafts for the first payment mentioned in the bond. These were made negotiable and payable at either of the banks in *Portland*. The language of the bond is, that they are to be paid according to their tenor. These notes and drafts were to be *first paid;* this condition was to be first *absolutely performed*, and was independent of the defendants' covenants. That some of the covenants, or agreements, in a contract may be dependent, and others independent, is fully and finally settled, in *Kane* v. *Hood*, 13 *Pick.* 281. Admitting, therefore, that the covenants of the defendants and the giving notes secured by the mortgage might be dependent, still the payment of the first notes and drafts was a perfectly *independent condition.* He cited as authorities on this point, 1 *Saund.* 320; 12 *Mod.* 445; 1 *Salk.* 171; 8 *T. R.* 366; *Johnson* v. *Reed*,

9 *Mass. R.* 81; 4 *T. R.* 761; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; 2 *New Rep.* 232; *Willes*, 157; 3 *Merivale*, 52.

The plaintiffs show neither a performance nor a readiness to perform; and one of these is necessary. 5 *Johns. R.* 179; 2 *Johns. R.* 207; *Brown* v. *Bellows*, 4 *Pick.* 179. By the terms of the bond, "*good notes*, secured by mortgage on the premises" were to be given. By this is meant such notes as would be *good*, if not secured by mortgage; that the mortgage was to be *additional security*. If this be not the true construction, the word *good* is without meaning.

Deblois for the plaintiffs.

The covenants in the condition of the bond were mutual and dependent, and it was not necessary for the plaintiffs to part with their money, and to perform the other parts of their engagement, inasmuch as the defendants were unable to perform their part of the obligations. By a proper construction of the contract, the acts of the parties were to be simultaneous. *Kane* v. *Hood*, 13 *Pick.* 281, cited on the other side; also *Johnson* v. *Reed*, 9 *Mass. R.* 78; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Porter* v. *Noyes*, 2 *Greenl.* 22; 10 *Johns. R.* 265; 4 *T. R.* 761; 8 *T. R.* 366; *Hunt* v. *Livermore*, 5 *Pick.* 395; 17 *Johns. R.* 293; *Couch* v. *Ingersoll*, 2 *Pick.* 301; *Dana* v. *King*, *ib.* 155; 2 *Burr.* 899; 1 *H. Black.* 270; 1 *Salk.* 112; 2 *Doug.* 684; *Howland* v. *Leach*, 11 *Pick.* 151; 11 *Johns. R.* 525; 7 *T. R.* 129; 2 *Johns. R.* 207; 16 *Johns. R.* 267; 20 *Johns. R.* 130; *ib.* 24; 5 *Johns. R.* 181; 2 *Esp. R.* 639. The plaintiffs were not bound to make an unconditional tender, unless the other party was willing to perform. *Newcomb* v. *Brackett*, 16 *Mass. R.* 161. Where one has disabled himself from performing his part of the contract, the law does not require tender or payment by the other. *Brown* v. *Bellows*, 4 *Pick.* 179; 1 *East*, 203.

All that the bond required was that the notes should be good notes. It is immaterial who gave them, if they were good. Whether they were or were not good notes, was a question exclusively for the jury, and they have found them to be good. Any other fact in the case could be taken from the jury with equal propriety.

S. Fessenden also argued for the plaintiffs, and *Preble* replied for the defendants.

The case was continued for advisement, and at a subsequent term the opinion of the Court was drawn up by

EMERY J. — Notwithstanding the wide range of able argument which this case has elicited on the subject of the eighteen requested instructions, we conceive that the cause is ultimately to be settled on the decision of but few of the questions which have been so elaborately argued.

The action is debt on bond. The plea is that it is not the deed of the defendants; and in a brief statement they set forth the deed and say, that they have been always ready to perform all things on their part to be done and performed according to the true intent and meaning of said writing obligatory, whenever the said plaintiffs, on their part, should entitle themselves to a performance thereof, and that the plaintiffs have not performed the conditions and duties on their part first to be performed. In reply, this is denied by the plaintiffs, and they say, that although the plaintiffs were ready to perform all the conditions and stipulations named in said bond to be by them performed and tendered performance of the same according to the true intent and meaning of said bond; yet the defendants were unable to sell and convey to the plaintiffs the land named and described in said bond by good and sufficient deed of warranty, by reason whereof the defendants broke their covenants and agreements to and with the plaintiffs as set forth in said bond. And particularly that said land was incumbered by a mortgage from the said defendants to one *Benjamin F. Copeland*, dated *January* 7th, 1834, to secure the payment of four notes of $3127,50, and also to fulfill the conditions of a bond from said *Copeland* to one *Samuel F. Lyman*. Also that the township was originally granted by the Commonwealth of *Massachusetts* to *Justin Ely* on condition that said *Ely* should settle on said township twenty families in four years and twenty families in eight years, which condition was never performed by the grantee, or any person claiming under him, whereby said township was forfeited and liable to be re-seized for non-fulfillment of said condition. That said land was also incumbered by a mortgage from *Neal D. Shaw*, *Benjamin F. Copeland*, and *John*

Lemist, to *Samuel F. Lyman*, conditioned to pay to said *Lyman* $10,000 in five annual instalments, with interest annually on the whole, from *December* 6, 1832, the date of said deed.

The jury have said, that the defendants did waive the strict performance by the plaintiffs, of all the conditions on the part of the plaintiffs; that the notes offered by the plaintiffs were good notes within the terms of the bond; and that the notes made in the form they are and payable as they are, were good notes, within the meaning of good notes as understood by the parties. And as to the question, was the fact of the settling duties not having been released or commuted, known to the defendants and concealed by them from the plaintiffs at the time of executing the bond, the answer of the jury was, "we have no testimony to govern us in a decision on that point." And they say, that the other incumbrances were known to the plaintiffs at the execution of the bond. And the jury think that the defendants did waive objections to the notes on account of the place where made payable.

From the report of the trial, we learn, that if in the opinion of the whole Court any of the instructions given, were erroneous in matter of law, or if under the circumstances and facts proved in this case, instructions ought to have been given to the jury which the Judge declined to give, or the verdict is against law, or is not warranted by the evidence in the case, the verdict is to be set aside.

Now the evidence is clear, that on the interview at *Augusta*, it was stated by the defendants through their counsel to the plaintiffs that the notes and drafts were in *Portland*, where the same were payable, but if the plaintiffs wished to pay them the defendants could take the money, otherwise the plaintiffs must pay them where they were payable. On being asked, if the plaintiffs meant to make an unconditional tender, the answer was no, and that they should not pay the notes and drafts at that time unless they could have an unincumbered title. They were admonished too that if the plaintiffs wanted a lawsuit they must do all on their part to place themselves in a situation to maintain it. It was also stated to the plaintiffs just before they left the room, or as they were leaving it, that the defendants wished the plaintiffs distinctly to understand, that the defendants did not consider the plaintiffs saying they had the

money, as a tender, or what had been done as a compliance with the condition of the bond, and that the defendants would hold them to strict performance of all things on their part. We think the evidence did not warrant the finding a waiver of this portion of the condition as to the payment of the money, unless we attribute to language, a meaning directly opposite to the sense in which we have always been accustomed, and in this case feel bound, to understand it.

To ascertain the meaning of the contract we must look to its terms and the situation of the parties, and the subject matter of the contract. The whole concern was a speculation, and preliminary to the right of the plaintiffs to claim an unincumbered title, they were absolutely to pay their money for their notes and drafts already given and negotiated.

The report also communicates that divers witnesses were examined on both sides, as to the goodness of the notes offered, who differed in their opinions as to the goodness of the notes when secured by the mortgage, but all of them agreed that the notes of *Winslow*, *Bugbee*, *Cutter* and *Tinkham* would not be good, for their several amounts, without additional security, either of the land itself, or of some other security.

The instruction to the jury, that the value of the notes in connection with the property mortgaged, was to be taken into consideration, and that it was not necessary they should be good separate from the mortgage; the Court consider erroneous in matter of law. The finding of the jury must necessarily have been influenced by that instruction. The good notes should be such independently of the mortgage. And as the finding of the jury, that they were good must be taken to be in conformity with the direction of the Court, in this particular, that finding is ineffectual.

The defendants were seized in fee of the township. It was under incumbrances all of which were known to both parties, excepting the provision as to settling duties, which it would seem, was at the time of the contract, unknown to them all. It does not appear that there was any absolute contract made by the plaintiffs to take and pay for the land. They might pay the sums, for which they had given their notes or drafts, omit to proceed further, and the defendants must bear their disappointment without complaint, and

without remedy. It is true that in the deed of assignment to *William Cutter*, by *John D. Gardner*, dated the 2d of *Nov.* 1835, of his interest in the *Fowler* and *Ely* township, authorizing *Cutter* to settle for the same and to take a deed in his own name, he giving security therefor in *Gardner's* stead, agreeably (as *Gardner* says) to a bond signed by *Gardner* and others on the seventeenth day of *July* then last, it might be implied, possibly, that some direct engagement had been made to take the land. Yet no such bond, signed by *Gardner* and others, was exhibited in evidence, nor any notice given to produce it, if any such were given. It is possible that he alluded to the bond now in suit. But whether he did or not, our construction is, that the payment of the notes or drafts was a prerequisite on the part of the plaintiffs, in order to sustain an action upon the bond. *Campbell* v. *French*, 6 *Term Rep.* 200. The plaintiffs treat the matter as a subsisting contract. The defendants are free from any imputation of deception, concealment or fraud. They have extinguished the mortgages. The settling duties are commuted.

The verdict must be set aside. A new trial however must be utterly unavailing to the plaintiffs.

NOAH HINKLEY *& al. vs.* WILLIAMS FOWLER.

Where one covenants or agrees under seal with another to pay him a sum, or to do an act for his benefit, assumpsit cannot be maintained, the only remedy being on the covenant or agreement.

Where one *promises* another for the benefit of a third person, such third person may bring an action of assumpsit in his own name.

But where one person *covenants* with another to do an act for the benefit of a third, the action cannot be maintained in the name of such third person.

Yet without a violation of these rules, a sealed instrument may be used as evidence in an action of assumpsit, and may form the very foundation out of which the action arises, where in the sealed instrument there is no stipulation *for payment or performance to the party to be benefitted*, or to some other person for his use.

Thus where two persons set down on paper, under their hands and seals, a mere naked statement of what their rights, and the rights of certain others, shall be on the happening of a certain event, without any covenant or contract to pay to any one; the rights of such others secured by the instrument may be enforced in assumpsit, for money had and received, in their own names.

Where one sells property belonging to himself and others, and takes promissory notes therefor to himself alone, payable on time, and transfers the notes for his own benefit, an action will immediately lie against him, although the notes may not have become payable.

THE action was assumpsit for money had and received, and the plantiffs were *Noah Hinkley* and *George Jewett.* In the very long report of the case, and voluminous papers attached to it, it appears, that on the trial before EMERY J., the plaintiffs offered in evidence a paper under the hands and seals of the defendant and *Luther Jewett,* of which the following is a copy. "Whereas *Williams Fowler* has a bond from *John Bradley* of about 17,000 acres of land for two dollars per acre, and whereas *Luther Jewett* has a bond of about 13,000 acres of land from the *Messrs. Perleys* and *Richard Davis,* at one dollar and seventy cents per acre, both pieces in townships No. two and three, 9th range; now we, the subscribers, do hereby agree, that if said *Fowler* makes sale of said two pieces of land, then all over and above two dollars, which the 17000 acres sell for, is to be divided equally among *Williams Fowler, Joseph Thaxter,* and *Luther Jewett,* one third each, and all over and above one dollar and seventy cents per acre, which the

13000 acres sells for is to be divided equally among *Williams Fowler, Richard Davis, Jewett* and *Hinkley* as one, and *Luther Jewett*, one quarter each. To which agreement as above, we have hereunto set our hands and seals, this third day of *February*, 1835.

" *Williams Fowler*, [SEAL.]

" *Luther Jewett*, [SEAL.]"

On the back of a paper called a bond, not under seal, from *J. & T. Perley* to *Luther Jewett*, dated *October* 25, 1834, was the following. " *Augusta, February* 22, 1835. I hereby assign to *Mr. Williams Fowler*, for value received, all my right and interest in the within bond, and do hereby empower him to proceed with it as he may see fit. *Luther Jewett.*" There was parol evidence tending to show, that by an arrangement between the parties, not in writing, the several persons named in the paper signed by *Fowler* and *L. Jewett*, were in fact interested in the manner therein stated. When these papers were offered in evidence by the plaintiffs, the defendant objected to their admission. The objection was overruled by the Judge and the papers were read in evidence. *Luther Jewett* was called as a witness by the plaintiff, and testified, that he received no consideration whatever from *Fowler*, or from any other person, for making the said assignment to *Fowler*, nor was it agreed or contemplated, that he should receive any, but that it was done on his part solely for the purpose of enabling *Fowler* to carry into effect the original agreement and understanding between all the parties, as set forth in the writing under the hands and seals of himself and *Fowler*. To this testimony and statement of *L. Jewett*, the counsel for *Fowler* objected, but the objection was overruled by the Judge. The defendant sold the lands mentioned in the agreement at an advance, and received in part payment, notes running to himself, of which some had not become payable when the suit was commenced. When *Luther Jewett* was called as a witness, the defendant objected to him, as interested. He declared, that he had no interest in the event of this suit, unless the instrument signed by the defendant and himself made him so in law. The objection was overruled. At the close of the evidence, the counsel for the defendant, renewed their objections, and the JUDGE instructed the jury for the purposes of this trial, that under the facts proved in the case, the action of assumpsit would lie for the plain-

tiffs, so far as respected the mere form of action; that as the defendant took the promissory notes all payable to himself, or bearer, and had disposed in various ways of a large portion of them, had refused to give any account of the residue, and though regularly notified to produce them at the trial, if he still held any of them, or had them in his possession, had in fact produced only one, the greater portion of which appeared to have been paid, if they were satisfied, that the plaintiff had realized the amount of said notes and had had the benefit of them so as to apply the proceeds of them to his own use, he was rightly chargeable for them in this action. The verdict was for the plaintiff, and was to be set aside if the evidence objected to should have been excluded, or if the instructions were erroneous.

Fessenden & Deblois, in their argument for the defendant, endeavored to support these propositions.

1. The contract by which *Fowler* covenants to pay *Jewett* and *Hinkley* one quarter part of such sum as a certain quantity of land might sell for, being a contract under seal, and containing covenants, any remedy for a breach of these covenants must be sought by an action of covenant broken, and in the name of *Luther Jewett*. And no action of assumpsit will lie in the name of the present plaintiffs against this defendant, to recover any thing secured to them by the covenants in the contract. *Richards* v. *Killam*, 10 *Mass. R.* 239; *Perkins* v. *Gilman*, 8 *Pick.* 229; *Whiting* v. *Sullivan*, 7 *Mass. R.* 107; *Chandler* v. *Herrick*, 19 *Johns. R.* 129; *Rolls* v. *Yate, Yelverton*, 177; 1 *Chitty on Pl.* 5; *Sanford* v. *Sanford*, 2 *Day*, 559; 3 *Lev.* 138; 1 *East*, 497; *Montague* v. *Smith*, 13 *Mass. R.* 396; *Scott* v. *Goodwin*, 1 *Bos. & P.* 67; *Eccleston* v. *Clipsham*, 1 *Saund.* 153; *Pigott* v. *Thompson*, 3 *Bos. & P.* 147, *note A*; *Marchington* v. *Vernon*, 1 *Bos. & P.* 101, *note B*; *Dutton* v. *Poole*, *T. Raymond*, 302; *Anderson* v. *Martindale*, 1 *East*, 497; *Gibbs* v. *Bryant*, 1 *Pick.* 118; *Drinkwater* v. *Gray*, 2 *Greenl.* 163.

2. If the action of assumpsit can be maintained, the plaintiffs cannot recover the amount where the notes taken for the land were payable at times subsequent to the commencement of the action. If they were entitled to the notes, they should have brought trover for them, and not have sought to recover money instead of them.

Day v. *Whitney*, 1 *Pick.* 503; *Lamb* v. *Clark*, 5 *Pick.* 193; *Whitwell* v. *Vincent*, 4 *Pick.* 449. The defendant was entitled to the possession of the note as joint owner. *Sheldon* v. *Welles*, 4 *Pick.* 60; *Smith* v. *Stokes*, 1 *East*, 263; *Holliday* v. *Camsell*, 1 *T. R.* 658; *Selw. N. P.* 1155.

3. *Luther Jewett* was an interested witness, having a direct interest in the event of this suit. He was the person with whom the defendant had covenanted, and the only person who could discharge the contract of the defendant. *Offley* v. *Ward*, 1 *Lev.* 235; 2 *Institutes*, 673; *Gilby* v. *Copley*, 3 *Lev.* 139; *Scholey* v. *Mearns*, 7 *East*, 148; *Bland* v. *Ansley*, 2 *New Rep.* 331; *Buckland* v. *Tankard*, 5 *T. R.* 578.

Preble, for the plaintiff. There is no distinction, where third persons are interested, between a contract under seal, and one without a seal. The paper signed by *Jewett* and the defendant, is a mere recital of certain facts, and will no more entitle *Luther Jewett* to bring the action, than the plaintiffs. It was proper evidence to show, that the defendant had received a sum of money which he ought to pay over to the plaintiffs; and to recover it, assumpsit is the proper action. *Buller's N. P.* 133, 134; *Felton* v. *Dickinson*, 10 *Mass. R.* 287; 1 *Bos. & P.* 101; *Dumond* v. *Carpenter*, 3 *Johns. R.* 183; *Heard* v. *Bradford*, 4 *Mass. R.* 326; *Sutherland* v. *Lishnan*, 3 *Esp. R.* 42; *Cro. Eliz.* 729. He contended, that the second point was properly settled by the jury. They have found, that the securities were turned into money before the suit was commenced. On the third point, he cited *Barker* v. *Prentiss*, 6 *Mass. R.* 430.

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

Shepley J. — Several objections were made at the trial to the right of the plaintiffs to maintain this action, and to the proceedings at the trial; three of which only are insisted upon in argument. The first denies their right to maintain an action for money had and received, because their rights, if any they have, are secured to them by deed.

It is never the duty, nor should it be the design of the Court to endeavor to support a particular form of action contrary to well

established rules of law. It would introduce uncertainty and be productive of more mischief than will be in any case done, where a party has brought a wrong action, by turning him round to a right one. Yet in the great variety of contracts, and especially in times when the usual forms of instruments are greatly disregared, it may happen, that contracts are made in such a manner as to render it very difficult to determine, what is the proper remedy for an admitted right. And this case is not an inapt example of such a contract.

It is proper to state, for the purpose of coming to a correct conclusion, certain well established rules. Where one promises another, for the benefit of a third person, such third person may maintain the action of assumpsit in his own name. *Dutton* v. *Pool*, *Sir T. Ray*, 103; *Felton* v. *Dickinson*, 10 *Mass. R.* 289. Where one covenants, or agrees with another to pay a sum, or to do an act, the other cannot maintain assumpsit. His remedy is, as the law expresses it, of a higher nature. *Bennus* v. *Guildly*, *Cro. Jac.* 506; *Bulstrode* v. *Gilburn*, 2 *Stra.* 1027; *Toussaint* v. *Martinnant*, 2 *T. R.* 100; *Richards* v. *Killam*, 10 *Mass. R.* 239; *Charles* v. *Dana*, 14 *Maine R.* 383.

Where one covenants with another to do any act for the benefit of a third, the rule differs from that in assumpsit, and the action cannot be maintained upon such covenant in the name of the third person for whose benefit it was made. *Offley* v. *Ward*, 1 *Lev.* 235; *Salter* v. *Kingley*, *Carth.* 77; *How* v. *How*, 1 *N. H. Rep.* 49; *Montague* v. *Smith*, 13 *Mass. R.* 396. Without a violation of these rules, a statute, or record, or sealed instrument, may not only be used as evidence, but may form the very foundation out of which arises an action of assumpsit. *Rann* v. *Green*, *Cowp.* 474.

Such also is the case of *Sutherland* v. *Lishnan*, 3 *Esp. R.* 42, where a seaman brought assumpsit for his wages, the ship's articles being produced, were under his hand and seal, but not executed by the defendant, the master. In *Fenner* v. *Mears*, 2 *Bl. R.* 1269, defendant made a bond to one *Cox*, and indorsed upon it an agreement to pay to any assignee of *Cox*; the plaintiff being assignee, maintained assumpsit. *Innes* v. *Wallace*, 8 *T. R.* 595, was assumpsit by the assignee against the obligor of a stock bond, and the court say, this is not an action on the bond, that the assignment

is a consideration for the assumpsit, and liken it to an assumpsit on a foreign judgment.

It will be found upon examination of the cases which decide, that assumpsit cannot be maintained, where the rights of the party are secured by deed, that there is in the deed some stipulation for payment or performance to himself, or to some one for his benefit.

In this case the defendant and *L. Jewett* held bonds separately, of tracts of land in the same township, and agreed by deed, if the lands were sold at a profit, what portions, and between whom, there being others interested, that profit should be divided. There is not in the deed any stipulation obliging the defendant to sell, or to account, or to pay to any one. There is nothing more obliging the defendant to pay to the others, than there is obliging *L. Jewett* to pay to them; for he might sell, and *L. Jewett* receive payment. It is true the word agree, in the deed, is a covenant to do, what is agreed to be done; but the agreement is a naked statement of the rights of the parties interested, without any contract to account or to pay to *L. Jewett*, or do any act whatever for the benefit of the other parties. It is a single statement of what these rights may be upon the happening of certain events. It is said, that *L. Jewett* should bring an action upon the deed, and recover the share of the plaintiffs. But what right has he to recover of the defendant the shares of the other persons? Has the defendant agreed in the deed to pay them to him? He has not; and would have as good right to insist, that he held the money as the agent of the plaintiffs and for their use, as *L. Jewett* would to take it from him for such a purpose. There are even stronger indications in the deed, that the defendant was designed to be the trustee for the benefit of the plaintiffs, than that *L. Jewett* was, because it was expected that he would do the business, and there is no agreement to pay their share to any other person. But suppose *L. Jewett* could, and that he should recover from the defendant the share of the plaintiffs; how are they to bring an action against him and avoid the very objection now made? Their rights would still be secured only by deed, and that must be exhibited to prove them; and *L. Jewett* might then make the objection now made. If the plaintiffs cannot maintain this action it is difficult to perceive in what manner, they can obtain rights, to which the defendant admits they are entitled by an

instrument under his hand and seal. The case of *Allen* v. *Impett*, 8 *Taunt.* 263, fully justifies the plaintiffs in bringing assumpsit. In that case the plaintiff was the assignee of one *Prior*, a bankrupt; and the defendants were the trustees in a marriage settlement by deed, holding stock and obliged by the deed to pay the interest to the bankrupt during his life; after the bankruptcy the dividends were paid to his wife, and the plaintiff brought an action for money had and received, to recover it from the defendants. It was objected, that the action should have been upon the deed, and the plaintiff was nonsuited; but after argument the nonsuit was set aside and the action sustained.

The second objection is, that the defendant has not received money but notes of hand for a large part of the amount; and it is insisted, that the instructions upon this point were erroneous. They required that the jury should find "that the defendant had realized the amount of said notes, and had had the benefit of them so as to apply the proceeds to his own use;" and under such circumstances the action for money had and received, may well be maintained. *Tuttle* v. *Mayo*, 7 *Johns. R.* 132.

The third objection is, that *Luther Jewett* was not a competent witness. It is said, that he is interested in the event of this suit, being the person with whom the defendant has covenanted, and the effect of his testimony being to relieve himself from accounting to the plaintiffs.

It has been already stated, that the deed does not constitute him more than the defendant, the agent or trustee of the plaintiffs. And the case finds from other testimony, that the agreement was made by the consent of the plaintiffs, so that whether they obtain any thing of the defendant or not, they have no right to complain of the witness. The same answer in substance may be given to the argument, that he made himself liable to the plaintiffs by assigning the bond to the defendant. They had agreed, that he should enter into the contract by deed with the defendant, and it is therein recited, that he was to sell; and they could not complain of the witness, that he assigned the bond to enable him to do so. The witness does not appear to have received money, or to have done any act authorizing the plaintiffs to maintain a suit against him, and from which he would be relieved by the result of this suit.

Judgment on the verdict.

Ezra Allen *vs.* Josiah Dunn.

Where two persons are conducting business in such manner, that they may be holden as partners to third persons, dealing with them as such, but where as between themselves no partnership in fact exists; goods put into the business purchased by one in his own name and with his own funds cannot be holden to pay a private debt of the other, contracted in his own name, and entirely unconnected with the business.

This was an action of trespass against the defendant, as Sheriff of the county, for the acts of one *Gower*, as his deputy, in taking a quantity of goods, alleged to be the property of the plaintiff. The defence was, that the goods were legally attached by *Gower* on a writ in favor of *Stimpson & Emery*, against *Asa Lawrence, W. Demmon* and *W. S. Roberts*. The plaintiff proved, that the goods in controversy were originally his property, or purchased in *Boston* on his credit, and consigned to *Lawrence* for sale in *Portland*, on the terms mentioned in a written agreement between them. The defendant contended, that by this agreement the goods were owned in partnership by the plaintiff and *Lawrence*. The material parts of the agreement are stated in the opinion of the Court. The trial was before Emery J. who, for the purpose of the trial, in order to ascertain the damages, instructed the jury, that the articles of agreement did not constitute a partnership between the plaintiff and *Lawrence*. The verdict for the plaintiff was to be set aside, if this instruction was erroneous.

Daveis and *Kinsman*, for the defendant, contended, that there was under this agreement a partnership between *Allen* and *Lawrence*, both as it respected themselves and third persons; and cited *Waugh* v. *Carver*, 2 *H. Black.* 235; *Cheap* v. *Cramond*, 4 *Barn. & Ald.* 663; *Hesketh* v. *Blanchard*, 4 *East*, 144; *Smith* v. *Watson*, 2 *B. & Cres.* 401; 17 *Vesey*, 404; *Gow on Part.* 12 and 47; *Miller* v. *Bartlett*, 15 *Sergt. & R.* 137; *Purviance* v. *McClintee*, 6 *Sergt. & R.* 259; 3 *Har. & J.* 505; 2 *Har. & Gill*, 295; *Dob* v. *Halsey*, 16 *Johns. R.* 34; *Musier* v. *Trumpbour*, 5 *Wend.* 274; *Bailey* v. *Clark*, 6 *Pick.* 372; *Peacock* v. *Peacock*, 16 *Vesey*, 49; *Reid* v. *Hollinshead*, 4 *B. & Cres.* 878; *Smith* v. *DeSylva*, *Cowper*, 471; *Doak* v. *Swann*, 8 *Greenl.* 170; *Smith* v. *Jones*, 3 *Fairf.* 332; *Walden* v. *Sherburne*, 15

Johns. R. 409; *Turner* v. *Bissell*, 14 *Pick.* 192; 1 *Rose*, 89; *Bloxam* v. *Pell*, 2 *Wm. Black.* 999; *Ferry* v. *Henry*, 4 *Pick.* 75; *Collyer on Part.* 7, 8, 14, 43, 47, 50, 84, 91.

Deblois, with whom was *S. Fessenden, Codman & Fox*, for the plaintiff, contended, that the true question in this case was, whether this property was liable to be taken to pay the private debts of *Lawrence*. The instruction of the Judge must have been predicated upon the whole case, which shows, that the demand on which the attachment was made was the mere private debt of *Lawrence*, was not contracted in the partnership name, and had no concern with the partnership, if there was one. Under the agreement, *Lawrence* could not hold the goods against *Allen*, nor can his private creditors. The partnership effects are liable to pay the individual debts of one partner only so far, as he has an interest in them, and *Lawrence* has no interest whatever in this property. *Hesketh* v. *Blanchard*, 4 *East*, 144; *Gow on Part.* 12, 18; 3 *Kent's Com.* 34; *Smith* v. *Jones*, 3 *Fairf.* 332; *Dixon* v. *Cooper*, 3 *Wils.* 40; *Cheap* v. *Cramond*, 4 *B. & A.* 663; *Benjamin* v. *Porteous*, 2 *H. Black.* 590; *Dry* v. *Boswell*, 1 *Camp.* 330; *Wilkinson* v. *Frazier*, 4 *Esp. R.* 182; *Muzzy* v. *Whitney*, 10 *Johns. R.* 226; *Smith* v. *Watson*, 2 *B. & Cres.* 401; *Mair* v. *Glennie*, 4 *M. & S.* 240; *Baxter* v. *Rodman*, 3 *Pick.* 435; *Thompson* v. *Snow*, 4 *Greenl.* 264; *Meyer* v. *Sharpe*, 5 *Taunt.* 74; *Ross* v. *Drinker*, 2 *Hall*, 415; *Bailey* v. *Clarke*, 6 *Pick.* 372; *Rice* v. *Austin*, 17 *Mass. R.* 206; *Collyer on Part.* 14; *Miller* v. *Bartlett*, 15 *Sergt. & R.* 137; *Waugh* v. *Carver*, 2 *H. Black.* 235; *Post* v. *Kimberly*, 9 *Johns. R.* 470; *Saville* v. *Robertson*, 4 *T. R.* 720. The lien of *Lawrence* upon the goods to insure payment for his services was perfectly consistent with *Allen's* ownership of the property. *Newhall* v. *Vargas*, 13 *Maine R.* 93.

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

WESTON C. J. — There was such a connection and communion of profits, between the plaintiff and *Lawrence*, that they might have been held as partners as to third persons, dealing with them as such. But between themselves, we are of opinion, that they can-

not be so regarded. The relation of the parties with each other, depended upon their agreement, which is very precise and definite in its terms. *Lawrence* was employed to sell goods in *Portland*, for the space of two years, on the plaintiff's account. The goods were to be furnished by the plaintiff, from his own stock, or purchased by him elsewhere. As a compensation, and to quicken his zeal, in promoting the plaintiff's interest, "in the sale of said goods," the plaintiff agreed "to pay to said *Lawrence*, from time to time as a compensation," such sum or sums, as should be equal to half the profits of the business, so conducted by said *Lawrence*, "in behalf" of the plaintiff, *Lawrence* was to have a lien upon the goods for his part of the profits, and at the end of the two years, was to purcase of the plaintiff one half of such, as might remain on hand. But if any loss was made in the business, it was to be sustained by *Lawrence*.

The plaintiff was the principal and owner of the goods. He never parted with his title to them, but reserved it expressly, paying to *Lawrence* a portion of the profits, for selling the goods on his account. If it be possible, by any mode or form of stipulation, to pay for services in the sale of goods, by a portion of the profits, without constituting the parties partners, as between themselves, it was done here, such being their plain and manifest intention. If it was an artful contrivance, to carry on business jointly, and at the same time to put the common property out of the reach of creditors, dealing with either of them *bona fide*, as the partner of the other, it could not legally be permitted to have this effect. But no question of fraud is raised or presented. The goods were not to be purchased by *Lawrence*, and afterwards to become the property of the plaintiff, which might have a tendency to defraud the creditors of the former; but they were to be purchased by the plaintiff, to remain his property, and as such liable to his creditors.

The plaintiff had nothing to gain, to the prejudice of those, who might have claims upon *Lawrence*. His ability to fulfil his engagements might be aided, but were not impaired, by the contract he made with the plaintiff, who gave him employment, and a fair compensation for his services. But the plaintiff run the hazard of being held answerable to third persons, who might have dealt with *Lawrence* as his partner.

It has been repeatedly held, that this kind of compensation, given to another for his trouble in regard to goods, or other business, in which he engages for his employer, does not make the parties partners between themselves, and in certain cases, not even as to third persons. 3 *Kent*, 11, and the cases there cited. This has been settled and established in *England* by a series of decisions; although in *ex parte Homper*, 17 *Vesey*, 404, *Lord Elden* expressed his regret, that such a distinction had ever taken place. And this has been applied to a case where the agent, who was to have the profits of the sale, united with the principal also in the purchase of the goods. *Hesketh* v. *Blanchard*, 4 *East*, 144. In *Rice* v. *Austin*, 17 *Mass. R.* 197, the parties were to share the profits equally, but they were held not to be partners.

Waugh v. *Carver*, 2 *H. Black.* 235 is a leading case, as to the liability of persons, so circumstanced, to third persons as partners. The *Carvers* and one *Giesler* were to assist in procuring agencies for each other, as commission merchants, in regard to which business, thus procured they were to share each other's profits, in certain proportions. *Eyre C. J.* says, "it is plain, upon the construction of the agreement, if it be construed only between the *Carvers* and *Giesler*, that they were not, nor ever meant to be partners," yet, as they shared in each other's profits, they were liable as partners to third persons. Most of the cases, upon which the defendant relies, turn upon this distinction, which is perfectly well established, and is entirely consistent with the fact, that as between the parties themselves, no partnership exists.

If the plaintiff and *Lawrence* were not partners between themselves of which we are well satisfied, *Simpson*, the attaching creditor, who had a demand against *Lawrence*, entirely unconnected with their business, has no claim to treat them as partners for his benefit. He gave no credit to them as such. The goods did not belong to his debtor. They were originally the property of the plaintiff, and so continued up to the time of the attachment. Nor has he done any thing, which should implicate his property, in any liability, arising from the private dealings between *Lawrence* and *Simpson*.

In our judgment, the instructions of the presiding Judge, having reference to the facts in this case, are not liable to any legal objection.

Judgment on the verdict.

Isaac Robinson *vs.* Nathan Heard.

In an action on a bond, conditioned to purchase and pay a stipulated price for a tract of timber land, testimony that the land was of trifling value compared with the price contracted to be paid therefor, is inadmissible in evidence, unless the party will also prove, that the obligee made fraudulent representations in relation to the same, or had knowledge of the facts, when the contract was made.

In such action a paper of the same date, *not* under seal, signed by the obligee, and having reference to certificates to be furnished by him to the defendant respecting the quantity and quality of the timber upon the land agreed to be sold, is inadmissible as evidence.

In such suit, if the terms of the contract show that payment of money is to be made *before the deed is to be given*, and no money is paid or offered at the time fixed, the action may be maintained without first tendering a deed of the land.

When a contract is made to purchase and pay for land by one party, and to sell and convey by the other on payment of the price, and an action is brought against the purchaser for breach of the contract on his part, without tendering a deed, the measure of damage is the difference between the sum, which the purchaser agreed to pay for the land and the sum for which it would have sold on the day on which the contract should have been performed.

Where one party calls a witness, a paper admitted by the witness to be true, although not then under oath, contradictory to his testimony, is competent evidence for the other party.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Debt on a bond, dated *Aug.* 17, 1835. The condition of the bond recites, "that whereas the said *Robinson* has agreed to sell and convey to said *Heard* a certain lot or piece of land," particularly described, and containing twelve hundred and eighty acres, "and the said *Heard* in consideration thereof, hath agreed to pay to the said *Robinson*, his heirs and assigns, executors or administrators, the sum of six dollars per acre for each and every acre of said land, one third part of said purchase money in thirty days from this date, and one third part in one year, and one third part in two years from date, with interest upon the same, two notes with good security being given for the two last sums. Now therefore if said *Heard*, his heirs or assigns, executors or administrators, shall well and truly pay, or cause to be paid, to said *Robinson*, his heirs or assigns, executors or administrators, the aforesaid one third part of

said purchase money within the time aforesaid, and furnish the two notes aforesaid with the security aforesaid, said *Robinson* being ready and willing to make the deed of conveyance as aforesaid free of all incumbrances, then the obligation to be void." On the trial, the defendant offered in evidence a paper dated the day of the date of the bond, not under seal, and signed by the plaintiff, in which the plaintiff after describing the bond, agrees to procure the indorsements of good, credible and well informed men, duly qualified to judge, upon the back of certain certificates relating to the quantity and quality of the timber upon the land, that the persons signing the certificates were men of truth and veracity and well qualified to judge of the subject matter contained in the certificates. The Judge, on objection made, excluded the paper. In a deposition of the subscribing witness to the same paper, taken by the defendant, the witness was requested to annex a copy of the paper, and it was annexed. At the time of the taking of the deposition, the question and answer were objected to, and again at the trial, and ruled to be inadmissible. The other facts in the case, and the ruling of the Judge at the trial, appear sufficiently in the opinion of the Court.

Preble argued for the defendant, and cited *Sugden on Vendors*, 161, 162; 1 *Saund.* 320, *note* 4; *Hunt* v. *Livermore*, 5 *Pick.* 395; 2 *H. Black.* 123; 8 *T. R.* 366; 1 *East*, 619; 1 *H. Black.* 270; 4 *T. R.* 761.

W. P. Fessenden argued for the plaintiff, and cited 4 *Dane*, 389; *Doug.* 688; 3 *Stark.* 1002; *Dwight* v. *Pomeroy*, 17 *Mass. R.* 320; 3 *T. R.* 413; 12 *East*, 578; 2 *Wilson*, 376; *Kelleran* v. *Brown*, 4 *Mass. R.* 445; *Com. Dig. Pleader*, 2 *W*; *Shed* v. *Peirce*, 17 *Mass. R.* 623; 7 *T. R.* 350; 8 *East*, 346; 5 *T. R.* 564; *Dix* v. *Otis*, 5 *Pick.* 38; *Kimball* v. *Morrell*, 4 *Greenl.* 371; *Haven* v. *Brown*, 7 *Greenl.* 423; *Hanson* v. *Stetson*, 5 *Pick.* 506; *Freeport* v. *Bartol*, 3 *Greenl.* 340; 2 *Story's Eq. sec.* 1314.

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

Emery J. — To this action of debt on bond which the defendant executed, as is alleged by the plaintiff, on the 17th of *August*,

1835, in the penal sum of $15,000, the defendant after craving oyer of the bond and condition, pleaded that it is not his deed, and filed his brief statement of additional grounds of defence, that it is not his bond, the same having been obtained by misrepresentation and fraud. 2. That said *Robinson* was not ready and willing, within thirty days from the date of the bond, to make the deed of conveyance in the condition mentioned, nor was he ready to do and perform, nor did he tender or offer to do and perform whatever he was bound on his part to do and perform. 3. That in and by the original contract between the parties, the said *Heard* was not at any event bound to accept a deed of the land mentioned in said condition, but that he agreed to purchase the same only on condition there were growing on said land a large amount of pine timber, good and merchantable, to wit, twenty-five thousand feet to the acre at least.

The case comes before us on exceptions against the rulings and instructions of the Chief Justice of the Court of Common Pleas. It is requisite for the defendant, to satisfy this Court, that the ruling of that Judge was incorrect in rejecting the offered proof, that the whole of said lot of 1280 acres, mentioned in the bond, was burnt land, barren heath of no value, and meadow, and destitute of timber, as wholly irrelevant and inadmissible, unless the defendant would also prove, that the plaintiff knew that fact at the time when the bond was executed.

The defendant, by his counsel, contends, " that the covenants in the bond were mutual and reciprocally dependent, and that he who would avail himself of the benefit must first tender or offer to perform ; that as *Robinson* tendered no deed, it does not appear that he was ready to perform his part of the contract ; that the agreement signed by *Robinson* was an integral part of the contract ; that if necessary to stretch a principle to do right, this case will support the Court in making the effort ; that it would be the merest technicality, if they are not to be construed together ; that the contract was obtained by misrepresentation and sounds in fraud, though no moral fraud, and whether *Robinson* knew or not the deception on the defendant, it is the same. He also objects, that by the verdict the defendant is made to pay for the land, and yet it belongs to *Robinson*, that he has never tendered a deed nor brought any into Court.

"In equity a purchaser would be entitled to relief on account of any *latent* defects in an estate, or the title to it, which were not disclosed to him, and of which the vendor or his agent was aware. But a provident purchaser should examine and ascertain the quality and value of the estate himself.

"As to false representation to a purchaser of value or rent, the same remedy will lie against a person *not interested in the property*, for making such false representations as might be resorted to in case such person were owner of the estate, provided the statement be *fraudulently* made, with an intention to deceive, whether it be to favor the owner, or from an expectation of advantage to the party himself, or from ill-will towards the other, or from mere wantonness. And it will be sufficient proof of fraud to shew first, that the fact represented is false; secondly, that the person making the representation had a knowledge of a fact contrary to it. And it is no excuse in the party, who made the representation, to say, that though he had received information of the fact, he did not at that time recollect it.

"It is equally true, that if the person to whom the sale is made was aware of all the defects in the estate, he cannot impute bad faith to the seller in not repeating to him what he already knew, nor will the seller be liable *if he were ignorant of the defects*, or if they were such as might have been discovered by a vigilant man.

"The purchaser must take the property as it is, if he bought with full knowledge of the actual state of it." *Sugden's Vend.* 37, 38.

It appeared, that *Robinson* utterly declined to guarantee a certain quantity of timber on the land.

It is also in evidence that the defendant, with a *Mr. Waite, B. Stinchfield,* and two *Libbeys* was seven days on the township to which this land belongs, and explored it to *Waite's* and *Heard's* satisfaction, as they said.

It also appears that about the middle of *Sept.* 1835, at the American House in *Boston, Robinson* said to *Heard,* that he was ready to deed on the contract according to contract, and his answer was that he should not take it.

Permission having been afforded by the Judge, for the defendant to implicate the plaintiff with knowledge of the quality of the land and timber at the time of the execution of the bond, which

liberty was not improved, we coincide with the Judge in the opinion that the evidence was irrelevant and inadmissible.

The Judge instructed the jury, that the writing given by *Robinson*, and the subject of it, was an independent contract, and could not be offered, as constituting a part or appendage to the bond, nor could a non-compliance with the stipulations by *Robinson* be set up in this action by way of defence.

The instrument on which the suit is brought is of a more solemn character, than the paper attempted to be drawn into connection with it, the bond being under seal, and the paper offered is without seal, and contrasted with the bond, is to be viewed as a mere parol agreement. The consideration of it is the fact that the defendant had executed the bond in question. But this paper is not made part of the bond, nor is there, in the bond, any reference to the paper. It is on both grounds inadmissible. 1 *Sch. & Lef.* 22. We must construe the bond by itself. No conversation which preceded it, nor propositions, or representations, not introduced into it, are to be taken into view, in construing the instrument.

This paper, being mere parol evidence in relation to the bond cannot be admitted to explain, add to, vary or contradict the bond, and was therefore properly rejected. It was purely collateral to the instrument now in suit, and could not be used in defence. *Dow* v. *Tuttle*, 4 *Mass. R.* 405; *Dwight* v. *Pomeroy*, 17 *Mass. R.* 320; *Shed* v. *Pierce*, 17 *Mass. R.* 623; *Hanson* v. *Stetson*, 5 *Pick.* 506.

By the terms of the bond, *Heard*, the defendant, agreed to pay the plaintiff the sum of six dollars per acre for 1280 acres, one third part in thirty days from the date of the bond, one third in one year, and one third in two years from the date, with interest upon the same two notes, with good security, being given for the two last sums; and if he paid the plaintiff, or his heirs, or assigns, the aforesaid one third part of said purchase money within the time aforesaid, and furnished the two notes aforesaid with the security aforesaid, said *Robinson* being ready and willing to make the deed of conveyance as aforesaid free of all incumbrances, then the obligation to be void, otherwise to remain in full force and virtue.

The instruction to the jury was, that "the plaintiff was not bound to tender a deed of the lot in question to the defendant, but

that it was for the defendant to tender the money and notes mentioned in the condition of said writing obligatory to the plaintiff; and as the defendant made no such tender, the plaintiff was entitled to maintain his action."

As a matter of convenience, it may be well for a seller, in a contract like the present to prepare a deed conformable to the provision, to be delivered on the performance by the purchaser of what he engages to do. But when the terms of the instrument indicate that an actual payment of money is *first* to be made by the other party, the seller is not bound *first* to tender, but is on reasonable demand, to deliver a deed.

It seems not to be questioned in this case, but what the plaintiff had the regular title in him. Indeed the instrument shows from whom he received his deed.

This contract decidedly throws on the defendant the obligation of *first tendering the money* and the two notes with good security; for without this he could not expect to find the plaintiff ready and willing to make the deed of conveyance free of all incumbrances. But this does not impose on the defendant the duty of parting with his money without receiving the deed of conveyance, provided he takes the precaution of demanding it, and the jury ought not to have withdrawn from them the question whether the plaintiff was on his part ready to perform.

Upon the views already advanced as to the admissibility of the paper, we think the answer of *Mr. Vose*, to the 5th cross interrogatory inadmissible.

Complaint is made against the direction, that "the rule of damages was not the difference between the value of the land at the date of the bond, and the value of the land when the contract was broken by *Heard*, but the rule was the whole amount which *Heard* agreed to give for the land at six dollars per acre, with interest thereon, on two thirds from the date of the bond, and on one third from *Sept.* 16, 1835."

When a contract is made to sell and convey on one side, and on the other to purchase and pay for land, on a breach of the agreement, each party has an election to seek for damages in a suit at law, or proceed in equity for a specific performance. It is rather unusual for the same party to pursue both remedies. If the seller

commence his suit at law, it is supposed that he is contented to keep the property, and pocket the damages which a jury may give him in satisfaction for the injury.

Should he wish to get rid of the land, he will proceed in equity to compel specific performance, and in that case nothing would be recovered but the money and interest which were to be given.

It may be that a man having contracted to sell his estate, from the very circumstance that the condition is not performed by payment of the price stipulated, may be ruined. Yet no system of laws could provide for all the remote consequences of the non-performance of any act. Human justice must stop at the direct and immediate and necessary consequences of acts and omissions, and not aim beyond a reasonable indemnification for them. 2 *Sto. Eq.* 548, 549, *note.*

Yet parties make their own contracts, and the object of law is to encourage, and compel the performance of them, if fairly made. A purchaser, who has entered into a contract, and agreed to pay a specific sum as the price of land to be conveyed to him, cannot be relieved from the payment thereof by the tender of a less sum, agreed upon in the contract as stipulated damages, to be paid in case of non-performance of the contract on his part. *Ayres* v. *Pease*, 12 *Wendell*, 393.

The appeal to the jury in this case, is to be relieved from the penalty of fifteen thousand dollars. If that sum had truly and intentionally been adopted and described in the contract as liquidated damages, and not as a penalty on failure of performance, it may be doubted whether a court or a jury could rightfully have changed it. And had the deed been tendered in season and brought into Court by the plaintiff and filed to be delivered to the defendant, perhaps the rule of damages prescribed by the Judge would appear to us to be correct. It would hold the defendant to pay what he agreed. The plaintiff did not stipulate to receive any part of that sum in land. And the argument then that because he holds the land, he ought not to recover the price stipulated to be paid by the defendant in money, ought not to avail, as it would tend to encourage people to break their contracts, in the hope of escaping with trifling damages, by casting the commodity back upon the seller's hands.

But under these exceptions, no tender of the deed appears to have been made, nor does it appear to be brought into Court. Under such circumstances, to give the plaintiff a perfect indemnity, the rule, the Court understands, to be the difference between the sum which the defendant agreed to give for the land, and the sum for which the plaintiff could have sold it on the day when the contract should have been performed. Had the plaintiff put it up and sold it at public auction, on that or the next day after the refusal to take upon fair notice, and obtained a sum of money for it, it would be the duty of the defendant to make up the deficiency, and those two sums would have been the same as the plaintiff would have received if the defendant had performed.

