REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

VOLUME IV.

MAINE REPORTS.

VOLUME XVI.

HALLOWELL:
GLAZIER, MASTERS & SMITH.

1841.

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, }

A TABLE

OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF KENNEBEC, JUNE TERM, 1839.

Mem. A part of the Kennebec cases of this term were published in the last volume.

JOHNSON LUNT *vs.* ALFRED HUNTER *& al.*

The right of regulating the fishery in rivers not navigable, having been exercised by the legislature long before the separation of this State from *Massachusetts*, and the common law right in the riparian proprietor having been made subject to the control and direction of the legislative power, before any restrictions were imposed on that power by the constitution of *Maine;* the constitution does not forbid the exercise of this right.

The statute of 1830, regulating the taking of fish in *Sebasticook River*, in the town of *Clinton*, is not unconstitutional.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The action was debt, to recover a penalty incurred by taking fish, contrary to the provisions of "An act to regulate taking of fish, called salmon, shad and alewives, in the *Sebasticook River*, in the town of *Clinton*," passed in 1830. The plaintiff was duly authorized by the town of *Clinton* to take fish in that river during the spring and summer of 1835. The fish were taken by the defendants, *June* 3, 1835, by a seine, in the river in that town, near the shore where they owned the land, one of them standing on the shore and holding one end of the seine, and the other being on the river in a boat. Fish could not be taken at that place in any other manner. Since the law was passed, the defendants erected a dam above the place where the fish were taken, making a valuable priv-

ilege for fishing not existing before. The land on both sides of the river was owned by individuals. The town of *Clinton* chose a committee in *March*, 1835, to estimate the damages done to individuals by those authorized by the town to take fish, by passing over their land. The Judge ruled, that the action could be supported on the facts; and the defendants filed exceptions.

The case was submitted on the briefs of the Counsel.

Boutelle, for the defendants, argued in support of these propositions:—

1. The defendants contend, that the law of 1830, on which this action is brought, is not constitutional.

2. If constitutional for some purposes, it cannot be so considered in relation to the defendants.

He cited *Comins* v. *Bradbury*, 1 *Fairf.* 447; *Boston & R. Mill Dam Cor.* v. *Newman*, 12 *Pick.* 467; 2 *Kent's Com.* 275; *Coolidge* v. *Williams*, 4 *Mass. R.* 140; *Commonwealth* v. *Chapin*, 5 *Pick.* 199.

There is no connexion between the *Mass.* act of 1814, and the act of 1830, and the latter cannot be aided by the former, but being on the same subject repeals it, if it existed before.

Stark, for the plaintiff, contended, that the act of 1830 was intended by the legislature to be in addition to and in extension of the act of 1814. The law of 1830, independently of the law of 1814, is constitutional. The owner of the land contiguous to the river has no greater rights than any other inhabitant of the town. *Vinton* v. *Welsh*, 9 *Pick.* 87; *Stoughton* v. *Baker*, 4 *Mass. R.* 522; *Burnham* v. *Webster*, 5 *Mass. R.* 266; *Commonwealth* v. *McCurdy*, *ib.* 324; *Com.* v. *Chapin*, 5 *Pick.* 199; *Nickerson* v. *Brackett*, 10 *Mass. R.* 212; *Commonwealth* v. *Wentworth*, 15 *Mass. R.* 188.

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

SHEPLEY J. — The second section of the act of 1830, regulating the taking of fish in the town of *Clinton*, authorizes the plaintiff upon the facts agreed to maintain the action, unless the defendants are protected by being the owners of the land adjoining the river where the fish were taken. By the common law, they would

have been entitled to a several fishery in that place; but the right of fishing was early regarded in *Massachusetts* as liable to be regulated and controlled by the legislature, and the individual right was not admitted against such right of legislation. This description of legislation seems to have been introduced from necessity, and for the sake of convenient regulation by common consent, before any constitutional restriction was placed upon the legislative power; and it was a part of our system of laws, when this State was separated from *Massachusetts*. *Vinton* v. *Welsh*, 9 *Pick.* 87. The defendants are not therefore justified in violating the law by shewing that the plaintiff could not fish in that place without trespassing upon them. All, which it is incumbent upon the plaintiff to establish, is a violation of the act by the defendants, and his right to prosecute for it.

It is not therefore necessary to decide whether the act of *June* 14, 1814, is in force and operative upon the rights of those interested; and no reason is perceived why it should not be so considered. And when there are several enactments relating to the same subject, the rights of those interested in it are to be collected from a consideration of the whole of the enactments.

Exceptions overruled, and defendants to be defaulted.

Lot M. Morrill *vs.* Matthew Haywood.