If the plaintiff has not done that, nor offered the title to the defendant, *then he elects to keep the land at what price it might have sold for at that time.*

We are not convinced of the propriety of rejecting the statements in the paper, which *Stinchfield,* as we must take it, admitted to be true. For *the deposition of B. Stinchfield was introduced by the plaintiff.* And it was competent evidence for the defendant for the purpose of affecting the testimony of *Stinchfield,* although the confession or admission as to the paper was not under oath. The effect of it might have been submitted to the jury, and doubtless it would have been argued, that *it went hard toward contradicting the allegation that he heard the person intended to be described as the defendant, declare that he would not take the deed.* It speaks too of recommending to the plaintiff to sell without exploring. Whether he meant that he also stated to him that he was satisfied there was but little or no timber thereon, it being nearly all burnt land, seems not quite so clear.

The plaintiff's counsel argues, that it was uncertain, illusory, and calculated to deceive. However that may be, after the proper and decided expression by the Judge of his intention to let in the proof of fraud, if it could be shewn, and it was not; we regret that this evidence was excluded. For the reasons stated as to the jury's right to pronounce on the question of the plaintiff's readiness to perform, and for the rejection of the statements in that paper, and the statement as to the rule of damages, the exceptions must be sustained, and a new trial granted.

William G. Lane *vs.* John McKeen *& ux. & al.*

An agreement by a married woman for the sale of her real estate, although made with the assent of her husband, and for a valuable consideration, is void in law, and will not be enforced in equity.

This is a bill in equity, in which the plaintiff alleges, among other things, that *Richard* and *Elizabeth Tappan* were seized of an undivided share in certain lands in her right, and in order to make an equitable and just partition thereof, between the respective proprietors, agreed by parol to convey her interest in this tract to an ancestor of the present plaintiff in equity, whose right he has, and suffered his said ancestor to enter into possession thereof; but that before the promised conveyance was made, *Richard* and *Elizabeth Tappan* died, and that the defendants, heirs at law of said *Elizabeth*, have instituted their suit at law to recover the same. The bill prays, that the defendants may be perpetually enjoined from proceeding in the suit at law. The answer states, that the said *Elizabeth* previously to the alleged agreement had been married to said *Richard Tappan*, and so continued until her death, and therefore was incapable of entering into any such contract.

Fessenden & Deblois argued for the plaintiff, and cited *Jaques* v. *Meth. Ep. Church*, 17 *Johns. R.* 548; *Powell on Con.* 124; *Osgood* v. *Breed*, 12 *Mass. R.* 531; *Downey* v. *Hotchkiss*, 2 *Day*, 225; *Duke of Bolton* v. *Williams*, 2 *Vesey, Jr.*, 155.

Everett, for the defendants, contended, that a post-nuptial contract, made by a married woman for the conveyance of her real estate, is not binding on her or on her heirs, either in law or in equity. 2 *Story's Eq.* § 1388, 1391; *Thomes, ex parte*, 3 *Greenl.* 50. He commented on the cases cited for the plaintiff, and insisted, that they were either cases of ante-nuptial contracts, cases of personal estate, or in other respects inapplicable to the present case.

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

Shepley J. — There are difficulties in the way of the plaintiff in maintaining this bill, which cannot be overcome. The contract

attempted to be proved to convey the real estate of the wife is not in writing, and it is not taken out of the statute of frauds by part execution. There has been no such delivery and change of the possession from one party to the other as is necessary for such a purpose. But it is not necessary to examine the testimony to prove this; for the contract, had it been in writing, and signed by the husband and wife, could neither bind the wife, nor her heirs.

The argument for the plaintiff is, that in *England* a contract by husband and wife to levy a fine of the wife's lands would be decreed to be performed, the wife being separately examined, and assenting; and *Powell*, and the cases referred to by him, are relied upon as authority for this position. It is then said, that our mode of conveyance by deed is a substitute for the conveyance by fine, and the same principle being applied, equity will decree the performance of a contract by husband and wife to convey her lands according to our mode of conveyance; and the case of *Downey* v. *Hotchkiss*, 2 *Day*, 225, is relied upon as deciding the question as to the application of such a principle here.

The case of *Baker* v. *Child*, 1 *Vern.* 61, is the most direct authority for the exercise of such a power by the *English* chancery. That case, it is said in *Thayer* v. *Gould*, 1 *Atk.* 617, was erroneously reported; and *Kent* says, it is not law; and that an "agreement by a *feme covert* with the assent of her husband for a sale of her real estate is absolutely void at law, and the courts of equity never enforce such a contract." 2 *Kent's Com.* 167, and *note c.*

Story states the disability of the wife, and that it "can be overcome only by adopting the precise means allowed by law to dispose of her real estate; as in *England*, by a fine, and in *America*, by a solemn conveyance." 2 *Story's Eq.* 617.

In the case of *Martin* v. *Mitchell*, 2 *Jac. & Walk.* 412, it was held, that an agreement by husband and wife to sell her estate was void as to the wife, and that courts of equity would not give relief against her on such a contract.

The case of *Downey* v. *Hotchkiss* does show one instance of the exercise of such power in *Connecticut*, but that case has been twice overruled in that State. And the principle is now there established, "that an agreement by a married woman with the assent

of her husband for the sale of real estate, and on a valuable consideration is void in law; and that courts of equity will never enforce such a contract against her." *Butler* v. *Buckingham*, 5 *Day*, 492; *Watrous* v. *Chalker*, 7 *Conn. Rep.* 224.

The case of *ex parte Thomes*, 3 *Greenl.* 50, decided such a contract to be void in this State.

Bill dismissed, with costs for respondents.

REUBEN RUBY *vs. Abyssinian Religious Society of* PORTLAND.

If a mortgagee enter into actual possession before breach of condition, he will be holden to strict accountability; and cannot recover against the mortgagor in an action of assumpsit, brought after the discharge of the mortgage, for repairs not necessary for the preservation of the estate.

A corporation is not bound by the declarations or acts of individual members thereof, made or done at a time when they were not acting as the agents of such corporation.

THE action was assumpsit for money paid, laid out and expended, in paying certain debts against the corporation, and in finishing the meeting-house belonging to the society. It was conceded by the defendants, that the plaintiff had paid debts to the amount of $217,13, and that he had a just claim for that sum. The plaintiff proved by witnesses, that he had employed persons to finish the inside of the meeting-house, and had paid for labor and materials $689,58. It did not appear, that the corporation had by vote authorized the plaintiff to finish the house, or by vote had appointed any committee or agents to do the work or cause it to be done. To show an acceptance of the work, and a ratification of his doings, the plaintiff offered to prove acts of members of the corporation, by occupying and enjoying the same house for public worship and other meetings. The counsel for the defendants objected to the admission of any evidence of acts to bind the corporation, other than the votes of the corporation, or acts of its authorized agents. EMERY J. presiding at the trial, overruled the objection. The testimony of many witnesses, not very intelligible in some respects,

was spread upon the report of the case, in relation to the doings of the plaintiff and of other members of the society, which will be sufficiently understood from the opinion of the Court, as will also the proceedings of the plaintiff under a mortgage from the society to him. The verdict was for the plaintiff for the sum of $944,84, and was to be set aside, if the evidence was improperly admitted, or the charge erroneous.

Daveis and *Megquier* argued for the defendants, and cited 1 *Pick.* 87; 2 *Pick.* 505; 5 *Pick.* 259; 10 *Pick.* 398; 1 *Johns. Ch. R.* 385.

Fessenden & Deblois argued for the plaintiff, and cited *Abbott* v. *Hermon*, 7 *Greenl.* 118; *Hayden* v. *Madison*, *ib.* 96; 2 *Pick.* 345; 14 *Mass. R.* 282; 17 *Mass. R.* 479; *Wyman* v. *Hook*, 2 *Greenl.* 337; *Tinkham* v. *Arnold*, 3 *Greenl.* 120; 7 *Cranch*, 299; *Doug.* 524; 3 *Mass. R.* 364; 5 *Mass. R.* 80; *ib.* 491; 6 *Mass. R.* 40; 2 *Stark. Ev.* 55; 4 *B. & Cr.* 575; *Angell & Ames on Cor.* 128; 12 *Wheat.* 64.

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

Emery J. — The verdict in this case as to $217,13, with interest from the date of the writ, ought upon every principle, to be sustained, if nothing more were in the case. As to the residue, it is gathered from the report, that the defendants on the 7th of *March*, 1831, executed to the plaintiff, a mortgage of the property about which the controversy has arisen to secure the payment of $250 in three years.

The plaintiff said it was private property while he had the mortgage; that the property was his own, and he would do with it as he pleased, nearly three years after the giving of the mortgage; that he would do as he pleased with the house, and that the society should not have it if they paid a thousand dollars. He also said, if they would pay the mortgage, he would have nothing more to do with them. He took possession on the 7th of *Sept.* 1835, *under his mortgage to foreclose it.*

The mortgage was discharged on the 25th of *November*, 1835, and the society took violent possession of the house after the mortgage was discharged.

A motion is made at common law to set aside the verdict, as against law and evidence.

It is insisted by the plaintiff, that corporations are bound by the same rules of evidence as individuals; that a corporation may be bound by acts as well as an individual; that the plaintiff went on and finished the house; a dedication was made for the use of the society; that the vote to take possession, to open and close the house, and to rent the pews, amount to a ratification of the doings of *Ruby*.

The case is a very peculiar one, and every honorable exertion appears to have been made by the counsel on both sides to effect a healing and soothing cooperation of the parties litigant, and the Court have urged it upon the consideration of the parties to consent to an amicable adjustment, and they are informed that time only can bring about an accommodation. We are therefore compelled to do our duty in disposing of the cause.

We can easily conceive, that it may be gratifying to the feelings of the plaintiff and to some members of the society, perhaps to all, to find the house so handsomely finished; and we cannot withhold commendation of the spirit of the plaintiff to improve the character of his friends in a religious point of view.

Perhaps the cases of *Hayden* v. *Madison*, and *Abbott* v. *Hermon*, carry the doctrine of implied responsibility of corporations as far as it should be carried. One was in relation to a school-house in which a school had been kept under the direction of a school agent, whose authority was not questioned. The other to obtain payment for building a piece of road. A part payment had been made without objection, when a portion of the road had not been completed as stipulated to be done. An acceptance and waiver of objection was deemed by the Court to result from this act.

The present case presents very strong considerations of difference from those cases.

The commencement of the improvement in the meeting-house was not with the expectation of resorting to the society.

We cannot admit the principle that a mortgagee can take such liberties with property mortgaged to him, averring that the society should not have the meeting-house, if they paid him a thousand dollars; and yet, after he had undertaken to deal with it as his own

private property, and discharged the mortgage, attempt to charge the society upon a principle of their accepting the house thus improved. They had a right to take it. If a mortgagee enter, as he may, before breach of a condition, he is holden to the strictest accountability for the profits. And the mortgagor is not to be holden chargeable in an action of assumpsit for repairs, not necessary to the preservation of the estate. We must consider this objection open. Besides, there has been no deliberate action legally binding the society or engaging them to pay this demand.

For the proceedings of the colored people as reported, are not to be taken as the doings of the society, and were inadmissible as evidence for such a purpose.

The verdict must be set aside.

Andrew Wiggin *vs.* Luther Fitch.

In an action for deficiency of arms and equipments against one who was liable to do duty as a private in a company of militia, and who was notified to appear at the time and place of meeting of the company for inspection, and who did so appear, it furnishes no defence, if the name of the private, giving such notice, be omitted in his order from the commanding officer to warn the men.

Error to reverse a judgment rendered by a justice of the peace, in an action brought by *Wiggin* against *Fitch*, to recover a fine for deficiency of arms and equipments at the annual inspection. The facts appear in the opinion of the Court. At the trial before the justice the defendant objected, that he was not legally and sufficiently notified of the time and place of parade and inspection of the company, because of the omission of the name of the private warning him in the order. This objection was sustained by the justice. The plaintiff's counsel insisted, that the appearance of the defendant was a waiver of the objection. The justice decided, that the appearance did not preclude the defendant from making the objection, and gave judgment for the defendant. These decisions of the justice were assigned for error.

Swasey argued for the plaintiff in error.

1. The order was sufficient. *Militia Act of* 1834, *c.* 121.

2. If there were any defects in the order, it was a mere informality, or clerical mistake, not sufficient to render the order ineffectual. *Commonwealth* v. *Cutter*, 8 *Mass. R.* 279; *Commonwealth* v. *Derby*, 13 *Mass. R.* 433; *Field's case*, 9 *Pick.* 41; *Smith's Court Martial Rep.* 57, 68, 83.

3. The want of the name of *Davis* in the warrant was properly amended according to the truth, as it might be at any time. *Avery* v. *Butters*, 9 *Greenl.* 16; *Hearsey* v. *Bradbury*, 9 *Mass. R.* 95.

4. As the defendant was in fact duly notified, and did appear, and put himself under the orders of the captain, it was not competent for the defendant to object to the omission in *Davis's* order. *State* v. *Hill*, *Smith's C. M. Rep.* 83; *stat.* of 1834, *c.* 121, § 44, *art.* 29.

S. Longfellow, Jr. argued for the defendant, that as *Davis* was not authorized to warn the defendant, the warning was wholly void, and the defendant under no obligation to perform any duty. If he voluntarily did some duty, he might cease when he pleased. If there was any waiver, it could only be as to his own personal conduct; but he must be taken, if received as a volunteer, as he was, without arms and equipments, and could not be made responsible for their absence.

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

Emery J. — The only question which arose in this case was on the company order. It began, "Militia of *Maine*. Company order. To ——— You are hereby ordered to warn and give four days notice to all the non-commissioned officers and privates enrolled under my command, a list thereof being hereunto annexed, to appear with arms and equipments required by law." It was in writing, properly dated, and signed, "*Robert A. Sanborn*, Commanding Officer of the 6th Company of Infantry in the 2d Reg't, 1st Brig. 5th Division," and appointed the time and place of appearing, for military duty and inspection. To this order was annexed a list of names, among which was the defendants, and also that of the said *James C. Davis*. *This order was received by the said Davis, as an order to*

him from said Captain, and he immediately proceeded to notify the persons whose names were annexed to the order. He notified the defendant, by delivering to him in person, an order in due form. The order was duly issued, recorded and returned. The name, *James C. Davis*, was not inserted at the top when the order was delivered to him. The place now filled by his name was at that time a blank.

The defendant appeared at the time and place appointed but was deficient of arms and equipments.

A primary object of the *stat.* of *March* 8, 1834, *c.* 121, to organize, govern and discipline the militia of this State, was to secure the assembling of a portion of the militia, and the production of arms and equipments on the first *Tuesday* of *May*, the stated time of annual inspection, for the purpose of enabling the officers to ascertain the situation of the troops, in arms and equipments by law required, on the proper notice given. When so assembled, the 17th, 20th, 21st, and 22d articles of the militia law were designed to secure the safety of lives against accidents, decorum toward officers, obedience to command, and regularity in discipline.

To ensure notice, the commanding officer is to issue his orders to a non-commissioned officer or private. The statute does not say that the name of the private shall be inserted in any particular part of the order, though the form seems strongly to indicate that it should be near the beginning. In this case, the list of the company annexed, described the person to whom the order was delivered, as one of the privates of the company. If the private was himself dissatisfied with the address, possibly, he might have taken exception, and probably might have obtained an amendment on the spot. And he might waive this particularity of form. But receiving the order without exception as to the form of the address, and proceeding to execute the duty, and return the order as executed, it would be too late for him to seek exemption from the obligation to completely perform the duty, which he had undertaken, merely on account of the omission of inserting his name previous to "you are hereby ordered," when he deliberately admitted that he was so ordered, by entering on the performance of it. No one can but applaud the prudence of his conduct, for had he refused or neglected, having accepted and received it as an order issued to him,

he would stand exposed to an indictment under the 23d article for disobeying the order.

He was invested with authority to warn. The warning was given by a private of the company. This was sufficient to put the defendant on inquiry, whether such order was given by the competent authority. At his peril he has disobeyed it. *Commonwealth* v. *Cutter*, 8 *Mass. R.* 279; *Commonwealth* v. *Derby*, 13 *Mass. R.* 433.

We do not perceive any objection to the inserting the name of *James C. Davis* after it was delivered to him, for it only conformed to truth. *Avery* v. *Butters*, 9 *Greenl.* 16.

Even where property may be attached, where the *ad damnum* in a personal action did not exceed $70, it could be served by a constable, a writ was so served and returned without being directed to the constable. And on motion, leave was granted to amend, as being a mere matter of form. *Hearsey* v. *Bradbury*, 9 *Mass. R.* 95.

It cannot be the right of the private warned, to quarrel with the submission of the person ordered to warn to the Captain's order for that purpose, provided that person was, in truth, a non-commissioned officer, or private of the company.

A case having some analogy to this has been the subject of judicial decision. In the *State* v. *Leonard*, 6 *N. H. Rep.* 435, where one, who had enlisted into a *light* infantry company of the regiment, and was not discharged, but was within the limits of the company to be warned, received an order to him as a private in the infantry company to warn the members of it, and did so. The Court held that he was a private in fact, yielded obedience to the order, and thereby acknowledged its authority as binding on him, and a warning by him was sufficient to put the respondent on inquiry, whether orders actually issued from the Captain. It was not for the respondent to ask a settlement of what might be a disputable question between *Boardman*, the private warning, and the Captain, when the private, warning, did not think it expedient to contest the matter himself.

With as little propriety, after attending at the *time and place appointed*, can this defendant, *on this prosecution for deficiency of arms and equipments*, allege his want of being regularly warned.

By appearing, he admits himself to have had notice. In *Wood* v. *Fletcher*, 3 *N. H. Rep.* 61, *John A. Fletcher* was enrolled in the militia by name of *John Fletcher*. *John A. Fletcher* appeared at the training and answered to the name of *John Fletcher*, but was not equipped as the law directed. The suit was against the father for his son's neglect, and it was objected that *John A. Fletcher* was not enrolled, because not enrolled by the name of *John A. Fletcher*. But the court held, that as he appeared at the muster, and answered to the name of *John Fletcher*, it seemed to them to be too late now for him, or his guardian to make that objection.

From the whole record of the proof in the present case we understand, that the defendant appeared and answered at the time and place appointed.

But whether he answered or not, he was there, and he should have had his arms and equipments too, agreeably to law.

We conceive that the company order to *Davis*, so accepted and received by him, was a valid one. That the defendant was properly warned. That the magistrate erred on both points, which he decided on giving judgment for the defendant.

The general error is well assigned. The judgment must be reversed, and a trial may be had at the bar of this Court.

ALBERT NEWHALL *& al., Ad'mrs vs.* JOSEPH VARGAS,
and
JOSEPH VARGAS *vs.* ALBERT NEWHALL *& al., Ad'mrs.*

The stoppage of goods *in transitu*, does not rescind the contract of sale, but places the parties in the same situation, as nearly as may be, in which they would have been, if the vendor had not parted with the possession.

Where goods are sold, and delivered on board a ship of the vendee, and are stopped in their transit by the vendor, the vendee is entitled to receive payment of the freight and charges on the goods reclaimed, and has a lien upon them therefor.

This lien on the goods stopped is not divested, because the possession of them has been obtained by process of law.

And this lien remains after the vendee has died insolvent, and a commission of insolvency has been issued upon the estate, so that the vendor cannot set off any claim of his, whether for a balance due on the goods sold, or arising from prior transactions, against the claim of the administrator of the vendee for freight and charges.

Where goods are stopped in their transit by the vendor, the vendee cannot recover back a partial payment made therefor.

If goods are thus stopped, and applied to the payment of the price, and a balance still remains unpaid, the vendor may recover it of the vendee.

THE two actions pending between these parties, arose out of the same transaction, and they will be treated as one. But as the parties agreed on distinct and separate statements, the abstract of the facts will be given in the same mode.

NEWHALL *& al. Ad'mrs vs.* VARGAS.

This was an action of assumpsit, by the plaintiffs, administrators of *Samuel Winter*, to recover of the defendant, a certain sum of money, amounting to $414, received by the defendant, of *Hernandez & Co.*, on account of *Winter;* also the net proceeds of a cargo of lumber shipped by *Winter* on board the *Barque William Smith*, and finally assigned by his order to the defendant, and received and disposed of by the defendant; and likewise for the freight of a cargo of molasses, shipped by the defendant on board the same vessel, and consigned to the said *Winter;* and by the defendant afterwards stopped in transitu on account of *Winter's* death

and insolvency, and reclaimed by defendant, as will appear by the facts agreed in the former action between the present parties.

The defendant had filed in set-off an account for a cargo of molasses, of the *Brig Ann*, consigned by him to *Winter*, amounting to $5888,36, and for balance of cargo of said *William Smith*, amounting in the whole to the sum of $7869,77.

The liability of the defendant for the sum received of *Hernandez & Co.* was shewn, and *not disputed.* The shipment, consignment, and receipt of the *outward bound* cargo of lumber, was shewn and admitted. The net proceeds of sales amounted to $3619,13.

The homeward bound cargo of molasses on which freight was claimed, consisted of 457 hogsheads. And it was proved and agreed, that $4 a hogshead, was a just and reasonable freight, if any was due.

Against the claim to account for the *outward cargo* of lumber, and *freight on the return cargo*, the defendant set up in defence, and shewed in fact the shipment and consignment of the homeward bound cargo of molasses on board the *William Smith*, on account of *Winter*, and the subsequent stoppage and reclamation of the same on the arrival of the vessel at *Portland*, in transitu, in consequence of the death and insolvency of *Winter*.

It was agreed, that the statement of facts agreed by the parties in the former case of the plaintiffs against said *Vargas*, and others, in the Supreme Court of the State, together with the record of the action, judgment, writ of restitution and return, should be referred to as making part of the present case.

It was contended by the defendant, that these facts constituted a defence against the plaintiffs' demand for payment of the outward cargo, and freight on the homeward cargo. The plaintiffs maintained, that the defendant, having reclaimed and recovered the homeward cargo, was bound to account for such outward cargo and freight.

The plaintiffs objected to the admission or allowance of the set-off; and it was shewn by the defendant, that the account thereof had been by him duly exhibited to the commissioners on *Winter's* estate, and allowed, and reported in the list of claims, and had been duly allowed and filed in the Probate Court before the commence-

ment of this action. The question here raised, was as to the competency and effect of such offset.

The Judge, by consent of the parties, directed a nonsuit; judgment to be entered by agreement for plaintiffs or defendant, according to law.

VARGAS *vs.* NEWHALL *& al. Ad'mrs.*

In this case the following facts are agreed by the parties. The statement of facts agreed and filed in the replevin case, in which the present defendants were plaintiffs, and the present plaintiff and others were defendants, which was decided by the Supreme Judicial Court in this county, is to be considered as a part of *this* statement; and either party may read or refer to the same and to the record of said cause; also the facts agreed in the case between the same parties now pending, in which the present defendants are plaintiffs.

The net proceeds of said cargo of molasses, sold at *Portland*, amounted to $9677,99

Damages given in replevin suit, were 445,83

$10,123,82

which sum of $10,123,82, the said *Vargas* has recovered of said defendants and no more; and the present action is commenced for the recovery of the balance due to him from the estate of said *Winter*, whatever that balance may be. The said *Vargas* exhibited and presented to the commissioners on said *Winter's* estate, his account and claim against the same for allowance, the balance amounting to the sum of $1975,82; but they rejected and refused to allow the same, and on the 17th day of *November*, 1836, made their report to the Judge of Probate, for the county of *Cumberland;* and the said *Vargas* afterwards on the 25th day of the same *November*, gave notice in writing at said probate office, that he was dissatisfied with the non-allowance of said claim; and that he should prosecute the same at common law. Whereupon he commenced the present action as speedily as the same could be done. The plaintiff took up the bills of exchange referred to in the replevin suit. If on the foregoing facts the Court should be of

opinion, that the action is maintainable, the defendants are to be defaulted, and judgment is to be entered for such sum as the Court shall direct; if the action is not maintainable, the plaintiff is to become nonsuit.

The *replevin suit*, referred to in the statements, is reported in 13 *Maine Rep.* 93. The abstract of the facts in the printed report was read at the argument of these cases, and was agreed to be accurate, saving that one of the counsel thought there was an error in one particular. A comparison of the abstract with the original statement of facts has proved its correctness in that respect.

These cases were argued, *April* 18, 19 and 20, 1838, by *Preble* and *Daveis*, for the administrators of *Winter*, and by *Mellen* and *Deblois*, for *Vargas*.

The counsel for the administrators, cited *Bolin* v. *Huffnagle*, 1 *Rawle*, 1; *Snee* v. *Prescott*, 1 *Atk.* 269; *Conner* v. *Henderson*, 15 *Mass. R.* 319; *Judkins* v. *Earl*, 9 *Greenl.* 7; 2 *Kent*, 551; *Case of the Constantia*, 6 *Robinson*, 321; *Wiseman* v. *Vandeputt*, 2 *Vern.* 204; *Lickbarrow* v. *Mason*, 2 *T. R.* 63, and 1 *H. Black.* 366; *Fenton* v. *Pearson*, 15 *East*, 419; *Inglis* v. *Usherwood*, 1 *East*, 515; *Oppenheim* v. *Russell*, 3 *B. & P.* 42; *Mills* v. *Ball*, 2 *B. & P.* 457; *Leeds* v. *Wright*, 3 *B. & P.* 320; *Feise* v. *Wray*, 3 *East*, 96; *Newsom* v. *Thornton*, 6 *East*, 19; *Ellis* v. *Hunt*, 3 *T. R.* 464; *Crashaw* v. *Eades*, 1 *Barn. & Cr.* 181; *Abbott on Shipping*, 216, 286, 370; *Dixon* v. *Baldwin*, 5 *East*, 175; *Richardson* v. *Goss*, 3 *B. & P.* 127; *Domat*, *b.* 1, *t.* 2, *s.* 6.

For *Vargas*, *Deblois* cited *Morton* v. *Chandler*, 6 *Greenl.* 142; *Joy* v. *Foss*, 8 *Greenl.* 455; 3 *Kent*, 220; *McDonald* v. *Webster*, 2 *Mass. R.* 498; *Case between the same parties*, 13 *Maine R.* 93.

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

Shepley J. — The rights of the parties in these two cases, arise out of the same transactions, and must be governed by the same rules, and they will be considered together. If the principles upon which stoppage in transitu is exercised can be ascertained, it will not be difficult to apply them to the different incidents, which

have arisen out of the transactions between *Vargas* and the intestate, and his legal representatives. It must be admitted, that there are to be found in the decided cases, expressions indicating a difference of views in the minds of different Judges. The doctrine having been introduced in the year 1690, in *England* in equity, has there been abandoned, and has passed into the common law; and like many other rules of the common law has been modified and matured by the decisions of the tribunals, until it now stands as a prominent doctrine. But while it does so, no case has been found deciding upon the rights of parties under circumstances like those existing in these cases, and ascertaining the rights of parties after the right of stoppage has been exercised.

In the course of the voyage a part of the return cargo was lost by the perils of the sea, and the vendor could not again obtain possession of it. A partial payment may be considered as made by the intestate by the proceeds of the outward cargo, and freight, and perhaps other charges had attached to the return cargo before the right of stoppage was exercised. And the vendor, after applying the proceeds of that part of the cargo stopped, not being paid in full, claims to recover the balance. These and some other matters arising out of our own law for the settlement of insolvent estates are before the Court for decision.

The first object will be to endeavor to ascertain the principle out of which stoppage in transitu has arisen. In the cases of *Wiseman* v. *Vandeputt*, and *Snee* v. *Prescott*, decided in chancery, it is difficult to ascertain any general rule or principle upon which the decisions were made. They appear to have been decided upon what the chancellor esteemed to be equitable and just between the parties under all the circumstances. This is the view taken of *Snee* v. *Prescott*, by *Mr. Justice Buller* in his elaborate opinion in *Lickbarrow* v. *Mason*, in the house of Lords. 6 *East*, 22. It was thought to be equitable in those cases to restore, or cause to be accounted for, partial payments. When we come into the courts of law, this right of stoppage is spoken of as a "lien," as an "equitable lien," as an "equitable right;" and the Judges soon declared it to be "a common law right." By the common law, "if a man do agree for a price of wares, he may not carry them away before he hath paid for them, if he have not a day expressly given to

him to pay for them." *Noy's* maxims, 87. "I state it as a clear proposition," says *Lord Loughborough*, in *Mason* v. *Lickbarrow*, 1 *H. Bl.* 357, "that the vendor of goods not paid for may retain the possession against the vendee, not by aid of any equity, but on grounds of law." In the case of *Palmer* v. *Hand*, 13 *Johns. R.* 484, after part of the goods had been delivered, and the buyer had pledged them to a third person, it was decided, that the seller had not lost his lien, but might still obtain and hold the whole property. So the civil law says, "*venditor pignoris loco quod vendidit, retinet, quoad emptor satisfaciat.*" *Dom. b.* 1, *t.* 2, *s.* 3, *a.* 3. And even after delivery the purchaser did not without paying or securing the price obtain by that law a perfect right of property. *Idem*, *a.* 1. But this rule never prevailed in the common law. *Ludlows* v. *Bowne*, 1 *Johns. R.* 18. It is probable, that stoppage in transitu as admitted in *England* arose out of this rule of the civil law, perhaps modified by the *French* law, as the learned translator of the *Napoleon* code supposes. If this were its origin, it has evidently been modified and made to conform as far as practicable to the rules of the common law; and as it is now found in operation, it rather presents the common law as modified by the introduction of an ingredient of the civil law, than as a principle of the civil law ingrafted upon the common law. Liens at common law exist only where the party has possession of the goods. A delivery is actual or constructive, and where there has been an actual delivery to the purchaser the right of stoppage does not exist. But where there has been a constructive delivery by putting the property into the hands of a third person to be delivered to the vendee, it is allowed to exist. The common law doctrine of liens appears to have been so varied as to allow the seller, in case of the insolvency of the purchaser, before payment, to regain possession; or in other words, to place himself in the same position with regard to the purchaser as he would have been, if he had not parted with the possession. This is believed to be the true principle of the doctrine of stoppage in transitu, as recognized in the *English* law, and an examination of some of the decided cases will tend to prove it. In *Wright* v. *Campbell*, 4 *Burr.* 2050, *Ld. Mansfield* says, "the owner retains a lien till delivery of the goods, and before they are actually sold and turned into money." By this he means a de-

livery actually to the vendee, unless the lien is divested by a sale. In *Burghall* v. *Howard*, 1 *H. Black.* 365, *note a*, the same Judge, speaking of the right of stoppage, says, "and that this was ruled, not upon principles of equity only, but the laws of property." By "the laws of property," he could have referred only to the law of lien and its effects upon the right of property. In *Mason* v. *Lickbarrow*, 1 *H. Bl.* 357, *Ld. Loughborough* says, "but the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has therefore a complete right for a just cause, to retract the *intended delivery* and to stop the goods in transitu." "And it will make no difference in the case, whether the right is considered as springing from the original property *not yet transferred by delivery*, or as a right to retain the things as a pledge for the price unpaid." In the same case, 2 *T. R.* 71, *Ashurst J.* says, "where delivery is to be at a distant place, as between vendor and vendee, the contract is ambulatory and *therefore* in case of insolvency of the vendee in the mean time, the vendor may stop the goods in transitu." In *Hodgson* v. *Loy*, 7 *T. R.* 440, *Kenyon* said, "it was a kind of equitable lien adopted by the law for the purposes of substantial justice." The reason why it is designated as an equitable lien may be, that it is an extension of the lien beyond the rules of the common law, allowing the party to regain his lien at law after he has parted with the possession. In *Oppenheim* v. *Russell*, 3 *B. & P.* 42, *Heath J.* says, "in the first place it is clear, I think, that the right of seizing in transitu is a common law right." "In the next place, I think it is a right arising out of the ancient power and dominion of the consignor over his property, which at the time of delivering his goods to the carrier he reserved to himself." *Rooke J.* says, "this right to stop goods in transitu, I must consider as a legal right. Our courts of common law recognize it, and they distinguish between the constructive and the actual delivery of goods." "Where there is an actual delivery the transitus is at an end, but where the delivery is constructive, there the law considers *that* as a delivery to certain purposes only, for it is a fiction of law, and that fiction of law must work equity."

The position, that it does not proceed upon the ground of rescinding the contract, also shows, that the principle upon which it

does proceed, is that of restoring the party to his lien, by placing him in the same position, as if he had never parted with the possession. In *Hodgson* v. *Loy*, *Kenyon* said, " that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding the contract." In *Tucker* v. *Humphreys*, 4 *Bing.* 516, *Park J.* says, " not proceeding at all, on the ground of the contract being rescinded by the insolvency or bankruptcy of the consignee of the goods, but as an equitable right adopted for the purpose of substantial justice." In *Bloxam* v. *Saunders*, 4 *B. & C.* 941, *Bayley J.* speaking of the consignee, says, " he has not an indefeasible right to the *possession*, and his insolvency without payment of the price defeats that right;" that is, it defeats the right to the possession, not to the property. The contract is regarded as existing after the exercise of the right of stoppage, and the vendee or his assigns may recover the goods upon paying the amount due. The relations of vendor and vendee are in this respect the same, as when the vendor has never parted with the possession ; and this tends to prove the principle to be as before stated. It is doubtless true, that parties may so conduct as to rescind the contract, where the right of stoppage is exercised, as well as where it is not. And in some of the cases in the books, it appears to have been the intention of the vendors to rescind. And there are expressions of the Judges to be accounted for only from the belief, that such was the intention of the parties in the case then under consideration, or from a want of a clear perception of the principle, which allowed the exercise of such a right. It would not be difficult to accumulate proofs, that the principle upon which the doctrine rests, is as before stated, but an apology is rather due for what has been offered.

Proceeding to carry out these principles, the parties are to be placed in the same condition, as nearly as may be, in which they would have been, if the vendor had never parted with the possession of the goods. And if he would repossess himself of them he must relieve them of all charges and burthens rightfully and necessarily accruing after he parted with the possession ; for the vendor cannot be allowed by his attempt to regain possession, to put the vendee in a worse position, than he would have been, had the possession remained with the vendor. And this requires him to pay the freight and intervening charges. This is in precise accordance

with the rule in the *Napoleon* code, *b.* 3, *c.* 11, *t.* 3, *a.* 579. And in note 197, to the translation, title 3, the learned translator says, "thus the doctrine of revendication in mercantile cases, first borrowed in part by the *English* law from the *French* system of jurisprudence, has been modelled in *France* to the shape, and reduced to the extent, that it had received in *England.*" Thus clearly indicating, that such was understood to be the doctrine in *England.* And *Mr. Justice Story*, in note *(f.)* 1 *Wheat.* 212, speaking of stoppage in transitu, says, the *Napoleon* code, "adopts a principle similar to that of the common law," and that it "subjects the goods sold to the right of stoppage in transitu by the vendor upon the same conditions with our own law." Upon these principles and authorities the representatives of the intestate are entitled to recover the freight and charges upon that portion of the cargo reclaimed.

If the vendor is adjudged to pay freight, he claims to set off against it a debt due from the intestate to him on the purchase of a former cargo shipped by another vessel. It is not necessary to cite authorities to shew, that the owners of a vessel have a lien on the cargo for the freight. The well known rule in mercantile law, that the ship is bound to the merchandize, and the merchandize to the ship is admitted here. This right is not destroyed, if the property be taken from the possession of the owners *in invitum*, or by operation of law. It is true, that this principle does not apply, where the owner of the vessel is carrying his own goods; but when the vendor claims to repossess himself of the goods by virtue of his original title, it is not for him at the same time to declare the title to be in the vendee for the purpose of avoiding the vendee's lien for the freight; who may well claim to retain them until he is placed in a position as favorable as he would have been, if the goods had never been delivered. And as the whole rights of the consignor depend upon an extension of his lien after he has parted with the possession, it is not for him to deny to the consignee the equitable right to set up as against him the same lien, which he would have by law, if the goods were transported for another. When the right of stoppage is exercised, the goods become in fact transported not for the benefit of the vendee, but the vendor. In this mode the just rights of the parties may be secured to them, notwithstanding what has already taken place. And as it is the only

way in which it can be done, the representatives of the consignee have a right to expect, that the Court will exact of the consignor, who asserts what is sometimes denominated an equitable right, an adherence to the rule, that he who asks equity shall do equity. It is evident, that the representatives of the intestate, or the master, who was their agent, did not intend to yield any legal right; and by no fair construction of their acts can they be regarded as having done it. The net proceeds, by agreement of the parties, represent the cargo, and upon that cargo, they have, as before stated, an equitable lien not divested by any act of their own. Ought they, representing the general creditors to be compelled to relinquish it, and to receive in satisfaction of a claim thus secured, a debt due from the intestate's insolvent estate? It is true, that the general policy of our law for the settlement of insolvent estates, allows balances only to be recovered, or proved, before the commissioners. But this rule does not apply to a case, where one party has a lien and can thereby compel payment without resorting to legal proceedings. Nor is there any equity on the part of the vendor in claiming such a set-off. He is allowed to have a lien on the cargo for the price, and instead of permitting it to go into the general fund and presenting his whole claim and taking his dividend, he rightfully asserts that lien, and claims only for the balance. The representatives of the intestate had at least an equitable lien upon the same cargo for the freight, and have an equitable right to assert it, and it is only after that is discharged, that the vendor has an equitable right to the cargo. There is as much equity on the one side in asserting a lien in behalf of the general creditors, as on the other in asserting it for a particular creditor. Both being equally entitled to insist upon their rights, both should be permitted to do it without any interposition by the Court.

If not allowed to set off against the freight his prior debt, the vendor claims to set off the value of that part of the cargo lost at sea. But the cases before cited for another purpose shew, that the property after the vendor parts with it, until he again resumes the possession, is regarded in law as at the risk of the vendee; and that any loss happening in the intermediate time is the loss of the vendee. The vendor by stopping, acquires no title to that, which does

not come to his possession. Having no property in that which was lost, he has nothing to offer by virtue of it as a set-off.

The net proceeds of the outward cargo may be regarded as a partial payment, and the representatives of the vendee claim to recover it back. The vendor having the same rights as he would have, if he had not parted with the possession, there is no principle, which will allow the vendee, where the fault is his own in not paying the whole price, to recover back a partial payment. It would be as much opposed to the doctrines of the civil as the common law. In such case the earnest or partial payment is by the civil law forfeited, if the contract is never completed. *Dom. b.* 1, *t.* 2, *s.* 6, *a.* 4. And the buyer is never to elude the effect of the sale by failing to pay the price. *Idem. s.* 3, *a.* 9. If the sale be rescinded by consent of both parties, or without the fault of either; both are restored to all their rights. *Idem. s.* 12, *a.* 4, 5, 14, 15. And so is the common law. *Smith* v. *Field*, 5 *T. R.* 402; *King* v. *Price*, 2 *Chitty's R.* 416; *Hunt* v. *Silk*, 5 *East*, 449. Where the vendee is in fault and gives occasion for the vendor to take extraordinary measures to prevent a loss, no inference should be drawn, that he thereby intended to rescind the contract. This should be a matter of clear proof, especially when it is perceived to be against his interest, and when he is under no necessity to do so. All which the vendor has done in this case is to consent to a sale of the property without prejudice, and to receive the proceeds instead of the goods. Such acts, under the circumstances, can never be regarded as manifesting a disposition or intention to rescind; and the law does not rescind, or require him to rescind the contract. The representatives of the intestate cannot therefore recover back the partial payment. They will have the benefit of it as extinguishing so much of the vendor's claim.

The vendor claims to recover a balance, which will be due to him after applying the net proceeds of that part of the cargo reclaimed. When the vendee does not pay and take the goods contracted for, the vendor, upon a tender agreeably to the terms of the contract, may bring his action for not accepting and paying for the goods, and recover the damages which he has suffered. And if the vendee has refused to complete the contract, that dispenses with a tender by the vendor. Nor does the bankruptcy of the vendee re-

scind the contract, or release the vendor from performance, or excuse the vendee. *Glazebrook* v. *Woodrow*, 8 *T. R.* 366; *Bloxam* v. *Saunders*, 4 *B. & C.* 941; *Boorman* v. *Nash*, 9 *B. & C.* 145. In *Langford* v. *Tiler*, 1 *Salk.* 113, *Holt* says, "after earnest given, vendor cannot sell goods to another without a default in vendee, and therefore if vendee does not come and pay and take away the goods, the vendor ought to go and request him, and then if he does not come and pay and take away the goods in convenient time, the agreement is dissolved, and he is at liberty to sell them to any other person." When he says the agreement is dissolved, he is not to be understood as meaning, that it is rescinded, but only that it is determined; the right of the vendee to require a further execution has ceased. Nor that it is even determined unless it be the pleasure of the vendor so to consider it. And even this right was denied by *Lord Ellenborough* in *Greaves* v. *Ashlin*, 3 *Camp.* 426. He says, "if the buyer does not carry away the goods bought, within a reasonable time, the seller may charge him ware-house room, or may bring an action for not removing them should he be prejudiced by the delay. But the buyer's neglect does not entitle the seller to put an end to the contract." By the civil law the vendor could not annul the sale for lack of payment at the time, without the intervention of the Judge. *Dom. b.* 1, *t.* 2, § 3 *a.* 8. But the right of the vendor to resell after notice to the vendee of such intention, and a reasonable time allowed to pay and take the goods, seems now to be admitted in the cases before cited of *Bloxam* v. *Saunders*, and *Boorman* v. *Nash*. If there could be no recovery after a stoppage, the effect would be to take away that right in all cases, where a large portion of the property had been lost during the voyage, or to subject the vendor to bear such loss, when the law casts it upon the vendee. If these parties are to be regarded as standing in the relation of vendor ready to deliver his goods, and vendee refusing to take them and pay the price, the vendor may upon these principles recover for the injury suffered by the non-performance of the contract. And the true relation of the parties should be regarded as that of each insisting upon all his legal rights. And that whatever arrangements have been made between them, or have been the result of the operation of law by legal process, or otherwise, their rights are not thereby

varied. Viewing these rights in that light, the vendor has not by any act manifested a disposition to rescind or to determine the contract. His interest requires him to insist upon its execution, and his acts appear to have been dictated by it. On the contrary, the representatives of the vendee have found it for the interest of the estate to refuse to pay the whole price, and take the whole property, and their acts are in accordance with this interest. They have made no effort to take up the bills or pay the price, and have resisted all efforts made to obtain it; and this cannot be regarded in any other light, than that of a refusal to comply, which relieves the vendor from the necessity of making a tender of the goods, or of the proceeds, which by agreement now represent them. But it is said that the books shew no case, where such a recovery has been had after the vendor stopped the goods and took possession of them. If it were so, that is no sufficient reason to prevent a recovery, if by the principles of law the vendor is entitled to recover. This absence of decided cases may partly be accounted for by supposing, that the vendor usually obtaining all the goods sold, finds he is fully paid; or if not, that the object of pursuing the insolvent vendee is not worth the trouble and expense. But the case of *Kymer* v. *Suercropp*, 1 *Camp.* 109, does in principle, afford a precedent for such a recovery. And *Kent* so understands it, and declares, that the vendor is thus entitled to recover. He says, "and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment;" 2 *Kent*, 541. But the principle does not entitle the vendor to recover on the bills; it authorizes a recovery only for damages for non-performance of the contract. There is no count in the writ claiming upon this principle, but dealing with the case, as has been the desire throughout in these cases, in such a manner as to allow each party to obtain all his just rights, the vendor should be permitted to amend by introducing such a count and have judgment upon it.

WILLIAM STEELE *& al. vs.* ALEXANDER H. PUTNEY.

If the owner of an undivided share of goods direct an officer to attach the whole at the suit of himself and others, without knowing at the time that he had any interest therein, he is not *thereby* precluded from recovering the value in an action against the officer.

And if such owner, being also an attaching creditor, after he has knowledge of his interest in the goods, consent that the officer may sell them upon the writs, he is not estopped by this act from showing that he is the owner of a share of the goods sold.

Where an officer attaches goods owned by the debtor and creditor as tenants in common, and sells them on the writ by consent, an action cannot be maintained by the creditor to recover against the officer the proceeds of the sale of his share of the goods without a previous demand.

ASSUMPSIT for goods sold and delivered, and for money had and received. The defendant justified as a deputy-sheriff. The whole of the evidence introduced at the trial, which was before EMERY J. is spread upon the report of the case, as are also eight questions put to the jury to be answered, and the answers thereto. The case will be sufficiently understood from the opinion of the Court without putting down here an abstract of the facts. By consent of the parties a verdict was taken for the defendant, to be set aside, if in the opinion of the whole Court the action could be maintained.

The case was submitted on the briefs of the counsel.

Fessenden & Deblois, for the plaintiffs.

This is the proper form of action, and presents the simple question, whether the plaintiffs are entitled to recover of the defendant the amount of their share of the goods sold. Trespass or trover would not lie, because the goods were sold by consent of the plaintiffs. 3 *Black. Com.* 163; 3 *Burr.* 1010; 1 *Doug.* 138; 2 *Com. on Con.* 1; 2 *Stark. Ev.* 107; 1 *Salk.* 9; *Ld. Raymond,* 1007; *Portland Bank* v. *Stubbs*, 6 *Mass. R.* 422; *Gardner* v. *Dutch*, 9 *Mass. R.* 427; *Ladd* v. *Billings*, 15 *Mass. R.* 15; *Badlam* v. *Tucker*, 1 *Pick.* 389; *Oliver* v. *Smith*, 5 *Mass. R.* 183.

Where the plaintiff's goods are so intermingled with those of the debtor as not to be distinguishable, trover will not lie against the officer until the plaintiff points out his goods and makes a demand

of them. *Shumway* v. *Rutter*, 8 *Pick.* 446; *Bond* v. *Ward*, 7 *Mass. R.* 123; *Marshall* v. *Hosmer*, 4 *Mass. R.* 60; *Perley* v. *Foster*, 9 *Mass. R.* 112.

The jury have found, that when the plaintiffs ordered the attachment, they had no knowledge, that any portion of the goods was their property. Ordering the attachment only furnished a presumption, that the goods did not belong to the plaintiffs. But presumptions must yield when facts appear. *Powers* v. *Russell*, 13 *Pick.* 69; 3 *Bl. Com.* 371; 1 *Burr.* 422; 3 *Dane's Ab. c.* 94, *art.* 1; 2 *Burr.* 1072; 2 *East*, 472; *Garland* v. *Salem Bank*, 9 *Mass. R.* 408; 1 *T. R.* 712; 5 *Burr.* 2670.

Nor is it an objection to our recovery, that after we knew the goods were ours, we consented to the sale. We had the rights of attaching creditors also, and as such, might consent to the sale. *Stat.* 1831, *c.* 508. The officer was justified in taking the whole property, when the debtors were but tenants in common, and the plaintiffs' interest was to have the goods sold, before their value was diminished, and we had a right to suffer the property to be turned into money, and claim our share.

Nor was any demand on the officer necessary. The commencement of the suit is a sufficient demand. 2 *Stark. Ev.* 94, 95, and cases cited; *Cooper* v. *Mowry*, 16 *Mass. R.* 5.

Codman & Fox for the defendant.

The evidence does not support either count in the declaration. 4 *Mass R.* 382. No implied promise can be raised from the facts. 1 *Dane's Ab.* 222. The plaintiffs have disabled themselves by their own fault from bringing the action. 1 *Dane*, 177, *sec.* 4; *Hampshire* v. *Franklin*, 16 *Mass. R.* 86. The plaintiffs are estopped by their own acts from setting up title in the property. *Bonaffe* v. *Woodberry*, 12 *Pick.* 463; *Chapman* v. *Searle*, 3 *Pick.* 38; 7 *Conn. Rep.* 214; *Wallis* v. *Truesdell*, 6 *Pick.* 457; 8 *Wend.* 480; 9 *Wend.* 65; 9 *B. & Cr.* 577; 1 *Story's Eq.* 375.

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

EMERY J. — Marked as this case is with singularities in the developement of its merits, the finding of the jury has divested it of

every thing which might at first seem to cast a shade about the interest which belonged to the plaintiffs. One of them, *Gilbert*, who appears to be the principal mover in the affairs relating to this concern, on the 28th of *October*, 1836, introduced to *Mr. Codman*, an attorney and counsellor at law, *Mr. Somers*, one of the attaching creditors, and agent for the others, residing in *New-York*, and while writs were in making, volunteered his services in pursuit of an officer to make the attachment of the very property, the proceeds of which, are the subjects of the present suit, as the property of *William S. Roberts*. *Gilbert* also consented to have his own attachment, on the plaintiffs' writ against *Roberts*, *the last* of four suits then commenced by the same lawyer against the same defendant.

Some time afterward, the plaintiffs discovered that *they* were in truth, owners as tenants in common with *Roberts* of a portion of the property which *Gilbert* had ignorantly, and by mistake of his rights, directed to be seized as the property of *Roberts*.

Yet after this information, the plaintiffs consented that the officer now made defendant, should sell the property so attached, without communicating to the officer that they in fact were part owners.

On the 5th of *January*, 1837, *Roberts* requests the defendant to sell the goods attached, agreeably to the statute, and the proceeds of the sale to be holden by the defendant subject to such judgment as may be awarded to the plaintiffs in the writs, which the defendant "may have in his hands."

On the 26th of *January*, 1837, on the back of the same paper, is indorsed, we consent *to the sale of* the property attached on writs in our favor, as within stated; and it is signed by *George Somers*, *Seth E. Clapp*, *Clapp & Peirson*, *Steele & Gilbert*. The signature of all these is by *R. A. L. Codman*, their attorney. *Marshall French* also signed it by *Charles Harding*.

Equally clear with all the foregoing is the proof, by the finding of the jury, that the plaintiffs owned $338 of the proceeds of those goods, so held by the defendant.

But the plaintiffs made no demand on the defendant of the money before the commencement of the suit.

We adopt the views of the plaintiffs' counsel, that the advising or directing the attachment in ignorance of the fact of their com-

mon ownership ought not to be construed to their prejudice. And further, though with some hesitation, we are drawn to the conclusion that the assent to the sale under the circumstances, ought not to deprive the plaintiffs of their interest. Conceding all this, the question still returns, whether the action is *now* maintainable against the defendant, on the facts and circumstances of the case.

It was said, by *Lord Ellenborough*, in *Thurston* v. *Mills*, 16 *East*, 274, that, "there is no case which has determined, that a mere seizure will charge the sheriff in an action for money had and received."

Had not a sale taken place, the question of the defendant's liability, in this form of action, could not be raised.

Our statute of *March* 25th, 1831, *c.* 508, by the first section intended to facilitate the proceedings at law, and make property of a perishable nature, of fluctuating price, or expensive in keeping, the most productive by an early sale, upon the consent of the parties, signified in writing, rather than have it remain in the officer's hands, till after execution should be obtained.

But the money produced by the sale, deducting all charges, is to be retained by the attaching officer, and stand bound to respond the judgment to be rendered upon such writ in the same manner, as if the goods had remained specifically in the hands of such officer, and had been sold on execution.

The seventh section provides for a sale at the request and on the responsibility of the plaintiff, when property is attached on mesne process, and is claimed by a person not party to the process, if he omit for ten days after notice given him therefor, by the attaching creditor, to bring an action of replevin, in the same manner as on executions; unless the defendant also claim the property in his own right, and forbid the sale. But no such sale is to impair the right of persons claiming the property, to maintain his action of trespass against the officer for taking it.

No such action of trespass could have been supported by the plaintiffs *here* against the defendant. For if a sheriff have a precept against a tenant in common of a personal chattel, he may lawfully attach the whole, and on execution sell the undivided interest of the debtor, and the purchaser would be tenant in common

with the other owner. 1 *Salk.* 392; *Scrugham* v. *Carter*, 12 *Wend.* 131.

The property when attached, and the proceeds of the sale, are deemed to be in the custody of the law. But the law does not intend that one man's property shall be taken to pay another's debt. Hence a sheriff, after return of sale on *fieri facias*, of part, was permitted to show, that the goods belonged to the assignees of the defendant. *Brydges & al.* v. *Walford*, 1 *Stark. Rep.* 313; *Fuller* v. *Holden*, 4 *Mass. R.* 498; *Tyler* v. *Ulmer*, 12 *Mass. R.* 163. If the sheriff had paid the money to either of the other creditors, they would have been bound to refund it to the plaintiffs, because their suits were not against *Steele & Gilbert*, and they would have no right to appropriate the plaintiffs' goods to pay *Robert's* debts. *Coppendale* v. *Bridgden & al.*, 2 *Burrow*, 814.

Where an officer has seized and sold the whole of partnership effects, on execution against one, it is the officer's duty to pay over to the other partner his proportion of the avails. *Eddie* v. *Davidson*, *Douglas*, 650.

Yet in this case the officer was led along to the sale by the acts of the plaintiffs. And it would be a deep reproach to the administration of justice, for Courts to fail of protecting innocent officers in the fair execution of their duty, so far as they can legally extend that protection against proceedings calculated to mulct the sheriff in costs. It is in evidence, that the dispute is between the *New-York* creditors, and the plaintiffs. Be it so. Still the plaintiffs insist, that no demand on the officer was necessary, that the commencement of the suit is a sufficient demand.

We are of opinion, that where property situated like that in question, has been sold by consent, a demand should first be made of the officer in whose hands it is placed. *Wilder* v. *Bailey, & Trustee*, 3 *Mass. R.* 294, 295. And we are further of opinion, that notwithstanding we are satisfied, that the plaintiffs ought to hold $338 of the proceeds of sale, and that on proper demand previous to the commencement of the suit, the verdict should have been amended, still there are authorities, that if a sheriff be sued without any previous demand of the sum levied on execution, the Court will, on application, stay the proceedings against him, on

payment of that sum, *without costs.* *Dale* v. *Birch & al.* 3 *Camp.* 347 ; 3 *B. & A.* 696.

As the present case stands however, no such demand having been made, though hereafter, upon a new suit, he may be holden, there must be judgment on the verdict.

HANNAH HARDING *vs.* JOB RANDALL.

When one party makes a misrepresentation of fact, upon the faith of which the other acts, it is immaterial, in a court of equity, whether he knew of its falsehood, or made the assertion without knowing whether it were true or false ; and a conveyance of land obtained by such false representation is void.

Where a recorded deed of land has been obtained through fraud, the grantee will not be permitted in a court of equity to say, that the grantor was so disseized thereby, that no title to the same could pass from him to a third person, by deed or by devise.

THIS was a bill in equity, and was heard on bill, answer, and proof. The case, and the points made in defence, appear in the opinion of the Court.

S. Fessenden and *S. Longfellow, Jr.* argued for the plaintiff, and cited 1 *Story on Eq.* § 188, 190, 193, 140, 161 ; 2 *Kent's Com. c.* 39 ; *Smithwick* v. *Jordan,* 15 *Mass. R.* 113.

Mellen argued for the defendant, and cited *Low* v. *Treadwell,* 3 *Fairf.* 441 ; *Elder* v. *Elder,* 1 *Fairf.* 80 ; 1 *Mad. Ch.* 76 ; *Jeremy's Eq.* 366 ; 2 *Atk.* 592 ; 3 *Swanst.* 463 ; 1 *Story's Eq.* 146, 147 ; 2 *Johns. Ch. R.* 557 ; *ib.* 632.

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

SHEPLEY J. — The bill in substance alleges, that the respondent either by fraud or by mistake, obtained a deed of a lot of land from the plaintiff's late husband, so describing the lot as to include the easterly end of a dwellinghouse standing upon an adjoining lot, and a well near to it ; when it was the intention and belief of the grantor, that the boundary line should pass two feet easterly of the

eastern end of the house, and should exclude the well. The deed bears date the sixth day of *March*, 1833. The plaintiff claims title by devise from her late husband, and by purchase from his heirs at law.

The answer denies the false representation and fraud charged in the bill ; alleges that he was urged to purchase ; had been a very long time in treaty for it ; that one object was to straighten the line of a former purchase ; that the bounds were stated in the deed, as they were designed to be ; and that there was no mistake unless it was a mutual one arising from their inattention or ignorance, where the line of the lot conveyed would intersect the main street.

The general replication has been filed, and the proof has been taken, which must be examined, to ascertain how far the allegations of the bill are supported. It is in proof that the grantor was unwell and paid little attention to his business, most of which was transacted through the agency of the plaintiff.

It further appears, that there was a building standing upon the lot, in such a manner as to prevent one from ascertaining by the eye, where the westerly line of the lot would intersect the street. Three witnesses, *Joshua Harding*, *Eliza Brintnell*, and *William H. Plummer*, agree in substance, making allowance for the difference of language, in testifying, that the day before, or on the day of the execution of the deed, and immediately before it was executed, a conversation was had between the plaintiff and defendant, in which the plaintiff stated, that it was her intention to leave room for the blinds on the house to swing, and not to include the well, and that in answer to her inquiries, the defendant stated, that the line would leave sufficient room for the blinds to swing, that it would not come within two feet of the end of the house, that it came hard on the well, but did not include it. That the plaintiff stated to the defendant, that the land had not been measured, and that she trusted altogether to his word, or his honor, and that he repeated the assurances which he had before given ; that she said she preferred having it measured, and that he urged the immediate execution of the deed, stating, that he wished to put a frame upon the lot. *J. S. Libbey* testifies to the same in substance except, that he says nothing of the well. *Joshua Harding* also says, that in the same conversation "*Mr. Randall* said he had measured the

ground before getting the deed made, and knew all about the lines." *William Smith* testifies, that the defendant stated to the grantor about the time they were making the bargain, that the line would not touch the house by about four feet, or some feet; and that a week or two after he saw the defendant and his brother measuring the line upon the street, and the brother shew him where the bound would be, and that it extended so far as to include one of the front windows of the house. *Clement Randall*, the brother, testifies, that he did assist in measuring the line in *March*, 1833, that it was after the deed was executed, that he did not see *Smith* there, and did not shew him the line. *Thomas McKenney* testifies, that in the spring or summer after the deed, the defendant said, he expected the line would go into the house, but not so far; that he expressed his surprize to find, that the line extended on to the house so far; and said *Harding* was surprized at it.

Charles Milliken testifies, that in the year 1826, he and the defendant measured on the lot for the purpose of building cellar walls for *Harding*, and placed the wall about eighteen inches from the house where it remained in good condition about five years ago. *Benjamin Larrabee* testifies, that he surveyed the lot in the presence of the plaintiff and the defendant, and ascertained, that the line included about five feet of the dwellinghouse; that the plaintiff was much surprized, and stated to the defendant, that he told her, that the bounds would not encroach upon the house; and that she had been deceived in the deed. The witness, does not state, that he denied the truth of her statements. From this evidence taken in connexion with the nature of the transaction, there can be no doubt, that the grantor did not intend to convey a small part of the dwellinghouse and lot, and that every precaution was taken to avoid it, which could be expected, if assurances of the grantee were to be at all relied upon. It is equally clear, that the defendant could not honestly have expected or designed to include any part of the house, or the well, in his purchase. Allowing to the answer all its legal weight, there can be as little doubt, that the grantor was induced to execute the deed, with such a description contained in it, by the false representation of the defendant. Whether the defendant at the time, knew such representations to be false may admit of more doubt. Yet the facts, that he had procured the deed

to be written, was in haste to have it executed, avoided having the lot measured, with the other testimony, though in some degree contradicted by *Clement Randall* and by the answer, lead one strongly toward such a conclusion.

It remains to apply the law to such a state of facts. For the defendant it is insisted, that equity will act upon the rule at law, and will not interfere, if the representations were in fact untrue, unless the defendant at the time knew them to be untrue. But this case is distinguished from that class of cases by there being a trust and confidence reposed in the party making the representations, and by him accepted with professions of a knowledge of the subject.

Story, speaking of actual frauds, says, "whether a party, thus misrepresenting a fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for the affirmation of what one does not know, or believe to be true, is equally in morals and law as unjustifiable, as the affirmation of what is known to be positively false. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive; for it operates as a surprize and imposition on the other party." 1 *Story's Eq.* 202.

It is said in *Ainslie* v. *Medlycott*, 9 *Ves.* 13, "if knowingly he represents what is not true no doubt he is bound. If without knowing that it is not true, he takes upon himself to make a representation to another, upon the faith of which that other acts, no doubt he is bound, though his mistake was perfectly innocent."

According to these principles this is a clear case for a court of equity to give relief. But it is said that the plaintiff has no title, and has therefore suffered no injury, and is entitled to no relief. The objection to the title is, that the testator did not die seized of the portion in controversy, and it did not pass by the will. Nor could the heirs at law convey it by their deeds, because they were disseized by the defendant.

The effect of this argument is, to allow the defendant to set up the very deed obtained by his own fraudulent acts as creating a disseizin, while it must be held inoperative as a conveyance; thus making it operative to destroy the title of the grantor, and inoperative on account of the fraud to pass the title to the grantee. If for

the argument it be admitted, that the defendant did acquire a seizin by the deed, and disseized the grantor, will a court of equity allow him to take advantage of it? In the case of *Huguenin* v. *Basely*, 14 *Ves.* 289, the Chancellor says, "I should regret that any doubt could be entertained, whether it is not competent to a court of equity to take away from third persons the benefits, which they have derived from the fraud, imposition, or undue influence of others." If it may be taken from third persons, surely the party himself cannot be allowed to enjoy a benefit thus derived; and he cannot be allowed to set up a disability in others or a benefit to himself from such an act.

If the matter in which the instrument is not correct demonstrates fraud, the Court will generally set it aside. *Watt* v. *Grove*, 2 *Sch. & Lef.* 502. The Court will grant relief to the extent of the injury suffered. *Dunlap* v. *Stetson*, 4 *Mass. R.* 349. The defendant must be bound by his own representations, and can hold no more than he assented that the deed would convey.

The westerly line of the lot must be so varied as to run from the northerly corner, in a direction to exclude the well and to intersect the main street, two feet easterly of the dwellinghouse; and the defendant is to be perpetually enjoined against claiming any title westerly of that line; and a decree is to be entered accordingly, with costs for the plaintiff.

BENJAMIN KNIGHT *vs.* MOSES NORTON *& al.*

The only mode of citing the creditor, under the *stat.* 1835, *c.* 195, and 1836, *c.* 245, is by a citation from a magistrate, issued on the complaint of the debtor to the prison keeper and on the application of the prison keeper to the magistrate.

Where the only notice to the creditor was issued by a magistrate on the application of the debtor, without any from the prison keeper, the Justices have no jurisdiction, or power to administer the oath, and their doings are illegal and void.

The *stat.* of 1835, *c.* 195, is peremptory, that in all cases where there has been a breach of the condition of the bond, taken under the provisions of that statute, the measure of damages shall be, "the amount of the execution and fees, and costs of commitment, with interest thereon at twenty-five per cent."

THIS was an action of debt on a bond dated *December* 26, 1836, in the penal sum of $68,62, and came before the Court upon a statement of facts, which sufficiently appear in the opinion of the Court.

Codman & Fox, for the plaintiff, commented on the poor debtor laws of 1822, 1831, 1835, and 1836, and cited *Burroughs* v. *Lowder*, 8 *Mass. R.* 373; *Call* v. *Hagger*, *ib.* 423; *Clap* v. *Cofran*, 10 *Mass. R.* 373; *Little* v. *Hasey*, 12 *ib.* 319; *Cargill* v. *Taylor*, 10 *ib.* 206.

W. P. Fessenden, for the defendants, contended, that upon a fair construction of the *stat.* of 1835, *c.* 195, and of 1836, *c.* 245, that whenever the debtor gave bond without being committed to prison, the application for the notice should be made directly to the justice by the debtor, as in this case; and that application should be made by the jailer, only in cases where the debtor was actually in prison, and had not the power to make a personal application. He also contended, that there was a compliance with the condition of the bond; that the creditor was notified, and the oath administered; and that even if there was not a strict compliance in every particular, the damages should be but nominal. *Winthrop* v. *Dockendorff*, 3 *Greenl.* 156.

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

SHEPLEY J. — The acts for the relief of poor debtors have been so numerous and so defective in their provisions, that it is no matter of surprise, that they have been the occasion of many suits. The act of 1835, *c.* 195, provided, that a debtor arrested or imprisoned on execution upon giving bond conditioned, that within six months he would cite the creditor and submit himself to examination and take the oath prescribed by the tenth section, or pay the debt, interest, costs and fees, should be discharged; but no express provision was made to whom the bond should be taken, nor was any mode pointed out for citing the creditor, nor any authority given to notify his agent or attorney in case of his not being a resident within the State. The design of the act of 1836, *c.* 245, seems to have been among other things to provide a remedy for these defects. And the fourth section provides, that the bond required by the eighth section of the act of 1835, shall run to the creditor; and the fifth section provides, that any person arrested or imprisoned on any execution, or warrant for taxes, by the giving the bond referred to in the fourth section, which is the same required by the eighth section of the act of 1835, shall be discharged; and that the debtor giving bond as aforesaid may cite the creditor and take the oath provided in the seventh section, which oath is substituted for that contained in the tenth section of the act of 1835. How is the debtor to cite the creditor? The only provision in reference to it is in the same fifth section in these words, "and in other respects complying with the provisions of the ninth and tenth sections of the act to which this is supplementary." The ninth section referred to provides, that a person committed, and in prison, shall make a written complaint to the keeper, who shall apply to a justice of the peace of the county, by whom the notification is to be made out, which is to be served upon the creditor or his attorney in the manner there provided. The design seems to have been to adopt in all respects the same mode for the application, notice, service, and subsequent proceedings as is provided in cases when the debtor is in prison. And it is practicable to do this, for the debtor will not be obliged to be committed to enable him to make such an application to the keeper to whose custody he should have been commit-

ted, if he had not given the bond. He has but to present himself, being at large, to the keeper to make the request or complaint, and the statute impliedly at least authorizes the keeper thereupon to proceed as he would if in his custody. In conformity to the provisions of the tenth section referred to, the certificate that the debtor has taken the oath should be lodged with such prison keeper instead of with the clerk or magistrate issuing the execution.

In this case the debtor himself applied to the magistrate instead of to the keeper of the jail, and the certificate was lodged with the clerk instead of the prison keeper.

It may be said, that the notice would be equally effectual whether made out upon the application of the debtor, or the prison keeper; and it undoubtedly would be so, and other modes of giving notice equally effectual might be named, but the answer is, those are not the modes provided by the legislature, and the Courts cannot determine, that other modes apparently equally satisfactory, shall be substituted for those, which the law has prescribed.

The preliminary proceedings must be in conformity to the provisions of the statute to give the justices jurisdiction, and authorize them to act. This appears to have been the intention of that provision in the tenth section, which declares, that the justices shall "examine the notification and return, *and if regular, and in due form,* may hear," implying that if not regular and in due form, they have no authority to proceed. And such was the decision in the case of *Putnam* v. *Longley*, 11 *Pick.* 487.

The case of *Agry* v. *Betts*, 3 *Fairf.* 415, decides that the certificate of the magistrates is conclusive as to the fact of notice, but not as to the form and regularity of the papers issued.

The rule for assessing damages, adopted in the case of *Winthrop* v. *Dockendorff*, 3 *Greenl.* 156, cannot be applied here. In that case, the statute was considered as authorizing a judgment according to equity and good conscience. The statute of 1835 prescribes in case of forfeiture of the bond the judgment to be rendered, and leaves the Court, no discretionary power. And although the agreed statement of facts authorizes the Court to make up judgment for such sum as it "may adjudge due in equity and good conscience,"

it cannot exercise any power thus granted in violation of the provisions of the statute.

Judgment for plaintiff.

NOTE.

The judgment was directed to be made up by reckoning interest on the debt only from the judgment to the time of the breach of condition of the bond; and after breach, by reckoning 25 per cent. interest on the debt, costs, and costs of commitment.

An alteration has been made in the mode of estimating the amount of damages on breach of the condition of a poor debtor's bond, and in the manner of citing the creditor, by *stat.* 1839, *c.* 366, and 412.

JOHN EDMOND *vs.* ISAIAH C. CALDWELL.

When payment is not made at the time, a sale by a factor creates a contract between his principal and the purchaser; and after notice of the claim of the principal, the purchaser is bound to pay him.

And if the factor take a note of the purchaser for the amount of the sale, payable to himself only and not to order, and hand it over to the principal, yet the action may be maintained by the principal for the goods sold in his own name.

The disclosure of a trustee is not admissible evidence for him in another action in favor of one not a party to the trustee process.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Assumpsit for a gig and harness, with the money counts. The plaintiff called one *William Smith*, as a witness, and he testified, that the gig and harness were the property of the plaintiff who entrusted them with him to sell, and that in *July*, 1836, he sold the gig to the defendant, informing him, that it was *Edmond's* property; that *Caldwell* gave a note payable to *Smith*, not negotiable, *Smith* informing him at the time, that it would immediately be transferred to *Edmond*, *Caldwell* refusing to purchase the gig, and give a note running to the plaintiff; that *Smith* sold the gig to the defendant and gave him a bill of sale, according to his impression, in the name of *Edmond*, and took the note in the name of the witness,

and delivered it to *Edmond*, who accepted it, making no objection thereto. The note was retained by *Edmond* until *August* 5, following, when *Smith* sold the harness, also the property of *Edmond*, to *Caldwell*, gave up the first note to *Caldwell*, and took a new note for the gig and harness running to him, *Smith*, not negotiable, which was handed over to *Edmond* by *Smith*. The bill of sale was produced by the defendant, and showed that *Smith* made the bill of sale in his own name; and the plaintiff offered in evidence the note made to *Smith* for the gig and harness. The defendant contended, that he was not liable to the plaintiff on this evidence in general assumpsit; that if the sale was good, he was only liable on his express contract, or note; and that the law would not imply a contract contrary to the express contract and express declarations of the defendant; that if the sale was not good the action should be in tort; and requested the Court to direct a nonsuit. This the Court declined doing. The defendant also contended, that *Smith* was not a competent witness to impeach his bill of sale. This objection was overruled. The defendant also offered to prove that he had been summoned as the trustee of *Smith*, had disclosed the facts, had been adjudged the trustee of *Smith*, on account of the note; that execution had issued, and that the defendant had paid the amount of the note as the trustee of *Smith*. The Judge ruled, that this evidence was inadmissible. The verdict was for the plaintiff, for the value of the gig and harness, and the defendant filed exceptions.

The case was argued in writing.

J. C. Woodman, for the defendant, insisted on the following propositions.

1. The law will not imply a contract under such circumstances from the defendant to pay the plaintiff immediately as much as the gig and harness were worth. There was an express contract on the part of the defendant to pay *Smith* in six months, and if that is valid, the law will not imply a different contract. *Jewett* v. *Somerset*, 1 *Greenl.* 125; *Whiting* v. *Sullivan*, 7 *Mass. R.* 107.

2. The contract made by *Smith* and *Caldwell* was valid, and binding by reason of authority in *Smith*, or by subsequent ratification. *Dwight* v *Whitney*, 15 *Pick.* 184; *Wise* v. *Hilton*, 4 *Greenl.* 437.

3. Although the sale of goods by an agent creates a contract between the owner and the purchaser, it is competent for a commission merchant to receive payment by cash, or note running to himself. *Dwight* v. *Whitney*, before cited; *West Boylston M. C.* v. *Searle*, 15 *Pick.* 230.

4. If the sale was not valid, because *Smith* had no prior authority, and because his acts were not subsequently ratified, then there was no sale, and this action cannot be maintained.

5. The evidence offered in relation to the trustee process was legally admissible. *Wentworth* v. *Weymouth*, 2 *Fairf.* 446; *Hull* v. *Blake*, 13 *Mass. R.* 153.

6. *Smith's* testimony was improperly admitted, because he could not impeach his own bill of sale.

Codman & Fox argued for the plaintiffs.

1. As it respects the rights of factors, principals, and vendees, the general rule is, that a factor's sale creates a contract between the owner and buyer, and when a factor has sold upon credit, and the principal gives notice to the purchaser of his claim and interest before payment, and requires payment to be made to himself, the buyer will not be justified in afterwards paying the factor. *Kelly* v. *Munson*, 7 *Mass. R.* 324; *Thompson* v. *Perkins*, 3 *Mason*, 238; 2 *Kent's Com.* 631; 7 *T. R.* 360; 3 *B. & P.* 490; 5 *Serg. & R.* 19.

2. The rights of the plaintiff were not varied by the giving of a *non-negotiable* security to *Smith*, the plaintiff's agent. *Greenwood* v. *Curtis*, 6 *Mass. R.* 371; *Maneely* v. *McGee*, *ib.* 145; *Johnson* v. *Johnson*, 11 *Mass. R.* 361; 8 *Johns. R.* 389; *Goodenow* v. *Tyler*, 7 *Mass. R.* 42; *Dutton* v. *Kendrick*, 3 *Fairf.* 384.

They controverted the various positions taken by the counsel for the defendants; and to show, that the proceedings in the trustee process were not admissible, cited *Wise* v. *Hilton*, 4 *Greenl.* 435.

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

Weston C. J. — It appears, that in *July*, 1836, *William Smith*, as the agent and factor of the plaintiff, sold to the defendant a gig, and in a few days afterwards a harness, the property of the plaintiff. When payment is not made at the time, a sale by a factor creates

a contract between his principal and the purchaser. *Titcomb & al.* v. *Seaver*, 4 *Greenl.* 542, and the cases there cited. And in *Kelly* v. *Munson*, 7 *Mass. R.* 319, *Sewall J.* says, "this rule applies, whether the factor has or has not named his principal, at the time of the sale."

It is insisted, that the express promise to pay to the factor, excludes the contract, which the law would otherwise imply, between his principal and the purchaser. But we are not aware, that such would be the effect of an express promise to the factor. Had the latter taken a negotiable note, which had been duly transferred, it would have been tantamount to payment; and to hold the purchaser still liable to the owner or the factor, might subject him to be twice charged. His promise to the factor, was subject to the control of the owner. If he chose to require payment to himself, he had a right so to do.

It is said, the note received was payable on time, and that the defendant is, for that reason, liable only upon that contract. No such fact however appears in the case; and it is therefore unnecessary to consider what might have been its effect. It is further contended, that the defendant bought under an express protestation, that he would not be liable to the plaintiff. He declined giving a note running to him, but he did not disclaim any liability, which the law would imply. He knew the gig belonged to the plaintiff, and that the note was to be passed to him, and he must have understood, that to him payment was to be made.

It appears, that the plaintiff, when apprized of what was done, received the note and made no objection. But there is no evidence, that he did at any time consent that *Smith* should receive payment, or that he waived his right to insist upon receiving himself the price, for which his gig and harness sold. If by the appointment of the owner, a note had been given to a third person, to be received for his own use, the liability would be transferred by his consent, and the purchaser would be holden only to the appointee. But in this case the plaintiff had the evidence of the express promise to *Smith*, which the defendant knew was not made for his benefit. Upon payment to the plaintiff, the collateral promise to *Smith* would be discharged; and the defendant was in no danger of being twice charged. The plaintiff might ratify the sale to the de-

fendant, without being bound to acquiesce in his express promise to pay *Smith*. The law gave him a right to interpose, as the real vendor of the property, which could not be defeated by any collateral promise, he might choose to make to his factor.

It is urged, that the contract, into which the defendant entered, is to be found only in the note; and that it was not given on account of a prior debt or obligation. The sale of the plaintiff's gig, and the giving of a note running to *Smith*, are parts of one transaction; but the plaintiff is not precluded from showing, that he sold the property to the defendant through his agent, and the legal result is, that his right to look to the defendant for the price is not taken away, by his mere promise to pay the agent.

In the case of the *West Boylston Man. Co.* v. *Searle & al.* 15 *Pick.* 225, the court held that the legal title in a note given to a factor, for goods sold on account of his principal, is in the factor, and the principal, who has the beneficial interest, is the *cestui que trust*, and if he sues on the note, he must do it in the name of the factor, or if as indorsee, would do so, subject to any fair matter in offset or discharge. But the court say further, "if the principal is in a condition, to declare on the contract for goods sold, treating the note as a nullity, or as a mere collateral security, not amounting to payment, he might probably recover in his own name." And this does appear to us to be the condition of the plaintiff. We are therefore of opinion, that the presiding Judge was right in refusing to order a nonsuit.

The counsel for the defendant, attempts to distinguish the plaintiff's claim for the harness from that of the gig. It does not appear, that he took any such distinction at the trial, or that he did, upon this ground, request any instructions or ruling from the Judge. If the defendant had paid *Smith* for the harness, or had been adjudged his trustee therefor, without being apprized of any interest in the plaintiff, payment thereupon may have been equivalent to payment to *Smith*; and if the purchaser has paid the factor without notice, he does not remain liable to the principal. But this assumes, that he had no such notice, which is not found, nor is it deducible from the evidence. *Smith* does not testify, that he notified the defendant, the harness was the plaintiff's, but as it was put into the same note, which was given for the gig, which he knew did be-

long to the plaintiff, the jury might have been warranted in finding, that the defendant was apprized that *Smith* sold both in the same character.

The defendant had paid the amount to an attaching creditor of *Smith*, upon being adjudged his trustee. This would discharge him from all claim on the part of *Smith*, but not on the part of the plaintiff, at least unless payment to *Smith*, at the time of the disclosure, ought to have that effect. And he would not have been justified in paying *Smith*, having no reason to believe that he was the holder of the note, and knowing also, that the interest was in the plaintiff. If he disclosed all the facts, and was adjudged trustee, that judgment was erroneous. If he did not disclose all the facts, he omitted to do so at his peril. In either case, it could afford him no defence against the plaintiff, who was not a party to that judgment, the evidence of which was therefore properly rejected.

Exceptions overruled.

Asa W. H. Clapp *vs.* Asa Hanson.

If the acceptance or rejection of the report of referees depend on the exercise of a discretionary power of the Judge of the Court of Common Pleas, it is not subject to revision in this Court by exceptions.

The payee of a negotiable note, indorsed before it fell due, cannot be received as a competent witness to prove the note originally void.

It is not competent for the maker of a negotiable note to set up in defence usury in the transfer from the payee to the indorsee.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Assumpsit on a note made by the defendant to one *Oliver Hale, Jr.* and by him indorsed, dated *July* 23, 1835, for $2760, payable in one year from date with interest. The action was referred in the Court of Common Pleas to *J. Adams Esq.*, the decision to be made on legal principles. At the hearing before the referee, the defendant, for the purpose of obtaining a continuance, offered an

affidavit of facts expected to be proved by *Hale*, who was absent, tending to prove that the note was void when originally given, being indorsed by *Hale*, before it fell due. The referee rejected the affidavit on the ground, that if *Hale* was present, he was an incompetent witness to prove the facts. There was also testimony introduced, which the defendant contended, showed, that there was usury in the indorsement of the note by *Hale* to the plaintiff. The bill of exceptions then states, that "on the foregoing facts and evidence the referee reported, that the plaintiff should recover the full amount of the note with interest; to the acceptance of whose report the defendant objected, and produced the same evidence to the presiding Judge, who ruled, that no such error in point of law was apparent in the case, as would authorize the Court to refuse the acceptance of the report, and thereupon ordered it to be accepted." The defendant filed exceptions.

Codman & Fox, for the defendant, submitted the case without argument.

W. Goodenow, for the plaintiff, by his brief, cited *Clapp* v. *Balch*, 3 *Greenl.* 216; *Walker* v. *Sanborn*, 8 *Greenl.* 288; *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 25; *Churchill* v. *Suter*, 4 *Mass. R.* 156; *Knights* v. *Putnam*, 3 *Pick.* 184.

The opinion of the Court was afterwards drawn up by

Weston C. J. — This suit was referred to *Joseph Adams, Esq.* to be decided by him upon legal principles. When his report was offered for acceptance in the Common Pleas, the judgment of the referee, upon certain questions of law, was examined, and being approved by the Judge, or because they did not appear on the report, the same was accepted. So far as that acceptance rested in the discretion of the Judge, it was not a matter, which was open to exceptions. The report is not made a part of the case. Whether therefore the Judge overruled the objections, because they did not appear in the report, or because he regarded them as not well founded in law, we have not the means of determining. But regarding the exceptions as indicating the ruling of the Judge, as well as the decision of the reference, upon the legal questions raised, we have examined them. And we are of opinion that *Oliver Hale, Jr.* the payee of the note in question, which was nego-

tiable and negotiated, could not have been received as a competent witness to prove the note void when made, on the ground of fraud. This point was decided in *Churchill* v. *Suter*, 4 *Mass. R.* 156, and it has been repeatedly so determined in this Court. We are further of opinion, that it was not competent for the defendant, the maker of the note, to set up in defence, any usurious transactions between *Hale*, the payee and indorser, and the plaintiff. *Knights* v. *Putnam*, 3 *Pick.* 184.

Exceptions overruled.

CHAPMAN BRACKETT *vs.* CLEMENT J. HAYDEN *& al.*

If one have a lien on chattels for labor performed thereon, and deliver them up to the owner, without insisting on holding them as security, the lien is dissolved.

Where the plaintiff in proving a conversion of his property by the defendant, at the same time proves that the defendant said, that he acted under lawful authority, the burden of proof is on the defendant to show such authority.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Trespass against *Hayden* and one *Whitney*, for taking four thousand of clapboards. The clapboards were sawed out by *Whitney*, from logs belonging to the plaintiff. The plaintiff went to the mill, which was owned by a third person, where these with others belonging to different persons were, and asked *Whitney* which were his, the plaintiff's, clapboards. *Whitney* pointed out the clapboards in controversy, and told the plaintiff those were his, and the plaintiff cross-piled them without objection or claim set up to them by *Whitney*. Afterwards the clapboards were taken away by *Whitney*. Some of the witnesses called by the plaintiff stated, that in a different conversation, when the plaintiff was not present, *Whitney* said that he sawed the clapboards from the plaintiff's logs, and wanted his pay, and that there were enough to pay him. The same witnesses also stated, that *Hayden* said he was about selling some clapboards, which he had taken for taxes as the property of the plaintiff; that the clapboards were sold at auction by *Hayden*,

who claimed to act as collector of taxes, and to sell them to satisfy a tax against the plaintiff. One of these witnesses said, that he laid off the clapboards at the request of *Whitney*, and bid for him the amount of the taxes, and of a bill *Whitney* claimed to have against the plaintiff; and that *Hayden* sold the clapboards subject to a claim which *Whitney* had upon them for a debt against the plaintiff. The defendant proved, that the owner of the mill gave him permission to pile lumber in the mill-yard.

Hereupon the defendants contended, that inasmuch as the plaintiff had voluntarily introduced evidence, that *Hayden* had sold the clapboards as a collector of taxes against the plaintiff, the presumption of law was, that the sale was a legal one. The Judge did not thus rule, but instructed the jury, that it was necessary for the defendants to prove the regularity of the proceedings in relation to the assessment and collection of the tax, if any there had been. The defendants then contended, that as *Whitney* had sawed these clapboards from the plaintiff's logs, he held a lien upon them until his bill for sawing was paid or tendered, unless he had voluntarily given it up; and that whether he had, or had not, thus given up his lien, was a question of fact to be determined by the jury. The Judge ruled, that upon the facts proved in this case, *Whitney* had no such lien, and that this was a question for the Court, and not for the jury, as there were no facts in dispute on that point. The verdict was for the plaintiff, and the defendants filed exceptions.

The case was argued in writing.

Codman & Fox, for the defendants, argued in support of the propositions contended for by them at the trial in the Court of Common Pleas; and cited 2 *Car. & P.* 152; 5 *M. & Selw.* 180; *Townsend* v. *Newell*, 14 *Pick.* 332; 11 *Wend.* 77; 4 *Wend.* 292; 1 *Stark. Ev.* 417; 2 *Stark. Ev.* 739; *Sanford* v. *Emery*, 2 *Greenl.* 5; 3 *Johns. R.* 431; 4 *T. R.* 366.

Eastman, for the plaintiff, argued in support of the ruling of the Judge. It is of no importance to inquire, whether *Whitney* had, or had not a lien on the clapboards for the sawing, because if the lien ever existed, it was given up. The actual or constructive delivery of the property to the owner, or purchaser, discharges the right of lien in all cases. *Parks* v. *Hall*, 2 *Pick.* 206; 3 *T. R.*

119; 1 *East*, 4; 2 *East*, 523; 10 *East*, 378; 2 *H. Bl.* 504; 1 *New Rep.* 69. If there had been a lien, and the property had not been given up, still *Whitney* for that cause had no right to convert the whole property to his own use. 2 *Roll. Abr.* 85 *(a) pl.* 5; 8 *Mod.* 172; 1 *Strange*, 556; 5 *M. & Selw.* 185. The plaintiff in proving the conversion of his property by *Hayden* proves also, that he pretended he was acting under an authority given by law, and *Hayden* relies on his own mere pretence, as a justification for taking the plaintiff's property. The doctrine seems to be, the pretence of right gives right.

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

WESTON C. J. — If the defendant, *Whitney*, had a lien, for the labor he had bestowed upon the clapboards in controversy, if he had not otherwise been paid, he might deliver them to the plaintiff without insisting upon the continuance of that security. If this was done, the lien would be dissolved. And this was done. The clapboards were pointed out by *Whitney*, to the plaintiff, and he took possession of them, and removed them, with the knowledge and assent of *Whitney*. This was a sufficient delivery, to vest the entire property in the plaintiff. If *Whitney* would have reserved his lien, if it existed, he should have told the plaintiff, that he might cross pile them, for the purpose of seasoning, but that he must retain the possession, until his claim was discharged. But he surrendered the clapboards to the control of the plaintiff, without any such intimation.

Title in the plaintiff being established, the burden of proof was thrown upon the defendants, to show affirmatively in *Whitney* a new title, under the collector's sale. Of this there was no evidence whatever, except what was mere assumption, under the defendant, *Hayden*. This was clearly insufficient, and so the Judge instructed the jury.

Exceptions overruled.

William L. Howe *vs.* Selden Huntington.

Where by the terms of a contract, acts are to be performed by each party at the same time, neither party can maintain an action against the other, without performance or tender of performance on his part.

Where the contract is to sell land at a price to be fixed afterwards by third persons, one fourth of the purchase money to be paid in cash, on the delivery of the deed, and the residue to be paid at subsequent times, secured by a mortgage of the premises, and the deed to be given on having notice of the price fixed by such third persons; the contract is mutual, and neither party can enforce it against the other, without performance or tender of performance on his part.

If by the terms of a contract, each party is to do certain acts upon the happening of a certain event, and no time when is fixed, performance or tender of performance must be made *within a reasonable time* after the event happens; that is, so much time as is necessary conveniently to do what the contract requires should be done.

And what is a reasonable time within which an act is to be performed is to be determined by the Court as a question of law.

In this case a delay of twenty-four days was held to be beyond a reasonable time.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Debt on a bond, dated *September* 26, 1835, the condition of which was, "that said *Huntington* has agreed with said *Howe*, to sell and convey to him, one undivided half part of seven thousand and thirty acres of timber land," described, "at such sum as all the merchantable pine timber standing on said one half, suitable for board logs, shall amount to at the rate of one dollar and twelve and an half cents per thousand, to be determined by the opinion of" certain persons named; "one fourth to be paid in cash upon the delivery of a good warranty deed, the other three fourths in one, two and three years with interest, secured by mortgage of the premises; Now if the said *Howe* shall take the necessary measures for obtaining the determination and opinion of said referees, and upon said opinion being made known to him, the said *Huntington*, he shall give to said *Howe*, or to such person as he shall appoint, a good and sufficient deed as aforesaid — then this obligation to be void, otherwise in force."

The persons selected to ascertain the quantity of timber, with the plaintiff and defendant, went upon the land, and explored the same for seven days, and on the 16th of *October*, 1835, made their report in writing, and notified each party thereof. On *Nov.* 9, 1835, the plaintiff tendered to the defendant the cash payment for one quarter of the amount, and offered the notes and mortgage for the other three quarters; and the defendant refused to receive either, "and denied his liability to give a deed." On *February* 6, 1836, the defendant conveyed the land to one *Breed.* This suit was commenced *November* 9, 1835. On the trial, the defendant contended, that inasmuch as the contract was silent as to the time within which the plaintiff was to perform his part of the contract, the law required him to perform it within a reasonable time, and that the report having been made *October* 16, it was not reasonable, that the plaintiff should wait until *November* 9, before he attempted to make his tender, or performance on his part, and therefore the offer of performance was not within a reasonable time. The Judge ruled, that the covenants and agreements were independent, and that either party could maintain his action for a breach thereof, and recover damages, without proving performance on his part, and therefore that no tender was necessary; and overruled the objection. Several questions were raised on the trial in relation to the amount of damages, but the opinion of the Court renders it unnecessary to state them. The verdict was for the plaintiff, and the defendant excepted.

The case was argued in writing.

Fessenden & Deblois, for the defendant, made the following points.

1. The covenants are dependent, and the action cannot be maintained, unless the plaintiff show performance, or tender of performance, on his part. 17 *Johns. R.* 293; 2 *Pick.* 155; *ib.* 301; 5 *Pick.* 395; 11 *Pick.* 151; 2 *Greenl.* 22; 10 *Johns. R.* 265; 2 *Johns. R.* 207; 16 *Johns. R.* 267; 20 *Johns. R.* 130; 5 *Johns. R.* 181; 20 *Johns. R.* 24; 2 *Burr.* 899; 8 *T. R.* 366; 4 *T. R.* 761; 11 *Johns. R.* 525.

2. There being no time mentioned in the contract, the law fixes the rule, that it must be done in a reasonable time. What is a reasonable time, is a question of law. *Atwood* v. *Clark*, 2 *Greenl.*

249; *Hussey* v. *Freeman*, 10 *Mass. R.* 84; *Ellis* v. *Paige*, 1 *Pick.* 43.

Adams argued for the plaintiff.

1. The covenants of the parties were independent, and no offer of performance by the plaintiff was necessary. *Thorp* v. *Thorp*, 1 *Salk.* 171; *Hotham* v. *East I. Co.*, 1 *T. R.* 638; *Couch* v. *Ingersoll*, 2 *Pick.* 292; *Borden* v. *Borden*, 5 *Mass. R.* 67; *Collins* v. *Gibbs*, 2 *Burr.* 899; *Kane* v. *Hood*, 13 *Pick.* 281; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Saco Man. Co.* v. *Whitney*, 7 *Greenl.* 256.

2. But if the covenants were mutual and dependent, still judgment should be rendered on the verdict, because within a reasonable time, twenty-four days, after the report was made known to the parties, the plaintiff tendered performance on his part, agreeably to the contract. *Atwood* v. *Clark*, 2 *Greenl.* 249; *Smith* v. *Jones*, 3 *Fairf.* 332; 1 *Com. on Con.* 4; 3 *Stark. on Ev.* 1407; *Hussey* v. *Freeman*, 10 *Mass. R.* 84; *Newcomb* v. *Brackett*, 16 *Mass. R.* 161; *Ellis* v. *Paige*, 1 *Pick.* 43; *Yelverton*, 67, *and notes.*

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

Shepley J. — The first question presented by this bill of exceptions is, whether the stipulations for the conveyance, and for the payment and security of the purchase money were mutual and dependent. The bond obliges the defendant to sell and convey the lands for a consideration, "one fourth to be paid in cash upon the delivery of a good warrantee deed, the other three fourths in one, two, and three years, with interest, secured by mortgage of the premises." The cash part is, according to the language, to be paid upon delivery of the deed. The intention is very clearly exhibited, that the other three fourths were to be secured at the same time. The defendant could not be safe in taking a mortgage unless it was executed at the time of conveyance, as the plaintiff might immediately convey upon acquiring the title, and thus deprive the defendant of all value in a mortgage executed at a subsequent time. Nor could it be expected, that the plaintiff would attempt to convey a title before he acquired one. The intention of the parties is to

be regarded; and that is too clear to leave any doubt, that performance was to be made by both at the same time. The ruling, that the covenants and agreements were independent, was therefore erroneous.

The next question which arises upon the record is, whether the tender or offer of performance by the plaintiff was made within a reasonable time. There is in certain cases, a difficulty in determining whether such a question should be decided by the Court, without the assistance of a jury, arising from the want of some certain rule by which to be governed. And this case is not free from that embarrassment. It will be useful to examine some of the cases for the purpose of obtaining some light to guide to a proper result. It has been finally settled, that what is due diligence, or a reasonable time, for making demands, and giving notices of negotiable paper, is a question of law to be decided by the Court. There are however exceptions to be noticed hereafter.

The representatives of a lessee for life, have a reasonable time after his death for removing the goods; and it was held to be a question of law, and that a removal within six days after his decease was reasonable. *Stodden* v. *Harvey*, *Cro. Jac.* 204; *Co. Litt.* 56, *b.*

It has been decided, that a tenant at will has a reasonable time after notice, to quit, and that it was a question for the Court; and that ten days were not sufficient for the purpose. *Ellis* v. *Paige*, 1 *Pick.* 43.

Where the maker of a note deposited with the holder, goods to be sold to pay it, the Court decided, that they were not sold within a reasonable time, not being sold for several years. *Porter* v. *Blood*, 5 *Pick.* 54.

The lessor reserved to his son on his coming of age, a right to put an end to the lease, and to take possession; it was held, that he had a reasonable time after being of full age in which to do it; and the *Court* decided, that a week or fortnight would have been a reasonable time, and that a year was not. *Doe* v. *Smith*, 2 *T. R.* 436.

Whether notice of abandonment was given within a reasonable time after intelligence of the loss, was held to be a question of law, and notice within five days not to be within a reasonable time. *Hurst* v. *Roy*, *Ex. Assur. Co.* 5 *M. & C.* 47.

Where the purchaser of a crate of ware, was to furnish the seller with an account of the broken ware found in it, the Court held, that he was entitled to a reasonable time, and that it was the duty of the Court to decide upon it. *Atwood* v. *Clark*, 2 *Greenl.* 249.

The exception alluded to, relating to negotiable paper has reference to bills payable at or after sight and to notes payable on demand. When a bill is thus payable, a reasonable time is allowed for the holder to present it, and whether done within a reasonable time is to be decided by the jury. *Muilman* v. *DeEuguino*, 2 *H. Bl.* 565; *Fry* v. *Hill*, 7 *Taunt.* 397; *Wallace* v. *Agry*, 4 *Mason*, 344. So the holder of a note payable on demand, and indorsed, is to make a demand on the maker within a reasonable time to be decided by the jury. *Field* v. *Nickerson*, 13 *Mass. R.* 131.

A tithe owner has a reasonable time, to be decided upon by the jury, to compare the tenth set out with the other nine tenths. *Facey* v. *Hardom*, 3 *B. & C.* 213.

A landlord has a reasonable time after keeping five days to remove goods distrained; and it was held to be a question for the jury to decide. *Pitt* v. *Shaw*, 4 *B. & Ald.* 206.

A purchaser of goods by sample, if the sample does not correctly represent the goods, may repudiate the contract within a reasonable time to be decided upon by the jury. *Parker* v. *Palmer*, 4 *B. & Ald.* 387.