A paper produced by the clerk of a company of militia, purporting to be the company roll, without being verified by the signature of the commanding officer or clerk, and without proof of its authenticity, is not evidence of the enrolment of a private.

This was a writ of error, brought to reverse a judgment of a Justice of the Peace in an action wherein *Haywood* claimed to recover of *Morrill* the penalty for nonappearance at a company training. The whole of the record in relation to the first error assigned, and the only one considered by the Court, will be found in the opinion.

The case was argued in writing.

E. Fuller, for the plaintiff in error, contended, that there was no evidence in the case to show, that *Morrill* was legally enrolled; and cited *Whitmore* v. *Sanborn*, 8 *Greenl.* 310; *stat.* 1834, *ch.* 121, *sec.* 12.

May, for the defendant in error, contended, that the book, which he said was in the form furnished by the Adjutant General, being produced by the clerk, was competent evidence to prove the enrolment without any certificate to verify it; and cited *Sawtel* v. *Davis*, 5 *Greenl.* 438; *Sumner* v. *Sebec*, 3 *Greenl.* 223; *stat.* 1821, *ch.* 121, *sec.* 12.

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

SHEPLEY J. — The first error assigned is, that an objection was made before the justice "that the book produced, headed company roll, was not evidence of said *Morrill's* enrolment, inasmuch as it was no where certified by the captain, or clerk, or any evidence to shew, that it was made by them or either of them, or that in fact it belonged to the company."

It is said, to have been in the usual form furnished by the Adjutant General, but the description is such, as to leave it doubtful, whether the paper produced purported to be the company roll, or the record of the company roll. It was admitted as the evidence of enrolment. The act of congress makes it the duty of the captain or commanding officer of the company to enrol the persons liable to do military duty; and the twelfth section of the act of the 8th of *March*, 1834, requires the clerk to assist the commanding officer of the company in the enrolment thereof, and to keep a fair and exact roll, and to revise it on the first Tuesday of *May* annually, and from time to time to correct the same as the alterations in the company may require. These are important duties, and they are to be performed under the sanction of their official characters and oaths of office. The enrolment of a citizen imposes upon him the performance of military duty only, when that enrolment is legally made by the persons authorized by law to make it. It is not for persons without legal authority, and without the responsibility of an official character, or an oath of office, to impose such duty upon any one. For aught that appears in this case, the paper re-

ceived in evidence might have been made out by one having no legal authority whatever to do it. It is said, that being produced by the clerk, it is to be presumed to have been legally made by him. But if the clerk should think proper to present a paper purporting to be an enrolment, and should neither attach to it his official signature, nor testify, that it was made by him, and it should be regarded as legal evidence of enrolment, those persons whose names were on the paper might have onerous duties imposed upon them in a manner not authorized by law; and yet the clerk by producing such a paper would not have subjected himself to the charge of a violation of official duty, or of his oath of office. The citizen has a right to insist, that proof should be adduced, that the duty required of him has been imposed by legal authority and under the legal sanctions before a penalty for neglect can be exacted of him. This right the law has secured to him, and it does not belong to a court of justice to violate it by presuming without evidence, that the duty has been legally imposed.

Judgment reversed.

MATTHIAS SMITH *& ux. vs.* WILLIAM WYMAN.

In an action of slander, evidence of words of a similar import of those charged in the declaration, spoken by the defendant afterwards, before and after the commencement of the action, is admissible for the purpose of proving malice.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The action was slander. The case will be sufficiently understood from the opinion of the Court.

Wells and Lancaster, for the defendant, contended, that the Judge of the Common Pleas erred in admitting the evidence; and cited 1 *Camp.* 48; 2 *ib.* 72; 7 *Johns. R.* 269; 1 *Phillips' Ev.* 151; 2 *Stark. Ev.* 870; 2 *Stark. R.* 84.

E. Fuller and May, for the plaintiffs, contended, that the ruling of the Judge was correct in admitting the testimony for the purpose

it was introduced, merely to show malice. They cited 8 *Wend.* 602; *Bodwell* v. *Swan*, 3 *Pick.* 376; *Bodwell* v. *Osgood*, *ib.* 379; *Stark. on Ev.* 870, *note* 1; 2 *Serg. & R.* 446.

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

EMERY J. — The defendant is alleged to have charged the wife of the said *Matthias* while sole, with stealing, and with the crime of fornication, and of being a whore. The plaintiffs married on the 28th of *November*, 1835. The words by one witness were proved to have been uttered in *December*, 1835, or in 1836. It was contended, that said words having been spoken after the marriage, were not admissible in evidence, the words set forth in the writ having been proved to have been uttered as alleged. The Judge instructed the jury, that, they might consider said evidence in connection with the other testimony in the case as having a tendency to prove malice.