Lord Mansfield observes, that whenever a rule can be laid down with respect to this reasonableness, that it should be decided by the Court, and adhered to by every one for the sake of certainty. *Tindale* v. *Brown*, 1 *T. R.* 167.

Abbott C. J. says, in many cases of a general nature, or prevailing usage, the Judges may be able to decide the point themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite. *Smith* v. *Doe*, 2 *B. & C.* 270.

Starkie endeavors to state the distinction between the duties of the Court and of the jury, in deciding upon this question, and says, where the law does not by the operation of any principle or established rule decide upon the legal quality of the simple facts, it is for the jury to draw the general inference of reasonable, or unreasonable. 1 *Stark. Ev.* 455. It is obvious, that many of the cases

would not be found to conform strictly to this rule. Its effect would be in some measure to relieve the Court, while it would hardly carry out the design of *Lord Mansfield* in having rules established in all practicable cases by the Court, for the purpose of affording settled rules by which to be governed. It has evidently been the desire of the Courts to decide themselves, where they could do so upon any rule, which might become certain, and furnish a precedent for future cases. And it is in this way, that the law in relation to demand and notice upon bills and promissory notes has become so well defined and exact. Where there is no certain time limited, within which, or from which, the act is to be done, but it is to be accommodated in some degree to the interests of the party and the course of trade, as in the case of bills at sight and notes on demand; or where it may in some measure depend upon the state of the weather, as in the case of removal of goods distrained, or the tithe crop, it has been left to the jury to decide upon each case as it arises. Where there is a certain epoch, after which the act is to be performed, as soon as it may be conveniently without regard to one's interest, or to the course of trade, or to other matters not within the control of human agency; the Court may be able to come to a satisfactory conclusion for itself without the assistance of a jury.

In this case, it seems to have been the intention of the parties, that the contract should be completed as soon as it could be with convenience. And they appear to have proceeded to act upon it under such an impression of their rights and duties. It bears date on the 26th of *September*. They appear to have notified the appraisers, to have agreed upon a substitute for one of them, and to have been upon the premises, and to have remained there seven days making their examination, and to have come to a conclusion and made up the result of it upon the 16th day of *October* following, when it was made known to the parties. In these twenty days, the principal labor required to fulfil the contract had been performed. The bond then declares, that, "upon said opinion being made known to him, the said *Huntington*, he shall give to said *Howe* or to such person as he shall appoint a good and sufficient deed as aforesaid," referring to the premises and mode of payment; and then the obligation is to be void. Here is a time named

on which it became the duty of the parties to proceed to execute fully the contract by a conveyance and by making payment and security. The law allowed only a reasonable time; and that in a case of this kind is so much time as might be necessary conveniently to do, what was required to be done. And the one, who would hold the other to the contract must perform or offer to perform within that time. What was then the situation of the parties, and what remained to be performed? They were then near the land. The plaintiff must travel to his home at *Waterford*, procure his money, make his notes and mortgage, and offer the money and securities to the defendant at *Portland*. The parties had within twenty days accomplished very much more, than remained to be performed; and to allow a longer period to perform the smaller portion left, would be to act contrary to the evidence afforded by the parties, that it could be conveniently done in less time. To depart from the rule requiring it to be performed as soon as convenient would produce great uncertainty, and leave the Court without any rule to guide its judgment. It may be objected, that more time should be allowed the plaintiff to collect the money. But the law must suppose, that every man, who enters into a contract is ready to perform it according to its terms when the time of performance arrives. And to allow that consideration to enter into the question of reasonable time, would be to defeat all rules, and render the performance of contracts dependent upon the necessities and misfortunes of the parties. The Court is therefore constrained, if it would rest upon any rule or principle not wholly arbitrary, to decide, that the offer of the money and security was not made within a reasonable time.

By this result, it becomes unnecessary to decide the point in relation to the amount of damages.

Exceptions sustained, and new trial granted.

EDWIN HERVEY *& al. vs.* GEORGE W. HARVEY.

The alteration by the holder of the date of an accepted bill, shortening the time of payment, without the knowledge of the acceptor, destroys the bill; and no action can be maintained upon it.

The holder of a bill has no right to make an alteration in it to correct a mistake, unless to make the instrument conform to what *all parties to it* agreed or intended it should have been.

If the vendor of goods sold draw a bill for the amount on the vendee, and by mistake extend the time of payment therein beyond the time agreed by the parties, and the vendee fraudulently seize upon the mistake, and accept the bill, to entrap the other party for his own advantage and to the other's injury; the vendor may treat the bill as void, and maintain an action for the goods sold.

Where the daybook upon which an entry of the sale of goods was made, is produced on a trial, and it does not appear from the book that the entry had been transferred to a leger, it is not necessary to produce the leger without previous notice.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Assumpsit for goods sold and delivered, and on a bill accepted by the defendant. The facts in the case, and the ruling of the Judge of the Court of Common Pleas, are stated in the opinion of the Court. The verdict was for the plaintiffs, and the defendant filed exceptions.

The arguments were in writing.

Codman and *Fox* argued for the defendant.

1. The bill declared on was in law a payment of the account. *Thatcher* v. *Dinsmore*, 5 *Mass. R.* 302; *Chapman* v. *Durant*, 10 *Mass. R.* 51; *Varner* v. *Nobleborough*, 2 *Greenl.* 124.

2. The alteration of the date of the bill by the holders of it, without the consent of the other party, was a material alteration, which destroyed the bill, and no action can be maintained upon it. *Bayley on Bills*, 91; *Chitty on Bills*, 204; *Farmer* v. *Rand*, 14 *Maine R.* 225; 5 *T. R.* 538; 4 *T. R.* 320; 5 *Bingham*, 183; 3 *B. & Ald.* 660; *Wheelock* v. *Freeman*, 13 *Pick.* 168; *Brackett* v. *Mountfort*, 2 *Fairf.* 115; 3 *Cranch*, 37; 3 *Yeates*, 391.

3. The plaintiffs' leger should have been produced. *Prince* v. *Swett*, 2 *Mass. R.* 569; 3 *Dane*, 321.

S. Fessenden argued for the plaintiffs.

1. The alteration of the date of the bill, making it to conform to the truth, and to the original intent and terms of the contract between the parties, does not render it void. *Smith* v. *Dunham*, 8 *Pick.* 246; *Hunt* v. *Adams*, 6 *Mass. R.* 519; 10 *Wend.* 93; *Bayley on Bills*, 96, *note*; 2 *Stark. R.* 313; *Nevins* v. *Degrand*, 15 *Mass. R.* 436; 6 *Maule & S.* 142; *Bowers* v. *Jewell*, 2 *N. H. Rep.* 543; *Chitty on Bills*, 85; 2 *American Com. Law*, 226; 4 *Petersdorff*, 348, *note*; 2 *Chitty's Rep.* 122; *Granite R. Co.* v. *Bacon*, 15 *Pick.* 239; *Hale* v. *Russ*, 1 *Greenl.* 334; 10 *East*, 431. The assent of the defendant to the alteration may well be presumed. *Hunt* v. *Adams*, 6 *Mass. R.* 522; *Hale* v. *Russ*, 1 *Greenl.* 334; *Bayley on Bills*, 97, *note* 17.

2. The instruction given at the trial was right. The acceptance of the bill with the fraudulent intention of delaying the time of payment, and the alteration of the time of payment, rendered the bill a nullity, and the action for the goods sold may be maintained. *Johnson* v. *Johnson*, 11 *Mass. R.* 359; *Stebbins* v. *Smith*, 4 *Pick.* 97; 6 *T. R.* 52; 2 *Caines*, 118; 8 *Johns. R.* 389; 6 *Johns. R.* 110; 15 *Johns. R.* 474; 4 *Johns. R.* 296; *Greenwood* v. *Curtis*, 6 *Mass. R.* 358.

The call for the leger, made after the trial had commenced, was too late. *Rule of Court*, 35.

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

Shepley J. — It appears, that the plaintiffs sold certain goods to the defendant on the 23d of *October*, 1835, on a credit of six months; and that early in *March*, 1836, they drew upon him for the amount payable to their own order, dating their bill on the 23d of *October*, 1836, and making it payable six months after date. The defendant accepted and returned it to the plaintiffs, who altered the date of the year, making it payable in six months, from *October*, 1835.

This suit is brought upon that acceptance and upon the original contract of sale and purchase. There can be no doubt, that the alteration was material, and the bill thereby vitiated, unless it was made by the consent of the acceptor, or to correct a mistake. The

facts proved negative any presumption, that it was done by the consent of the defendant. An alteration made to correct a mistake must be such as will make the instrument conform to what all parties agreed or intended it should be, not to what one party only intended. It does not appear, that the defendant had agreed to accept a bill at six months, although that was the term of the credit; and the plaintiffs cannot recover upon the acceptance. The defendant then sets it up against their right to recover on the count for goods sold and delivered. And the legal presumption in this state is, that receiving negotiable security for the amount is an extinguishment of the contract of sale.

The Judge however instructed the jury, "that if they were satisfied from the evidence, that the plaintiffs drew their draft upon the defendant, and dated it 1836 by mistake, and that it was intended by plaintiffs to have dated it in 1835, and that defendant well knew it at the time he accepted it, and accepted it with a view to take advantage of the mistake and thereby to secure a credit of eighteen months instead of the six months agreed to be given, it was a fraud on his part, and should render the draft and acceptance a nullity." The jury must have found the facts required by the instructions. And they exhibit an intention to seize upon a mistake to entrap the party for his own advantage and to the others' injury; and one who has been guilty of it cannot have the benefit of his own fraudulent act. And the defendant can no more set up the acceptance to prevent the plaintiffs from recovering upon the original contract, than they can after the alteration, claim to recover by it.

There is in this case no reason for believing that any thing more could have appeared upon the plaintiffs' leger, than a credit of the bill as payment for the account, because the defendant by accepting for the full amount of it admits it to have been due unless paid by the acceptance. The benefit, which the defendant could under such circumstances have derived from the leger, is not perceived. This Court must take the facts as they are stated in the bill of exceptions without presuming any to exist, which do not there appear; and it does not appear, that there were upon the books produced any marks shewing, that the account had been transferred to a leger; and it is only in such cases, that the party is required without notice to produce it.

Exceptions overruled.

NATHAN OAKES, JR. *vs.* EDWARD H. MITCHELL, *Adm'r.*

Declarations or acknowledgments from which a new promise might be inferred, if made by the debtor himself, will not be sufficient for that purpose when made by the executor or administrator. If the executor or administrator can charge the estate by any promise made by him to pay a demand barred by the statute of limitations, it must be an express promise or agreement to pay, and not a mere acknowledgment of the existence of the debt.

The mere expression of an intention by the administrator to pay a debt barred by the statute of limitations, is not sufficient to prevent the operation of the statute.

The words, "an arrangement will soon be made to pay the note. I calculate to pay it, and I always calculated to pay it," addressed by the administrator of an estate to the holder of a note barred by the statute of limitations, are not sufficient to charge the estate.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Assumpsit on a note, given by *Daniel Mitchell*, the intestate, to *Nathan Oakes, Sen.*; or order, for $100 on demand with interest, dated *June* 8, 1818, and indorsed by the payee. With other grounds of defence, not noticed in the opinion of the Court, the statute of limitations was pleaded and insisted on at the trial. For the purpose of proving a new promise, the plaintiff called a witness, who testified, that after the death of the intestate, in *February*, 1837, he received a letter from the plaintiff, directing him to place the note in the hands of an attorney for collection, if after once more notifying the defendant he neglected to pay it immediately; and that he called on the administrator, who said, "an arrangement will soon be made to pay the note. I calculate to pay it, and I always calculated to pay it." The Judge ruled, that this was sufficient to prove a new promise, and directed a verdict to be returned for the plaintiff. The defendant filed exceptions.

The case was argued in writing.

Mitchell and *Eastman*, for the defendant, contended: —

1. That when a claim is barred by the statute of limitations at the time of the death of an intestate, the administrator has not, nor should he have, the power by any promise of his to revive the demand against the estate, and thus impair the rights of other creditors, or of heirs. They admitted, that there were some decisions

opposed to this position, but said they were made at a time when the courts had nearly repealed the statute, and were inapplicable to the state of things since the recent decisions; and they urged, that the better opinions were against the right of the administrator to revive the demand by any act of his. 9 *Dowl. & Ry.* 40; 14 *Serg. & R.* 195; 15 *Serg. & R.* 231; *Chitty on Con.* 334; 1 *Wharton*, 66; *Parsons* v. *Mills*, 2 *Mass. R.* 80; *Gardner* v. *Tudor*, 8 *Pick.* 210; *Brown* v. *Anderson*, 13 *Mass. R.* 201; *Richmond, Pet'r*, 2 *Pick.* 567.

2. But if the administrator can in any case by a promise of his revive a claim barred by the statute, the evidence in this case is not sufficient for that purpose. *Porter* v. *Hill*, 4 *Greenl.* 41; *Deshon* v. *Eaton*, *ib.* 413; *Bangs* v. *Hall*, 2 *Pick.* 368; *Robbins* v. *Otis*, 3 *Pick.* 4; *Cambridge* v. *Hobart*, 10 *Pick.* 232; *Perley* v. *Little*, 3 *Greenl.* 97.

Fessenden & Deblois, for the plaintiff.

This was an unambiguous acknowledgment of the debt. An acknowledgment within six years by the executor or administrator of the debtor, that the debt is undischarged, will take it out of the statute of limitations. The evidence also is sufficient to prove a new promise to pay the debt. Either will sustain the action. *Porter* v. *Hill*, 4 *Greenl.* 41; *Deshon* v. *Eaton*, *ib.* 413; *Baxter* v. *Penniman*, 8 *Mass. R.* 133; *Brown* v. *Anderson*, 13 *ib.* 201; *Emerson* v. *Thompson*, 16 *ib.* 429; *Whitney* v. *Bigelow*, 4 *Pick.* 110; *Bangs* v. *Hall*, 2 *Pick.* 368; 10 *Bingham*, 446; 1 *Car. & P.* 631.

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

Shepley J. — That an executor or administrator may by an express promise take a case out of the statute of limitations appears to be the settled law of *England*. The like rule of law was recognized in *Massachusetts* and *New-York* in the cases of *Emerson* v. *Thompson*, 16 *Mass. R.* 429, and *Johnson* v. *Beardslee*, 15 *Johns. R.* 3. While the Courts in *Connecticut* and *Pennsylvania* have come to a different conclusion. *Peck* v. *Batsford*, 7 *Conn. R.* 172; *Fritz* v. *Thomas*, 1 *Whar.* 66.

This case does not appear to call for a decision of the point in this State, for no promise by the administrator is proved. An acknowledgment of a present existing debt is not of itself a new promise, but evidence from which one may be inferred. *Hyling* v. *Hastings*, 1 *Ld. Raym.* 389. In determining what language will be sufficient to raise a new promise, there is a distinction between those, who are acting for themselves, and those who are acting in trust for others, which must be regarded. Declarations or acknowledgments, from which a new promise might be inferred, if made by the debtor himself, when made by an executor or administrator, will not be sufficient to charge the estate. There must be a clear agreement or promise to pay. In the case of *Tullock* v. *Dunn, Ryan & Moody*, 416, *Abbott C. J.* says, "as against an executor an acknowledgment merely is not sufficient to take a case out of the statute; there must be an express promise." So in *Thompson* v. *Peter*, 12 *Wheat.* 565, *Marshall C. J.* says, "this is not a suit against the original debtor. It is brought against his representative, who may have no personal knowledge of the transaction. Declarations against him have never been held to take the promise of a testator or intestate out of the act. Indeed the contrary has been held." According to these cases, if the language used by the defendant would admit of such a construction as to make it equivalent to an acknowledgment, that the debt was due, it would not be sufficient. Does it amount to a new promise?

In the case of *Perley* v. *Little*, 3 *Greenl.* 97, it was said, that equivocal expressions ought not by construction to be converted into promises; and that rule should be closely adhered to, when the promise is to be proved, not against the party himself, but against his legal representative. When an administrator says an arrangement will soon be made to pay a demand against the estate, the fair intendment is, that he designs to make such a disposition of the assets as will enable him to do it. The word, "calculate," properly signifies to compute or reckon, but in this case it must have been used inaccurately and in a different sense. If the language used be examined either together, or each phrase by itself, the idea intended to be conveyed will appear to be, that it was his design or intention to pay the note, and that he had always so intended. Is an intention to do a thing a promise

to do it? Apply such language to other transactions and no one would understand, that a contract had been already made. When a purchaser expresses his intention or design to purchase, or if he should say, he "calculates" to purchase, having reference to a future time, the seller does not understand, that a contract has been made. So here the administrator expresses what his present intention was to do at a future time, but he does not expressly promise that he will do it. And if the witness had at that time pressed him to make a positive promise to pay, he might without any inconsistency have said, no, it is my intention to pay it, but I will make no promise. Without saying, that such language as the defendant has been proved to have used in this case would not be sufficient, when used by a person, who was himself the debtor, to enable a jury to infer a promise, it does not prove that express promise, which, as against an administrator, is necessary to take a case out of the statute.

Exceptions sustained, and new trial granted.

Inhabitants of POLAND *vs. Inhabitants of* WILTON.

When a man has a wife and children under his immediate care and protection, and with his family is unable to support himself and them, he is to be considered a pauper, within the meaning of the *stat.* 1821, *c.* 122.

In such case if the notice be applicable only to the *man himself,* the amount expended for *his* support can be recovered by the town furnishing the supplies.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The action was brought to recover the amount expended by the plaintiffs in furnishing supplies to one *Jonathan Reed,* alleged to have fallen into distress in *Poland,* and to have had a settlement in *Wilton.* The writ was dated *May* 15, 1837, and a part of the supplies were furnished in *January* and *February,* 1836, and the residue in the winter of 1837. On *March* 29, 1836, the plaintiffs gave notice to the defendants, that *Jonathan Reed,* a pauper of

that town, had become chargeable in *Poland*, and on *April* 7, following, the defendants sent a reply acknowledging the notice, and stating, "we acknowledge him to be a *resident* of our town, and wish you would have the goodness not to help him when he can maintain himself, if he is well he can support himself. We shall see to it as soon as convenient." On the trial it appeared, that *Reed* had a wife and four small children; that he was exceedingly poor, and when the supplies were furnished, was destitute of provisions, that he had neither bread, nor meat, nor house of his own; that in the winter his children were without shoes and ragged, and that winter he had been reduced to the necessity of living entirely upon potatoes. It however appeared, in the opinion of the witnesses, that if *Reed* had been an unmarried man, and was not sick, he might have supported himself, but could not have supported his wife and family. The counsel for the defendants contended, that they were not liable for any of the supplies thus furnished, if the jury believed, that *Reed* could have supported himself, and had not been a married man and burdened with a family, on the ground that the notice applied to *Jonathan Reed* only, and that *Reed* himself could not be considered a pauper, but his family only were paupers; and requested the Court so to instruct the jury. The Judge declined to give the instruction requested, and did instruct them, that if they believed, that the supplies were necessary for *Reed* in connection with his family, they were all paupers together, and that the plaintiffs in such case would have a right to recover so much of the supplies furnished as were consumed by *Reed*. The amount of the bill charged was $63,10. The jury found a verdict for the plaintiffs for $37,00, and the defendants filed exceptions.

Codman and *Fox*, in a written argument, insisted that the instructions requested ought to have been given, and that those given were erroneous. They cited *Danvers* v. *Boston*, 10 *Pick.* 513; *Dover* v. *Paris*, 5 *Greenl.* 430; *Walpole* v. *West Cambridge*, 8 *Mass. R.* 279; *Bangor* v. *Deer Isle*, 1 *Greenl.* 332; *Wilson* v. *Brooks*, 14 *Pick.* 344; 3 *T. R.* 637.

J. C. Woodman, for the plaintiffs, submitted the case without argument.

The opinion of the Court was drawn up by

SHEPLEY J. — The case finds that *Jonathan Reed* was able to support himself without a wife and children, but he had a wife and children in his dwelling, and under his care and protection although not mentioned in the notice to the defendants.

The defendants contend, that *Reed* was not a pauper or liable to be removed as such.

The cases of *Green* v. *Buckfield*, 3 *Greenl.* 136, and *Hallowell* v. *Saco*, 5 *Greenl.* 143, decide, that when supplies are properly furnished to any member of a family thus situated, with whose support the head of it is chargeable, he thereby becomes a pauper, and may be dealt with as such. The case of *Bangor* v. *Deer Isle*, 1 *Greenl.* 329, authorized the instructions so far as related to the amount to be recovered.

Judgment on the verdict.

EBENEZER FIELD *& al. vs.* URIAH HANSCOMB *& al.*

The statute of 1835, *c.* 165, took away the right to appeal from the Court of Common Pleas in petitions for partition.

In making partition of real estate, the commissioners should be governed by the comparative value of the land assigned to each share, and not exclusively by the quantity.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Field and *Baker* petitioned for partition of a tract of land, particularly described in the petition, "containing forty-two acres, more or less." They stated in their petition, that *Field* was seized in fee, as tenant in common with the respondents and others, "of six acres and eighty-six square rods," and that *Baker* was thus seized "of one sixth part, or seven acres and one seventh of an acre;" and prayed, that their "undivided several parts of the premises" might be assigned in severalty. Judgment was rendered, that the petitioners "have partition of the premises described in the

foregoing petition" without stating in any other way the extent of their rights, and commissioners were appointed to make partition. The commissioners in their return assign to *Field* " his full share of land," describing it, " containing six acres and eighty-six square rods," and to *Baker* " his full share of land," describing it, " containing nine and a half acres, be the same more or less." The report of the commissioners was offered for acceptance, and the respondents objected thereto, because the commissioners had assigned to *Baker* a " greater share than his part of the premises described in the petition." The Judge overruled the objection, and ordered the return to be accepted, to which the respondents filed exceptions. The Judge certified to the truth of the exceptions, but did not allow them, as he supposed the remedy was by appeal. The case was submitted for the decision of the Court on the briefs of counsel.

Adams, for respondents.

The remedy is by exceptions, and not by appeal. *Stat.* 1822, *c.* 193, § 5; *stat.* 1835, *c.* 165, § 2; 11 *Mass. R.* 465; 3 *Mass. R.* 305; 4 *Mass. R.* 670; 5 *Mass. R.* 420; 2 *Mass. R.* 441. The commissioners were bound to set off to *Baker* the *quantity* of land he claims in his petition, and which by the judgment he was entitled to, of *an ordinary quality*, compared with the whole lot. *Miller* v. *Miller*, 16 *Pick.* 215.

Deblois and *Eveleth*, for the petitioners.

The commissioners set off to *Baker* a greater quantity of land, than he would have been entitled to, had every portion of it been of equal value. They made up the deficiency in quality in quantity, and this was right. 1. Because it has been the common practice. 2. Because of the impossibility of making partition on any other principle. 3. The *stat.* of 1821, *c.* 37, gives the right to the commissioners to make partition according to the value. *Co. Lit.* 165; *Witham* v. *Cutts*, 4 *Greenl.* 31. 4. The petition itself does not seek to take the precise number of acres, but asks that his share may be assigned to him. *Bott* v. *Burnell*, 11 *Mass. R.* 167. 5. The exceptions are not properly before the Court, as an appeal was open to the respondents. The right to appeal is taken away by the *statute* of 1835, *c.* 165, only in *actions* originally commenced in the Court of Common Pleas. Nor does the statute authorize exceptions in a case like this.

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

WESTON C. J. — The *stat.* of 1821, *c.* 37, for the partition of lands or other real estate, has provided a process by petition, which may be substituted for a writ of partition at common law. It is not technically a civil action, commencing by writ, but a trial by jury is provided for, and an appeal allowed from the Common Pleas to the Supreme Judicial Court. In 1835, the right of appeal, from the former to the latter Court, was taken away; and it became the policy of the law to allow but one trial in a civil suit, except in certain cases, at the discretion of the Court. Accordingly, by the *stat.* of 1835, *c.* 165, it was provided, that no appeal shall be had from the Common Pleas in any civil action. Unless petitions for partition, which have in practice taken the place of writs of partition, are held to fall under this class, the right of appeal still exists with regard to them, and they remain subject to all the mischiefs, which were found to attend repeated trials of questions of fact. We are of opinion, that the term, civil actions, is broad enough to embrace petitions for partition. There is no reason for denying an appeal upon a writ of partition, which does not apply with equal force to petitions. But although the right of appeal no longer exists, the party aggrieved by an opinion, direction or judgment of the Court of Common Pleas, in any matter of law, may bring the case into this Court upon exceptions.

We perceive however in the case before us, no error in the opinion or adjudication of the Common Pleas. It must be understood, that the partition made by the commissioners was equal in value, according to the shares of the respective owners. It is not suggested or pretended, that there is any inequality in the value of the shares, as set off in severalty. The comparative value of each share is the criterion, by which equality of partition is to be ascertained. Probably in a majority of cases, this could not be effected by a division, having reference to quantity only.

Baker, one of the petitioners, avers that he is seized of one sixth part of the land, of which partition is prayed. This averment is not controverted. He proceeds further to deduce from that proportion, the number of acres of which he is seized in common. This is manifestly based upon the assumption, that there were

nearly forty-three acres in the whole, although the quantity stated is forty-two acres, more or less. It is a result obtained by dividing the number of acres and square rods by six, which would give his fractional proportion. The commissioners have assigned him only a sixth in value, although they have given him a greater number of acres, than he would have been entitled to, if every acre was of equal value. The controlling and decisive averment is, that he is seized of one sixth. That proportion has been assigned to him; and we are of opinion, that the partition made is substantially in conformity with the petition.

Exceptions overruled.

George Earle *& al. vs.* Franklin Clark *& al.*

Where the person offered as a witness made the machines, which were the subject of controversy, and were alleged, to have been sold by the plaintiff to the defendant, from materials furnished by the plaintiff, who made advances to the laborers employed; and where the machines, when made, were to be the property of the plaintiff, and upon the sale thereof, after deducting his disbursements and commissions, the plaintiff was to account to the witness for the surplus; *it was held*, that the witness was interested, and incompetent to testify in support of the action.

Where there is other evidence of the sale and delivery of goods, the agent by whom the sale is made, if interested, is not a competent witness to prove the sale and delivery.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Assumpsit for clapboard and shingle machines. Among the objections made by the counsel for the defendants, at the trial, and overruled by the Judge, was one to the admission of *Nahum Houghton*, as a witness, on the ground, that he was interested, and had sold the machines to the defendants and had an interest in making them pay therefor. The exceptions were sustained by the consideration of this point alone, and the facts bearing upon it appear in the opinion of the Court. The exceptions were filed by the defendants.

The argument was in writing, by *Fessenden & Deblois*, for the defendants, and by *Everett*, for the plaintiffs.

For the defendants, it was said, that the witness objected to was directly interested, and the testimony in the case was examined to show such to be the fact. The true principle is stated in *Scott* v. *McLellan*, 2 *Greenl.* 205. "In order to exclude altogether testimony, which might be liable to bias, by the general principles of the law of evidence, any direct interest however small, renders the witness incompetent." 4 *Johns. R.* 293; 2 *Esp. R.* 735. The pay of the witness depended upon the sale, and this alone is sufficient to exclude him. 1 *Caines*, 363; *Marland* v. *Jefferson*, 2 *Pick.* 240; 2 *Dallas*, 50; *New-York Slate Co.* v. *Osgood*, 11 *Mass. R.* 60; 5 *Johns. R.* 427; *ib.* 254; 10 *Conn. R.* 280; 2 *Stark. Ev.* 770; 3 *Yeates*, 172; 1 *Camp.* 381.

For the plaintiffs, it was argued:—

1. That the case was proved by adequate testimony, exclusive of that objected to. The testimony of *Houghton* being superfluous and only cumulative ought not to be a cause for a new trial. 2 *Stark. Ev.* 758; *Prince* v. *Shepherd*, 9 *Pick.* 176.

2. *Houghton* was not interested, because his compensation did not depend on the plaintiffs' getting their pay. He is not interested in this question, and the verdict will settle no rights of his. *Austin* v. *Walsh*, 2 *Mass. R.* 401; *Lang* v. *Fisk*, 2 *Fairf.* 385; *Peake's Ev.* 144; *Locke* v. *N. A. Ins. Co.*, 13 *Mass. R.* 64; *Burt* v. *Nichols*, 16 *Pick.* 560.

3. The witness was competent to testify by the well established rules applicable to the admission of the testimony of agents and factors acting in the course of business. 1 *Phil. Ev.* 94; 2 *Stark. Ev.* 54, 753, 758; *Phillips* v. *Bridge*, 11 *Mass. R.* 245; *Brown* v. *Babcock*, 3 *Mass. R.* 29; *Fisher* v. *Willard*, 13 *Mass. R.* 379; *Peake's Ev.* 165, *note B*; *Franklin Bank* v. *Freeman*, 16 *Pick.* 535; *Burt* v. *Nichols*, *ib.* 560; *Burrage* v. *Smith*, *ib.* 56.

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

WESTON C. J. — Several objections were taken at the trial in the Court below, none of which have been insisted upon in argu-

ment, except that made to the competency of *Nahum Houghton* as a witness. He made the machines, which are the subject in controversy. The materials were furnished by the plaintiffs, and they made advances to the laborers employed, and the machines when made were to be their property. Upon the sale of the machines, after deducting their disbursements and a commission, they were to be accountable to *Houghton* for the surplus. The witness then was interested in verifying a sale to the defendants, inasmuch as the plaintiffs thereby became accountable to him for the proceeds, which he must have considered more valuable, than the unsold product of his labor. His business could not have been prosecuted beneficially, if at all, unless sales could be effected. He had a direct interest also in the price, upon the amount of which his claim upon the plaintiffs depended.

In certain cases, an agent may be admitted, although interested, from the necessity of the case. No such necessity existed here, for there was other evidence of a sale and delivery to the defendants. And it is contended, that for this reason, the exceptions ought not to be sustained, and the verdict set aside. The testimony of the witness however was material, and was calculated to have an important bearing upon the cause. There may have been other sufficient evidence of a sale and delivery; but whether the machines had been faithfully made, and of suitable materials, and whether their value had or had not been impaired by previous use, was controverted, in regard to all which, *Houghton* was the principal witness for the plaintiff, although there was other corroborating testimony. Upon the whole, we are of opinion, that his testimony was not legally admissible; and upon this ground, we sustain the exceptions. The verdict is therefore set aside, and a new trial granted.

BETSEY MOSHER *vs.* DANIEL MOSHER.

Where the land, at the time of the alienation by the husband, was pasture and woodland, the widow is entitled to dower therein.

The widow on the assignment of her dower, is to be excluded from the increased value arising from labor and money expended upon the land after the alienation, but not from that which has arisen from other causes.

THE parties, in this action of dower, submitted to the Court, whether the demandant was entitled to dower in the premises? and if so, to what part and proportion thereof, on a statement of facts. From the statement it appeared, that *James Mosher, Jr.* the husband of the demandant, on *Sept.* 9, 1814, being then seized of the premises, conveyed the same in mortgage to the trustees of the Ministerial Fund in *Gorham.* On *Sept.* 10, 1818, the equity of redemption was sold on execution, and the purchaser took an assignment of the mortgage, and in *December*, 1826, conveyed the land to the tenant. *James Mosher, Jr.* removed from the premises in 1817, and died in 1836. When the conveyance in mortgage was made, six acres of land in which dower is demanded, were, and until the present time remain, pasture land; and sixteen acres were then, and still are, woodland, and were not then, and have not since been in a condition to be ploughed, mowed or cultivated. When the conveyance was made, there was a thrifty growth of young wood upon the woodland, which has since increased in quantity and in value from the natural growth. The value of the wood and timber has also since increased from the construction of the *Cumberland* and *Oxford* Canal within one hundred rods of it, and from the enhanced price of fuel in *Portland.* It did not appear from the statement, whether the pasture and woodland were parts of the same tract, or were separate lots.

The case was submitted on the briefs of the counsel.

J. Pierce, for the demandant, contended, that the demandant was entitled to dower in the premises, as they now are, as the increased value of the land and wood was not in consequence of any improvements made by those claiming under the husband, but from the natural growth of young wood, and the natural situation of the land. *Stoughton* v. *Leigh*, 1 *Taunt.* 402; *Stearns on Real*

Actions, 314. He stated, that the land was in one lot, part being wood and part pasture land.

J. Adams, for the tenant, relied on two points.

1. That the demandant cannot have dower assigned to her in any part of the woodland. *Conner* v. *Shepherd*, 15 *Mass. R.* 164; *Sergeant* v. *Towne*, 10 *Mass. R.* 303.

2. She can have dower in no part of the premises, except in the condition they were in, at the time of the alienation by the husband. *Catlin* v. *Ware*, 9 *Mass. R.* 218; *Ayer* v. *Spring*, 10 *Mass. R.* 80; *Libby* v. *Swett*, *Story's Pl.* 365, *note*; 2 *Johns. R.* 484; 11 *Johns. R.* 510; 13 *Johns. R.* 179.

The opinion of the Court was afterwards drawn up by

SHEPLEY J. — It was decided in the case of *Conner* v. *Shepherd*, that a widow was not dowable of wild land covered with wood and wholly uncultivated.

In the case of *White* v. *Willis*, 7 *Pick.* 143, the disallowance of dower was held to be limited to such land not used with the homestead, or with cultivated land.

A like rule was adopted by the Court in the case of *Kuhn* v. *Kaler*, 14 *Maine Rep.* 409. No part of the land in this case comes within the rule, which excludes the widow, and she is entitled to her dower. But she is not entitled to be endowed of improvements made by the grantee of the husband, or by the assignee of such grantee.

Whether the value of the land should be regarded as fixed, at the time of the alienation, or the widow should be entitled to the benefit, or be compelled to bear the loss arising from the rise and fall of property and other circumstances unconnected with improvements upon the land, has been much considered; and there was at one time apparently no little difference of opinion upon it between distinguished jurists. *Humphrey* v. *Phinney*, 2 *Johns. R.* 484; *Dorchester* v. *Coventry*, 11 *Johns. R.* 510; *Hale* v. *James*, 6 *Johns. Ch. R.* 258; *Thompson* v. *Morrow*, 5 *S. & R.* 289; *Powell* v. *Mon. & Brim. Man. Co.* 3 *Mason*, 365. Such difference can hardly be considered as now existing, for *Kent* admits the more reasonable doctrine to have been stated by *Ch. Justice Tilghman*. 4 *Kent's Com.* 68. The widow is to be excluded

from the improved value arising from the labor and money expended upon the land since the alienation, but not from that, which has arisen from other causes.

Judgment for demandant.

JAMES M. INGRAHAM *vs.* JEREMIAH MARTIN.

The action of replevin cannot be maintained, unless the plaintiff have the right to immediate possession of the property.

Thus where there is an agreement in a mortgage of personal chattels, that the mortgagor shall retain the possession for a stipulated time, the mortgagee cannot maintain replevin therefor until the time has expired.

But if the plaintiff have a right to the possession at the time of the trial, the defendant cannot have judgment for a return of the goods.

REPLEVIN for articles of household furniture. The defence was, that the furniture was the property of *B. T. Ingraham*, and attached as his property by the defendant, a deputy-sheriff. The plaintiff introduced a bill of sale of the property from *B. T. Ingraham* to himself, dated *Oct.* 14, 1837, with a provision in the same instrument, that it should be void, if the said *B. T. Ingraham* should pay certain notes from him to the plaintiff, and "provided also, that it shall and may be lawful for said *Benjamin* to continue in possession of the above named furniture without denial or interruption by said *James M.* until the 14th of *October*, 1839." The attachment was made, and the writ of replevin sued out after the delivery of the mortgage, and before the 14th of *October*, 1839. The counsel for the defendant insisted, that as the plaintiff had shown by his bill of sale, that he had no right to the possession of the property, until *Oct.* 14, 1839, he had no right of action, and should be nonsuited. EMERY J. with the intention of obtaining all the facts, declined to order a nonsuit, and the trial proceeded. The mortgage was made in the room where the furniture was, and the mortgagor pointed out the property to the mortgagee, made a verbal delivery, and gave it up to him, but the plaintiff did not touch or move any article, and took no other delivery. The defendant's

counsel then contended, that there was no sufficient delivery to defeat the claims of creditors. The Judge instructed the jury, that if they believed the witnesses, the delivery was sufficient. On the whole case the jury found a general verdict for the plaintiff, which was to be set aside, if the instructions were incorrect, and a nonsuit was to be entered, if the action could not be maintained.

The case was submitted on the briefs of counsel.

A. Haines, for the defendant.

As the plaintiff had no right to the possession of the property until *October* 14, 1839, he had no right of action, when he commenced his suit. *Co. Lit.* 145, *b*; 1 *Chitty's Pl.* 159; 7 *T. R.* 9; 15 *East*, 607; *Wyman* v. *Dorr*, 3 *Greenl.* 183; *Wheeler* v. *Train*, 3 *Pick.* 255. *B. T. Ingraham* was the only person, who could maintain the suit for a wrongful taking before *Oct.* 14, 1839. *Ricker* v. *Kelley*, 1 *Greenl.* 117.

Fessenden & Deblois, for the plaintiff, said that they should not contend, that where goods were leased by the owner to the debtor for a term not expired, that the owner could maintain replevin; but insisted, that there was a distinction in their favor between that and the present case. The cases cited for the defendant, were all cases of absolute, unconditional leases. The present is the case of mortgaged chattels, and the mortgagee may maintain replevin. The cases all concur in saying, that there is no difference between replevin and trover, and where the latter will lie, the former will also. The possession of the mortgagor is the possession of the mortgagee, and we are entitled to maintain our action. *Melody* v. *Chandler*, 3 *Fairf.* 283; *Brinley* v. *Spring*, 7 *Greenl.* 241; *Lunt* v. *Whitaker*, 1 *Fairf.* 311; *De Wolf* v. *Harris*, 4 *Mason*, 534; *Homes* v. *Crane*, 2 *Pick.* 607; 1 *M. & S.* 334; 5 *Johns. R.* 258; 2 *Hall's Sup. C. Rep.* 82; 1 *Ld. Raym.* 724; *Pickard* v. *Low*, *in Penobscot*, *not reported*, (*ante*, *p.* 48;) *Fobes* v. *Parker*, 16 *Pick.* 462.

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

Weston C. J. — By the instrument, under which the plaintiffs acquired title to the property in question, *Benjamin T. Ingraham*, the original owner, was to retain possession, "without denial or interruption" from the plaintiff, for the period of two years, which

had not elapsed, when this action was instituted. Having no right to possession at the time, according to the cases of *Wyman* v. *Dorr*, 3 *Greenl.* 183, of *Wheeler* v. *Train*, 3 *Pick.* 255, and of *Collins* v. *Evans*, 15 *Pick.* 63, the plaintiff could not maintain replevin. These cases are exactly in point, from which the one before us cannot be fairly distinguished. The mortgagor of personal property generally holds possession at the will of the mortgagee, who may terminate it at pleasure. Having the right of immediate possession, he may therefore maintain trover or replevin. It is otherwise where he has invested the mortgagor with the right of possession for a definite period, which has not elapsed. This is clearly shown by the cases before cited, to which reference may be had for the authorities, upon which they rest.

In *Wheeler* v. *Train*, there was a stipulation, in a separate instrument, that the vendor might remain in possession for one year. This was held not to be conclusive evidence, that the sale was fraudulent; but it was not held that, if the transaction had been a mortgage, the mortgagee could have maintained replevin during the year. In *Holmes* v. *Crane*, 2 *Pick.* 607, the mortgagee reserved to himself the right to take possession on demand, whereby the mortgagor became, as in other cases, his mere tenant at will. In *DeWolf* v. *Harris*, 4 *Mason*, 534, the mortgagee reserved to himself the same privilege.

In *Melody* v. *Chandler*, 3 *Fairf.* 283, *O'Reilly*, the original owner, was held, under the circumstances of that case, to have retained the possession, merely as the servant or agent of the plaintiff.

The verdict is set aside, the plaintiff is to become nonsuit, and the defendant to have judgment for his costs. As the jury have found the property in the goods to be in the plaintiff, and as he has now a right to the possession, the two years having terminated, the defendant is not entitled to a return. Nor can he, for the same reason, have judgment for damages, the interest of the debtor in the goods being of no available value to the attaching creditor.

JOSEPH THAXTER *vs.* JOHN BRADLEY *& al.*

Where the proprietor of a tract of land gave a bond to another to convey the same to him or his assigns within a certain time and at a stipulated price; and where the obligee made a contract with a third person to share equally with him the profits made by any sale thereof effected through his agency; and where the obligor, within the time fixed in the bond, and without the knowledge of the obligee, conveyed the land to purchasers procured by such third person, and received of them, pursuant to an arrangement made with him, a sum in addition to the price stipulated in the bond; in a bill in equity, *it was held*, that the obligor was entitled to recover of the obligee one half of the amount, above the price stipulated in the bond, received by him on such sale.

THIS was a bill in equity brought by *Joseph Thaxter* against *John Bradley* and *James Irish*. The case sufficiently appears in the opinion of the Court.

It was argued by *Mellen & Preble*, for *Thaxter*, who cited, during their argument, *Dockray* v. *Noble*, 8 *Greenl.* 278; and *Getchell* v. *Jewett*, 4 *Greenl.* 350.

By *Davis*, for *Bradley*, who in his argument, cited *Clason* v. *Morris*, 10 *Johns. R.* 524; *Brown* v. *Haven*, 3 *Fairf.* 164; *Fairbanks* v. *Dow*, 6 *N. H. Rep.* 266; *Miller* v. *Lord*, 11 *Pick.* 11; 2 *Kent's Com.* 490.

And by *W. P. Fessenden*, for *Irish*, who cited in his argument, *Hart* v. *Ten Eyck*, 2 *Johns. Ch. R.* 62.

The opinion of the Court was drawn up and delivered at the *April* Term, 1838, by

EMERY J. — The bill alleges that *Bradley*, being seized and possessed of a certain township of land, *No.* 1, *9th Range*, on the west branch of *Penobscot River*, by his memorandum and agreement in writing, dated the 28th of *April*, "agreed with the plaintiff to sell and convey to him the township, which *Bradley* bought of *Richard Bartlett* and *Amos M. Roberts*, in *December*, 1832, containing 22,104 acres, water included, from which is reserved 3 lots of 320 acres each, to be laid out for public uses; also reserving the right to hold, occupy and maintain a boom toward the head of the lake, for securing timber, &c. and receive toll on the same,

also reserving the right to erect and occupy a building or buildings, necessary for the accommodation of those, who may repair or tend said boom, and reserving the right to cut, and use any timber hereafter, by the owners of said boom, or their agents, necessary for the boom and buildings, paying a reasonable price for the timber so cut or used. *Thaxter*, to notify *Bradley* of his intention to purchase the tract by the last day of *June* then next, and to produce one fifth part cash, and satisfactory security to said *Bradley* for the residue of the purchase, payable in equal sums, in one, two and three years, with interest annually, the price to be $4,25 per acre.

"Now if the said *Thaxter* notify said *Bradley*, and produce the money and security as aforesaid for the payment of said township, I hereby agree to give him or his assigns a warrantee deed of the same. *Portland, April* 28, 1835.

"*John Bradley.*"

And at the same time, by another agreement in writing, of the same date, the time for the purchase was further extended, from the last day of *June*, till the 1st day of *October* then next, and if *Thaxter*, within sixty days, explore the township *Bradley* would pay half the sum *Thaxter* pays toward the expense of exploring the same, in case he does not sell it, and further agreed that if he failed to sell it in sixty days, to extend the time till the 1st of *October* then next, if necessary, at the price named in the instrument, reckoning interest on it. And the plaintiff, having received those instruments, on the 11th of *May*, entered into a bargain in writing with *James Irish*, and agreed to give him one half of all the net profits arising from the sale of said township over the price of $4,25 per acre as before stated, to be paid to *Bradley*, on condition that *Irish* should go on and explore the tract, and aid in effecting a sale, having reference to those obligations of *Bradley* to plaintiff, he, *Irish*, in consideration of the premises, not to charge the plaintiff for exploring and selling, to which *Irish* agreed, and did explore it, and did aid and assist the plaintiff in effecting a sale of it, and from time to time rendered to the plaintiff an account of his doings. And on or about the 25th of *June*, the sixty days having nearly expired, and no sale or prospect of it, before the last day of *June*, or before the lapse of the sixty days, the plaintiff gave *Bradley* notice in writing, that it had become necessary for him, in order to

sell, to claim the extension to the 1st day of *October*, to which *Irish* was knowing and assenting, and having availed themselves of the extension, *Irish* went on to explore and to aid in effecting a sale according to the terms of agreement between *Irish* and plaintiff, and from time to time rendered account in writing of his doings, and *Irish*, after the last day of *June*, and prior to the first day of *October*, contracted by himself, or through the agency of one *Smith & Marsh*, to sell the township, as well for the benefit of himself as of the plaintiff, under and by virtue of said agreements of *Bradley*, *Thaxter* and *Irish*, to *Josiah Perham, Jr.* and *Samuel Strickland*, or to one, or both jointly, with others unknown to plaintiff, at the rate of five dollars the acre, amounting in the whole, to $105,720, one quarter of which, viz. $26,430 in cash, said purchasers then and there paid to said *Irish*, and received *Irish's* obligation for a deed, upon their giving him on or before the 15th of *September*, good and satisfactory security for the balance, payable as in the last named agreement, was set forth, and in case the security should not be given, the cash payment was to be forfeited to the plaintiff and said *Irish*.

It further alleges, that prior to the said 1st day of *October*, as he believes, on 10th *September*, he requested of *Bradley*, information if he was ready to comply with the conditions of his two memorandums of agreement, of 28th of *April*, 1835, upon the plaintiff's complying on his part.

Bradley said, he was not, unless the plaintiff would give him $4,50 per acre, for the township. Plaintiff says he was informed by *Irish*, and believes *Irish* repeatedly requested *Bradley*, before the 15th of *September*, to execute a deed agreeably to *Bradley's* contract, upon *Irish's* offering to perform the conditions of the last memorandum and agreements, which he refused, unless he could have $4,50 per acre. Plaintiff further alleges that *Irish*, in consideration that plaintiff agreed to give him half the profits on the sale of the township, over $4,25 per acre for his aid and assistance in effecting a sale, *Irish* agreed to pay the plaintiff one half of all the interest the said *Perham* and *Strickland* agreed to pay *Irish*, and half of the interest the plaintiff agreed to pay *Bradley*, as mentioned in the memorandum of the 28th of *April*, 1835, and also to pay the plaintiff all his expenses, and liabilities about the

sale of the township. And that on 17th of *September*, *Bradley* stated to *Joseph Adams*, plaintiff's counsel, that he had no wish that plaintiff should comply, or offer to comply with his part of the condition of the agreement of 28th of *April*, 1835, for it would do no good, as he, *Bradley*, had deeded the township to *Josiah Perham, Jr.* which deed was in the custody of *Henry Goddard*; that he, *Bradley*, had received $4,50 for it per acre and that *Irish* had given to *Bradley* a bond in penal sum of $20,000 to indemnify him against said *Bradley's* liabilities on his said obligations, and *Bradley* denies the plaintiff's right and interest, alleging they are not binding. That on the 14th of *September*, notwithstanding the plaintiff and *Irish* offered to comply with the contract of 28th of *April* frequently to said *Bradley*, and he refused to accept the performance. Yet *Irish* and *Bradley* agreed, without the plaintiff's knowledge or consent, that *Bradley* should give *Josiah Perham, Jr.* a deed of warranty of said township, which was done, and deposited with *Henry Goddard*, to be delivered on *Perham's* complying with certain conditions, which plaintiff believes has been done, and *Perham* paid *Bradley* and *Irish*, exclusive of interest, $105,720, out of which, there is due to plaintiff, in addition to what *Irish* agreed to pay him, on account of interest, liabilities, and disbursements, $7929, excepting therefrom $4,228,80, which *Irish* has already paid the plaintiff, and the balance, or any part of it he refuses to pay, or secure, as *Perham* has agreed to pay. Because *Bradley pretends*, that, *Irish* and plaintiff will make profit enough, at the rate of 50cts an acre upon the township, and *Irish pretends* that he should have incurred the forfeiture of large sums to *Perham* and *Strickland*, on his obligation to convey to them at $5 the acre, which obligation would have expired on 15th of *September*, to save which, he agreed that *Bradley* should retain $4,50 per acre exclusive of interest. That *Bradley*, in fraud of his agreements, as to profits, pretends that *Irish* was employed by him, and sold under him, *charges that* he did it oppressively, collusively and contrary to equity, and received 25 cents for each acre which he ought to account for to plaintiff, and asks for general relief.

Bradley admits the execution of the writings of agreement of 28th of *April*, but denies that there was any consideration to sustain the plaintiff's claim against him, admits his ownership in part of

the tract, and his willingness to dispose of his property in it, and was solicited by the plaintiff to allow him the privilege of disposing of it, representing that he was competent to effect a sale on the terms of the first writing, but he did not notify the defendant of his intention to purchase by the last of *June*, nor produce the money, nor security, nor explore the tract in 60 days, otherwise than through the means of *Irish*, and employing him to make a new agreement with defendant; that extension of time was not necessary to effect a sale to 1st of *October;* might have been effected before last of *June;* and the pretended notice of plaintiff to defendant, of 25th of *June*, was nugatory; and before the last of *June*, arranged with *Irish*, to effect a sale, and gave him power to transact and manage the concern, *Irish* taking all the labor, trouble, care and responsibility of the concern, without consulting the defendant; and that *Irish* on the 26th of *June* applied to defendant, informing him his obligation would expire on the last of *June*, and requesting a new agreement for $4,50 the acre for sixty days, and accepted it, by which the former agreement was abrogated, and the notice waived of 25th of *June*, and that all the trouble of exploring and selling was well done by *Irish*, under and entirely by virtue of the new obligation, and defendant made the conveyances to the purchasers. That *Irish* was satisfied, and that the plaintiff received as large a share of profit, as he could under such extension, as he now pretends to claim, and more than he could, but through the means of *Irish*, and the plaintiff solicited accommodation in regard to an amount of money due from *Irish* to *Bradley*, and from plaintiff to *Irish*, out of this concern, and arising from the settlement of their proportions of profit thereof, *Irish* did not claim the extension, and that it would have defeated the sale. That *Isaiah Warren*, was part owner with defendant, and at some time, defendant told plaintiff that *Warren* forbid his making a deed after last of *June*. That defendant took a bond of indemnity from *Irish* against plaintiff's claim. That he had asked the plaintiff, why he did not tender, that it would be unjust to avail himself of the benefits, without the burdens of *Irish's* acts, and denies all confederacy.

James Irish in his answer, does not deny that the two papers were made by *Bradley* on the 28th of *April*, 1835, but if material, prays that the plaintiff may be held to produce them in Court

and to establish the validity of them. That on the 11th of *May*, 1835, *Thaxter* stated to him, that he had a bond or agreement in writing, whereby *Bradley* promised to convey by deed to said *Thaxter*, the township in question, on the conditions set forth in the plaintiff's bill, and though he has no recollection that *Thaxter* exhibited to him, or stated the second paper, it is possible he might have done so, that in effect the plaintiff stated to him that he was unacquainted with the nature of land speculations, had little experience in that kind of business, had little confidence in his own ability to sell said township, which was his sole object in taking said agreement, thereby to make a profit on the same, he, the said *Thaxter*, being unable to purchase and hold the same, and the defendant was requested by the plaintiff to become interested with him in said agreements, and aid in selling the land, and the defendant entered into the agreement, as stated in the paper marked **A.** That the defendant had previously explored the township, was well acquainted with its nature and qualities, immediately started for *Bangor*, to effect the object, *Thaxter* stating his wish to sell the land at all events, before the last day of *June*, then next, when his agreement would expire, and if not sold at private sale before the 10th of *June*, to put it up at auction, the defendant to bid as high as $4,25 per acre; it was deemed unnecessary to explore again then, that at the public auction, the land was struck off to defendant, at $4,25, no one bidding higher. *Thaxter* was present, and assenting. Not effecting a sale, he returned to *Gorham*. That on or about the 26th of *June*, 1835, he was applied to at *Gorham* by *Samuel B. Smith*, and *Noah Marsh*, for a bond of the township, at $5 the acre. That he came to *Portland* to see *Thaxter*, found he was in *Boston*, that then on referring to the original agreement of said *Thaxter*, the defendant found it would expire on the last day of *June*, it being then the 26th day of said month, that it did not then occur to the defendant, that *Thaxter* had the second agreement from *Bradley*. That he applied to *Bradley* for a new agreement for the benefit of *Thaxter* and himself on the same terms. *Bradley* refused, but expressed his willingness to give the defendant an agreement to convey the township to him at the rate of $4,50 per acre, payable one quarter in cash, and the residue in three equal annual payments.

The defendant considering it his only chance to secure said township, and the benefit of a sale thereof to said *Thaxter* and himself, concluded to take an agreement from said *Bradley* to that effect.

The simple plain unsophisticated matter of this case is, that *Mr. Bradley* professed to own lands, which in the season so distinguished for the spirit of speculation, he was willing to sell. *Mr. Thaxter* was desirous to become a sort of broker to effect a sale, and the better to accomplish his object, took the two papers mentioned in the bill and answer, dated the 28th of *April*, 1835, the first warily limiting the right to the last day of *June*, then next, so that the ardor of purchasers might be excited to complete an arrangement at an early day, lest the *el dorado* should not come into their possession. The second, providing for an extension till the 1st day of *October*. *Mr. Thaxter* becoming dubious, whether without some foreign aid, he should be so successful as at first he supposed, sought the concurrent exertions of General *Irish*, offering the splendid inducement of participation in half the profits to be made beyond the $4,25 per acre, the sum to be paid to *Mr. Bradley*. General *Irish* having previously, as land agent of the State explored the tract, was admirably qualified to aid in effecting a sale. And as early as the 11th of *May*, 1835, had commenced his journey to *Bangor* to find a purchaser. It is manifest from his letter of that date, written at *Brunswick*, that he had seen the second paper, and he urges *Thaxter* to send it to *Bangor*. He also says that he meets here at *Brunswick*, *Bradley* that evening, but has "not let him know all our plans." What is the just construction of those two papers? We cannot hesitate to declare that in our judgment they constituted one transaction. And that the first paper apparently so strict in its requisition, was neutralized as to the necessity of performance by the last of *June*, upon notice, proved by *Hill* and *Charles Thaxter*, to be given to *Bradley* by the plaintiff, before the last day of *June*, that the plaintiff claimed the benefit of the extension promised, and *Mr. Bradley* said, "very well, I have no objection to extending it." This as sworn by *Charles Thaxter* was on the 29th of *June*. The plaintiff had before that time, as proved by *John Hill*, between the 18th and 20th of *June*, given *Bradley* the same notice verbally.

The provision in the second paper, that *Bradley* would pay half the expense of exploring, if *Thaxter* within 60 days explored it, was only effectual in case he did not sell it. And *Bradley* further agreed, if *Thaxter* fails to sell it within sixty days, to extend the time till the first day of *October* next, if necessary, at the price named in said instrument, reckoning interest on the same. There is no pretence that *Thaxter* had effected a sale within the sixty days. On notice *Mr. Bradley* would be holden to give the extension. For it is proved by *Charles Thaxter*, and *Barstow*, that the plaintiff had entered upon the service of endeavoring to effect a sale, and incurred expenses. Here then these three gentlemen were mutually interested, understandingly, in their relative rights. *Mr. Bradley* to obtain $4,25 the acre, *Mr. Irish* and the plaintiff to increase the price as much as they could with integrity and honor, and to divide the profits, deducting *Mr. Thaxter's* expenses. Could any doubt on this subject arise, had the *bona fide* sale been effected on the 10th of *June*? If no doubt of this being the just expectation of each party, *then*, has any thing occurred in the progress of the proceedings, to justify a different conclusion as to the right of *Mr. Bradley*? We perceive nothing. He could not set up new terms till the 1st of *October*. Because, although *Mr. Thaxter* might have been holden to tender performance within that period, yet *Mr. Bradley*, before the 17th day of *September*, had disabled himself to convey. And, according to the testimony of *Joseph Adams*, declared that he could not take, if tender were made, as he had given a deed to *Perham*, and dispensed with it.

Is it then according to equity and good conscience, that the sum of twenty-five cents more per acre should be required and retained by him? The answer of *Mr. Irish* further is, that although something was said by *Bradley*, at the time of the conversation relative to the second agreement given to *Thaxter*, providing for an extension of the time mentioned in the original agreement, yet the defendant is positive that said *Bradley* did not state to him, that he had been notified by *Thaxter*, that he should claim such extension, but did state, that *Thaxter* had no claims upon him, said *Bradley*, which were binding for the conveyance of said land. And the stipulation aforesaid in the writing with regard to the delivery of said agreement with said *Thaxter* to him, said *Bradley*, was not, as

this defendant then believed, inserted by said *Bradley* for his own benefit, but at the request of the defendant to make it conditional, upon the delivery of the agreement with *Thaxter*, to satisfy *Thaxter*, because the defendant was knowing to his jealous and suspicious disposition, but never intended to exclude *Thaxter*. That he went to *Boston*, saw *Thaxter*, was then informed by him, for the first time, of his having claimed an extension, and that he considered himself entitled to it, but expressed to the defendant his full and entire satisfaction with what had been done by the defendant as aforesaid, and that he was more satisfied with the defendant's agreement, with said *Bradley*, as, if he, said *Thaxter*, could not hold said *Bradley* on the agreement to convey to him at $4,25 per acre, he would give up his said agreement to this defendant, in order that said *Bradley* might be holden on the agreement given to the defendant, and that the defendant and *Thaxter* would at all events, if said land was taken under the bond so as aforesaid given by the defendant, realize the sum of fifty cents per acre, in the sale of said township.

Is the claim of *James Irish* warranted to abstract any more than a half part of the net profits made between $4,25 and $5 the acre? Are expenses of *Thaxter*, a charge on General *Irish*? In the order of time, in which the events in proof took place, we perceive that on the 11th of *May*, 1835, *Mr. Irish* had full knowledge of the rights of *Thaxter*, or at least the knowledge that *Thaxter* had the paper providing for the exploring pay, and the extension, if *Thaxter* failed to sell. After the ineffectual attempt to sell to their satisfaction on the 10th of *June*, and *Thaxter's* unsuccessful efforts at *Bangor*, afterward, General *Irish* returned to *Gorham*. And on the 26th of *June*, while *Thaxter* was at *Boston*, application was made by *Smith & Marsh*, for a bond at $5 per acre. He applies to *Bradley* for extension on the same terms of the agreement with *Thaxter*, as he says, receives a letter of that date from *Mr. Bradley*, reciting that he had given the plaintiff the writings of the 28th of *April*, and in case *Irish* returned those papers, he agreed to give *Irish* a bond to extend sixty days, at $4,50 the acre, interest from that to the time of sale.

The great error and mistake of these parties was to entertain the opinion that this was right, unless done with the full knowledge ap-

probation and agreement of the plaintiff, at least so far as to prejudice his rights. Yet it seems that *Mr. Irish*, according to his answer, did obtain this paper, and contracted to sell to *S. B. Smith*, on his complying with the terms in 30 days. On the 4th of *July*, 1835, *Smith* notifies *Irish* of his intention to take up the bond, if he can have an extension. On the 6th of *July*, 1835, *Irish* gives a certificate of extension, 25 days. On the 10th of *July*, 1835, *Irish* from *Bangor* writes to *Thaxter*, that he is going to explore with the men he gave the bond to, and if they fail, shall leave nothing undone that is fair and honorable, to effect a sale. On the 15th of *July*, *Smith & Marsh* give a bond to *Irish* in the sum of $15,000, reciting their purchase. On the 22d of *July*, *Irish* certifies, that he considers himself bound in honor and justice to pay half the interest, which *Thaxter* may have to pay *Bradley*. And on the 29th of *July*, 1835, *Irish* gives his bond in $1,000 to *Thaxter* to pay half that interest. On the 11th of *August*, 1835, *Irish* gives his bond in $100,000 to *Smith & Marsh* to convey the land, and gives an extension, 15 days, from 1st of *September*. On the 11th of *September*, 1835, an agreement is made by *Irish* with *Thaxter*, that the cash payment already made and deposited in *Maine Bank*, of $26,430 shall be equally divided between *Irish* and *Thaxter*, and that the sale was made on a bond from *John Bradley* to *Joseph Thaxter*, which sum by condition of *Irish's* bond, will be forfeited by the purchasers of said *Irish*, should they fail to comply with the condition of it by the 16th of that month. On the 12th of *September*, *Strickland*, *Perham* and *Irish* called on *Thaxter* to aid them with *Bradley*. On the 14th day of *September*, 1835, *Irish* procured the deed from *Mr. Bradley* by new agreement. And the same day that deed and certain notes were deposited with *Henry Goddard*. General *Irish* giving his bond of that date in $20,000 to indemnify *Bradley* against *Thaxter*. The notes left with *Mr. Goddard* were for $7,929, described as arising from conveyance from *Bradley* to *Perham*, for benefit of *Irish*, to whom they belong after paying $1,987 and interest due from *Irish* to *Bradley*, when the condition of a certain obligation of said *Irish* to said *Bradley* of this date for indemnity shall be fulfilled, said *Bradley* to have a lien on said notes, the same to be retained by said *Goddard* for his

benefit for security of said note and obligation. On the 15th of *Sept.* 1835, *Mr. Irish* applied to *Thaxter* in presence of *Asaph Kendall,* and requested him to restore all of $4,228,80, which *Irish* said he had paid *Thaxter,* after retaining $1,327,50. *Irish* saying that the sum to be divided, was $10,572, cash payment, one quarter of that, was $2,643, and the half of that was $1,327, 50. *Thaxter* refused. Did not deny the truth of what *Irish* said.

These papers were left with *Goddard* for the accommodation of *Strickland* and *Perham* to obtain notes that would pass at the Banks designated.

For all just consideration between the parties before the Court, the sale was made before the first day of *October,* 1835, through the efficient service of General *Irish.*

As *Mr. Bradley* and *Mr. Irish* undertook to make a new arrangement, as *Mr. Irish* says, without *Mr. Bradley's* communicating to him, that *Thaxter* had required an extension, and it was against *Thaxter's* interest, we must consider the testimony of *Goddard* and *Adams* as evidencing circumstances very much affecting the answers of the defendants.

It is proved by the testimony of *Joseph Adams,* that to about midway between the 1st of *August* and 12th of *Sept.* 1835, he was the consulting counsel of *Thaxter* on an agreement for compensation. That his opinion in the fore part of *August,* was requested by *Thaxter,* on the two papers given to him by *Bradley,* and he gave it. Within a few days after, *Irish* came in, and the opinion was repeated to him. *Irish* wanted the opinion of other counsel, and it was agreed Judge *Preble's* should be taken. *Thaxter* returned, and reported that opinion. *Irish* then said, he thought there could be no doubt that the extension would be good and would hold *Bradley.* He requested *Thaxter* to go and consult Judge *Mellen.* It is proved by Judge *Mellen,* that *Thaxter* did consult him as to those papers, and he gave his opinion. A few days after giving it, *Bradley* overtook him in the street, and asked if he had given his opinion in favor of *Thaxter's* construction. Judge *Mellen* informed *Mr. Bradley* that he had, and stated to him the substance of that opinion.

By the testimony of said *Adams, Thaxter* said he had shown the obligation to Judge *Mellen,* and that he had given the same

opinion with the other three lawyers, that *Bradley* was bound by the extension. General *Irish* expressed himself fully satisfied, and said, "we will now fight the old scoundrel, for all he has in view, is to get 25 cents more the acre, than he agreed to sell the land for." *Irish* wished *Adams* to prevail on *Thaxter* to take 50 cents profit on the acre, and allow *Bradley* $4,50 per acre. *Irish* feeling that his situation was alarming, because his bond to *Smith & Marsh*, the purchasers, would expire the 15th of *September*, before *Bradley's* bond to *Thaxter* would expire. *Mr. Adams* told *Irish* there *was one way in which he could relieve himself from his difficulty*, if he was disposed to allow *Bradley* $4,50 per acre, and from the 50 cents profit pay *Thaxter* 37½ cents, retaining for himself, 12½ cents, which would give him a speculation in profit, of upwards of $2,500. *Irish replied with some warmth, that he would not do it, he would lose the whole first*, or in language of like import. *Mr. Adams* also testifies, that on the 16th or 17th of *September*, 1835, at the request of *Thaxter*, he called on *John Bradley*, told him that *Thaxter* wished to be informed, whether he intended to comply with the condition of his obligation, or obligations of 28th of *April*, then last, for the sale of the township, as the time limited therein, had but about a fortnight to run. And whether he wished *Thaxter* to make a regular and legal tender to him of the performance of the conditions of said obligation on his part. *Bradley* replied, that he should not take, or had not taken short of $4,50 per acre for said township, that $5,000 was profit enough for *Thaxter* to make on the sale of it. *It would do no good for Thaxter to do any thing more about it*, as the land had been sold, and the deed had been deposited with *Henry Goddard*, to be retained by him for a certain time, and upon certain conditions, and then to be delivered to the purchasers, and that he had a bond of indemnity from General *Irish*, against any claim that *Thaxter* might have against him, by reason of his bond or bonds to *Thaxter*. Produced and read it. During the interview, *Adams* endeavored to persuade *Mr. Bradley* to comply with what *Adams* considered the conditions of his obligation to *Thaxter*, but he persisted in saying that a half dollar an acre was profit enough, and especially that $5,000 was enough for *Thaxter* to make. *Adams* then asked him if *he wished or expected Thaxter* to comply with

his part of the conditions of said obligation, or to make him *any offer or tender of performance of said obligation on his, Thaxter's part.* He answered, *that he did not wish him to do it, as it could do no good, for he had deeded away the land.*

Irish expressed a strong desire that a tender should be made, proposed different methods, in which a tender of the notes and money might be made to *Bradley*, wished *Thaxter* to go forward himself and make a tender to *Bradley*, and demand performance, or that he should do it in company with *Irish*. *Thaxter's answer was, pay him or secure him his expenses, and 2s. 3d. per acre.*

Irish throughout, expressed great anxiety to have *Bradley* compelled to terms, according to the terms of his contract with *Thaxter*. To the question by *Irish's* counsel, Did he not make repeated offers to *Thaxter*, to do any thing in his power to bring about the result wished for by *Thaxter*? The witness answered, "Yes, he did, *excepting securing or causing Thaxter to be secured as aforesaid.*" To the question, was it in the power of *Irish*, to have done any thing effectively with *Bradley*, without *Thaxter's* cooperation or allowing him the use of *Bradley's* bonds, *Mr. Adams'* answer is, I don't know that it was, except upon these conditions. He subsequently explains, that he means to say, *Irish* uniformly said, that *Bradley* would not give a deed to the purchasers of the township, unless he could have $4,50 per acre, notwithstanding his bond to *Thaxter*, and that *Thaxter* would not give up his bond from *Bradley*, unless he could have or be secured in the sum of 2*s.* 3*d.* per acre, and his expenses paid.

Henry Goddard states, that General *Irish* did call upon him with an order from *Bradley*, to deliver certain papers or paper to him, and thinks the papers which were provided to be delivered by the papers left in *Goddard's* hands, and of which copies are annexed to his deposition, were by said order directed to be delivered, and he delivered the papers agreeably to said order. They were delivered the last part of *October*, or the first of *November*, 1835.

After the arrangement between *Bradley* and *Thaxter* of the 28th of *April*, 1835, *Mr. Bradley* was in a certain degree, in the light of a trustee to hold the property at $4,25 the acre, till the 1st of *October*, for the benefit of *Thaxter*.*

* *Legard* v. *Hodges*, 1*st Ves. Jun.*, 477. An agreement between persons raises a trust.

In *Garth* v. *Cotton*, 1 *Dickens*, 201, the observation of *Lord King* is quoted. "If it is a breach of trust, and the trustee convey the estate over, a court of equity is not to sit still and let others profit by the spoil." In page 218 it is said, that *collusion between two persons to the prejudice and loss of a third*, is, in the eye of the Court, the same as a fraud. And one principal ground of the judgment in that case, was *collusion appearing upon the face of the articles set forth in the answer.* Taking the papers set forth in the answer in the present case, could we give a different character to them? We mean not to use harsh epithets.

On contrasting the proof with the answers, *we are led to the conclusion, from all the acts of the parties, that there never was an unqualified assent of Thaxter to Irish's proceedings, but only with the proviso, that Bradley could not be holden on the papers of April* 28, *and equity requires, that the agreement then made, should be carried into effect.*

Appearing as it does, that *Bradley* should have allowed to *Thaxter* a profit of three quarters of a dollar per acre, and that in the adjustment between *Bradley* and *Irish*, he allowed only half a dollar. As *Irish* is entitled to half of *Thaxter's* profits, to wit, 37½ cents, subject to deductions, as stipulated between them, *Irish* and *Thaxter*, which may be adjusted between them; and as *Irish* may have relinquished some part of his proportion to *Bradley*, in his settlement with him, or may be possibly some how affected by his bond to *Bradley;* we do not propose to settle that matter between *Bradley* and *Irish.*

If *Mr. Bradley* pay *Thaxter* one eighth of a dollar per acre, he obtains his share, so far as it should come from *Mr. Bradley.*

The decree then should be that said *Joseph Thaxter* recover from the said *John Bradley* one eighth of a dollar per acre, being $2,643, with interest from the time it was received by said *Bradley*, on the 14th day of *September*, 1835, and costs of this suit.

And the bill as to *James Irish* is to be dismissed without costs for either party.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF OXFORD, MAY TERM, 1839.

BENNETT PIKE *vs.* JOHN WARREN, *& al.**

A new promise, made by one of two joint promisors, will take the case out of the statute of limitations against both.

If a Judge of the Court of Common Pleas decline to decide a question of law, and leave it to the jury for their decision, and they decide it rightly, exceptions will not be sustained.

EXCEPTIONS from the Court of Common Pleas, PERHAM J. presiding.

Assumpsit on an instrument in writing, witnessed by a subscribing witness, promising to pay the plaintiff $38, or put up a barn frame for him, dated *January* 1, 1824, and signed by the defendants, *Warren* and *Durgin*, and by one *Allen*, since deceased. *Durgin* was defaulted, and there was a brief statement put in by *Warren*, denying that the promise was made, or that the cause of action accrued, within six years next before the commencement of the suit. The plaintiff proved, that he presented the instrument to *Durgin*, one of the defendants, in the fall of 1833, and that *Durgin* said, that "the note was justly due, and he would pay it."

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* SHEPLEY J. did not sit in this case, not having been a member of the Court at *May Term*, 1836, when the argument was had. The opinion was delivered at the *Jury Term* in *Oxford* in 1838, as the Reporter has been informed; but it did not reach his hands until after the *Oxford* cases in the last volume were printed.

There was no other evidence offered to prove a new promise. *Durgin* was solvent until 1828, but since has been without property. The counsel for the defendants requested the Judge to instruct the jury, that the note offered in evidence was not a note in writing for the payment of money, and not within the tenth section of the statute of limitations; and that the promise of *Durgin*, made more than six years after the cause of action accrued, was not sufficient to revive the note or contract against *Warren*; and also, that if they believed, that *Warren* signed the note as surety, although it did not so appear on the note, he is discharged by lapse of time. But the Judge declined to give the instructions, "and left it to them to determine, whether the note or contract was or was not within the said tenth section of the act aforesaid, and whether the new promise of said *Durgin* proved as aforesaid was or was not sufficient to revive said note or contract against said *Warren*." The jury found for the plaintiff; and on inquiry by the Court, answered that they found *Warren* a principal, and not a surety. The counsel for the defendants filed exceptions.

Howard, for the defendants.

1. The note was not negotiable; was not a note for the payment of money; and not within the exception made in the tenth section of the *stat.* 1821, *c.* 62. The instruction on this point ought to have been given. 2 *Ld. Raym.* 1362; *Chitty on Bills*, 55, 430; *Gilman* v. *Wells*, 7 *Greenl.* 25. The finding of the jury was on the supposition, that this did come within the exception of the statute, as a witnessed note.

2. The admission of one joint maker of a note does not take the case out of the statute of limitations as to the other maker. *Whitcomb* v. *Whiting*, *Doug.* 652; *Atkins* v. *Tredgold*, 2 *B. & Cress.* 23; 3 *Kent's Com.* 50; *Hackley* v. *Patrick*, 3 *Johns. R.* 536; *Walden* v. *Sherburne*, 15 *Johns. R.* 409; 17 *Sergt. & R.* 126; 1 *Penns. Rep.* 135; *Ball* v. *Morrison*, 1 *Peters*, 351; *Exeter Bank* v. *Sullivan*, 6 *N. H. Rep.* 124; *Cambridge* v. *Hobart*, 10 *Pick.* 232; 1 *Marshall*, 189. The facts in this case give the reason for the principle. The party whose new promise is relied on was wholly insolvent; and ought not to be permitted to create a liability against the solvent maker, which did not exist by any act of his. 2 *Stark. Ev.* 898. That the principles embraced

in the requests for instruction were for the decision of the Court, and not the jury, is too clear to need the citation of authorities.

Jameson, for the plaintiff.

1. If the jury rightly decided the questions of law, erroneously submitted to them, the Court will not disturb the verdict. *Springer* v. *Bowdoinham*, 7 *Greenl.* 442; *Copeland* v. *Wadleigh*, *ib.* 141.

2. This may not, according to the decision in *Gilman* v. *Wells*, fall within the exception in the statute, but this matters not on the other facts in the case, showing a new promise from one of the promisors. A new promise by one of several joint promisors takes the case out of the statute of limitation as to all. This case cannot be distinguished from *Getchell* v. *Heald*, 7 *Greenl.* 26; 2 *Stark. Ev.* 897, and cases there cited.

D. Goodenow replied for the plaintiff.

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

Emery J. — Much of the argument in behalf of the defendant has been devoted to assailing the decision of the case of *Whitcomb* v. *Whiting*, *Douglas*, 650.

It was on a joint and several note executed by the defendant and three others, and having proved payment by one of the others, of interest on the note and part of the principal within six years, the Judge thought *that* was sufficient to take the case out of the statute as against the defendant, and a verdict was found for the plaintiff. It was observed, *per Curiam*, that when cases of fraud appear, they will be determined on their own circumstances. Payment by one is payment for all, the one acting virtually as agent for the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due. Beside, the defendant has had the advantage of the partial payment, and therefore must be bound by it. A similar attack was made upon the law of this case in *Atkins* v. *Tredgold*, 2 *Barn. & Cress.* 23, and *Chancellor Kent* says, it seems now to be considered as an unsound authority by the court which originally pronounced it. Certainly, however, not by the same members of that court who pronounced the decision. Their names and their fame have shone resplendently ever since the pub-

lication of that decision." And it is a little curious that in *Perham* v. *Raynal*, 9 *Moore*, *C. B. Rep.* 566, the authority of *Whitcomb* v. *Whiting* is reinstated, and held to contain sound doctrine, so far as that an acknowledgment within six years, by one of two makers of a joint and several note, revives the debt against both, though the other had signed the note as surety.

The jury having found that *Warren*, the defendant, was a principal on the note or agreement declared on, and not a surety, it becomes quite unimportant to discuss the propriety of the request to the Court to instruct the jury, that if they believe that *Warren* signed the note as surety, he is discharged by lapse of time of eight or nine years. Certainly, however, the authority of the case of *Perham* v. *Raynal* would be in favor of the Judge's declining to give the requested instruction. The prayer to the Court to instruct the jury that the note offered in evidence by the plaintiff, is not a note in writing for the payment of any sum of money, and does not come within the 10th section of the statute of *Maine*, entitled an act for the limitation of actions real and personal, and writs of error was by no means an improper request, and if the evidence of the new promise depended only on the circumstance that the note was attested by the witness, we should think that the case cited of *Gilman* v. *Wells*, 7 *Greenl.* 25, would be conclusive in favor of the position assumed by the defendant's counsel. The testimony of the witness is full and direct as to the new promise by *Durgin*, and the case presents no evidence that any reliance was placed by the jury on the fact that the note was witnessed. If they believed the testimony, it was entirely immaterial whether the note was attested by a witness, or not. Nor can we entirely approve the course of the Judge in leaving to the jury, "to determine whether the note or contract was or was not within the said tenth section of the act aforesaid, and whether the new promise of said *Durgin* proved as aforesaid, was, or was not sufficient to revive said note or contract against said *Warren*." According to the course of decisions in this Court, we deem it a question of law. *Perley* v. *Little*, 3 *Greenl.* 97; *Miller* v. *Lancaster*, 4 *Greenl.* 159. Still we are satisfied, that the presentation of the question in this light was made in a spirit of liberality, and with the intention, that no formal entrapping of the defendant should follow from the

evidence; but that the most favorable construction should be open for the jury to make on the whole subject. And we are also of the opinion that in conformity with the case of *Getchell, Adm'r* v. *Heald*, 7 *Greenl.* 26, and *Greenleaf & al.* v. *Quincy & al.*, 3 *Fairf.* 11, the matter is thoroughly settled as the law in this State, that the admission of one of several joint debtors, after the statute of limitations had attached, revived the debt as to all; so that the jury have decided the question correctly, and we cannot disturb the verdict on that account. *Copeland* v. *Wadleigh*, 7 *Greenl.* 141; *Springer* v. *Inhabitants of Bowdoinham*, *ib.* 442. The exceptions are overruled.

Judgment on the verdict.

Ebenezer W. Blake *vs.* Alden Blossom.

Where depositions are taken out of the State by persons duly authorized, they may be admitted in civil actions, or rejected, at the discretion of the Court, although the mode of taking may vary from our forms.

In an action of trespass for taking goods, where the defence was, that the goods were attached as the property of a third person, and where the jury found a verdict for the plaintiff for "the full value of the goods attached and interest from the time they were so attached to the present time," and then separated, and afterwards in open court ascertained the amount, and inserted it in their verdict, a new trial was not granted.

This was an action of trespass for taking the plaintiff's goods. With the general issue, the defendant filed a brief statement, setting forth, that he was sheriff of the county, and that *McMillan*, one of his deputies, attached the goods on several writs against one *Kilgore*, and that the same were then *Kilgore's* property. The description of the goods in the brief statement was, "so much of the goods and chattels in the plaintiff's declaration mentioned, as are specified in the schedule annexed, being seven pages, marked A, B, C, D, E, F, G, as the property of said *Kilgore*." The return of the deputy on the writs of the attachment of the goods was merely thus: "By virtue of this writ I have attached the goods in the store recently occupied by *E. C. Kilgore*, valued at nine hundred

dollars." There was no reference to any schedule, but there was a charge for taking an account of the goods. The trial was before EMERY J. and came before the Court on a motion of the defendant's counsel for a new trial, and on exceptions by the same counsel. There was a report of facts by the Judge, pertinent to the motion for a new trial. From the *exceptions* it appears, that several depositions taken in the State of *New-Hampshire* were offered by the plaintiff, and objected to by the defendant, "as insufficient, because it does not appear, that the deponents were first sworn, before giving their said depositions, which objection was overruled by the Judge who presided, and the depositions were admitted, and submitted to the jury." The caption of the deposition states that, "Then the within named A. G., after due caution and careful examination, made oath, that the within deposition by him subscribed contains the whole truth and nothing but the truth;" and that the defendant was present and did not object. From the report of the Judge it appears, that on the trial certain schedules were used by the defendant, and asserted to be descriptive of the articles taken on the writs of attachment under which the defendant justified, and that the return of the officer stated the value of the goods to be $900. "The jury were directed by the Court to agree, if they could, on the amount of the damages, and make out and sign their verdict, and hand it into Court in the morning, but that they need not trouble themselves to reduce it to form, and that this could be done in Court. And the parties, after the charge of the Court, were respectively requested to deliver the papers used in evidence to the jury, which was said to have been done. After the jury had agreed upon their verdict, they sealed up their verdict, separated, and handed it into Court the next morning, as set forth in the defendant's motion for setting aside the verdict. The foreman on handing in the verdict stated, that one leaf of the schedule, marked G, was not handed to the jury. That paper had been produced on the trial, by the defendant's counsel. Search was made by all the counsel for both parties for the paper, but it could not be found. Whereupon in open Court the jury took a verdict, reduced to form in Court, based on $900 as the measure of value of goods returned, taken by defendant's deputy on those writs, and interest calculated thereon, amounting to one thousand and fifty dollars,

examined, agreed thereto, signed the same, and it was duly affirmed, the defendant objecting." The verdict agreed on by the jury before they separated, was in these words. "The jury have agreed to a verdict in favor of the plaintiff, that he shall have the full value of all the goods attached, and interest from the time they were so attached to the present time. Attest, *John Leavitt*, foreman." The motion for a new trial recited the verdict first given in; the verdict affirmed; the principal facts stated in the report; and concluded by moving, that the verdict be set aside, and a new trial granted, because the same was rendered and affirmed irregularly and illegally. At the argument of the motion for a new trial, it was shown, without objection, that the valuation of the goods in the schedule was the same as in the officer's return, $900.

D. Goodenow and *Codman*, for the defendant, in their argument to sustain the exceptions, cited *Stat.* 1821, *c.* 85, § 3; *Amory* v. *Fellowes*, 5 *Mass. R.* 225; *Bradstreet* v. *Baldwin*, 11 *Mass. R.* 229; *Braintree* v. *Hingham*, 1 *Pick.* 245. In support of the motion for a new trial, they cited *Jackson* v. *Williamson*, 2 *T. R.* 281; *Coffin* v. *Jones*, 11 *Pick.* 45; *Bolster* v. *Cummings*, 6 *Greenl.* 85.

Fessenden & Deblois, argued for the plaintiff, and cited on the exceptions, *Clement* v. *Durgin*, 5 *Greenl.* 9; *Rule of Court*, 30; 1 *Paine*, 358; *Vail* v. *Nickerson*, 6 *Mass. R.* 262. On the motion for a new trial, they cited *Bolster* v. *Cummings*, 6 *Greenl.* 85; *Winslow* v. *Draper*, 8 *Pick.* 170; *Ropps* v. *Barker*, 4 *Pick.* 239; 7 *Johns. R.* 32; 3 *Johns. R.* 255; 1 *Gallison*, 360; *Bac. Ab. Verdict, H*; 1 *Cowen*, 221; 2 *Cowen*, 589; 4 *Cowen*, 39; 1 *Conn. R.* 401.

The opinion of the Court was prepared by

WESTON C. J. — The statute of this State, prescribing the mode of taking depositions, provides, that the deponent shall take the oath required, before he is examined, and before he subscribes the testimony by him given. *Statute* of 1821, *c.* 85, § 3. As the law formerly stood in *Massachusetts*, the oath was administered, after the deposition had been committed to writing and signed by the deponent. It does not appear in the captions objected to, that the oath was administered before the examination and subscription,

but it is rather to be understood, that it was administered afterwards. The form of the oath was such as is required by our law; and it appears that the adverse party was notified and was present, and it does not appear that he made any objection to the manner in which the depositions were taken. They were taken in *New-Hampshire*, and the sixth section of the statute before referred to provides, that depositions taken out of the State, by persons duly authorized, may be admitted as evidence in any civil action, or rejected, at the discretion of the Court. Accordingly, depositions so taken, have been permitted to be used here, although the mode of taking has varied from our forms. In the case before us, we are of opinion, that the discretion of the Court was properly exercised in receiving the depositions.

In regard to the completion of the verdict, by the computation of damages, after the jury had separated, the case has a near resemblance to that of *Bolster* v. *Cummings*, 6 *Greenl.* 85, where, as here, the title to the property, and not its value, was the principal question in controversy. The value of the goods was stated in the return of the officer, and although there was a schedule, in which the goods taken were detailed, it is not suggested, that it afforded any evidence, which would have required or justified a reduction of the amount set forth in the return. Indeed the presiding Judge states, that that was the lowest estimate. The return then, being *prima facie* evidence of the value, and there being no opposing or controlling testimony to reduce it, it was only necessary to add thereto the interest, which was a mere matter of computation. The jury had settled every point, which labored in the cause, before they separated; and it does not appear to us, that former precedents, or the justice of the case, requires that their verdict should be disturbed. In the case of *Jackson* v. *Williamson*, 2 *T. R.* 281, where the Court refused to increase the damages found, upon the affidavit of the jurors, the application to do so was made some time after the verdict had been received, and the postea made up. It is not to be deduced from that case, that the jury would not have been permitted to amend their verdict, before it was affirmed.

Judgment on the verdict.

Thomas Calder *vs.* Seth Billington.

Where a negotiable note has been assigned, but not indorsed, proof by the maker, that there was no consideration, or that the note was fraudulently obtained by the payee, is admissible.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Assumpsit on a note made by the defendant to the plaintiff, or order, dated *December* 28, 1835, for $40, payable in one year from date, with interest. After the note had been read to the jury the defendant offered to prove, that the note was fraudulently obtained, and without consideration. The plaintiff offered to prove by parol, that about two months after the note was given, and long before it became due, it had been sold and delivered for a valuable consideration, to one *Samuel Gray*, for whose benefit this action was brought, and who had no knowledge of any objection to the note. This evidence was objected to by the defendant, but the Judge overruled the objection, and the proof was made. The note was not indorsed, and the plaintiff refused to indorse it. There was no evidence of any notice to the defendant of the assignment to *Gray*. The defendant then renewed his offer to prove that the note was fraudulently obtained, and wholly without consideration. The Judge refused to receive the evidence, and a verdict was returned for the plaintiff. The defendant excepted.

The case was argued in writing.

R. Goodenow, for the defendant.

A negotiable promissory note is assignable for an adequate consideration by delivery only without writing. But in such case, it is but the assignment of a chose in action, and not the transfer of the note with its negotiable qualities, which can be done only by indorsement. *Jones* v. *Witter*, 13 *Mass. R.* 304. It is not entitled to any of the immunities of a negotiable note, until actually indorsed.

The equitable assignment of a chose in action, whatever it may be, merely puts the assignee in the place of the assignor, at the time of the assignment and notice thereof. The same defence can be made, on the facts then existing, as if the assignment had

never taken place. *Hatch* v. *Greene*, 12 *Mass. R.* 195; *Tucker* v. *Smith*, 4 *Greenl.* 415; 3 *Cowen*, 353; 20 *Johns. R.* 144; 18 *Johns. R.* 493; 2 *Caines*, 369.

Codman and *May*, for the plaintiff, contended, that the *bona fide* purchaser, holder, or assignee of a negotiable note, not indorsed, but purchased before it is dishonored, is entitled to the same protection, as if the note had been indorsed at the time. Each of the counsel cited *Titcomb* v. *Thomas*, 5 *Greenl.* 282; *Cone* v. *Baldwin*, 12 *Pick.* 545; *Goddard* v. *Lyman*, 14 *Pick.* 268; *Bayley on Bills*, 348, 544, *and notes*. In addition, *Codman* cited, 10 *B. & Cress.* 122; 2 *Jac. & Walker*, 243; 2 *Johns. R.* 50; *Perkins* v. *Challis*, 1 *N. H. Rep.* 254; *Babson* v. *Webber*, 9 *Pick.* 163. *May* cited *Jones* v. *Witter*, 13 *Mass. R.* 304; *Chitty on Bills*, 8*th Ed.* 263, 270, *and notes*; *Gooch* v. *Bryant*, 13 *Maine R.* 386; *Thurston* v. *McKown*, 6 *Mass. R.* 428; *Ayer* v. *Hutchins*, 4 *Mass. R.* 370; 3 *Caines*, 279; *Wilson* v. *Holmes*, 5 *Mass. R.* 543; *Grew* v. *Burditt*, 9 *Pick.* 265; 1 *Dane*, 389.

The opinion of the Court, after advisement, was prepared by

Weston C. J. — The free circulation of negotiable paper, has been found to be useful in the community. When, therefore, such paper has been negotiated, before it has become due, the law will not suffer it to be impeached, or sustain any matter in defence, by way of offset, in the hands of a *bona fide* holder, without notice. Unless where notes are payable to bearer, when the legal title passes by delivery, the settled mode of transferring negotiable notes is by indorsement. This not only passes the property, but it entitles the holder to sue in his own name. It had been doubted, whether the sum due could be assigned in any other mode, but in *Jones* v. *Witter*, 13 *Mass. R.* 304, it was held, that it would pass by a delivery of the note, for a valuable consideration.

The effect of this is, to pass the equitable interest to the assignee, who is thereby substituted for the payee. His equitable claim extends no further. Such a note is not negotiated in the usual course of business, without the indorsement of the payee. When this is done, the holder is protected, unless the note has been dishonored, or received under circumstances, calculated to excite suspicion, or to put the party on his guard. It is the circulation of

negotiable paper, in the usual and ordinary course of business, that it is the policy of the law to aid and protect.

If a purchaser will be satisfied with an equitable assignment, without having the title duly and legally transferred, we are aware of no reason, which should place him in any better condition, than any other assignee of a chose in action. If any thing is due, or whatever is due, at the time of the assignment, he is entitled to the benefit of it. Beyond this, as it is a transaction not in the usual course of business, he does not appear to us to have any just claim. In *Cone* v. *Baldwin*, 12 *Pick.* 545, the note in suit was payable to bearer. If the plaintiff is by the assignment only substituted for the payee, every ground of defence is open, which existed at that time. In our opinion therefore, proof on the part of the defendant of the want of a consideration, or of fraud in the payee, was legally admissible. The exceptions are accordingly sustained, the verdict set aside, and a new trial granted.

Joseph Matthews *vs.* Alden Blossom.

Where the process is by original summons wherein there is no command to attach the goods or estate, a service by leaving a *summons* is not legal; and the objection may be taken by motion in writing, if seasonably made.

The Court has power to grant an amendment, permitting a writ of original summons to be changed to a writ of attachment.

Such amendment is not to be considered matter of form, but of substance, and to be granted on terms, under the fifteenth rule of this Court.

At the commencement of the term at which the action was entered, and before the jury were empannelled, *S. Emery*, counsel for the defendant, in writing, moved the Court, that the writ abate, and that the action be dismissed, because the writ was not served upon the defendant by reading the same to him, or by leaving an attested copy, as the law requires, but was served merely by leaving a summons at his last and usual place of abode; and that said writ is an original summons, wherein there is no command to attach the goods or estate of the defendant; all which appears on the

face of the writ. Upon which motion, the facts alleged therein being apparent on the writ, EMERY J., then holding the Court, adjudged that the service was good and sufficient, and ordered the defendant to answer over. To this the defendant excepted. At the same term, *Fessenden & Deblois* and *Codman* and *Fox*, counsel for the plaintiff, moved for leave so to amend the writ, that it should read as a common writ of attachment.

D. Goodenow and *S. Emery*, argued for the defendant, and insisted that the legislature had established the different forms of writs, and that the Court had no power to permit an amendment like this, which would wholly change the form of action, and would in effect make a service good, which before was clearly bad. The plaintiff may have an option, which form of action to adopt, but when he has made his selection, he must abide by it, or go out of Court and commence anew.

Fessenden & Deblois, for the plaintiff, argued, that it was mere matter of form, and that it was clearly amendable. They cited *Hearsey* v. *Bradbury*, 9 *Mass. R.* 95; *Campbell* v. *Stiles*, *ib.* 217; *Wood* v. *Ross*, 11 *Mass. R.* 271; *stat.* 1821, *c.* 59, § 16; *McLellan* v. *Crofton*, 6 *Greenl.* 308.

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

SHEPLEY J. — The first and second sections of the *stat. c.* 59, point out the manner of serving writs. When a writ of attachment is used the service is to be made by delivery to the party, or leaving at his place of abode "a summons in form prescribed by law." And when "the process is by original summons" the service is to be made by reading the same to the party or by leaving a certified copy at his place of abode. This process being in the form of an original summons was served in the manner prescribed for a writ of attachment; and the exceptions are sustained.

A motion is made to amend the writ by inserting a command to the officer to attach the goods and estate; and thereby in effect to change the writ from one form to the other, for the part relating to the arrest of the body has been abolished, except in special cases.

The legislature having prescribed the form of writs, it has been doubted, whether the Court could regard them as formal in the

sense in which matters of form are spoken of in the sixteenth section. That section prohibits the Courts from granting a continuance, or allowing costs when amendments are made by reason of "defect or want of form only." Could it have been the intention to regard those matters, the form of which they had prescribed by law, as so immaterial as to authorize the change from one writ to another to be regarded as a circumstantial error, or want of form only? Admit such not to have been the intention, and the writ is then to be regarded so far as respects the selection of one or the other a matter of substance. By the rules which this Court, being authorized by law, has made, two classes of amendments are allowed. One applies to matters of form only; the other to matters of substance. The fifteenth rule allows amendments in matters of substance on payment of costs, or on such other terms as the Court shall impose. If the form of the writ be regarded as matter of substance, it may then be amended under this rule upon terms. And when the promotion of justice seems to require it, and the rights of third parties are not affected, there does not seem to be any important reason for refusing it.

Amendment granted upon terms.

The STATE *vs.* JOSEPH DEARBORN.

The proprietors of a toll-bridge have no lawful right to stop a traveller by force from passing to the toll-house of the bridge, because he refuses to pay toll until he arrives at the toll-house, where the rates of toll are exhibited.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

This prosecution for an assault and battery, was originally before a Justice of the Peace, on the complaint of one *Peterson*, and came by appeal to the Court of Common Pleas. There it was proved, that *Dearborn*, on the evening of *Sept.* 25, attempted to pass the *Canton Point Toll-Bridge*, and when he had arrived within 35 or 40 rods of the toll-house, upon which was a board or sign upon which were expressed the rates of toll, he was met by

the complainant, a brother of *Peterson*, the toll-gatherer, who had been employed that day as his assistant, just under the covered part of the bridge, about half an hour after sunset, the evening being rainy; that the toll-gatherer was about half way between them and the toll-house; that the assistant insisted upon payment of the toll, and *Dearborn* refused to pay, saying that he would pay at the toll-house, and no where else; that the assistant seized the reins of *Dearborn's* horse and held him fast; that *Dearborn* repeatedly told him, that if he did not release his hold of the horse, he would strike him or knock him down; that the horse was not released, and thereupon *Dearborn* struck him a violent blow across his head with the butt end of his whip. On this evidence, *Dearborn's* counsel contended, among other points taken, that the assault and battery was justifiable on the grounds, that the complainant not being toll-gatherer, had no right to demand toll; that toll was no where demandable, except at the toll-house; that in no case and under no circumstances had a toll-gatherer a right to seize hold of and detain by violence the person or property of an individual passing a toll-bridge, but that if payment of toll was refused, he must have his remedy at law to recover the toll, or the statute penalty, or by shutting the gate to prevent his passing; that the complainant was a violator of the peace and the first aggressor, and that the respondent had done no more than he had a right to do in self defence. WHITMAN C. J. instructed the jury, that so much violence only is justifiable as is absolutely necessary for the protection of the person defending himself; that the act of *Dearborn* in this case was not of that character; that the defence, that the defendant had a right to pass the bridge toll-free could not avail him, as he did not set it up at the time; that to render himself liable to the statute penalty for passing a bridge without paying toll, he must use force and violence; that toll-gatherers have a right to employ as many assistants to demand and receive toll as they may deem necessary; and that they have a right to stop persons refusing to pay toll on demand, either by shutting the gate, or by stopping the person, as in this case, from passing. The verdict was guilty, and the respondent filed exceptions.