We cannot hesitate to entertain the same opinion. And the subsequent statement proved by *James Dudley*, as having been made after the action was commenced, for the purpose of shewing malice, we think was rightly admitted.

Exceptions overruled.

MATTHIAS SMITH *& ux. vs.* WILLIAM WYMAN *& ux.*

An instruction to the jury, on the trial of an action of slander, — that the speaking of words importing a criminal offence might be considered as having been maliciously uttered, unless it should be made apparent that they were uttered otherwise, or that they were true; that this was for their consideration from the evidence; that the attempt to prove the truth of the words, if without success, might be regarded as evidence of express and continued malice; and that it was not every act of illicit intercourse on the part of a female which would authorize individuals to call her a whore, — was held justifiable.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The action was slander, for words alleged to have been spoken by the Wife of *William Wyman* of *Clarissa Ratcliff*, while sole,

now the wife of *Matthias Smith*, the brother of *Mrs. Wyman.* The exceptions do not state what the pleadings were. In the declaration the following words were alleged to have been spoken. "You are a thief, a liar, and a whore, and I can prove it." The speaking of the words, and the frequent repetition of them was proved. The defendants proved that *Mrs. Wyman* said to *Clarissa*, "you have told me, that one *Mrs. Jones* had charged you with stealing," to which *Clarissa* replied, "I did not expect to hear this from you." The exceptions state, that "the defendants to show probable cause for believing that *Matthias* and *Clarissa* did not conduct as they should do, proved that *Clarissa* had a child in four months after she was married." The exceptions also state, "that the defendants to disprove malice and in mitigation of damages offered evidence of her general loose character for chastity, and proved by several witnesses, that she had when from ten to thirteen years of age lived in a house notoriously of ill fame, and that twice since she had lived as a hired girl at the same place for about a fortnight at each time; also that *Clarissa* did tell *Mrs. Wyman*, that *Mrs. Jones* did accuse her of stealing; and that *Mrs. Wyman* after all this had recommended her to her present husband as a very worthy girl. Upon this evidence it was contended, that there being probable ground for believing what *Mrs. Wyman* said about being in whoredom she should be excused; also that it went to disprove malice and in mitigation of damages; and that it being true, that *Clarissa* did tell *Mrs. Wyman*, that *Mrs. Jones* charged her with stealing, this was a defence to this part of the action."

The Judge instructed the jury, that as the witnesses on both sides had testified to the speaking of the words, they might be considered as having been uttered as alleged; that importing a criminal offence, they might be considered as maliciously uttered, unless it should be made apparent, that they were uttered otherwise, or that they were true; that the jury would consider from the evidence, whether they were true, or had been proved to have been uttered otherwise than maliciously; that the attempt here to prove the truth of the words, if without success, might be regarded as evidence of express and continuing malice; and that it was not every act of illicit intercourse on the part of a female which would

authorize individuals to call her a whore. The verdict was for the plaintiffs, and the defendants filed exceptions.

Vose and Lancaster, for the defendants, contended, that the ruling of the Judge was erroneous, and cited 1 *Johns. Cas.* 279; *Wharton's Dig.* 555, 556; 1 *Camp.* 48; 12 *Pick.* 163; 2 *Stark. Ev.* 369, *note* 1; 2 *Marsh. Kentucky R.* 372.

E. Fuller and May, argued for the plaintiffs, and contended, that the instruction of the Judge was correct, as applicable to the facts in the case. They cited *Jackson* v. *Stetson,* 15 *Mass. R.* 50; *Spaulding* v. *Alford,* 1 *Pick.* 33; *Wyman* v. *Hook,* 2 *Greenl.* 337; *Colley* v. *Merrill,* 6 *Greenl.* 50; *Commonwealth* v. *Stephens,* 14 *Pick.* 370; 3 *Pick.* 376; 3 *Mass. R.* 546; 1 *Pick.* 1; 14 *Mass. R.* 275; 8 *Wend.* 602; 13 *Johns. R.* 475; 3 *Pick.* 379; 1 *Fairf.* 224.

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

Emery J. — In this case, after the merits of the action of slander have been considered by a jury, with the utmost latitude of examination as to all subjects calculated to affect the character of one of the plaintiffs, from ten years of age, in qualifying the proof of malice and in mitigation of damages; exceptions are taken to the opinion of the court, that it was not every act of illicit intercourse on the part of a female which would authorize individuals to call her a whore. And that the attempt here to prove the truth of the words, if without success, might be regarded as evidence of express and continuing malice.