Codman & Fox, for *Dearborn*, insisted on the grounds of defence by them taken at the trial in the Court of Common Pleas,

and cited *stat.* 1827, *c.* 357, § 1; *Nichols* v. *Bertram*, 3 *Pick.* 342; *stat.* 1821, *c.* 138, § 8; 1 *Com. Dig.* 436; *Almy* v. *Harris*, 5 *Johns. R.* 175; 4 *Bl. Com.* 490.

D. Goodenow, Attorney General, for the State, remarked, that as the assault and battery was proved, the justification must be made out on the other side, or a conviction must take place; that the bridge was private property, which the defendant had no right to pass over, but on compliance with certain conditions; that *Dearborn* had not performed these conditions; and that therefore he was lawfully stopped under the direction of the toll-gatherer. The penalties given for forcibly passing the bridge are merely cumulative, and will not protect a man in the commission of an assault and battery. *Conklin* v. *Elting*, 2 *Johns. R.* 410.

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

Weston C. J. — The proprietors of toll-bridges are entitled to receive the tolls, granted to them by the legislature. A question arises, by what remedies this right may be enforced. It may, in the first place, be enforced by suit. We are inclined also to the opinion, that at the place of receiving toll, they might interpose a gate or bar, which they might refuse to open, unless their toll was paid. And if a party, without paying, will pass by force and violence, or attempt to pass, without paying the legal toll, if demanded, he is liable to a penalty, to be recovered for their use. *Stat.* of 1827, *c.* 357.

If these remedies prove insufficient, it is for the legislature to provide others. The right to seize and stop the person of the traveller, or his horse or carriage, is no where given. The law does not suffer rights to be enforced by violence. The exercise of the power claimed by the toll-keeper, would rarely fail to occasion a breach of the peace. And if such a right existed, which we do not admit, we are satisfied that it could not be exercised, until the traveller had arrived at the place where toll was receivable. The statute, from which these proprietors derived their power, recognizes such a place, where also it requires, that the rates of toll should be affixed. The presiding Judge having ruled differently, the exceptions are sustained, and a new trial granted. Although

the toll-keeper had no right to seize the defendant's horse, yet if he repelled the assailant by unwarrantable violence, he will fail in his justification.

The STATE *vs. The Inhabitants of* FRYEBURG.

Although the inhabitants of a town may be excusable for a time, when a road becomes defective and out of repair from causes beyond their control, yet they are subject to indictment for unreasonable delay and neglect to put *any one road*, within the town, into suitable repair.

When the obstruction, which occasioned the prosecution, has ceased to exist at the time of trial, so that no expenditure upon the road is necessary, still the town will not be excused from the payment of at least a nominal fine and costs.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The indictment for neglecting to keep a road in repair, was found *January Term*, 1837. At the trial, which took place at the *November Term*, of the Court of Common Pleas, the defendants offered to prove, that prior to the finding of the bill, they had been indicted in the Supreme Judicial Court, for neglecting to open the same road, and make it safe, passable, and convenient; that a fine had been put on them, and a superintendant appointed to expend the fine upon the road, and to make return into that Court at the term next after the service was performed; and that when the bill was found, the superintendant had expended part of the fine upon the road, but had made no return of his doings. His return was made before the trial, by which it appeared, that when the bill was found, he had expended about one half of the fine, and proposed to expend the residue during the following season. The defendants contended, that the road was to be considered in the custody of the law, and that they were not liable to another indictment on account of its being out of repair, until the fine had been fully expended, or the time of executing the commission had expired. But "the Judge ruled otherwise." It appeared in evidence, that the cause of complaint was partly for neglect to keep the road

open in the winter, during which the bill was found, when blocked up with snow; and that there was another road running nearly parallel with this from the same points, but somewhat further, which during that time was kept open and convenient for public travel. "The defendant hereupon contended, that as confining the travel wholly to the latter road, the travelling would be made easier and better, and therefore more convenient and safe for public travel, than if both roads were broken out, and the travel divided between them, they were not bound to keep this road open and broken out; especially as the last winter was unusually severe in the depth and drifting of the snow; but the Judge ruled otherwise." The defendants objected, that no judgment could be rendered against them for not breaking out the road, as no fine could be expended in that way, the snow having long before melted away. The Judge overruled the objection. It was shown, that the road was otherwise out of repair. The verdict was guilty, and the defendants filed exceptions.

Fox argued in support of the grounds taken at the trial, and cited *stat.* of 1824, *c.* 300, § 4; *stat.* of 1836, *c.* 216, § 1; *Lowell* v. *Moscow*, 3 *Fairf.* 300; *Exparte Baring*, 8 *Greenl.* 137; *State* v. *Kittery*, 5 *Greenl.* 254; *Rice* v. *Comm'rs of Highways*, 13 *Pick.* 22.

D. Goodenow, Attorney General, for the State.

The complaint is, that the Judge decided the law instead of leaving it to the jury. The decision is nothing more than that the towns are obliged to keep *all* their roads in repair. The cases relied on in defence show, merely that a town is not obliged to keep in repair a road laid out, until the time fixed by law for its being opened as a public road. That the town has once before been indicted for neglecting to keep the same road in repair, is no bar to this indictment, and the road may have been once repaired, and again have become dangerous.

The opinion of the Court was prepared by

WESTON C. J. — The law imposes upon towns the duty of keeping the highways in a state of repair, so as to be safe and convenient for travellers, with their horses, teams, carts and carriages

at all seasons of the year. From the pressure of this duty, there must be, by necessary implication, some exceptions. As where a road has sustained an injury, by the operation of causes, over which the town has no control, reasonable time must be afforded to put it in a convenient and safe condition. So if it is rendered impassable while a bridge is rebuilding, or other necessary repairs are in progress, under the authorities of the town, or under an agent appointed by the Court, towns are excused, if they use suitable precautions to put the public upon their guard. *Frost* v. *Inhabitants of Portland*, 2 *Fairf.* 271. The case presents no such justification, on the part of the defendants. Nor does the fact, that there existed, at no great distance, a road nearly parallel, afford any matter in defence. The competent authorities had adjudged both roads to be of public necessity and convenience. The obstruction, which occasioned the prosecution, has ceased to exist, so that no expenditure upon the road is necessary on that account, but this does not in our judgment excuse the town from being liable at least to a nominal fine and costs, for the delinquency which has been found against them.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF LINCOLN, MAY TERM, 1839.

Moses Riggs *vs.* James Sally.

By a devise of lands to one, "to hold the same to him and the heirs of his body forever," the devisee takes an estate in tail general.

If a testator devise an estate tail to his oldest son, and afterwards in the same will provide, that if the oldest son should die without issue of his body, "that then from and after his death, the estate herein before devised to him shall enure to my second son, and the male heirs of his body forever;" and if the oldest son die without ever having had issue, the second son having died before the oldest son, leaving four sons surviving the oldest son of the testator; on the death of the first devisee, the oldest son of the second devisee takes the estate in fee tail.

A tenant in tail, by the provisions of the *Massachusetts* statute of 1791, *c.* 61, in relation to entailed estates, which was reenacted in the *Maine* statute of 1821, *c.* 36, § 4, has the power to defeat the entailment and to convey in fee simple, although the will was made and approved before the passage of the first act.

Writ of entry. From a statement of the parties, referring to several papers, it appears, that in 1790, *William Butler*, being then seized of the demanded premises, made his last will and testament, and died in 1791, and the will was duly approved. In that will was contained the following words. "Imprimis, — I give and bequeath to my beloved son *William* all my lands on *Arrowsick Island*, in *Georgetown*, to hold the same to him the said *William Butler*, and the heirs of his body forever." Then follow several devises, and among them, one to his son *Thomas*. The next clause

in the will is this. "Item. — I will and ordain, that in case my son *William* should die without issue of his body begotten, that then from and after his death, the estate herein before devised to him, shall enure to my son *Thomas Butler* and the male heirs of his body forever." *William Butler*, the son, entered into the premises soon after the death of his father, and remained in possession until his death in 1835, without ever having had issue. On *April* 22, 1828, *William Butler*, by his deed, witnessed by three witnesses, acknowledged and recorded, and for a valuable consideration expressed, made a conveyance of the same premises to the demandant and to his heirs and assigns. The parties agreed, that if the Court should be of opinion, that it was competent for the tenant to impeach this deed, this question should be submitted to a jury. *Thomas Butler*, son of the testator, died in 1817, leaving four sons, *George*, the *oldest son*, *Thomas*, *John*, and *James*. On *July* 26, 1836, *George Butler*, made and executed a deed, *bona fide*, in the presence of two witnesses, to *James Leman*, his heirs and assigns, which was acknowledged and recorded. On the same day *Leman* made a deed thereof to the demandant. The tenant defends under the title of *Thomas* and *John Butler*, grandsons of the testator, and sons of *Thomas Butler*.

The case was argued in writing, by *Mellen* and *Randall*, for the demandant; and by *Mitchell*, for the tenant.

For the demandant it was said, that it was not necessary to cite authorities to show, that by virtue of the devise to *William Butler*, he became *tenant in tail general* of the premises devised to him. He could bar the entail, and did so, by his deed to the demandant. But it is said, that the tenant can impeach this deed; and by agreement he is to have the opportunity of doing so, if he have the right in the situation in which he stands. If the deed be not valid then the demanded premises are in *George Butler*, the oldest son of *Thomas*, deceased, and the defendant is a mere stranger, and as such cannot contest the deed to the demandant. There is no distinction in this respect between deeds to bar entails and other deeds. *Knox* v. *Jenks*, 7 *Mass. R.* 488; *Worcester* v. *Eaton*, 11 *Mass. R.* 370; *Nightingale* v. *Burrell*, 15 *Pick.* 104; *Steele* v. *Adams*, 1 *Greenl.* 1; *Emery* v. *Chase*, 5 *Greenl.* 232; 3 *Mason*,

357; 2 *Johns. R.* 230; 3 *Johns. R.* 471; *Lithgow* v. *Kavanagh*, 9 *Mass. R.* 161; *Wheelwright* v. *Wheelwright*, 2 *Mass. R.* 447. But if nothing passed by the deed of *William Butler*, then *George Butler* took an estate tail at the time of the death of *William*, as next in succession, *per formam doni*; and we claim under him by deed, to which there is no objection.

Mitchell, for the tenant, contended, that *William Butler* never was tenant in tail with the right to bar the second son. *William* was only tenant for life with limitation conditional to his heirs, if any, and if not, to *Thomas*, the next son. The Court should give the will such construction, as is consistent with the manifest intention of the devisor, with common sense and the laws of the land. 4 *Kent's Com.* 536. The statute respecting wills and tenements, *c.* 38, § 3, gives the true construction, and is a full answer to the demandant's claim. 12 *Johns. R.* 389. This will was made and published in 1790, and is to have effect according to the law as it then existed. At that time nothing but a common recovery could bar an estate tail, and the legislature could not affect rights then existing by any law passed afterwards. But this is not an estate tail. *Sayward* v. *Sayward*, 7 *Greenl.* 210; 1 *Johns. R.* 440; 16 *Johns. R.* 382; 4 *Kent*, 127, 128, and *note* to page 128.

Thomas Butler having died long before *William*, in 1817, his children inherit by representation, and thus each takes his equal share, unless *George* had a double share, as the oldest son. As *William Butler* could convey only his life estate, it is not important to inquire whether his deed conveyed any thing. But we have the right to contest it. 2 *Kent*, 450; *Strange*, 1104; 2 *Vent.* 198; 3 *Day*, 90; 5 *Pick.* 431; 4 *Conn. R.* 203; 15 *Johns. R.* 503; 3 *Camp.* 33; 2 *Vermont R.* 97; 2 *Paige*, 30. The deed from *George Butler* conveys but one share to the demandant. The case stands thus: 1. *William Butler*, the devisee, had an estate for life only, unless he had heirs of his body. 2. That under the will he took an estate in *fee conditional* with limitation. 3. That the heirs of *Thomas*, the devisee, inherit, by representation, from their ancestor in equal proportions.

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

WESTON C. J. — The clause in the will, under which *William Butler* claimed, taken by itself, devised the estate in controversy to the said *William*, in fee tail general, by apt and proper words, having that legal effect. There is in that part of the will no condition or contingency, upon the happening of which, the estate was otherwise limited. But in another clause, it is provided, that in case *William Butler*, the devisee, should die without issue of his body begotten, that then, from and after his death, the same estate should enure to *Thomas Butler*, another son of the testator, and the male heirs of his body forever. The limitation over must be by way of executory devise, or as a contingent remainder.

It is contended, by the counsel for the tenant, that the effect of this clause, is to reduce the estate tail, which would otherwise have been given to *William Butler*, to an estate for life, with a conditional limitation to the heirs of his body, if he had any, and that the limitation over to *Thomas*, if *William* died without issue, was good and took effect, as an executory devise. As an estate tail was expressly given to *William*, it may be difficult to support this construction consistently with the current of authorities.

The question, whether in devises of this kind, a definite or indefinite failure of issue is intended, has been frequently brought under discussion in courts of justice. The general doctrine of the books, from an early period of the *English* law, is, that a limitation over, if the first devisee dies without issue of his body, is to be understood to mean an indefinite failure of issue, that it is accordingly void as an executory devise, and that the first devisee takes an estate tail. And this is to be the construction, unless it clearly and distinctly appears by the will, that the failure of issue, upon which the devise over depends, has reference to the time of the death of the first devisee. The cases, in which this distinction has been taken, have arisen generally, if not uniformly, where the estate is given to the first taker, without qualification, and in a subsequent clause is given over, if he die without issue, or without leaving issue. And there have been very refined constructions, turning upon slight variations in the language used. But it is apprehended, that it would not be easy to find a case, in which this point has

been agitated, where an estate tail has been given to the first taker, as here, in express terms. Questions of this kind are of such rare occurrence in our jurisprudence, that it would be more curious than useful, to go into a consideration of the cases, in which they are brought under discussion. We deem it unnecessary however to decide, whether *William Butler* took an estate tail, with a contingent remainder to *Thomas Butler*, or whether he took an estate for life, and if he died without issue, with limitation over to *Thomas* in tail male, by way of executory devise.

If *William Butler* took an estate tail, he had, under the *statute* of 1821, *c.* 36, § 4, which is a reenactment of the *statute* of *Massachusetts* of 1791, *c.* 60, the power of defeating the entail, and conveying in fee simple, in the mode there prescribed. We do not accede to the correctness of the position, taken by the counsel for the defendant, that this statute did not apply to estates tail, created by wills, made and approved before its passage. The statute prescribed a more simple mode for barring entails, as a substitute for the complicated process of a common recovery. And accordingly its provisions in *Massachusetts*, were applied to estates tail then existing. *Wheelwright* v. *Wheelwright*, 2 *Mass. R.* 447; *Soule* v. *Soule & als.* 5 *Mass. R.* 61. The conveyance of the estate therefore by *William*, if he was seized in tail, to the demandant in 1828, in the form prescribed, vested it in him in fee simple, unless it is competent for the tenant to impeach that conveyance. We have not found it necessary to decide that point, as if that deed was void, the limitation over took effect, as a remainder, or as an executory devise; and in either case, the demandant has a good title under *George*, the heir in tail of *Thomas Butler*.

As *Thomas* died, before the decease of *William* without issue, upon which his estate was to vest in possession, his right descended to his heir male, in whom it did vest in possession, upon the death of *William*, the first devisee. Estates tail, so far as they are authorized by law, descend in the mode prescribed by the donor, which differs from the general law of inheritance. An estate tail is descendible to some particular heirs only of the person, to whom it is granted, and not to his heirs general. An estate in tail male, descends to the oldest son of the donee in tail. The statute law of inheritance, as it respects intestate estates, differs from the common

law; but it does not affect estates tail, which depend upon the will of the donor. The law upon this point, as it existed in *Massachusetts*, prior to our separation, and which also remains the law of this State, is fully considered in the case of *Hawley & al.* v. *The Inhabitants* of *Northampton*, 8 *Mass. R.* 3. *Parsons C. J.* there says, that in an estate tail all the heirs of the body of the tenant in tail cannot take together, but only in succession, the oldest son and his issue, then the second son and his issue, and so on. And in *Davis* v. *Hayden & als.* 9 *Mass. R.* 514, it was directly decided, that such an estate vested in the oldest son as the heir in tail, to the exclusion of the other children.

It is agreed, that *Thomas Butler* died in the lifetime of the first devisee, and that *George* is the oldest son of *Thomas*. Upon the decease then of the first devisee, without issue, *George Butler* became seized in tail male, under the will. Being so seized, it was competent for him to bar the entail, in virtue of the *stat.* of 1821, *c.* 36. And the case finds, that in *July*, 1836, the said *George Butler* did, *bona fide*, for a valuable consideration, in the presence of two witnesses, who must be taken to be credible, by deed duly executed, acknowledged and recorded, convey the demanded premises to one *James Leman*, his heirs and assigns. By this deed, under the statute before cited, the estate tail, which had vested in *George Butler*, was barred, and converted into an estate in fee simple. It further appears, that on the same day, *Leman* conveyed the same estate to the demandant, his heirs and assigns. He thereby acquired a valid title in fee, if the limitation over to *Thomas Butler*, in tail male, took effect. In every legal point of view therefore, in which the case may be contemplated, the title of the demandant is sustained.

Judgment for the demandant.

JOTHAM SEWALL, JR. *vs.* CHARLES CARGILL.

Where, in 1739, a grant of land was made, "unto the inhabitants now settled on *Sheepscot River*, at a place called *Newcastle*," which place was then unincorporated, to hold unto the "said inhabitants, their heirs and assigns forever, to be and remain in said settlement now called *Newcastle* for a glebe or parsonage forever"; and where the same place was, in 1753, incorporated as the town of *Newcastle*, and the inhabitants of the town ever after claimed and improved the land for parochial purposes, until the town was divided into several parishes, since which the first parish have claimed and improved; the grant was held to pass the land to the inhabitants of the town as a gift or dedication to public, pious, and charitable uses.

THE action was trespass, *quare clausum*, brought by the plaintiff, as *Minister of the first Congregational Church and Parish in Newcastle;* and was submitted to the decision of the Court on an agreed statement of facts. These appear in the opinion of the Court.

Mitchell and *I. G. Reed*, for the plaintiff, contended, that they had established the following propositions.

1. That the plaintiff has a perfect title under the deed from *Christopher Toppan.*

2. That they had shown an uninterrupted possession sufficient of itself, without the deed, to enable them to maintain the action.

3. That the defendant, being a mere trespasser, has no right to require a title in us.

They cited under the first proposition, *Weston* v. *Hunt*, 2 *Mass. R.* 500; *Dillingham* v. *Snow*, 5 *Mass. R.* 555; *First Parish in Brunswick* v. *Dunning*, 7 *Mass. R.* 445; *Brown* v. *Porter*, 10 *Mass. R.* 93; *Hornbeck* v. *Westbrook*, 9 *Johns. R.* 73; *Jackson* v. *Cory*, 8 *Johns. R.* 385; *Cincinnati* v. *White*, 6 *Peters*, 432; *Beaty* v. *Kurtz*, 2 *Peters*, 566; *Pawlet* v. *Clark*, 9 *Cranch*, 292; *Jarvis* v. *Dean*, 3 *Bingham*, 474; *Shapleigh* v. *Pillsbury*, 1 *Greenl.* 271; *Rice* v. *Osgood*, 9 *Mass. R.* 38. Under the second proposition, they cited *Warren* v. *Childs*, 11 *Mass. R.* 222; *Little* v. *Megquier*, 2 *Greenl.* 176; *Ken. Pur.* v. *Laboree*, *ib.* 273; *stat.* 1821, *c.* 62.

Mellen and *F. Allen*, for the defendant.

The plaintiff must show good title by deed, or the action fails. Because a title by possession extends only to actual occupation.

Ken. Pur. v. *Springer*, 4 *Mass. R.* 416; *Ken. Pur.* v. *Laboree*, 2 *Greenl.* 176. And because a corporation cannot acquire a title by disseizin. *Weston* v. *Hunt*, 2 *Mass. R.* 500.

A deed of bargain and sale by the law of the land, conveys nothing unless to grantees named, or to a corporation, capable of taking; and the object of the grant does not alter the case, as to the question of its legal operation. *Hall* v. *Leonard*, 1 *Pick.* 30; *Paul* v. *Moody*, 7 *Greenl.* 455; 4 *Kent*, 461; *Com. Dig. Capacity*, 1; 2 *Conn. R.* 287. A grant is one thing; a dedication a different one.

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

Emery J. — This is an action of trespass, for breaking and entering on the 1st of *April*, 1834, and continuing the trespass to the 11th day of *August*, 1836, the date of the plaintiff's writ, on a tract of land in *Newcastle*, the plaintiff's close, containing one hundred acres, describing its boundaries, being the land called and known as the ministerial lot, and cutting down and carrying away a great number of the plaintiff's trees, naming them, of the value of $600, and other enormities to the plaintiff's damage, as he saith, the sum of $1000.

It comes before us on an agreed statement of facts, from which we gather, "that on the 15th day of *May*, 1739, *Christopher Toppan* of *Newbury*, in the county of *Essex*, and Province of the *Massachusetts Bay* in *New-England*, *Clerk*, for and in consideration of good will and affection, by deed of that date, acknowledged in the county of *York*, on the 19th day of *May*, 1739, recorded *June* 21, 1739, gave and granted unto the inhabitants now settled on *Sheepscot River*, at a place called *Newcastle* in the county of *York*, and province aforesaid, their heirs and assigns forever, for the uses hereinafter mentioned two hundred acres of land, situate, lying and being in *Newcastle*, and is the lots No. 15 and 16, which lots is eighty-two rods or poles wide, having the lot No. 14 on the southerly side, which is the land sold by said *Toppan* to *Samuel Kennedy*, fronting westerly on *Dyer's River Marsh*, on the east side, so called, and containing the aforesaid width from said marsh east south-east to the *River* called *Mill River*, also two thirty-sev-

enth parts of all the marsh and meadow lying within the bounds of a tract of land purchased of the *Indians* by *Elizabeth Gint*, as by a deed bearing date, Anno Domini, 1662, and recorded in the old book of *Eastern Records*, reference thereto being had, may more fully appear, of which the premises is a part. To have and to hold the said granted and gifted premises with all the appurtenances, privileges and commodities to the same belonging to the said inhabitants, their heirs and assigns, to be disposed of in manner following, viz. one half of said land and marsh to be disposed of to the first Minister that shall be settled amongst said people at said place, either by ordination or instalment, to him, his heirs and assigns forever, and the other moiety or half to be *and remain in said settlement now called Newcastle for a glebe or parsonage forever*," with covenants of lawful ownership and seizin in fee, &c.

On the 19th of *June*, 1753, an act was passed for "erecting a place called *Sheepscot* in the county of *York* into a district by the name of *Newcastle*," because it had been represented to the Court that the inhabitants of *Sheepscot* aforesaid labored under difficulties by reason of their not being incorporated into a district. The bounds of the district were, "beginning at the narrows, called *Sheepscot* narrows, at the upper end of *Wiscasset Bay*, and so extending from said narrows up the said river eight miles, from thence south-east to *Damariscotta River*, and to extend down said river eight miles, and from thence to run to *Sheepscot River* at the place first mentioned; and the district was by that act invested with all the privileges, powers, and immunities, that towns in this province by law do or may enjoy, that of sending a representative to the general assembly only excepted."

On the 28th of *Oct.* 1773, the town voted to build a meeting-house on the westerly side of this town, on the ministerial lot near the town road. In *March* 14, 1774, it was voted to build a meeting-house on the west side of the town, fifty feet in length, and forty feet in width. An attempt was made in *July* afterward, to reconsider the vote, but at the meeting for that purpose on the 21st of *July*, 1774, it was put to vote, whether the former vote should be reconsidered, and it passed in the negative. On the 14th of *March*, 1776, voted unanimously, to give *Mr. Thurston Whiting* a call to settle in the gospel ministry in this town. *May* 9th, 1776,

voted, to settle *Mr. Thurston Whiting* on the congregational platform, and that he be ordained the second *Wednesday* in *July* next; and *June* 24, 1776, voted, that *Mr. Thurston Whiting* be ordained in *Mr. Samuel Nichol's* barn. On the 7th of *March*, 1782, voted to dismiss him according to the result of council.

It further appears, that as early as *March* 18, 1783, Captain *Robert Hodge* had cut a number of oak trees on the ministerial lot and "on the 7th of *April*, 1783, the town voted, that Captain *Robert Hodge* be acquitted for his cutting a number of oak trees on the ministerial lot, him paying the cost of running out the lines of said lot, which is the sum of £2, 5*s.* and the charge of entertaining the men employed in said business." On the 19th of *Dec.* 1786, an article was inserted in the warrant for the town meeting to see what method the town will take to prevent the timber from being cut from off the ministerial lot of land; and on the 2d of *January*, 1787, the town voted, that Col. *James Cargill* be authorized to take care of the ministerial lot with power to prosecute any person or persons who have cut any timber on said lot during the last year past from this time, and all that may be cut on said lot in one year next to come, and that he be accountable to the town for all the money he shall receive for said timber. On the 19th of *Dec.* 1795, it was proposed in the warrant to see if the town will sell all or a part of the oak and pine lumber which is on the ministerial lot so called, to the person who will give most for the same, and to see what the town will do about the lumber that has been cut on the ministerial lot. On the 1st of *Jan.* 1796, they voted not to sell the timber, and appointed a committee of three to prosecute all those who have committed trespasses on the lot to final judgment and execution. On the 10th of *May*, 1797, they voted to give *Mr. Kiah Bailey* a call to settle in the gospel ministry in this town, with £100 per year salary, and £100 for settlement. On the 3d of *Oct.* 1797, *Mr. Bailey* was ordained.

From the deposition of *Mr. Bailey* it appears, that he continued pastor of the congregational church and society in *Newcastle*, until the fall of 1823, when he was dismissed; that the town voted to give him a salary of £100 a year, and the use of the parsonage or ministerial lot situated on *Dyer's River*, old *Sheepscot*, and a little south of Capt. *Chase's* house, now deceased, and had a piece of

salt marsh attached to it; that he took possession of the parsonage soon after his settlement, and employed two men, naming them, to cut and haul off the lumber in the winter of 1797–8; that he cut the grass by one of those two men, and others, from year to year, and cut the wood and lumber without molestation; that *Thomas Kennedy* and *William Chase* improved the lot a portion of the time, and paid *Mr. Bailey* a certain sum for the grass and pasture the year he was dismissed. That after his contract with the town was closed he continued in possession of the lot until he was dismissed from the church and society as their pastor. That a colored man, *Charles*, he thought he was called, came to him and requested to build a house on said land, and *Mr. Bailey* gave him liberty to do it, and also to pick up such wood as was down for his own use, but he was not to cut down any standing trees; that the colored man did build a house on the land, and lived on the premises a number of years, and his family were there, the witness believed, when he left the town in 1824; and that the witness had the open, free, and as far as he knew, the exclusive possession of said parsonage upland and marsh until he was dismissed, and that no one to his knowledge claimed or received any portion of the rents paid for said lands until he left the town, in 1824, except himself. Subsequently to the departure of *Mr. Bailey*, in 1824, the ministerial lot was let by the town to *Mr. Townsend*, for $26,50. In 1825, the amount obtained for the use of it, was voted to be paid to the *Rev. Mr. Sewall*, and that he preach out that amount on the west side of the town. In 1826, voted, that the note obtained for the use of the ministerial lot be given up to the congregational society in this town. In 1827, the use of the lot was sold to *William Chase*, at $19,50; and voted to choose an agent to run and settle the line of said lot and marsh thereunto belonging, the expense of which to be one half by the town, and the other half by the owner of the land adjoining; and *Eben'r D. Robinson* was chosen agent for that purpose, and it was regularly let out down to 1831 inclusively, as appears by town records.

The alleged trespass was committed on the south-east part of said close which is woodland, and has never been enclosed by fences.

A meeting-house was once erected on said land by said town, but was abandoned.

On the 16th of *Sept.* 1778, the *Rev. Thurston Whiting*, by his deed of that date, acknowledged the same day, and recorded *May* 24, 1779, conveyed the lot of 100 acres, more or less, bounded northerly by the ministerial lot, so called, in said *Newcastle*, to *Robert Hodge.*

The *Rev. Jotham Sewall*, the present plaintiff, was settled in 1825.

It is contended, by the defendant, that the deed of *Christopher Toppan* to the inhabitants now settled on *Sheepscot River*, at a place called *Newcastle*, &c., is void for uncertainty as to grantees. That a corporation cannot acquire a freehold by disseizin committed by itself. That the plaintiff relying on being a settled minister, and the cutting being on land not fenced, the plaintiff had no possession to give seizin independent of title.

That there is no evidence that *Christopher Toppan* had any interest in the land or possession of it. That a grant is not a dedication.

And that on no fact now before the Court, can this action be sustained, for want of possession and for want of title. That a deed of bargain and sale, by the law of the land conveys nothing unless to grantees named or to a corporation capable of taking; and that the object of the grant, does not alter the law, as to the question of its legal operation.

In the case, *City of Cincinnati* v. *The Lessee of White*, 6 *Peters*, 432, it is said, that dedications of land for public purposes, have frequently come under the consideration of the Court, and the objections which have generally been raised against their validity have been the want of a grantee competent to take the title, applying to them the rule which prevails in private grants, that there must be a grantee as well as a grantor. But that is not the light in which the Court has considered such dedications for public use. The law applies to them rules adapted to the nature and circumstances of the case, and to carry into execution the intention and object of the grantor; and secure to the public the benefit held out, and expected to be derived from and enjoyed by the dedication,

In *Potter* v. *Chapin*, 6 *Paige's Ch. Rep.* 649, it is said, that the decision in the case of the *Baptist Association* v. *Hart's Executors*, 4 *Wheat.* 1, the chancellor said, he believed it is generally admitted, that the decision in that case was wrong. By that decision some doubt was thrown upon the question of charitable donations, for the benefit of a community or body not incorporated so as to be capable of taking and conveying the legal title to property. But the chancellor observes, that it may now be considered as an established principle of *American* law, that the court of chancery will sustain and protect such a gift, bequest or dedication of property to public or charitable uses, provided the same is consistent with local laws and public policy, where the object of the gift or dedication is specific, and capable of being carried into effect, according to the intention of the donor; and he cites 2 *Kent's Com.* 286; 4 *idem*, 508; 2 *Peters' U. S. Rep.* 566; 3 *Peters*, 99; 7 *Vermont Rep.* 241.

We are not aware that any principle of local law will prevent the passing of this estate for a glebe or parsonage to the inhabitants at *Newcastle*, incorporated subsequently to the grant. We have heard no complaint for nearly a century from *Christopher Toppan* or his heirs, that the corporation of *Newcastle* had committed any disseizin, or that they had failed to appropriate the land according to the intent of the donor. The town has taken and held it in their parochial character, and as soon as the minister was ordained in 1776, he held it in right of the parish. After his connexion with the parish ceased, they again proceeded to take charge of it till the settlement of *Mr. Bailey*, who held it till 1824. The present plaintiff on his ordination became rightfully entitled to hold it. We consider that the reasoning of the Court in the *Proprietors of the Town of Shapleigh* v. *Pillsbury*, 1 *Greenl.* 271, and the *Inhabitants of Bucksport* v. *Spafford*, 3 *Fairf.* 487, goes to support the plaintiff in his claim to maintain this action. The defendant is a mere stranger and exhibits no title.

WILLIAM RICHARDSON *vs.* FREEMAN CLARK *& al.*

A bill of sale of the hull of a vessel with all and singular her tackle, apparel and furniture, does not include a chronometer on board at the time, where no agreement of the parties, or custom of merchants, in relation to it, is made to appear.

EXCEPTIONS from the Court of Common Pleas, REDINGTON J. presiding.

The verdict was for the defendants, and the plaintiff excepted to the instructions given to the jury. The facts in the case will be found in the opinion of the Court, as will also the ruling of the Judge of the Court of Common Pleas.

F. Allen and *Randall* argued for the plaintiff. They cited *Shannon* v. *Owen*, 1 *Manning & Ry.* 392; *Farrar* v. *Stackpole*, 6 *Greenl.* 154.

Mitchell and *Tallman* argued for the defendants.

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

EMERY J. — On the 6th day of *September*, 1836, *Freeman Clark*, by *William D. Sewall*, and *William D. Sewall*, by bill of sale of that date, "in consideration of $3400, bargained and sold to the plaintiff one half of all the hull or body of the good brig *Pliades*, together with one half of all and singular her tackle, apparel and furniture, as she arrived at *Philadelphia*, and her cargo discharged, now at *Philadelphia*. To have and to hold, the said granted and bargained one half of said brig *Pliades*, and premises, with the appurtenances unto the said one half belonging; covenanting to warrant and defend the said one half of said brig *Pliades* and appurtenances against the lawful claims of all persons."

This action is assumpsit to recover half the value of a chronometer charged in an account annexed to the writ, at $200. The chronometer had been screwed down to the transom of the vessel and was taken therefrom after her arrival, but remained on board until after the discharge of the cargo, and then was carried to a nautical instrument maker in *Philadelphia* for the purpose of being rated. Capt. *Robinson*, the master of the brig, originally purchased the

article in *France*, without any orders from the owners. He sold it to one Capt. *Welch*, and there was evidence to shew that Capt. *Welch* purchased it, as defendants' agent. But soon after by *Welch's* order it was taken to *Bath*, and was never again on board the brig. The purchase from *Robinson* was prior to the date of the bill of sale.

It was a controverted point whether, if defendants were the purchasers they ever appropriated the article to the use of the brig, or designed it for some other purpose. Evidence of the acts and declarations of the parties before and after the time of the conveyance was introduced, to shew what was the usage as to chronometers passing by such a bill of sale. No usage in this particular could be proved. The whole matter was submitted to the jury with instruction to which the exceptions are taken.

In *Beawes' Lex Mercatoria, page* 74, it is said to be held, that a bill of sale, specifying a ship, her tackle, apparel and furniture, will not pass her boat; for so little is it considered as appertaining to the vessel, that in a forfeiture for piracy, the boat is not involved, for the perfect use of the ship may be enjoyed without her boat; it is for this reason, that ballast is not included under the description of furniture, for a vessel not only may, but when sufficiently laden does, in general sail without it; therefore where a bond was given on the sale of a vessel, conditioned for the undisturbed enjoyment of her and her furniture, it was held not to be forfeited, because a third person sued the purchaser for money due for ballast bought by the seller for the use of the ship, in which action the plaintiff recovered, in consequence of which the vessel was seized. The ballast is neither the vessel nor her furniture. *Rolls. Abr.* 50; 1 *Moll. de Ju. Ma. p.* 313, *sec.* 8; *Lenter's Case*, *Leon*, 46, 47; *Abbott on Ship.* 9.

To promote peace and security, "the precision of law requires that all conveyances should actually express the matter to be transferred." Yet general terms which have received a fixed and technical meaning may be employed, so that no misapprehension need arise. In using general terms the parties would be supposed to intend to embrace whatever was essential in the subject of conveyance and its beneficial enjoyment, according to its nature and design. When a fixed and technical meaning is not appropriated to

the language used, the intention of the parties should be submitted to a jury. *Duffee* v. *Mason*, 8 *Cowen*, 25; *Farrar* v. *Stackpole*, 6 *Greenl.* 154.

A policy of insurance on ship and furniture has been held to include provisions sent out in the ship for the use of the crew and were to be paid for by the underwriter against fire, though they took fire in a ware-house called a Bank Saul. And *Justice Buller* observed, that where losses have been settled, the provisions on board the vessel when she sailed have been considered part of the ship. *Brough* v. *Whittmore*, 4 *Term Rep.* 206. In *Haskins* v. *Pickersgill*, cited in *Marshall on Insurance*, 727, *Lord Mansfield* said, that in an insurance on the ship and furniture, &c. there was no doubt but that the boats and rigging and stores belonging to the ship were included. And as to the fishing stores, it must depend on the usage of trade. Under the denomination goods, wares and merchandize in the policy, the Captain's clothes, the ship's provisions and goods lashed to the deck are not comprehended. *Marshall*, 319, 727. In *Ross* v. *Hunter*, *Park on In.* 20, it is said they should be insured by name.

In the case of *Brough* v. *Whittmore*, 4 *Term Rep.* 206, *Buller Justice*, is represented to have said, that a policy of assurance has at all times been considered in courts of law as an absurd and incoherent instrument; but it was founded in usage, and must be governed and construed by usage.

In one case a policy against fire was upon the body, tackle, apparel, ordnance, munitions, artillery, boat and other furniture of and in said ship. 1 *Burrow*, 341. The sails, yards, tackle, cables, rigging, apparel, and other furniture belonging to the *Onslow* on which the insurance was made were consumed by fire in a ware-house called a Bank Saul. And the underwriters were holden. This is referred to for the purpose of shewing that the boat was specially named. It would have been well for both parties to have named the chronometer if it was intended to be sold. A boat, cable and anchor were held to be attachable, if the vessel were at the wharf, and her cable, anchor and boat not in use, *Parker J.* saying, there seems to be no reason why they may not as well be taken, as the harness of a carriage, or the sails and rigging of a vessel, when separated from the hull and laid up on shore. To take

a boat or a cable and anchor from a vessel, when they are in use and necessary to the safety of the vessel, would expose the party to damages. *Briggs & al.* v. *Strange*, 17 *Mass. R.* 405. Bills of sale have not yet been spoken of judicially as absurd and incoherent instruments. We are to give the present one a just construction according to its terms and the intention of the parties. *Dolan* v. *Briggs*, 4 *Binney*, 496.

It has been said by *Pigott* and *Marryat*, that though in some instances the courts of law have enlarged the terms of mercantile contracts in order to meet the general ideas of merchants, yet there is no instance in which they have narrowed the construction of them.

The case of *Freeman* v. *Baker*, 5 *Barn.* and *Adolphus*, 797, and 27 *Com. Law Rep.* 194, is one in which no particular liberality of construction is adopted as to the extent of a warranty of a vessel.

In the present case, the instruction was, "that the burden of proof was upon the plaintiff to satisfy them, that half the property in the chronometer passed to the plaintiff by the bill of sale under one of the terms, tackle, apparel, furniture, or appurtenances. That as the chronometer is of recent introduction into nautical use, neither of those terms would of its own force, necessarily embrace the article. That it was therefore incumbent on the plaintiff to shew by the acts and declarations of the parties that they intended it to pass by the bill of sale; or that by usage among mercantile men such articles do pass, by the bill of sale, under the circumstances in which this article was placed, at the time of making the conveyance to the plaintiff."

A chronometer designed to discover the longitude at sea, seems to be particularly appropriate to the service of the master to aid him in navigating the vessel, as much as his quadrant, or watch, or scale and dividers. And the circumstance that the box containing the chronometer had been secured to the transom and removed, though it was on board when the cargo was discharged, would no more authorize the Court to consider it an essential part of the brig or essential to its beneficial enjoyment, than the watch or the quadrant in like circumstances. The case shews that the jury could not find from the acts and declarations of the parties that it

was intended to pass by the bill of sale. And the usage that it should so pass was not proved. The opinion of one witness, as reported, though drawn forth by the defendants, cannot affect the case. It established no usage. We do not intend to decide but what in the improvements of nautical science chronometers may become necessary appurtenances to ships. But as the case is presented, we perceive nothing erroneous in the ruling and instruction of the Judge, and therefore overrule the exceptions.

Judgment on the verdict.

SAMUEL M. PHILLIPS & *al.* *vs.* ISAAC PURINGTON.

Where the partnership is first established by other proof, the admissions of one partner may be received to charge the partnership in relation to transactions during its existence.

A ship may be held by part owners in partnership, as any other chattel.

Where goods have been delivered on an order, proof of the admission of the debt by the purchaser dispenses with the production of the order.

On the question whether a partnership did or did not exist, the declarations of the alleged partners, unaccompanied by acts, and unconnected with any of their declarations proved by the other party, are inadmissible in their own favor.

Testimony by the attorney who made a writ, that he had made diligent search and inquiry therefor and could not find it, and *that he last saw it in the hands of the officer*, is not sufficient proof of the loss of the writ to admit parol evidence of its contents.

EXCEPTIONS from the Court of Common Pleas, REDINGTON J. presiding.

Assumpsit brought against *Purington* and *James Temple*, who died since the commencement of the action, to recover the value of a quantity of iron. The delivery of one parcel of the iron was proved by the books and suppletory oath of the plaintiffs, and it appeared that the residue of the iron had been delivered on written orders. The iron was shown to have been used in the building of a vessel. During the trial the plaintiffs offered to prove the admissions of *Temple* to show the amount due them for the iron.

The defendant denied any partnership between him and *Temple*, or that he was a part owner of the vessel, while building, and objected to this testimony, and to the admission of any evidence to prove the delivery of the iron, delivered on orders, without the production of the orders. The Judge ruled, that if the plaintiffs made out the fact of the existence of a copartnership by other evidence, that then the declarations of *Temple* were admissible as evidence to show the amount of the plaintiffs' claim, and the testimony was given. The defendant offered evidence, that he had commenced an action against *Temple*, and caused the same vessel to be attached as his property. Objection was made, and the Judge ruled, that the defendant might prove the fact of the attachment, but not at whose suit, without producing the writ or proving it to have been lost. The defendant then proved by the attorney who made the writ, that he had searched for it, and could not find it, and that he last saw it in the hands of the officer. The Judge ruled, that the objection was not removed by this evidence. The defendant then offered in evidence his own statements, made while the vessel was building, and conversations with *Temple*, and statements of *Temple*, to show that there was no partnership between them. The Judge ruled, that all such declarations and conversations were inadmissible, unless connected with acts done, or unless they were parts of the same conversations and statements, respecting which the plaintiffs had previously inquired. The Judge instructed the jury, that if they found from evidence other than *Temple's* declarations, that there was a copartnership in building the vessel between *Temple* and *Purington*, that then the admissions of *Temple* would be proper evidence in showing the existence and amount of the claim of the plaintiffs against them; and if they did not so find from other evidence, that this should be disregarded. The jury found a verdict for the plaintiffs for the full amount of their claim, and the defendant filed exceptions.

F. Allen, for the defendant, argued, that the testimony offered by the plaintiffs, and objected to by the defendant, ought not to have been admitted; and also that the Judge erred in excluding the testimony offered by the defendant, and rejected. He cited *Thomas* v. *Harding*, 8 *Greenl.* 417; 3 *Kent*, 22, 23; *Harding* v. *Foxcroft*, 6 *Greenl.* 76; *Marshall* v. *Winslow*, 2 *Fairf.* 58; 3 *Johns.*

R. 528; 15 *Johns. R.* 409; 9 *Cowen,* 433; 7 *Cowen,* 650; *Parker* v. *Merrill,* 6 *Greenl.* 41; *Baring* v. *Calais,* 2 *Fairf.* 463.

J. S. Abbott and *Moody,* for the plaintiffs, supported the ruling of the Judge, and cited *Savage* v. *Balch,* 8 *Greenl.* 27; *Hale* v. *Smith,* 6 *Greenl.* 416; *Parker* v. *Merrill, ib.* 41; *Alden* v. *Gilmore,* 13 *Maine R.* 178.

The case stood over for advisement, and the opinion of the Court was prepared by

SHEPLEY J. — The declarations of *Temple* were not admitted until after the jury had found from other testimony the existence of a partnership between the defendant and *Temple* in building the vessel. The partnership being first established, the admissions of one partner may be received to charge the partnership in relation to transactions during its existence. 6 *Greenl.* 41; 8 *Greenl.* 421.

It is contended, that they were not partners, but tenants in common of the vessel. Such is the usual relation of part owners, but they may become partners. 6 *Greenl.* 77; 3 *Kent,* 154. It appears from the case, that a partnership was denied, and that the jury found its existence.

A party may waive his right to the production of testimony to prove a debt against him, by admitting it to be due from him; and the admission of the debt of the plaintiffs by one of the partners dispensed with the production of the orders and other proofs.

The excluded declarations of *Temple* were those made in his own favor, and they were of course correctly excluded under the circumstances stated in the case.

Proof of the existence of a suit, should be made by the production of the exemplification of the record; but where there has been a loss or a suppression, as in 7 *Greenl.* 236, other evidence may be admitted. There does not appear to have been such proof of loss in this case as to authorize it.

Exceptions overruled.

Ambrose Merrill *vs.* Moses Call.

Where the charter of a bank provides, that, "no part of the capital stock shall be sold or transferred, except by execution or distress, or by administrators or executors, until the whole amount thereof shall have been paid in," a contract to transfer shares therein, not falling within the exception, made and to be carried into execution when but fifty per cent. is paid in, is illegal and void.

Exceptions from the Court of Common Pleas, Redington J. presiding.

The action was brought upon a contract in writing, dated *March* 9, 1837, whereby it was agreed by the parties, that the defendant should transfer to the plaintiff, "twenty shares in the stock of the *Damariscotta Bank*," on the payment to him of fifteen hundred dollars on or before *March* 16, 1837. Several points were made at the trial, but the decision here rested solely on one. The facts bearing on that, will be found in the opinion. The Judge ordered a nonsuit, to which the plaintiff excepted.

F. Allen & I. G. Reed, for the plaintiff, and *Farley*, for the defendant, argued points made on the exceptions, which were not considered in the opinion.

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

Shepley J. — The case finds, that fifty per cent. only of the capital stock had been paid in at the time when the transfer should have been made according to the contract; and that both parties knew that fact, and that no vote had passed requiring payment of the residue before the time for making the transfer. This then is a contract for the sale or transfer of shares, or stock before the whole capital was either paid in, or contemplated to be paid in. The charter provides, that the corporation shall be subject to all the liabilities and duties specified in an act to regulate banks and banking, passed *March* 31, 1831. *Special Laws, c.* 194, § 3. The act referred to, *stat.* 1831, *c.* 519, § 3, provides, "and no part of the capital stock of any bank shall be sold or transferred, except by execution or distress, or by administrators or executors, until the whole amount thereof shall have been paid in." The object of the provision probably was, to prevent the accumulation of the

stock in the hands of irresponsible persons, to whom the legislature would not grant a charter, before the whole capital was secured for the protection of the public. And when so paid in, the law does not permit it to be withdrawn until its debts and contracts are satisfied. Whatever may have been the design of the enactment, it is binding upon the corporation and upon the citizens.

The contract between these parties having been made in violation of law, the Courts will afford no aid to enforce it. As the plaintiff for this reason cannot maintain the action, it is unnecessary to examine other points in the case.

Exceptions overruled.

JACOB BORNEMAN, *Adm'r*, *vs.* CHARLES SIDLINGER *& al.*

Where an intestate in his last sickness, when death was near, and in contemplation of that event as impending, gave to donees named, a note and mortgage, and actually delivered the same to a third person for their use; the gift is good as a *donatio causa mortis*.

A chose in action may be the subject matter of such gift.

There must be an actual delivery to perfect the gift, but it may be made to a third person for the use of the donee, if the third person retain possession up to the time of the death of the donor.

But a gift of this description may be defeated for the benefit of creditors.

EXCEPTIONS from the Court of Common Pleas, REDINGTON J. presiding.

Writ of entry on a mortgage to *John G. Borneman*, the intestate, made to secure the payment of a note of hand. *John G. Borneman* died intestate in 1830. His estate was represented insolvent, and commissioners were appointed, but no claims were presented, and they so reported. But the administrator claims, that there is a debt due to him from the estate. The defendants then offered to prove, that the intestate, during his last sickness and within ten days of his death, gave the note, not indorsed, with the mortgage to four of his daughters, delivering the same to another

daughter, in trust, for the benefit of the other four; that the note and mortgage remained in her hands until after the death of the intestate, who died without revoking the gift; that part of the amount due on the note has been paid to the supposed donees and the remainder is yet due; and that the suit is brought against the wishes of the supposed donees, and solely for the benefit of the estate. The Judge rejected the evidence, as being insufficient to establish any defence, and a verdict was returned for the plaintiff. The defendants filed exceptions.

I. G. Reed, for the defendants.

The note and mortgage are the property of the four daughters. The gift to them was valid in law, as a *donatio causa mortis*. *Ridgway's R.* 202; 5 *Dane*, 140, § 15; 3 *Maddock's R.* 184; 2 *Kent*, 447; 1 *Peere Wms.* 404; 2 *Ves. Jr.* 113; 1 *Bligh. N. S.* 497. There were no debts against the estate to defeat the gift. The plaintiff has not shown any thing due to him, and it cannot be presumed, that he is a creditor.

Bulfinch, for the plaintiff.

To render a *donatio causa mortis* valid in law, it must be made by the deceased in his last sickness, when so feeble that he is unable to make a will. 20 *Johns. R.* 514; *Prec. in Ch.* 269; 1 *Ves.* 546; *Swinburne*, 18; 3 *Peere Wms.* 356; 7 *Johns. R.* 26; 18 *Johns. R.* 149. In order to constitute a good *donatio causa mortis*, there must be an absolute, actual delivery to the donee by the deceased. 2 *Marsh.* 532; 7 *Taunt.* 224; 2 *Esp. R.* 663; *Dane, c.* 133, *art.* 3, § 6.

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

Weston C. J. — If the defendants can prove, as the case finds they offered to do at the trial, that the intestate in his last sickness, when death was near, and as we think must be understood, in contemplation of that event as impending, gave to the donees named the note and mortgage in question, and actually delivered them to a third person for their use, we are of opinion, that it was good, as a *donatio causa mortis*.

That a chose in action may be the subject matter of such a gift, we regard as settled law at the present day. This question is very

satisfactorily examined in the case of *Parish & al.* v. *Stone*, 14 *Pick.* 198, to which we refer, without deeming it necessary to go over the same ground. There must be an actual delivery, to perfect the gift, but it may be made to a third person, for the use of the donee, if such third person retain possession up to the time of the death of the donor. *Drury* v. *Smith*, 1 *P. Williams*, 404. The equitable interest passes to the donee, and if there be a mortgage as collateral security, it is held in trust for his benefit, and may be enforced in the name of the representative of the deceased, as the principle debt may be also, if necessary. We are of opinion, therefore, that the evidence offered, ought to have been received. And if thereupon, it should be made to appear, that the donees are the real party in interest, the plaintiff will not be permitted to prosecute this suit against their will, and still less for the benefit of the estate.

A gift of this description however may be defeated for the benefit of creditors. 2 *Kent*, 362. And if it should turn out, on a further trial, that the plaintiff is a *bona fide* creditor of the estate, and has a claim, which he can legally enforce, and that a reclamation of this gift is necessary to satisfy it, he may still be permitted to prosecute this suit, notwithstanding the defence interposed.

Exceptions sustained.

John H. Converse *vs.* Damariscotta Bank.

If a writ be directed to and served by a constable, wherein the damage demanded exceeds one hundred dollars, the writ may be amended by reducing the *ad damnum* to that amount.

The teste of a writ is matter of form, and is amendable.

Exceptions from the Court of Common Pleas, Redington J. presiding.

The *ad damnum* in the writ exceeded one hundred dollars, and the service was made by a constable. The writ was not tested by one of the Judges in office at the time it was issued, but instead thereof was the name of *Judge Smith*, having then recently resign-

ed. For both these causes the defendants seasonably filed their plea in abatement. The plaintiff moved to amend his writ by reducing the *ad damnum* to one hundred dollars, and by inserting the name of a Judge of the Court in office at the time, in the place of the name of *Judge Smith.* The Judge granted leave to amend in both particulars, and the defendants excepted.

Rundlett, for the defendants, argued, that the Court had no power to permit the amendment reducing the *ad damnum.* The constable then had no authority to serve the writ; and on the face of it, there was no service, or what is the same, no legal one, as the acts of the constable were merely void. *Gordan* v. *Pierce,* 2 *Fairf.* 213; *Hart* v. *Huckins,* 5 *Mass. R.* 260; *Same,* 6 *Mass. R.* 399; *Brier* v. *Woodbury,* 1 *Pick.* 366; *Wood* v. *Ross,* 11 *Mass. R.* 271; *Briggs* v. *Strange,* 17 *Mass. R.* 405; *Hearsey* v. *Bradbury,* 9 *Mass. R.* 95; *Lawrence* v. *Smith,* 5 *Mass. R.* 362; *Tingley* v. *Bateman,* 10 *Mass. R.* 343; *Jacobs* v. *Mellen,* 14 *Mass. R.* 132.

The teste of the writ is not amendable, being an original writ. Judicial writs are amendable, when original ones are not. 1 *Shower,* 80; 1 *Wils.* 91; *Ripley* v. *Warren,* 2 *Pick.* 592; *Campbell* v. *Stiles,* 9 *Mass. R.* 217; *Hall* v. *Wolcott,* 10 *Pick.* 218; *Young* v. *Hosmer,* 11 *Mass. R.* 89; *Sawyer* v. *Baker,* 3 *Greenl.* 29; *Bailey* v. *Smith,* 3 *Fairf.* 196; *Clapp* v. *Balch,* 3 *Greenl.* 216; *Whiting* v. *Hollister,* 2 *Mass. R.* 102.

F. Allen, for the plaintiff.

The *ad damnum* may be amended. *Danielson* v. *Andrews,* 1 *Pick.* 156; *Blood* v. *Harrington,* 8 *Pick.* 552; *McLellan* v. *Crofton,* 6 *Greenl.* 307. And so may the teste of the writ. *Ripley* v. *Warren,* 2 *Pick.* 592; *Howe's Pr.* 362.

The opinion of the Court was afterwards drawn up by

WESTON C. J. — As the writ originally stood, it would not justify the service, but by amending it, so as to reduce the *ad damnum* below one hundred dollars, the service might be justified; and we are of opinion the Judge might allow that amendment. It has been decided that the *ad damnum* is amendable. *McLellan* v. *Crofton,* 6 *Greenl.* 307. It has been determined, that a constable has no authority to serve process in a civil action, unless it is direct-

ed to him. *Wood* v. *Ross*, 11 *Mass. R.* 271; *Brier* v. *Woodbury & al.* 1 *Pick.* 362. Yet it has been decided, that where a constable had served a writ, not directed to him, the writ might be amended, by inserting such direction, by which the service would be made good. *Hearsey* v. *Bradbury*, 9 *Mass. R.* 95. There is no reason, which could justify the amendment in that case, which does not apply with equal force to this.

As to the teste, there is undoubtedly a distinction between original and judicial writs, the latter being more perfectly under the control of the Court, than the former. Hence in judicial writs, amendments have been allowed, which in original writs would have been refused. Yet it is the uniform practice of the Courts to allow the latter to be amended, in matters of mere form. And indeed this is expressly required by law. *Statute* of 1821, *c.* 59, § 16. The seal of the Court, which gives solemnity and authenticity to its process, has been held to be matter of substance. *Bailey* v. *Smith*, 3 *Fairf.* 196. And the indorsement of a writ, which is for the security of the defendant, cannot be regarded as a matter of form. But the teste of a writ, in the name of a Justice of the Court, we do hold to be a matter of mere form. In *Ripley* v. *Warren*, 2 *Pick.* 592, *Parker C. J.* says, "nothing can be more precisely mere matter of form, than the teste of a writ. We all know that in practice, it is considered wholly insignificant." And this the Court in *Massachusetts* felt constrained to regard it, although the requirement as to the teste formed a part of their constitution. It was not here held of quite enough importance, to be inserted in our own. We are entirely satisfied, that the amendment was within the discretion of the Judge.

Exceptions overruled.

Inhabitants of RICHMOND *vs. Inhabitants of* LISBON.

Where a woman resides in a town with her husband for four years, when he dies, and she continues to reside therein for the two succeeding years, unmarried, she gains no settlement in the town by such residence.

THE action was brought for supplies furnished to one *Mary Umberhind*, alleged to have had her legal settlement in *Lisbon*, and came before the Court on a statement of facts agreed by the parties. If the pauper had her settlement in *Lisbon*, a default was to be entered; but if in *Richmond*, the plaintiffs were to become nonsuit. *Mary*, the pauper, lived with one *Edward Umberhind*, as his wife, and was reputed to be his wife, in *Lisbon* from 1819 to 1828. From thence they removed to *Dresden*, and from *Dresden* to *Richmond*, in *October*, 1830, and there resided until his death in *January*, 1835. The pauper, *Mary*, continued to reside in *Richmond*, until *February*, 1836, when the supplies were furnished for which this suit was brought. They further agreed, that if actual marriage was a fact of importance in the case, in the opinion of the Court, that there should be a jury trial to determine how the fact was.

F. Allen, for the plaintiffs, referred to his argument, in *Thomaston* v. *St. George*, argued the present term prior to this, embracing other points, but it is not known to the reporter, that an opinion has been delivered in that case. He there contended, that while the pauper was under coverture, she could gain no settlement in her own right by residence, and could have one only derivatively from her husband; that the husband had none by a residence of less than five years; and that she had none in her own right from a residence of less than two years. In *Thomaston* v. *St. George*, he cited *Shirley* v. *Watertown*, 3 *Mass. R.* 322; *Winchendon* v. *Hatfield*, 4 *Mass. R.* 123; *Hallowell* v. *Gardiner*, 1 *Greenl.* 101; *Biddeford* v. *Saco*, 7 *Greenl.* 270; *Athol* v. *New-Salem*, 7 *Pick.* 42.

S. Moody, for the defendants.

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

EMERY J. — The residence of *Edward Umberhind*, with his reputed wife, *Mary*, in the town of *Lisbon*, from 1819 to 1828, would fix her settlement *there*, unless she acquired a new settlement in *Richmond* with her reputed husband, by his removing with her to that town in *October*, 1830, and there residing till his decease in *January*, 1835, not having received any supplies for his support, and by her continuing after her husband's death, there to reside, without receiving supplies till *Feb.* 1836.

But her husband failed of accomplishing a residence of full five years in *Richmond*, and unless we can connect the residence of the wife, while under the power of her husband, when her will was merged in his, with her own voluntary act of residence, after she became a widow, we cannot adjudge her settlement to be in *Richmond.* According to the spirit of former decisions on this subject of settlement, arbitrary it must be admitted, and perhaps carried out upon refined reasoning in regard to the subjugation of the wife, respecting her chance of settlement, to the husband's judgment, yet as he did not gain one in *Richmond*, we must leave her with her settlement in *Lisbon*, which she *had derivatively from her husband.*

As there is no evidence, at present, rendering the marriage doubtful, we do not consider it important to send the cause to a jury, to make it more certain. The action seems to us maintainable upon the facts agreed, and the defendants must be defaulted.

James McLellan *& al. vs.* Abner W. Turner.

Where a testator directed his debts first to be paid, and gave all the residue of his real and personal estate to his wife, so long as she remained his widow, and if she should marry again, directed that two thirds of his estate, remaining in her hands at the time, should be divided among his children and their heirs; and if she should not marry, that whatever of his estate should remain at her decease, after paying funeral charges, should be divided among his children; and also gave her an article of personal property, not to be inventoried; and where she did not marry again; the widow took but a life estate in the land.

Where there are no words of limitation or inheritance in a devise of land, and the *estate*, with or without the personal property, is charged with the payment of debts, the devisee takes but an estate for life; but if the charge be upon the *devisee*, he takes an estate in fee.

Writ of entry. The case was submitted on a statement of facts agreed by the parties. *Simeon Turner*, being seized of the demanded premises, made his last will and testament in these words, the formal parts only being omitted. "After my just debts and funeral charges are paid, I give and bequeath unto my beloved wife *Sarah Turner* all my real and personal estate, so long as she remains my widow. And in case she should marry again, then in that case two thirds of my estate remaining in her hands at that time is to be divided among my children and their heirs. And if she should not marry again, in that case at her decease, what of my estate may then remain, after paying her funeral charges, to be divided to and among my children in equal shares, to them and to their heirs forever. I do give to my wife *Sarah* my horse and chaise, and they are not to be inventoried as a part of my estate. And my wife *Sarah* to be my sole executrix." The will was proved in *October*, 1805. The widow did not marry again, and died intestate in 1826. Various conveyances and descents are given in the statement, but it is enough to state, that if the widow by the will took *only a life estate* in the land, *the demandants* are entitled to recover; but if she *took a fee simple estate*, the *defendant* should prevail.

The case was argued in writing, by *Mellen* and *Randall*, for the demandants, and by *Groton* and *Tallman*, for the tenant.

The demandants' counsel cited *Co. Lit.* 42, *a*; 2 *Bl. Com.* 121; 2 *Bac. Ab.* 272; *Carle* v. *Thomas*, 4 *Greenl.* 341; *Minot* v.

Prescott, 14 *Mass. R.* 495; *Bates* v. *Webb*, 8 *Mass. R.* 458; 6 *Cruise*, 279; *Noy*, 80; *Stevens* v. *Winship*, 1 *Pick.* 318; 16 *Johns. R.* 537; *Willes*, 141; 1 *Ves. & B.* 466. They contended, that they had established these two propositions. 1. That only a life estate was given to the widow. 2. That no power was given to her by the will to dispose of the fee of the estate, express or implied, or on any contingency; and that no evidence appears, that she attempted it.

The points attempted to be sustained by the counsel for the tenant will be seen in the opinion of the Court. They cited *Parsons* v. *Winslow*, 6 *Mass. R.* 174; *Stevens* v. *Winship*, 1 *Pick.* 325.

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

SHEPLEY J. — By the language of the will, "I give and bequeath unto my beloved wife all my real and personal estate so long as she remains my widow," the devisee took an estate for life subject to be defeated by her marriage, unless an intention to give a different estate can be inferred from the use of other language.

The argument is, that an intention not to use the words, *so long as she remains my widow*, as giving an estate *durante viduitate*, or for life, may be inferred from the clause of disposition in case of her marriage. The true intent being only to take the estate from her in case she should marry. The same design is also inferred, because in case of her marriage there is no devise over at her decease of the one third, which she was permitted to retain. This argument is opposed to the declared intention of the testator, that in case she did not marry, the estate at her decease should be divided among his children. The last clause in the will also shews an intention to give by the first clause only an estate for life. For after giving her all his real and personal estate by the first clause, he in the last, gives her his horse and chaise not to be inventoried as part of his estate; clearly implying, that she was to dispose of that, as she pleased and in a different manner from the rest, which, it is implied, was to be inventoried and accounted for.

Again it is insisted, that she had a power of disposal, and therefore took a fee. This power is inferred from several expressions

used in the will. Those principally relied upon are, "after my just debts and funeral charges are paid;" "remaining in her hands;" "what of my estate may then remain after paying her funeral charges." It is very difficult to infer the power contended for from such phraseology. Payment of his debts and funeral charges was to be made before she could take the estate in any manner. She was to take only what remained after they were paid; and it was not necessary, that she should dispose of any part of what she did take for that purpose. The other expressions would be appropriate to shield her from accountability for the destruction and delay incident to the use; or would be explained by their connexion. If it were admitted, that a power of disposal existed, she would not take a fee, there being an express devise to her for life. *Cruise's Dig. tit.* 38, *c.* 13, § 6.

It is further argued, that the devise is equivalent to one of all the real and personal estate for the payment of debts, and therefore is a devise of a fee. Reasons have been given for not admitting such a construction; but if it were admitted, that the estate was charged with the payment of the debts, the result contended for would not follow. For where there are no words of limitation, or inheritance, and the charge is upon the estate, the devisee takes only for life. It is otherwise if the charge is upon the devisee. This was settled by the case of *Denn* v. *Mellor*, which was much examined in the *King's Bench*, *Exchequer Chamber*, and *House of Lords*, where the judgment of *K. B.*, which had been reversed, was affirmed by the unanimous opinion of the Judges. 5 *T. R.* 558 and 2 *B. & P.* 247. The same rule may be regarded as established in this country. *Jackson* v. *Bull*, 10 *Johns. R.* 148, where the *English* cases are collected and examined by *Kent C. J.*; *Gardner* v. *Gardner*, 3 *Mason*, 211; *Wright* v. *Denn*, 10 *Wheat.* 231, where *Justice Story* says the authority of *Denn* v. *Mellor* has never been broken in upon.

The words, "all my real and personal estate" are much relied upon as exhibiting an intention, according to legal rules and decided cases, to give a fee. In this case those words are followed by the words so long as she remains my widow. If it were not so, the cases would not authorize a construction that would carry a fee. In the case of *Doe* v. *Allen*, 8 *T. R.* 497, the testator directed

his debts to be paid out of his personal estate, and in case that was insufficient charged his real estate, and then devised "all my messuages, lands, tenements, and hereditaments whatsoever," and it was decided, that the devisee took no more than an estate for life.

In the case of *Denn* v. *Mellor*, the devise was of "all the rest of my lands, tenements and hereditaments," and also of all his personal estate after payment of his debts; and the decision was, that the devisee took an estate for life, there being no charge upon the devisee. It is unnecessary to refer to other cases, as the doctrine appears to be too well established to be shaken. When the intention can be ascertained, the law will not allow it to be defeated, because the testator has not used appropriate language to convey his meaning. In this case, there is not only an absence of words of inheritance, but an express limitation during widowhood or for life, and a devise over, shewing clearly an intention to give a life estate only; and upon the application of legal rules established by decided cases, to the language, it will not be found to give the devisee more than an estate for life.

Judgment for the plaintiffs.

*George Bailey *v.* Joseph Rust, Jr. *& als.*

If two persons, being tenants in common of a lot of land embracing a mill privilege, make partition of the lot by mutual deeds of release, and in each of the deeds make a reservation "of one half the mill privileges on said land, with the right of using the same," the effect is, to divide the land, but to leave the mill privileges in common as before.

Where such owner in common of half the mill privileges on the whole lot conveys to a third person certain mills not in controversy, and also conveys in the same deed "one half of all the water for a gristmill, *on said lot*, below the mills before mentioned," the grantee takes one half of all the water, if so much be necessary, for the use of a gristmill to be erected below the mills then existing.

Where each of two persons, having equal rights to a water privilege of sufficient power to drive but one mill, has recently erected a mill on his own land, neither acquires a priority of right by first erecting his mill; but each has an equal right to the use of the water therefor, and neither can maintain an action founded in tort for such use of the water thus owned in common, before their rights become several by partition thereof.

The action was *trespass* on the case, whereby the plaintiff claimed damages of the defendants for erecting a dam and mill below the mill of the plaintiff and on the same stream, and thereby raising a head of water which flowed back upon the plaintiff's mill, dam and land, and greatly injured and destroyed his timber, grass and interval. After the plaintiff's evidence was closed, Weston C. J. directed a nonsuit, which was to be set aside, if the Court should be of opinion that the action was maintainable on the facts. The material facts are stated in the opinion of the Court.

Foote and *J. S. Abbott*, argued for the plaintiff, and cited *Hatch* v. *Dwight*, 17 *Mass. R.* 289; 2 *Dane, c.* 55, *art.* 3, *sec.* 15; *Miller* v. *Miller*, 7 *Pick.* 133; *Co. Lit.* 200, *b*; 2 *Black. Com.* 193; 3 *Black. Com.* 221, 235; *Cro. Eliz.* 803; *Rising* v. *Stannard*, 17 *Mass. R.* 285; *Bartlett* v. *Harlow*, 12 *Mass. R.* 352; *Blanchard* v. *Baker*, 8 *Greenl.* 253.

Mellen argued for the defendant, and cited *Stowell* v. *Flagg*, 11 *Mass. R.* 364.

* This case was intended to have been published in the preceding volume, but was accidentally mislaid.

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

WESTON C. J. — It appears, that *John M. Bailey* and *George Z. Mears*, being tenants in common of lot number eight, embracing certain mill privileges, did in *January*, 1828, make partition of that lot by mutual deeds of release, but in each of the deeds there was a reservation "of one half the mill privileges on said land with the right of using the same." Each conveyed to the other his interest in the land described by metes and bounds, excepting, from the operation of the deed, the half of the mill privileges, previously owned by each.

The effect of this was, and so the parties must have intended, to divide the land, but to leave the mill privileges in common as before. In *October*, 1833, *John M. Bailey* conveyed his interest in the land, which had been assigned to him, with the same reservation as to the mill privileges, to the plaintiff; but he did not transfer to him the interest, which he had in the privileges on the land, which had been assigned to *Mears*. The operation of this deed was, to convey by metes and bounds, part of the right which the grantor had in the common property. This though operative between the parties, might be defeated by his co-tenant, who could not be deprived of his right, if it should so be adjudged upon partition, to have his part assigned to him in severalty, in the part conveyed to the plaintiff; but as the plaintiff's title to half the privilege on his land in common is not controverted, we may, for the purposes of this investigation, regard him as the owner of the mill privilege or privileges on his land, in that proportion.

In *October*, 1828, *Mears*, being the owner in common of half the privileges on the whole of number eight, conveyed to *Lot Rust*, one of the defendants, a portion of certain mills, not in controversy, also "one half of all the water for a grist mill, on said lot number eight, below the mills before mentioned." What was to be below those mills, the gristmill, or one half of all the water for its use? We think the gristmill; and that the fair and just construction of this part of the deed is, that *Rust* was to have half of all the water for the use of a gristmill, to be erected below the mills then existing. The grantor was the owner of one half of all

the water; and it is wanted to enable his grantee to avail himself beneficially of what was conveyed. *Rust* thus became the assignee of half the water, which had been previously owned by *Mears*, at least so far as the same is necessary for the use of his gristmill. Whatever use of the water for this purpose, it was competent for *Mears* to make, has been conveyed to his assignee, *Rust*. It results, that from the date of the deed to *Rust*, he was tenant in common of the right to the use of the water, first with *John M. Bailey*, and then with the plaintiff, his grantee.

It appears, that where the plaintiff and *Rust* have erected their mills, there is but one privilege, which can be beneficially used. But each has a right to the use; and if their rights conflict, and they cannot come to an understanding between themselves, their only remedy is, to take legal measures to have partition made. The plaintiff cannot by his previous erection, deprive the defendant, *Rust*, of his equal right. The plaintiff had a right to build his mill upon the common privilege; and *Rust* could not, while he occupied, turn the plaintiff out and usurp his place. But *Rust* had a right to build his mill and dam below. There the plaintiff had no interest whatever. And if the effect of this is, to impair the value of the plaintiff's mill or land above, it is but the consequence of the use of the water, which the grantor of *Rust* specially reserved to himself. To decide otherwise, would be to render the reservation altogether ineffectual, and to deprive *Mears* and his assignee, *Rust*, of all rights under it.

It is contended, that the use made of the privilege by *Rust*, destroys the interest of the plaintiff. It may be equally said, if the plaintiff prevails, that his prior use destroys that of the defendant. Both may use the water; but in the conflict, in which each has attempted to exclude the other, *Rust* has an advantage, his mill and dam being lower down the stream.

We are of opinion, that the defendants are not answerable in an action founded in tort, for the use they have made of the water, to which the parties were entitled in common. If they cannot agree among themselves, the plaintiff may be restored to his rightful share upon partition made in pursuance of law.

Nonsuit confirmed.

The Trustees of WARREN ACADEMY *vs.* AARON STARRETT, *Administrator.*

Where the maker of a witnessed promissory note, payable in 1811, to the treasurer of a corporation or his successor in office, afterwards in 1828, added at the bottom of the note the words, "*I hereby renew the above promise,*" and subscribed his name thereto, and it was attested by a subscribing witness; in an action brought in 1836, upon the note and new promise, in the name of the corporation, *it was held:*

1. That the action was rightly brought in the name of the corporation.
2. That proof of the *new promise* by the subscribing witness thereto, was sufficient to authorize reading the *note* to the jury.
3. That the action was not barred by the statute of limitations.
4. That the note was a sufficient consideration to support the new promise.
5. That parol evidence that the note was made to show an apparent amount of funds, to enable the corporation to obtain a grant from the State, and that it was agreed at the time, that it should be given up after payment of interest for a few years, was inadmissible.
6. And that parol evidence that the new promise was made on a condition which had not been complied with, was inadmissible.

EXCEPTIONS from the Court of Common Pleas, SMITH J. presiding.

The writ, dated *April* 11, 1836, contained a count on the note of which a copy follows, signed by the intestate, with the money counts. "*Warren, May* 17, 1808. For value received, I promise to pay the treasurer of the *Warren Academy*, or his successor in office, or order, for the use of said *Academy*, one hundred dollars, on or before *February* 22, 1811, with interest annually.

"*William Starrett.*

"*Test. Jos. A. Head.*

August 23, 1828.

"I hereby renew the above promise. *William Starrett.*"

"*Test. Daniel Newcomb.*"

There were on the note nine indorsements of interest, the last in 1824. With the general issue, was pleaded by brief statement, the general statute of limitations. When the note was offered in evidence, the signature was denied, but on proof of the renewal, the whole was admitted. The defendant objected to its introduction, because it was made payable to the treasurer, and the action

was brought in the name of the corporation. The Judge overruled the objection. The defendant contended, that the note, and also the renewal, was barred by the statute of limitations. The Judge ruled, that the renewal might be regarded as an independent note; and being witnessed, that it was within the exception of the statute. The defendant then offered to prove by oral testimony, that at the time when the note was given, it was obtained to enable the trustees to have an apparent amount of funds in order to obtain a grant from the legislature of *Massachusetts*, and that it was then promised and agreed, that the note should be given up after a few years interest had been paid. The Judge ruled, that such evidence would contradict the note, and could not be received; and that the note was a good consideration for the renewal. The defendant then offered to prove by parol, that the renewal of the note by the intestate was made upon a condition which was not complied with. This objection too was overruled. The defendant filed exceptions.

J. S. Abbott, for the defendant.

1. The note ought not to have been read without proof by the subscribing witness. *Homer* v. *Wallis*, 11 *Mass. R.* 309. 2. The action should have been brought in the name of the treasurer, or his successor. *Fisher* v. *Ellis*, 3 *Pick.* 323; *Phil. Lim. Academy* v. *Davis*, 11 *Mass. R.* 113; *Essex Turn. Cor.* v. *Collins*, 8 *Mass. R.* 298. 3. The defendant should have been permitted to prove the circumstances under which the note was given. *Folsom* v. *Murray*, 8 *Greenl.* 400; 11 *Mass. R.* 113, before cited; *Boutelle* v. *Cowdin*, 9 *Mass. R.* 254; *Boynton* v. *Hubbard*, 7 *Mass. R.* 118. 4. He should have been permitted to prove that the renewal was made under conditions which had not been complied with. *Porter* v. *Hill*, 4 *Greenl.* 41; *Deshon* v. *Eaton*, *ib.* 413. It was a mere admission relied on to take the case out of the statute, and the whole was proper to be shown. 5. The renewal was incorrectly ruled to be an independent note, and within the exception of the statute. *Stat.* 1821, *c.* 62, § 10; *Gilman* v. *Wells*, 7 *Greenl.* 25; *Russell* v. *Swan*, 16 *Mass. R.* 314.

M. H. Smith, for the plaintiffs. A moral obligation is sufficient to support an express promise. *Andover, &c. T. Corp.* v. *Gould*,

6 *Mass. R.* 40. The action is rightly brought in the name of the corporation, on a note given to their treasurer. *Amherst Academy* v. *Cowls*, 6 *Pick.* 427; *Levant* v. *Parks*, 1 *Fairf.* 441. Whether there was fraud, or want of consideration, is not before the Court on these exceptions; but merely whether the parol testimony was admissible to vary the written instruments. This was manifestly right. The note was a sufficient consideration for the renewal. Renewing the promise is equivalent to renewing the note. And this takes the case out of the statute of limitations. *Murray* v. *Hatch*, 6 *Mass. R.* 465; *Hunt* v. *Adams*, *ib.* 519; *Hunt* v. *Adams*, 7 *ib.* 518; *Richards* v. *Killam*, 10 *ib.* 239; *Stackpole* v. *Arnold*, 11 *ib.* 27; *Rice* v. *West*, 2 *Fairf.* 323; *Pembroke* v. *Stetson*, 5 *Pick.* 506; 6 *Pick.* 427, before cited.

The case was continued several terms for advisement, and the opinion was drawn up by

Emery J. — The renewal of the note being proved, it is deemed by the Court sufficient to allow the whole to go to the jury. This subsequent act of recognition necessarily ratifies and confirms the original promise. And this renewal being witnessed, the whole is taken out of the statute of limitations.

The suit is properly in the name of the Trustees.

The defendant offered to prove by oral testimony, that at the time when the note was given, it was obtained for the purpose of enabling the Trustees to have an apparent amount of funds in order to obtain a grant from the legislature of *Massachusetts*, and that it was then promised and agreed, that the note should be given up after a few years interest should be paid, which in fact was paid. To say nothing of the disingenuousness of this arrangement, as it regards the legislature, and the important interests of education, we think the Judge decided rightly in rejecting the evidence, because it would contradict the note. And we coincide in his opinion that the note was a good consideration for the renewal of the note absolutely, and without condition.

In a review of the cases by *Parker C. J.* in *The Trustees of Amherst Academy* v. *Cowls*, 6 *Pick.* 438, he observes, that promises of this nature, if inefficient at first for want of a payee, or because, at the time, there was no actual consideration, but one in

contemplation only, it is a legal basis for a subsequent promise. And that the execution of, or beginning to execute the trust, for which the fund is raised, forms a sufficient consideration for such subsequent promise. As to the pretence of paying the interest for a few years, as a satisfaction of the note, it would seem that even if it be considered in the light of an accord and satisfaction, it would not be available. For if the accord or agreement that satisfaction should be rendered by the defendant, or a third person, at a future day, be not founded on a new consideration, and be not so far *binding* on the debtor as to afford *a fresh right* of action to the creditor for its non-performance, an action lies on the original demand even before the time prescribed for rendering satisfaction.

The defendant offered to prove by oral testimony that the renewal, dated *August* 23, 1828, was made by said *William Starret* upon condition, which was not complied with. But the Judge ruled that the renewal appearing to be absolute and unconditional could not thus be proved to be conditional.

Much speculation has arisen heretofore, on the subject of what admission is sufficient to take a debt out of the statute of limitation. And it has been held that it should be of such a nature that a promise can be implied from it. But in this case, the Court are not left to be seeking for grounds on which to make such implication. The defendant, under the original note, declared in writing by him signed, "I hereby renew the above promise." Now to suffer the introduction of parol testimony to alter, qualify, contradict, or restrain this, we think would be to conflict with the rule of law, long settled, in regard to promissory notes. According to the agreement of the parties, the default is to stand; and judgment must be rendered for the plaintiff for damages and costs.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF KENNEBEC, JUNE TERM, 1839.

BARNABAS D. HOWARD *vs.* EDWARD S. FOLGER.

After a member of a company of militia has been elected and commissioned as Ensign, although he has not been qualified by taking the oath of office, he is an officer, and cannot legally warn a private to perform militia duty, by leaving a notice.

Where the Captain of a company has been elected and commissioned as Major, he is no longer commander of the company, although he has not been qualified as Major.

Where the record shows, that the exceptions were not filed until after the adjournment of the Court without day, they cannot be considered as part of the record.

But if the exceptions have been returned as part of the record, and the defendant in error has pleaded *in nullo est erratum*, he cannot then make the objection.

It is only when a civil suit *is pending*, that depositions, *not in perpetuam*, are authorized to be taken; and if the opposing party appear before the magistrate without objecting before him to the taking, and put interrogatories to the witness, this does not preclude him from making the objection at the time of trial.

THIS was a writ of error, brought to reverse a judgment of a justice of the peace, in an action brought by *Folger*, as clerk of a company of militia, to recover of *Howard* a fine for not appearing at a review on the fourth of *Oct.* 1837. To prove the warning, the deposition of one *Pishon* was produced, and shew that the only notice to *Howard* of the intended taking, was served upon

him before the commencement of the action; and also, that he was present at the taking, and put interrogatories. *Howard* objected to its admission, but the justice admitted it in evidence. The name of *Pishon*, at the time of the warning, was upon the roll of the company as Ensign, but not as a non-commissioned officer or private; and he had then been elected and commissioned as Ensign, but had not been qualified as such. His testimony alone was relied on to prove the notice to *Howard*, and he stated that it was given by him. Objection was made, that no legal warning had been proved, but the justice overruled the objection. The company was ordered out by the Lieutenant as commanding officer. To show a vacancy in the office of Captain, it was proved that before that time, the Captain had been elected and commissioned as Major, but had not been qualified. The facts relative to the time and manner of filing the exceptions, and the pleadings on the writ of error, are sufficiently noticed in the opinion. The facts and arguments of counsel bearing on several other points are not given, as the judgment was reversed, without deciding on them.

McCobb, for the plaintiff in error, contended:

1. The deposition was improperly admitted. Notice to attend at the taking of the deposition, given before the suit, is legally no notice. Besides, the authority to take the deposition did not exist, and the proceeding is wholly void. No appearance can cure it. *Amory* v. *Fellowes*, 5 *Mass. R.* 219; *Clement* v. *Durgin*, 5 *Greenl.* 9; *Talbot* v. *Clark*, 8 *Pick.* 51.

2. The militia act, *stat.* 1834, *c.* 121, § 21, requires the notice to be given by a non-commissioned officer or private, and makes such only liable for disobeying an order to warn. The warning by the Ensign was necessarily without authority, and not binding upon any one.

3. If it be said, that this man was not Ensign, because not qualified, then the company was not legally ordered to perform militia duty. There was no vacancy in the office of Captain, until the right to act as Major existed. Until he was qualified as Major, he remained Captain. *Chapman* v. *Shaw*, 3 *Greenl.* 372.

As to the objection now made, that the case is not properly before the Court, it comes too late. He cannot say there is no record, after having pleaded, that there is no error in the record. The

record is sent by the justice as his record, and this Court cannot inquire when it was made up. The records of all Courts are usually made up after the Court adjourns. 1 *Salk.* 270.

Vose & Lancaster, for *Folger*, argued, that the exceptions were not tendered in season, as the Court had adjourned long before its seal was affixed to them, and could not be considered as part of the record. *Stat.* 13 *Edw.* 1, *c.* 31; *Colley* v. *Merrill*, 6 *Greenl.* 50. It is a sufficient answer to the objection to the deposition, that *Howard* was present and put interrogatories. If a qualification be necessary to make the man Ensign, then it is admitted that the person warning had authority. But the warning is good, if the notice be seasonably left by an officer, or even by a stranger. *Commonwealth* v. *Cutter*, 8 *Mass. R.* 279. The company was properly ordered out by the Lieutenant, as the moment the Captain had been chosen and had accepted as Major, he was no longer commander of the company, and the vacancy might be filled, if he was never qualified as Major.

The case was continued for advisement, and the opinion of the Court subsequently given by

SHEPLEY J. — The defendant in error objects, that the record is not regularly before this Court, because the bill of exceptions was not seasonably tendered and allowed. It appears, that the trial before the magistrate took place on the 25th of *November*, 1837. There is no notice of any continuance, and the certificate of the magistrate upon the bill of exceptions states, that notice was given on the day of trial, that exceptions would be filed, and that he allowed and sealed them on the 14th of *May*, 1838.

It sometimes happens in practice, that the bill of exceptions is not completed until after the close of the session, but it should bear date as of the term, and is supposed to have been then made up in like manner as the records of the Court are, although written out afterward. The magistrate has not in this case conformed to that practice; and the exceptions are irregularly here, unless the defendant is precluded from making that objection. The effect of the plea *in nullo est erratum* is, that this record as it is, is without error, and the party cannot allege that there is none before the Court. *Meredith* v. *Davies*, 1 *Salk.* 270. It is said, that the

plea does not bind the Court, but the Court cannot be expected to seize upon such objections as arise out of a want of conformity to a well known practice of the courts.

The Captain of the company having been elected Major was commissioned as such on the 22d of *August*, 1837, but was not qualified to act by taking the oaths until the 4th of the next *October;* and the plaintiff in error contends, that the company was not legally ordered upon duty by the Lieutenant, because there was not a vacancy in the office of Captain. The act of *March* 8, 1834, § 10, provides, that "every person who shall be elected to any office as aforesaid and shall not within one hour after he shall have been notified of his election by the officer presiding thereat (excepting Major Generals) signify his acceptance thereof, shall be considered as declining to serve, and orders shall be forthwith issued for a new choice." The Captain must therefore have accepted very soon after he was elected, or he could not have been commissioned; and by being elected and accepting the office of Major he vacated that of Captain. This case differs from the case of *Chapman* v. *Shaw*, 3 *Greenl.* 372. The question there arose upon the *exercise* of powers belonging to a different department of the government, under *article* 3, § 2 of the constitution. Before he could *exercise* the duties of a justice of the peace he must have taken the requisite oaths, and therefore the decision was, that one office was not vacated until he could exercise the other, being qualified for that purpose.

For like reasons, it must be inferred that *Pishon* had accepted the office of Ensign, otherwise he could not have been commissioned as such; and he had been commissioned before the warrant issued to him to warn the men. The same act, § 21, provides that the commanding officer of the company "shall issue his orders to some one or more of the non-commissioned officers or privates of his company requiring him or them to notify the men." The testimony of such non-commissioned officer or private, "unless invalidated by other evidence," is made conclusive, that due notice was given. And he is subjected to a penalty of not less than one, or more than three dollars for each one, whom he shall neglect or refuse to warn. It appears to have been the intention of the legislature to appropriate the duties in such a manner, and to attach such penalties to the

non-performance of them as effectually to compel those upon whom the duty was imposed to order out and warn the men. No commissioned officer's testimony is made equally effectual to prove the notice; nor is it made his duty to give the notice, nor is he subjected to any penalty or delinquency for neglecting or refusing to do it. If the commander may issue his warrant to a commissioned officer, who will consent to assume the performance of the duty, the company may fail to be called out and yet no one be liable to be punished for any neglect, and thus the intention of the legislature would be defeated. It is important that no such irregularities, as would impair the efficiency of the militia law, and allow a practice, by which the officers and men might evade it with impunity, should be allowed. In the case of the *Commonwealth* v. *Cutter*, 8 *Mass. R.* 279, the non-commissioned officer would have been responsible for the neglect, and the course permitted did not violate the spirit of the law or permit it to be evaded with impunity. The warrant must be regarded in this case as illegally issued to a commissioned officer, contrary to the letter and spirit of the law; and the notices under it were unauthorized. It is only when a civil suit is pending, that depositions not *in perpetuam* are authorized to be taken. Appearing and putting interrogatories to the witness waives only objections to the form of the question, or the manner of examination, if not taken at the time, but does not preclude objections to the legal character of the testimony. *Polleys* v. *Ocean Ins. Co.* 14 *Maine R.* 141. The deposition was not legal testimony. As the judgment must be reversed for these causes, it is not necessary to decide upon the other errors assigned.

Judgment reversed.

WILLIAM GILMAN *vs.* ISAAC LEWIS.

A guaranty of payment upon a negotiable note over the signature of the indorser, is *prima facie* evidence that it was written at the time the indorsement was made.

There is no necessity of causing inland negotiable notes to be protested.

A guaranty of payment of a negotiable note, "for debt and costs without demand or notice," made by the indorser, renders him liable to the indorsee for the costs of a fruitless suit against the maker, but does not subject him to the payment of the expense of a protest.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Assumpsit against the defendant as indorser of a promissory note, dated *January* 22, 1834, for $30, signed by *G. W. Washburn*, and payable to *Lewis*, or his order in *June* then next, with interest, and also to recover costs of a suit against *Washburn*. On the back of the note were these words, not in the handwriting of the defendant, except his signature, which was admitted to be genuine. "For value received, I *guarantee* the within note for debt and costs, without demand or notice. *Isaac Lewis*." Before the commencement of this suit, the plaintiff had obtained judgment against *Washburn*, the maker, for $32,25, debt, and $8,06, costs of suit; and an execution issued thereon had been returned unsatisfied. The plaintiff read the note to the jury and offered to read the guaranty on the back thereof. The defendant objected to the reading of it in evidence, unless the plaintiff should first prove, that the same was on the back of the note, when *Lewis* put his signature there. The Judge permitted the paper to be read in evidence, and instructed the jury, that the legal presumption was, that the guaranty was written upon the note, when the defendant put his signature, and that the plaintiff was entitled to recover the amount of the note with interest, and that he was not entitled to recover the costs incurred in the suit against *Washburn*, as that part of the guaranty relating to the defendant's liability for costs extended only to the expense of protest, and making demand and giving notice. By permission of the Judge, the plaintiff wrote over the name of *Lewis*, "For value received I indorse the within to *William Gilman*." The verdict was for the plaintiff, but did not

include the costs of the suit against *Washburn*. The plaintiff excepted to so much of the instruction, as denied the right to recover the costs of the suit against *Washburn;* and the defendant excepted to so much as related to the presumption arising from the guaranty being over the name of the defendant.

Boutelle, for the defendant, contended, that the instruction of the Judge, that the presumption was, that the paper was in its present state, when the defendant placed his name on the back of the note, was erroneous, and that it was right, as to the costs; and cited 1 *Stark. Ev.* 310; *Roseboom* v. *Billington*, 17 *Johns. R.* 182; *Josselyn* v. *Ames*, 3 *Mass. R.* 274; *Oxford Bank* v. *Haynes*, 8 *Pick.* 423; *Tenney* v. *Prince*, 4 *Pick.* 385; *Fuller* v. *McDonald*, 8 *Greenl.* 213.

I. Redington, for the plaintiff, argued, that the same presumption of law existed in relation to the contract on the back of the note, that did in respect to the one upon its face. The production of the contract and proof of the signature are alike sufficient in both in the absence of all other proof. The word costs is a technical term, and where no qualifying words are attached, means costs of Court. The term may be broad enough also to include the costs of protest, demand and notice. But these do not appear to be recoverable against an indorser without an express promise to pay them. *City Bank* v. *Cutter*, 3 *Pick.* 414; *Young* v. *Bryan*, 6 *Wheat.* 146; *Union Bank* v. *Hyde*, *ib.* 572.

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

Weston C. J. — The only question, arising on the defendant's exceptions is, whether what was written over the defendant's signature, on the back of the note, must be presumed to have been written before his signature; in other words, whether the paper itself is *prima facie* evidence of that fact. And we are of opinion that it is. It differs much from an indorsement of interest on a bond or note, by the obligee or holder, which has not the signature of the obligor or maker. It is true the contract, upon which the defendant is attempted to be charged, differs from what would arise from his blank indorsement, he being the payee. In that case his liability would be conditional, that of a common indorser only. If the

holder, without his privity or consent, should write over his name a waiver of demand and notice, he would be guilty of forgery, which is not to be presumed. If a blank indorser is exposed to have his liability increased by forgery, it cannot change the law of evidence upon this point, which is, that a special contract, which has the signature of the party to be charged is, until impeached, taken to be genuine.

Whoever presumes to alter a written instrument, to the prejudice of another's right, is liable to be severely punished. The peril attending the commission of such a crime, which may be proved by the oath of the party injured, is the security afforded by the law, to preserve commercial paper, and other instruments from violation. The strictness of the law, upon negotiable notes and bills, as to demand and notice, and the hazards attending it, do often induce a prudent indorsee to require a waiver of this condition. In *Farmer v. Rand*, 14 *Maine R.* 225, and in *Buck* v. *Appleton*, 14 *Maine R.* 284, it was expressly held, that a waiver of demand and notice, upon a negotiable note, over the signature of the indorser, is *prima facie* evidence, that it was done with his privity and consent. The exceptions on the part of the defendant are overruled.

On the point raised in the plaintiff's exceptions, we do not agree with the presiding Judge. As demand and notice was waived, no expense of this sort could have been necessary, or would have been justified. There is no occasion to cause notes of hand to be protested; and it is rarely practised on small notes in the country. In a suit by the plaintiff against the defendant upon the note, the law gives him costs, if he is the prevailing party. Something must have been intended, by the express stipulation of the defendant as to costs, which in our opinion must be understood to mean, that the defendant undertook to guaranty the payment of the debt and such costs as might arise, in attempting to enforce its collection. We accordingly sustain the exceptions taken by the plaintiff.

JOHN VAUGHAN *vs.* EBENEZER BACON.

The relinquishment and yielding up to one of several tenants in common by the disseizor, after a disseizin of five years, of all the right, seizin, possession and betterments which the disseizor had in and to the proportion of that tenant in common in the premises, has the effect to put *all the tenants in common* in the seizin and possession of their shares respectively, and to prevent the operation of the statute of limitations against any of them prior to that time.

THE demandant in a writ of entry, dated *May* 17, 1836, counting on his own seizin and a disseisin by the tenant, demanded one twenty-eighth part of the premises, as heir at law to *Benjamin Hallowell*, and proved his title thereto on the trial. The tenant then proved, that he had been in the continued open possession of the premises for the last twenty-two years before the suit. The demandant then introduced a power of attorney made by three of the other tenants in common with the demandant, upon which the tenant, *Bacon*, under date of *Nov.* 25, 1819, had made and signed this writing: "I hereby relinquish and yield up to the within mentioned three co-tenants with the demandant, all the right, seizin, possession and betterments which I have in and unto their respective proportions of the demanded premises, reserving to myself and my heirs and assigns the right to take off and carry away all the fences which I have erected on the same."

A verdict was thereupon taken for the demandant, subject to the opinion of the Court, whether the surrender so operated and enured to the benefit of the demandant, as to purge the disseizin, and enable him to maintain this action.

The case was argued in writing.

Boutelle, for the tenant, contended, that the case shows a complete title by disseizin in the tenant, who has done nothing to avoid or impair the title, unless by yielding to the claim of three persons claiming three twenty-eighth parts thereof. This does not revest any title in the demandant, or estop the tenant from asserting his title. This yielding up is not what is known in law as a surrender. *Co. Lit.* 337, *b.* Tenants in common are deemed to have several and distinct freeholds; and each is considered as solely or severally seized of his share. 4 *Kent's Com.* 363; 4 *Dane*, 764.

They never went into the actual possession of the premises, or any part thereof; and a right to the possession, or a constructive possession, in the three cannot purge a disseizin of the owners of the other shares. *Fox* v. *Widgery*, 4 *Greenl.* 218. To have this effect in any case, the entry must be made in the name and for the benefit of the whole. In this case they acted exclusively for themselves.

A. Redington, Jr. for the demandant.

It is indispensable to the maintenance of the defence, that the possession should have been *uninterruptedly* adverse to the true owner for at least twenty years. This paper was proper evidence to be submitted to the jury to prove a submission to the title of the true owners.

The effect of a surrender is to drown and extinguish the title of the surrenderor. 1 *Shep. Touch.* 300. It restores to the owner all his original rights. *Co. Lit.* 338, *a*; *Oliver's Conv. 2d Ed.* 462; 2 *Salk.* 618; *Cro. Eliz.* 488; 6 *Com. Dig.* 313; *Stat.* 1821, *c.* 53, § 2; 2 *Wils.* 26; 1 *Shep. Touch.* 306.

A disseizin lasts no longer than the adverse claim continues. 2 *Johns. R.* 444; *Peters* v. *Foss*, 5 *Greenl.* 182; 3 *Wash. C. C. R.* 546; *Welles* v. *Prince*, 4 *Mass. R.* 67. The effect is to purge the disseizin as to three tenants in common, named in the paper. The seizin of one tenant in common is the seizin of all. 2 *Cruise*, 529; *Viner's Ab. Title Curtesy, A. pl.* 11; *Porter* v. *Hill*, 9 *Mass. R.* 34; 6 *Mod.* 44; 5 *Cruise*, 257; 4 *Kent's Com.* 365; *Ricard* v. *Williams*, 7 *Wheat.* 60; 1 *Shep. Touch.* 308; *Co. Lit.* 214, *a*; *ib.* 192, *a*; 15 *Petersd. Ab.* 12.

There can be but one seizin in land. No proprietor can be disseized of an undivided part of his interest, nor can a tenant in common be disseized by a stranger claiming his part only. *Farrar* v. *Eastman*, 1 *Fairf.* 195. In a mixed or concurrent possession, the legal seizin is according to the title. *Codman* v. *Winslow*, 10 *Mass. R.* 146; *Langdon* v. *Potter*, 3 *Mass. R.* 219; 2 *Salk.* 423; 5 *Cowen*, 92; 9 *Johns. R.* 174; *Knox* v. *Silloway*, 1 *Fairf.* 201.

The case was continued, and the opinion of the Court was by

Weston C. J. — The recognition by the tenant, in 1819, of the title of the three, who were co-tenants with the demandant, and

his abandonment at that time to them of all his right, seizin, and possession in their proportion of the land in controversy, had the effect to put them in the seizin and possession of their shares respectively. If the tenant held after that, it was either in subordination to their title, or by a subsequent disseizin. And we are of opinion, that thereupon the seizin was at that time revested in the rightful owners.

It is common learning, that the seizin of one tenant in common is the seizin of all. 2 *Cruise,* 529. *Coke Lit.* 199, *b.* Where there is a concurrent possession, the seizin is according to the title. *Langdon* v. *Porter & als.* 3 *Mass. R.* 215; *Farrar & al.* v. *Eastman & al.* 1 *Fairf.* 191. The entry and possession of one tenant in common, is the possession of his co-tenants. 2 *Cruise,* 537. The entry of one joint-tenant, coparcener, or tenant in common, will avoid the effect of a fine, as to all the other co-tenants. 5 *Cruise,* 292. So the entry of one heir will enure to the benefit of all. *Ricard* v. *Williams & als.* 7 *Wheat.* 59. And an acknowledgment of title, by a party in possession, is equivalent to an actual entry. *Wells* v. *Prince,* 4 *Mass. R.* 64. It would result, that one tenant in common, while another is in possession, cannot be disseized by a stranger. And so the Court strongly intimate in *Farrar* v. *Eastman & al.* A disseizin cannot exist, unless the disseizee is excluded. Here the true owners were in the actual seizin by some of the tenants in common, who represented the whole. It appears to us very clearly, that the tenant has not been in the actual and uninterrupted seizin of the estate, claimed by the demandant, long enough to entitle him to the protection of the statute of limitations.

Judgment on the verdict.

PALMER EMERSON *vs.* EPHRAIM H. LOMBARD *& al.*

The creditor is entitled to recover of the debtor, the expense of citing him on the execution to appear before two justices and make a disclosure, as provided in the third section of the poor debtor's act of 1831, *c.* 520.

If the execution issue on a judgment before a justice of the peace, his certificate, made upon the margin of the execution, certifying that the debtor had been cited to appear before two justices for that purpose and had made default, and stating the amount of the costs of citation, is sufficient to authorize the officer holding the execution to collect such costs.

THE plaintiff in an action of trespass, alleged, that he had been arrested and falsely imprisoned by the defendants. The defendants justified the arrest and imprisonment by virtue of an execution in favor of *Lombard* against the plaintiff, the other defendant, *Eastman*, being a deputy-sheriff and having the execution in his hands. An alias execution was produced, issued by the Municipal Judge of *Hallowell*, for a balance of $18,50, in the margin of which was inserted the sum of $18,50, and also the following entry. "It appears by a certificate attached to a former execution, that the creditor herein named had caused the within named *Emerson* to be notified according to law, to appear and make a disclosure as contemplated by an act entitled an act for the relief of honest debtors from imprisonment for debt, and that said *Emerson* did not appear, but made default. The cost taxed, is $4,29. *S. K. Gilman*, Judge." The certificate of the two justices, referred to in the margin of the execution, was produced, signed by *S. K. Gilman* and *William Clark*, as justices of the peace and quorum, whereon was the following taxation. Justices' fees, $3,00, citation, $0,50, service of citation, $0,79, total, $4,29. The plaintiff tendered the amount due on the execution, $18,50, to *Eastman*, and his fees. *Eastman* demanded the sum of $4,29, in addition, and on his refusal to pay it, by direction of *Lombard*, committed the plaintiff to prison. The trial was before the Chief Justice, who directed the jury, for the purposes of the trial, that the officer had no right to imprison the plaintiff for the non-payment of the $4,29. The verdict for the plaintiff was to be set aside, if the instruction was erroneous.

Otis, for the defendants, cited the poor debtor act of 1831, *c.* 520, and commented on its provisions, and argued, that the officer had a perfect right, and that it became his duty, to make the arrest complained of. He cited also, *Fisher* v. *Ellis*, 6 *Greenl.* 455.

F. Allen and *Clark*, for the plaintiff, argued, that the defendants had shown no legal cause for the commitment, and contended: 1. The burthen of notifying the debtor was on the creditor, if he would arrest the body of his debtor, and the statute had provided no mode to force the debtor to pay it. 2. If there was any mode, the justices before whom the notice was returnable should issue the execution therefor. 3. That if the justice before whom the judgment was rendered could do it, he had not done it, and should have inserted the direction to collect the amount in the execution. They cited *Gordon* v. *Edson*, 2 *N. H. Rep.* 152.

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

Weston C. J. — Whether the imprisonment complained of is justified or not, will depend upon the question, whether the plaintiff, while under arrest, tendered to the officer the full sum, for which he was liable, upon the execution. The plaintiff had been cited, under the act of 1831, *c.* 520, § 3, and had made default. The seventh section of the same statute determines the fees, to which the justice, who issues the notice, and the justices, before whom the disclosure is appointed to be made, shall be entitled, to be paid by the party applying therefor. The twelfth makes provision, where the debtor is about to go out of the State. And it gives to the justices "the same fees as are allowed, for like services, in and by the seventh section of this act, to be taxed on the mesne process or execution, with the other costs of the creditor, or creditors, if he or they shall be the prevailing party on such disclosure."

As it is the general policy of the law, to allow costs to the prevailing party, and as the recovery of the costs, provided for under the seventh section, in favor of such party, is no where else determined in the statute, we are of opinion, that it was the intention of the legislature, that the costs under the seventh, as well as under the twelfth section, should be taxed for the creditor on the execution, if he should be the prevailing party. They were to be the

same fees, to be taxed and allowed in the same manner. Where the debtor was adjudged to be the delinquent party, it does not appear to us to have been the design of the law, to throw upon the creditor any part of the costs, incurred in enforcing the collection of his debt. And it appears to us, that the certificate of the municipal Judge of what had been done, and the entry of the accruing costs in the margin of the execution, was taxing the same thereon, and sufficiently complied with the requisition of the statute. A more detailed authentication of these proceedings remained for the inspection of the debtor, in the office of the Judge. There is no legal objection to the fees of the justices, which are expressly given, whatever may be said of the fee, claimed and allowed to the officer. It results then, that the plaintiff did not tender enough, and the justification under the execution is sustained. In *Gordon* v. *Edson*, 2 *N. H. Rep.* 152, the fees for committing were held not to be due, until after the commitment, and that the debtor therefore could not be said to be committed for these fees, although he might be detained in prison, until they were paid. The costs here were due before the arrest. The decision there turned upon the form of the execution. These costs depend upon a special statute.

New trial granted.

Inhabitants of PITTSTON *vs.* SAMUEL CLARK.

A town agent is not liable to the town for not resisting the payment of a claim, which the town had agreed to pay, even if the claim could have been successfully resisted.

THE action was brought to recover damages occasioned by the neglect of the defendant, as their agent, to defend an action brought against them by one *Blanchard*, wherein he claimed the sum of $20. The facts in the case appear sufficiently in the opinion of the Court. On the trial, before the Chief Justice, the counsel for the defendant insisted, that acting, as he did, by a delegated authority, he ought not to be charged by the plaintiffs for negligence in being defaulted upon a claim, the justice of which they had re-

cognized and ordered to be paid. The counsel for the plaintiffs contended, that the vote afforded him no justification, not being within the municipal powers of the town. A nonsuit was ordered by consent, to be set aside, if in the opinion of the Court, the action could be maintained.

Clark, for the plaintiffs, after the adjournment, furnished the Court with a very long argument in writing and reply, and *Evans*, for the defendant, a more condensed written argument. The subjects discussed are noticed in the opinion of the Court.

Clark cited, *Wiscasset* v. *Trundy*, 3 *Fairf.* 204; *Salem Bank* v. *Gloucester Bank*, 12 *Mass. R.* 29; *Foster* v. *Essex Bank*, *ib.* 483; *Odiorne* v. *Maxey*, 13 *Mass. R.* 181; 2 *Cranch*, 127; 2 *Johns. R.* 109; *Snow* v. *Perry*, 9 *Pick.* 542; *Damon* v. *Granby*, 2 *Pick.* 345; *Vinton* v. *Welch*, 9 *Pick.* 90; *Hill* v. *Davis*, 4 *Mass. R.* 140; 2 *Strange*, 828; *ib.* 1241; 5 *East*, 313; *Stetson* v. *Kempton*, 13 *Mass. R.* 272; *Bussy* v. *Gilman*, 3 *Greenl.* 191; *Haliburton* v. *Frankfort*, 14 *Mass. R.* 214; 5 *Dane*, 158, § 11; 12 *Mod.* 448; 5 *Dane*, 562; *stat.* 1833, *c.* 64; *Gedney* v. *Tewksbury*, 3 *Mass. R.* 307; *stat.* 1821, *c.* 114, § 7; 5 *Mass. R.* 423; 12 *Pick.* 480; 10 *Reports*, 32; *stat.* 1821, *c.* 59, § 15; *Com. Dig. Pl. B.* 1; 6 *Petersd. Ab.* 625; *Arch. Pr.* 98; 2 *Kyd on Corp.* 404; 4 *Cowen*, 97; 9 *Dane*, 570; *stat.* 1821, *c.* 60, § 2; *ib. c.* 138, § 7; 5 *Peters*, 171; 1 *Dane*, 458; *Dec. of rights*, § 22.

Evans, in his argument, commented on many of the positions taken by the opposing counsel, and argued in support of these propositions:—

1. The defendant is not liable, by reason of the recovery against the town in *Blanchard's* suit.

2. The vote in town meeting furnished sufficient justification to the defendant for permitting such recovery. He cited, under the first position, *stat.* 1821, *c.* 133, § 1, 9; *Dennet* v. *Nevers*, 7 *Greenl.* 399; *Baker* v. *Windham*, 1 *Shep.* 74; *stat.* 1821, *c.* 121; *ib. c.* 127; *ib. c.* 114, § 6; *Nelson* v. *Milford*, 7 *Pick.* 18; *Ford* v. *Clough*, 8 *Greenl.* 334; *Kempton* v. *Stetson*, 13 *Mass. R.* 272; *Farrar's Rep. of Dartmouth College case in Supreme Court of N. H.* 211. And under the second, *stat.* 1821, *c.* 114,

§ 7; *Hayden* v. *Madison*, 7 *Greenl.* 76; *Abbott* v. *Hermon*, *ib.* 118; *Canal Bridge* v. *Gordon*, 1 *Pick.* 297; *Folsom* v. *Muzzy*, 8 *Greenl.* 400.

The opinion of the Court was subsequently drawn up by

Shepley J. — To support this action it is necessary to prove the misconduct or neglect of the agent, and that in consequence of it, the plaintiffs suffered damage. The neglect charged, consists in permitting a default to be entered by agreement in an action brought by *Leonard Blanchard* against the town. Before the default was entered and judgment rendered, the town had at a legal meeting voted to authorize the selectmen to pay the claim. The neglect and injury now complained of consists in not resisting the payment of a claim, which the town had agreed to pay. This simple statement of the case is sufficient to shew, that the action can be maintained only upon some unusual view of the relation between principal and agent. The argument for the town rests the right to recover upon grounds which distinguish it from the ordinary relation in such cases. One of these is, that the agent of a town appointed according to the provisions of the statute, becomes an officer of the law and bound to perform his duties in prosecuting and defending suits according to law, whether in so doing he conforms to, or disobeys the instruction of the principal. The statute providing for the appointment, does not prescribe their duties, or define their powers. It only gives them the right to represent their towns and perform such acts as their principals might perform by any other agency, which would legally represent them. And to ascertain the relative rights and duties of towns and their agents, reference must necessarily be had, as in other cases, to the laws of the land. And these laws decide, that the agent cannot act against the express will of the principal without subjecting himself to an action for such damages, as he may thereby have occasioned. It is not to be understood that the agent may be required to do an illegal or immoral act.

Another ground taken in the argument is, that the agent cannot be justified by the vote of the town, because the town had no legal right to pass such a vote.

It is said *Blanchard* had no legal claim upon the town for compensation for his time and money expended in its service by virtue of a vote of the town, because the town was not authorized to expend money for the purpose for which *Blanchard* was employed. Towns have power to employ agents, and if those agents are instructed to do an act not within the power of their towns to perform, the act will be inoperative, but does it follow, that the agent is not to be paid for his services? But assuming the argument to be correct, and that *Blanchard* could not have recovered; these parties are then presented in the position of a principal employing an agent to do an act not within the powers of the principal to accomplish, and in such case if the agent acts according to the instructions of the principal it affords no ground of complaint for the principal. He cannot say I had no right to give you such instructions, and therefore you must pay me for any injury which I have suffered in consequence of your obeying them. The gist of the action is the want of obedience, and that does not exist under such circumstances. Whatever rights third persons may have against the agent, it is not for the principal to make his own want of power the cause of complaint against the agent acting in obedience to the instructions given. If it be admitted that *Blanchard* could not legally recover, must a town litigate every claim brought against it, and pay only such, as have been proved to be legal and just by a judgment recovered? Towns are liable to be sued and are empowered to defend, and this implies the power of judging of the proper means of defence, as well as the right to adjust suits upon such terms as their own interest may require. If this be allowed it is said, that towns may thus permit the property of the inhabitants to be taken for purposes for which it was never intended, that they should be liable to charge, or assessment. Be it so; it only proves the imperfection of the system and its liability to be abused and perverted to improper purposes; and that the powers, which are granted may by abuse be made injurious and even dangerous to the security of private property. What was intended for good may by perversion become an instrument of evil. The same result may be produced by the improper performance or by the neglect of many of the duties enjoined upon towns; and the inhabitants may be subjected to heavy losses beyond what was con-

templated by the laws. To prove that such results may by possibility happen by allowing towns the powers necessarily implied, to enable them to exercise the powers actually conferred, is but another mode of shewing the imperfection of most, if not of all legislation. And if towns by the abuse of the powers granted may subject their inhabitants to taxation for purposes not within the granted powers, it is not for the judicial department to devise and apply the necessary restrictions to prevent it.

Upon the principle upon which this action can be maintained, the selectmen after paying a doubtful claim in obedience to the vote of the town, if it can afterward be proved to have been for objects for which the town was not authorized to expend money, may be subjected to pay damages for that very act of obedience.

The adoption of such a principle, now unknown to the law, would render the town incapable of the exercise of the powers granted or of performing the duties enjoined, as well as sanction the grossest injustice. To avoid an evil, as yet prospective or imaginary, the Court cannot depart from the well established principles of law regulating the rights and duties of principal and agent.

Nonsuit confirmed.

Emerson F. Carter *vs.* Isaac Thompson.

The refusal of a Judge of the Court of Common Pleas, to permit an amendment of a writ of original summons by inserting a direction to attach property, is but an exercise of discretionary power; and the Judge is under no obligations to grant such amendment.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Scire facias against the defendant as trustee of one *Chamberlain.* The plaintiff's counsel moved for leave to amend the writ of *scire facias,* by inserting a direction to attach the goods and estate of *Thompson* to the amount of four hundred dollars. *J. W. Bradbury* stated, that he appeared not only for the defendant, but for attaching creditors by whom the same property had been

taken and sold, and opposed the motion. The exceptions state, that "this motion was overruled by the Judge, on the ground, that such amendment was not allowable." The plaintiff filed exceptions.

Vose, for the plaintiff, contended, that the counsel opposing the amendment was to be considered only as counsel for the defendant, as no bond had been filed by creditors to enable them to contest the suit, and was to be considered a question between the plaintiff and defendant. The writ is amendable, especially as it is a judicial writ. But the same rules do not apply to the amendment of writs, as to the returns of officers, and whether the goods have been attached or not, is immaterial. He cited, *stat.* 1830, *c.* 463; *stat.* 1831, *c.* 508; *Wood* v. *Ross*, 11 *Mass. R.* 271; *Hearsey* v. *Bradbury*, 9 *Mass. R.* 95; *stat.* 1821, *c.* 59, § 16; 6 *Bac. Abr.* 103; *Co. Lit.* 290, *b*; 2 *Ld. Raym.* 1048; 2 *Wils.* 251; 1 *T. R.* 388; *Burrell* v. *Burrell*, 10 *Mass. R.* 221; *Campbell* v. *Stiles*, 9 *Mass. R.* 217; *Young* v. *Hosmer*, 11 *Mass. R.* 89; *Close* v. *Gillespey*, 3 *Johns. R.* 526; *Sawyer* v. *Baker*, 3 *Greenl.* 29.

J. W. Bradbury, for the defendant, contended: —

1. The writ, as it stands, is an original summons, and the proposed amendment would change it to a writ of attachment. This the Court cannot do. He has made his election, and must abide by it.

2. The amendment would affect the rights of third persons, and *therefore it cannot* be granted.

3. To grant the amendment, or not, is a mere exercise of discretion in the Judge of the lower court, and exceptions do not lie. *Clapp* v. *Balch*, 3 *Greenl.* 216; *Wyman* v. *Dorr*, *ib.* 183; *Reynard* v. *Brecknell*, 4 *Pick.* 302; *Hayden* v. *Stoughton*, 5 *Pick.* 528.

4. But if this Court can determine the question, and *the right exists*, the amendment ought not to be granted, because it would interfere with the rights of others previously acquired. *Howe's Pr.* 364, 390; 9 *Pick.* 167; 8 *Mass. R.* 240; 3 *Greenl.* 260; 1 *Pick.* 156; *ib.* 204; 3 *Pick.* 445; 7 *Greenl.* 232; 13 *Maine R.* 36.

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

WESTON C. J. — The writ as originally made, followed the form provided by law, and entitled the plaintiff to judgment. *Statute* of 1821, *c.* 63, prescribing the forms of writs. The *stat.* of 1830, *c.* 463, rendered the body of the defendant liable to be taken, and his goods to be attached upon writs of *scire facias*, and it is provided that such writs may contain a direction for this purpose. This is a privilege given to the plaintiff, of which he may avail himself or not at his election. Without finding it necessary to determine whether the amendment moved for could have been properly allowed or not, we are very clearly of opinion, that the Judge was under no legal obligation to grant it; and upon this ground we overrule the exceptions.

LEANDER M. MACOMBER *vs.* JAPHET SHOREY.

A notice to a private to do duty in a company of militia is fatally defective, if there be no such date thereon as to enable one to be satisfied, that one year rather than another was intended.

Thus, where the only date on the notice was, "the twenty-fourth day of *September*, 183 at one of the clock in the afternoon," the notice was held insufficient.

THIS is a writ of error, brought to reverse a judgment rendered by a justice of the peace, in favor of the defendant, in an action brought by the plaintiff in error against him to recover a fine for neglecting to appear at a company training. The only question was, whether *Shorey* was legally warned to appear at the training. The only proof of the warning was evidence, that a paper was left at his place of abode more than four days before the training, of which a copy follows. "Militia of *Maine*. To *Japhet Shorey*. You, being duly enrolled as a soldier, in the company of which *Rufus Marston* is commanding officer, are hereby ordered to appear at the usual place of parade of said company, on *Saturday*, the twenty-fourth day of *Sept.* 183 at one of the clock in

the afternoon, armed and equipped. By order of said commanding officer. *Wm. H. Boynton*, Corporal. Dated at *Monmouth*, this 17th day of *Sept.* 183 ."

The case was argued in writing.

May argued for the plaintiff in error, and cited *stat.* 1834, *c.* 121, § 21; *Howard* v. *Harrington*, 4 *Pick.* 133; *Tillson* v. *Bowley*, 8 *Greenl.* 163; *Commonwealth* v. *Derby*, 13 *Mass. R.* 433.

A. Belcher argued for the defendant, and cited *Cobb* v. *Lucas*, 15 *Pick.* 7.

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

Shepley J. — The cases cited by the plaintiff's counsel decide, that where a month is named in the body of an instrument, it is to be understood to be a month of the year of its date, unless it is apparent from the connexion, that another was intended. In those cases the instrument itself was regularly dated. In this case, there is no such date as to enable one to be satisfied, that one year rather than another of the present period was intended. The argument that the year may be inferred from the time, when the notice was handed to the party is not satisfactory; because it leaves the person in doubt whether the paper was designed to be, or can be considered, as an authentic instrument. The law designs, that he should be made certainly, and not by conjecture, to know his duty before obedience is exacted.

Judgment affirmed.

David Betts *vs.* Francis Norris.

An officer is not bound to make a special service of a writ, by attaching property, without written directions to that effect from the plaintiff, or his agent or attorney.

And if an officer, without such written directions, make an attachment of property upon a writ, but of less value than the full amount of the debt, no action can be maintained against him for not attaching additional property.

The action was for an alleged neglect of duty by the defendant, as a deputy-sheriff of the county of *Kennebec*. On *June* 2, 1829, the plaintiff commenced an action against *Lane & Leadbetter*, claiming damages to the amount of two thousand dollars, and delivered the writ to the defendant, a deputy-sheriff, without any written directions on the back thereof, but with verbal directions to attach all their real estate, or the real estate of either of them, in that county. The return of the attachment by the defendant, dated *June* 12, 1829, was, "I have attached all the real estate of the within named *Jabez Leadbetter*, to wit, all the right and interest he owns in the gristmill and stream the said mill stands on, in the town of *Wayne*, and his farm with his dwellinghouse, and all other buildings thereon, in said *Wayne*, in said county." At this time *Leadbetter* owned a house and lot in *Wayne* village, in which he lived with his family, a farm, which he carried on, on which were buildings and which farm was distant about thirty rods from the house, and owned the gristmill. He also owned a small farm in *Leeds*, which he conveyed in *August*, 1830. The house in which *Leadbetter* lived, was destroyed by fire in the fall of 1833, without any fault of the defendant. The plaintiff recoverd judgment against *Leadbetter* at the *June Term* of the Supreme Judicial Court, 1834, for $1558,68, debt, and $317,67, costs, and took out his execution and within the thirty days duly levied the same upon the mill, the farm in *Wayne*, and upon the lot on which the house, which had beeen burned, stood, leaving a balance unsatisfied of $332,69. The house burned was of much greater value than the balance of the execution. This action was commenced *January* 20, 1837. A nonsuit was entered by consent, which was to be taken off, if the action could be maintained.

The case was argued by *S. W. Robinson* for the plaintiff, and by *Wells* for the defendant, chiefly on views of the case not taken into consideration in the opinion.

The first of seven objections made by *Wells* was, that the defendant was under no obligation to make any attachment of property on the writ, unless he was directed in writing. It was a mere gratuitous act, for which the plaintiff should thank him, but gives no right of action, if the debt was not fully secured by it. *Stat.* 1821, *c.* 105, as to officer's fees; *Stat.* 1829, *c.* 445, § 1. And such has been the practical construction of the statute.

Robinson, in reply, said that there was a sufficient direction to attach property on the face of the writ; and if any thing more was necessary, the verbal orders were sufficient, and it had so been decided. Our statute in relation to fees was merely to remedy an abuse, and was not intended to take away the existing right to give verbal orders.

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

WESTON C. J. — By the act establishing and regulating fees, *statute* of 1821, *c.* 105, the officer is allowed on a *capias* or attachment, an additional fee for attaching property, which is called a special service, only where he has the written directions of the plaintiff, his agent or attorney, so to do. For the service merely, where no special attachment is made, he is to have a less fee. The same distinction is preserved, in the additional act respecting sheriffs, *statute* of 1829, *c.* 445. And the practice has been uniform, to make only a nominal attachment, where no such directions are given.

Although the precept in every writ of attachment is, to attach to the amount therein prescribed, yet where a special attachment is not ordered in writing, the return of a nominal attachment has been received as a sufficient service. And we are of opinion, that by virtue of the statutes, and the settled practice under them, the officer was under no legal obligation to make a special attachment, without written directions to this effect, from the plaintiff, his agent or attorney. He was in this case entitled to no fee for such a service, and if he has done it gratuitously, by which the plaintiff has

been secured to a large amount, he has no just or legal right to complain, that it has fallen somewhat short of the final amount of his judgment. We are very clearly of opinion, that no official delinquency has been made out against the officer.

Nonsuit confirmed.

MOSES WHITE *vs.* CHARLES PERLEY.

Where the declaration sets out a written contract made by the defendant, and the contract produced on trial is signed by the defendant and another, the objection cannot be taken as a variance between the declaration and proof, but must be made by plea in abatement.

Where a contract was made in a foreign province, to be performed within this State, and damages for the non-performance are sought by a suit here, the laws of this State are to govern, in the absence of all proof of the foreign laws.

If a promise be made out of the *United States* by a foreigner to one living within this State, to deliver specific articles on a fixed day, and no place of delivery is assigned, it is the duty of such promisor to ascertain from the promisee the place where he will receive the articles.

Where the party receiving specific articles promises to re-deliver them on a certain day, or pay an agreed price therefor, on failure of delivery an action can be maintained to recover the stipulated price without a prior demand.

THE case came before the Court on a statement of facts, which appear in the opinion of the Court.

A. Belcher, for the plaintiff.

The contract is joint and several. But if joint only, the non-joinder can only be taken advantage of in abatement. No demand is necessary because a time and place were fixed in the contract for the return of the articles. And it makes no difference, whether the contract was made in *New-Brunswick*, or *Maine*. It was to be performed here. *Bixby* v. *Whitney*, 5 *Greenl.* 192. As the defendant was to return the property or pay for it, he was bound to pay without a demand, as an attorney is money collected. *Coffin* v. *Coffin*, 7 *Greenl.* 298. The defendant by not returning the articles made his election to become the purchaser at the price agreed. *Holbrook* v. *Armstrong*, 1 *Fairf.* 31.

D. Williams, for the defendant.

There is no allegation in the writ, that any other person signed the contract. There is a variance between the declaration and the proof, and no plea in abatement is necessary.

The paper shows, that the contract was made in *New-Brunswick*, and the plaintiff must show, that he is entitled to recover by their laws, as the contract must be governed by them.

The paper shows, that the articles were merely left to be sold, and no action can be maintained against a factor until after a demand at his house, and a refusal. *Langley* v. *Sturtevant*, 7 *Pick.* 214; *Ferris* v. *Paris*, 10 *Johns. R.* 285.

The property remained in the plaintiff until paid for, and he might go and take it when he pleased. He cannot therefore maintain this suit. 1 *Com. on Con.* 261.

The case was argued at the *May Term*, 1838, and the opinion of the Court was delivered orally at the same term, and written out afterwards by

EMERY J. — The defendant being sued alone on a contract, which was signed by himself and *Thomas E. Perley*, it is suggested that the contract is not in conformity with the declaration, ought not to be received in evidence, and does not require a plea in abatement.

The contract is, "Rec'd from *Moses White, Esq.* ten pairs of coarse boots, and seventeen pairs of coarse shoes, *which I promise* to return to him on or before the first day of *July* next, or pay him seventeen shillings and sixpence per pair for the boots, and seven shillings and sixpence per pair for the shoes, for all the above quantity that *I sell.*

"*Woodstock*, 11*th February*, 1834."

Signed "*Charles Perley*,
"*Thomas E. Perley.*"

But if we entertained the opinion that this was a joint contract, we should also consider that the only way in which advantage could be taken of the circumstance, would be by plea in abatement.

It is further contended, that the contract was made in a foreign country, to be construed by laws of the place where made, to be dealt with as a contract between factor and principal, and that a

demand should first be made upon the defendant at his house in *Woodstock*, before an action can be sustained.

In our judgment, however, as the remedy is sought here, and we do not find from the contract any decisive evidence that the contract was necessarily to be performed in a foreign country, we must construe the contract according to our own laws.

The time at which the property was to be returned is stated to be the first of *July* then next; and as no place was appointed for this duty, according to the spirit of the decision of *Bixby* v. *Whitney*, 5 *Greenl.* 192, it became the duty of the defendant to seek the plaintiff. No demand was requisite on his part. We make no more rigid construction against the defendant, than has been in that case applied against our own citizens when the creditor lives out of the *United States*. That circumstance does not absolve the debtor from ascertaining of the creditor where the goods shall be delivered.

Upon the failure to deliver the property, the parties agreed upon the price which should be paid. The amount became a debt. It must be concluded that the defendant had sold the whole, as he returned none by the time stipulated. We cannot make a contract for the parties. If there were qualifications and conditions, which would have been convenient, or agreeable to the defendant, they should have been inserted in the contract. We find nothing but an absolute engagement upon valuable consideration either to return the property, or pay for it. We are of opinion that the action is well sustained. According to the agreement of the parties, the defendant must be defaulted.

The STATE *vs.* JOHN COTTLE.

In an indictment under the *statutes* of 1834, *c.* 141, § 1, and of 1835, *c.* 193, concerning innholders, retailers, &c., *it was held* : —

1. That it is not necessary to insert therein the name of the complainant : —
2. Nor how the penalty is appropriated by law : —
3. That by *Windsor* in the county of *Kennebec* must be understood the *town* of *Windsor* : —
4. That the averment, from the first day of *November*, 1835, until the finding of the indictment, is a sufficient statement of the time when the offence was committed : —
5. That averring afterwards, that the accused had also been guilty before the time alleged, does not impair the force of the prior allegation : —
6. That the averments, that the accused did presume to be a common retailer of the liquors mentioned in the statute, within the time specified, and that he did sell such liquors to divers persons, sufficiently describe the offence : —
7. That to sell less than twenty-eight gallons at one time, is unlawful, whether the liquor is carried away at one time or at several times : —
8. That the indictment is not double, because it alleges, that the accused did sell wine, brandy, rum and other strong liquors, as but one penalty is incurred under this section of the statute, although each description of the liquors may have been sold.

EXCEPTIONS from the Court of Common Pleas, SMITH J. presiding.

The indictment, found at *August Term*, 1836, charged, "that *John Cottle* of *Windsor*, in the county of *Kennebec*, at said *Windsor*, on *Nov.* 1, 1835, and on divers other days and times, as well before as afterwards, and until the finding of this indictment, without any lawful authority, license or admission, did presume to be a common seller of wine, brandy, rum, and other strong liquors by retail, in less quantity then twenty-eight gallons, and did then and there sell and cause to be sold, wine, brandy, rum, and other strong liquors, in manner aforesaid, to divers persons, to said jurors unknown, against the peace of said State, and contrary to the form of the statutes in such case made and provided." The exceptions state none of the facts, and consist solely in a reference to the indictment, and of the two following requests, and the instructions given by the Judge. The defendant, by his counsel, requested the Judge to instruct, "1. That the indictment was defective and

therefore void, because it did not appear with sufficient certainty, that any offence had been committed. 2. That to be a common retailer within the meaning of said statutes, the party accused must be in the habitual practice of selling ardent spirits by retail, in less quantities than twenty-eight gallons to all persons applying for the same, and that the proof in this case of a sale in *March*, *July* and *November*, to eight different persons, and at more than eight different times would not constitute him a common retailer. But the Judge instructed the jury, that evidence of that kind, together with the facts which were proved, that the defendant had a sign, and had in his house a common bar-room, with kegs and decanters, containing ardent spirits to appearance, was sufficient, if unexplained, to authorize them to find the defendant guilty of the allegations in the indictment." *Cottle* filed exceptions.

Clark argued for *Cottle*. The number and character of the objections made, may be understood from the negative given to them in the opinion of the Court. He cited, *stat.* 1834, *c.* 141, concerning innholders, retailers, &c.; *stat.* 1835, *c.* 193; 2 *Russell on Crimes*, 717; 2 *Ld. Raym.* 1478; 1 *Chitty's Cr. Law*, 199; 5 *T. R.* 162; *Commonwealth* v. *Pray*, 13 *Pick.* 359; *Butman's case*, 8 *Greenl.* 113; *Commonwealth* v. *Hall*, 15 *Mass. R.* 240; *Douglas*, 153; *stat.* 1821, *c.* 62, § 14; 7 *Dane*, *c.* 218, *art.* 10, § 3; *Hawk's Rep.* 460; *stat.* 1821, *c.* 92; *stat. Geo.* 3, *c.* 170; 2 *Strange*, 900; 2 *Mason*, 144; 1 *Chitty's Cr. Law*, 292; *Cro. Jac.* 187; *Hawkins, Book* 2, *c.* 25, § 117; 3 *Bac. Ab.* 112; *Crown Cir. Com.* 111; 3 *Burr.* 400; 6 *T. R.* 739; 3 *Chitty's Cr. Law*, 788; *Commonwealth* v. *Bolkom*, 3 *Pick.* 281.

Bradbury, County Attorney when the bill was found, for the State, remarked, that *Butman's case*, 8 *Greenl.* 113, and the cases, *Commonwealth* v. *Pray*, 13 *Pick.* 359, and *Commonwealth* v. *Eaton*, 9 *Pick.* 165, covered every objection made, which had any bearing on this case.

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

WESTON C. J.—The statute of 1835, *c.* 193, authorized the recovery of the penalty, imposed in those cases, by complaint or indictment, before any Court of competent jurisdiction. The law

does not require the name of the complainant to be inserted in the indictment, nor is it usual, nor would it be proper to do so. The appropriation of the penalty depends upon the general law. It is no part of the offence, nor essential to its description. By *Windsor* in the indictment, must be understood the town of *Windsor*. It is described as being in the county of *Kennebec;* and the Court will take notice, that there is such a town in that county. And the offence is alleged to have been committed in *Windsor*.

The defendant is charged with presuming to be a common retailer, from the first day of *Nov.* 1835, until the finding of the indictment. This is a definite and fixed period, to which the conviction may be referred, the force of which is not impaired by the averment, that he had also been guilty, before the period first stated. It might have the effect to protect the defendant from any other prosecution for a similar offence, at any time prior to the indictment. The averment, that the defendant did presume to be a common retailer, is expressive of the fact, that such was his habit. This coupled with the averment, that he did sell to divers persons, within the period stated, is a sufficient description of the offence. He is charged with doing that, which the statute declares, shall not be allowed to any person to do, without a license. It is one of that class of offences, which to avoid unnecessary prolixity, may be described in general terms. To sell twenty-eight gallons, to be carried away at one time is lawful; but to sell less than that is unlawful, whether carried away at one time, or at several times.

The objection taken, that the offence charged is double, does not appear to us to be sustained. We are not satisfied, that the law imposes as many penalties, as there may have been kinds of strong liquors, of which the party charged may have presumed to be a common retailer. The indictment does appear to have been found within one year after the offence was committed, so that it is not barred by the statute of limitations, although the penalty is appropriated to the use of the town.

Exceptions overruled.

THE STATE *vs.* STEPHEN NOBLE.

It is a general rule in criminal prosecutions, that an unnecessary averment may be rejected, where enough remains to show, that an offence has been committed.

There is one exception however to this rule, which is, where the allegation contains matter of description. Then if the proof given be different from the statement, the descriptive words cannot be rejected as surplusage, and the variance is fatal.

Thus no conviction can take place, where the indictment charges the taking and conversion of a pine log marked with a mark particularly described, and the proof has reference exclusively to a pine log marked with a manifestly different mark.

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EXCEPTIONS from the Court of Common Pleas, SMITH J. presiding.

Noble was indicted for fraudulently and wilfully taking from the *Kennebec River* and converting to his own use certain logs. He was found guilty on the first count only, thus describing the log: "One pine log marked H × W, of the value of three dollars, of the goods and chattels of *J. D. Brown, Charles McIntire* and *John Welch*, and not the property of said *Noble*." The evidence applied entirely to a pine log marked "W × H × *with a girdle*," or circle cut round it. *Brown* testified, that one of their logs, partly sawed into blocks, with the mark last mentioned was seen by him near *Noble's* house, "but that the log described in the first count of the indictment was not of their mark, and that he should not claim or know it as their property." Other objections were made, besides that arising from variation in the description in the indictment and the proof, which need not be stated, nor the facts on which they were founded. The Judge on this point instructed the jury, that the mark, by which the log was described in the first count, might be rejected as surplusage, and if they found that the log, which was seen near *Noble's* house, was removed from the river and sawed by him, with the intention fraudulently and wilfully to convert it to his own use, and that the same log was the property of said *Brown, McIntire* and *Welch*, then they would find *Noble* guilty on the first count. *Noble* excepted to this instruction.

Wells, for *Noble*, argued orally, and on this point contended: that it is necessary to allege the property to be in some one, or that

the owner is unknown, and to prove it as laid, or there must be an acquital. 2 *Chitty's Cr. Law*, 708; 2 *Russell*, 153, 162; *Commonwealth* v. *Morse*, 14 *Mass. R.* 218. The name of the owner is part of the description. The proof by the government is, that *Brown*, *McIntire* and *Welch* did not own the log described in the indictment. The description of the log in the indictment is the only way the logs of these men can be distinguished from the logs of others, and cannot be rejected as surplusage. It has been settled, that if a man be indicted for stealing a black horse, and the evidence be, that he stole a white one, he cannot be convicted. The description of a log by the mark is more essential, than that of a horse by its color. If it was not necessary to describe the log so particularly by the mark, yet having so stated it, there can be no conviction without proof of it. 2 *Russell*, 171; 3 *Starkie on Ev.* 1530.

H. W. Paine, *County Attorney*, afterwards argued in writing.

On this point he contended, that had all mention of the mark been omitted, the indictment would have been good. The rule is well established, that an unnecessary allegation does not become material by being introduced into an indictment, if it forms no part of the *description of the offence*, and does not qualify or aggravate the offence. *Commonwealth* v. *Arnold*, 4 *Pick.* 252; *Commonwealth* v. *Cooley*, 10 *Pick.* 37; 3 *Starkie on Ev.* 1534, citing *Pye's case*, *East's P. C.* 785; 3 *Burrow*, 1586.

The case was continued, and the opinion prepared by

Weston C. J. — It may be regarded as a general rule, both in criminal prosecutions and in civil actions, that an unnecessary averment may be rejected, where enough remains to show, that an offence has been committed, or that a cause of action exists. In *Ricketts* v. *Solway*, 2 *Barn. & Ald.* 360, *Abbott C. J.* says, "there is one exception however to this rule, which is, where the allegation contains matter of description. Then if the proof given be different from the statement, the variance is fatal." As an illustration of this exception, *Starkie* puts the case of a man charged with stealing a black horse. The allegation of color is unnecessary, yet as it is descriptive of that, which is the subject matter of the charge, it cannot be rejected as surplusage, and the man convicted

of stealing a white horse. The color is not essential to the offence of larceny, but it is made material to fix the identity of that, which the accused is charged with stealing. 3 *Stark.* 1531.

In the case before us, the subject matter is a pine log, marked in a particular manner described. The marks determine the identity; and are therefore matter purely of description. It would not be easy to adduce a stronger case of this character. It might have been sufficient to have stated, that the defendant took a log merely, in the words of the statute. But under the charge of taking a pine log, we are quite clear, that the defendant could not be convicted of taking an oak or a birch log. The offence would be the same; but the charge, to which the party was called to answer, and which it was incumbent on him to meet, is for taking a log of an entirely different description. The kind of timber, and the artificial marks by which it was distinguished, are descriptive parts of the subject matter of the charge, which cannot be disregarded, although they may have been unnecessarily introduced. The log proved to have been taken, was a different one from that charged in the indictment; and the defendant could be legally called upon to answer only for taking the log there described. In our judgment therefore, the jury were erroneously instructed, that the marks might be rejected as surplusage; and the exceptions are accordingly sustained.

The Inhabitants of WILTON *vs. The Inhabitants of* FALMOUTH.

Where a man abandoned his domicil in one town, and removed with his family to another, with the intention there to abide for an indefinite period, and was there in fact abiding, with such intention, on the twenty-first of *March*, 1821, his home was there, and he thereby gained a settlement, although his right to continue in the house in which he lived depended on the will of the owner.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The action was brought to recover expenses for the support of one *James Dolly*, alleged to have had his settlement in *Falmouth* at the time they were incurred. The pauper had a derivative settlement from his father in *Falmouth*, and in 1818 removed with his father's family to *Wilton*, being then an inmate therein, although about twenty-three years of age. After his removal to *Wilton*, he was there married, and with his wife lived in his father's family a few months, and in *April*, 1819, removed with his family to *Vermont*, and there remained until 1821, when he left, and arrived at his father's house in *Wilton* on the last of *Feb.* or first of *March*, 1821. On the trial, the plaintiffs denied, that the pauper was in fact within their town on *March* 21, 1821; and insisted, that if he was, he was there but as a visitor, and had no such residence, as would give him a settlement by being there on that day. On these points there was much evidence introduced by the respective parties. The defendants' counsel contended, that if the pauper was in fact in *Wilton*, *March* 21, 1821, without any present intention of removing elsewhere, but intending to reside there, if the contemplated arrangement could be made, although he had no legal right or claim, and although his expectations were subsequently disappointed, it was nevertheless such a residence as the statute contemplated. The Judge instructed the jury, that the residence, dwelling and home required by the statute, was a permanent fixed abode, where the pauper had a legal right to be, and from which he could exclude all others not having an equal right with himself, and from which he could not be removed but by an act of trespass; and that if there was no place in *Wilton* to which the pauper

had, on *March* 21, 1821, a right to resort and abide in, a right which he could assert and maintain; he did not so dwell and have his home there, as to gain a settlement by virtue of the act. On returning their verdict for the plaintiffs, the jury were inquired of whether they found the pauper to have been in *Wilton* on *March* 21, 1821; and replied, that they could not agree as to that, and that from the instructions of the Judge on other points, they supposed it unimportant. The defendants excepted to the instructions.

The arguments were in writing.

Evans, for the defendants, argued in support of the principles contended for by him at the trial, and insisted that the instructions were erroneous. He cited *Greene* v. *Windham*, 1 *Shep.* 225; *Richmond* v. *Vassalborough*, 5 *Greenl.* 396.

Wells, for the plaintiffs, contended, that as the pauper once had a settlement in *Falmouth*, and that fact proved on the trial, the settlement must remain, until a new one is gained in some other place. The burthen is on the defendants to do it, and in this case, they must show a residence and domicil in *Wilton*, *March* 21, 1821, and the verdict shows that they have not. Two things are necessary to constitute a domicil, residence and intention there to remain. *Jennison* v. *Hapgood*, 10 *Pick.* 98; 2 *Kent's Com.* 430, *and note*; *Story's Con. of Laws*, 42; *Hallowell* v. *Saco*, 5 *Greenl.* 145. The habitation must be fixed, without any present intention of removing therefrom. *Putnam* v. *Johnson*, 10 *Mass. R.* 501. And it must be where a person has municipal rights and duties, and is subject to corresponding burdens. *Harvard College* v. *Gore*, 5 *Pick.* 367; *Hampden* v. *Fairfield*, 3 *Greenl.* 436. He insisted, that the instruction was correct; and at all events, that the verdict was right, as the defendants did not remove the burden resting upon them by proof furnished of a settlement in their town.

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

Weston C. J. — One point taken is, that the jury not being agreed that the pauper had a residence in *Wilton*, on the 21st of *March*, 1821, without which the defence necessarily fails, the verdict for the plaintiffs is justified, whatever may have been the legal character of the instructions of the Judge. We do not so under-

stand the law. If a plaintiff has made out a *prima facie* case, and the jury find, that the matter set up in defence has not been proved, it is a verdict for the plaintiff. But if they are not agreed, whether the defence is proved or not, the case is not disposed of. It remains therefore to be determined, whether the instructions of the Judge are warranted by law.

It appears, that when the father of the pauper, in 1818, removed from *Falmouth* to *Wilton*, the pauper accompanied him, and established his domicil in the latter town. Subsequently he removed with his family to *Vermont*, where it is to be understood he established a new domicil. But this he soon after abandoned, and returned to *Wilton*. If he did so, with a view to take up his residence for an indefinite period, he might acquire in that town a new home, although his rights there were less strong than the instructions required. If he and his family were received as inmates by his father, so long as it might prove convenient and agreeable to the latter, or until the son could be otherwise accommodated, his home would be at his father's, while that arrangement continued, although the father had a right to require his removal from his residence at pleasure, with which the right of the pauper subsequently to abide there, is necessarily inconsistent. Nor was it essential, that the pauper should have the power to exclude all others, who might presume to resort to the same residence, without right. That would be an invasion of the rights of the father.

We are not aware, that such a control over an adopted residence is essential to the establishment of a domicil. It is not unusual for persons, with or without families, removing into a town, to be received at board, as the inmates of other families, and there to remain for years, although their right to do so, depends upon the pleasure of the owner or occupant of the house, where they are thus received. And yet in such cases, if they have abandoned their former homes, with the intention to abide for an indefinite period in the town, to which they have removed, we doubt not they there acquire a new domicil, and that the place where they lodge is for the time being their home, however precarious may be the tenure, by which they hold it. Nor does such domicil at all depend, upon the length of time, in which it is in fact continued. Inducements may arise for frequent changes, which may be yield-

ed to by persons of a certain temper and habits; and yet such persons may have a domicil, although it may not be so easily susceptible of proof. *Greene* v. *Windham*, 13 *Maine R.* 225.

In our judgment, therefore, if the pauper had abandoned his domicil in *Vermont*, and had removed with his family to *Wilton*, with an intention there to abide for an indefinite period, and was there in fact abiding, with such intention, on the twenty-first of *March*, 1821, his home was there, although his right to continue in the house depended on the will of the owner.

Exceptions sustained.

A TABLE

OF

THE PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

BONDS.

CONVEYANCE.

EXECUTION.

EXECUTORS AND ADMINISTRATORS.

ERRATUM. — On page 9, line 12, in the abstract, for *five*, read *six*.