We think that the Judge upon the facts reported was justified in the instructions given. And the exceptions should be overruled.

FREDERIC W. DEARBORN *vs.* EDWIN TURNER.

Where the owner of a chattel delivers it to another, and takes his promise in writing to return it on a day specified, or pay a sum of money therefor, the property in the chattel passes from the former to the latter.

TROVER for a cow and calf, on a statement of facts agreed. The plaintiff, being then the owner of the cow, on the 22d of *April* 1836, delivered her to one *Nason* under the following agreement. "*Monmouth, April* 22, 1836; Rec'd of *F. W. Dearborn,* one four year old cow, and a calf by her side, which I promise to return to him in *Augusta* in one year from this date, with a calf by her side, or pay twenty-two dollars and fifty cents. *Wm. H. Nason.*" Within the year *Nason,* without the knowledge of the plaintiff, sold the cow to the defendant, who paid him therefor. The plaintiff has not been paid for the cow. On *April* 23, 1837, the plaintiff found the cow in the possession of the defendant, with a calf by her side, and demanded the same, but the defendant refused to deliver them.

Emmons, for the plaintiff, contended, that the true construction of this contract was, that it was a conditional one, by which the cow was to remain the property of the plaintiff unless the condition was performed. *Nason* could be entitled to the cow only on payment of the price by the time agreed on. *Tibbets* v. *Towle,* 3 *Fairf.* 341.

May, for the defendant, contended, that by the contract, *Nason* had the election to consider this a sale, if he pleased. By the sale of the cow, or by the neglect to return her, the election was made, that the cow should be his. But the contract amounted to a sale at the time of the delivery. *Holbrook* v. *Armstrong,* 1 *Fairf.* 31; *Hurd* v. *West,* 7 *Cowen,* 752; *Story on Bailments, ch.* 6, *sec.* 439.

The opinion of the Court was subsequently drawn up by

WESTON C. J. — The plaintiff delivered to *Nason* a cow and a calf, for which he took his written promise, to return the same cow within a year, with a calf by her side, or to pay twenty-two dollars and fifty cents. We are very clear, that the security of the

plaintiff vested in contract; and that *Nason*, having the alternative to return or pay, the property passed to him, and he was at liberty to sell the cow. *Tibbets* v. *Towle*, 3 *Fairf.* 341, was a very different case. There the plaintiff expressly reserved to himself the title to the oxen, until paid for. The case of *Hurd* v. *West*, 7 *Cowen*, 752, decides expressly, that where an alternative exists, the title to the property, in a case like this, is transferred upon the delivery.

Plaintiff nonsuit.

David Wheeler, Jr. *vs.* Jeremiah Lothrop.

Where a Justice of the Peace certifies at the bottom of a paper purporting to be the record of a judgment before him, that it is "a true copy," it is sufficiently authenticated to be read in evidence.

Parol testimony from the Justice, that he had in fact made no record of the judgment is inadmissible.

To maintain *scire facias* against the indorser of a writ, in an action commenced before a Justice of the Peace, and carried by appeal by the plaintiff in that action to the Court of Common Pleas, it is not necessary for the plaintiff in *scire facias* to show, that he made use of due diligence to collect the costs of the surety on the appeal.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Scire facias against the defendant, as indorser of a writ in favor of one *Fabyan* against the plaintiff, before a Justice of the Peace. The Justice gave judgment for the defendant in that suit, and *Fabyan* appealed to the Court of Common Pleas, and entered into recognizance to prosecute his appeal. In the Court of Common Pleas, the present plaintiff recovered judgment against *Fabyan* for his costs. It appears from the bill of exceptions, that on the trial of this action, that no judgment was rendered by the Justice in favor of *Wheeler*, against *Fabyan*, and to prove there was, the plaintiff produced a paper purporting to be a copy of the judgment certified by the Justice to be "a true copy." The defendant then objected to the copy, contending, that the original record should be produced, and also, that it did not appear, that it was a

copy of the record. The Judge overruled the objections, and admitted the copy. The Justice had been called by the plaintiff to prove the indorsement on the writ to be in the handwriting of the defendant, and the defendant proposed to prove by him, that there was not, and never had been, any such record of the Justice actually made up, as appeared from the copy. The Judge refused to admit this evidence. The defendant objected, that this action could not be maintained but for the costs before the Justice, because it did not appear, that the plaintiff had used due diligence to obtain the costs after the appeal from the sureties to prosecute the same. This objection was overruled by the Judge. The record of the judgment, *Fabyan* v. *Wheeler*, in the Court of Common Pleas, shew that the defendant was the surety to prosecute the appeal, and had appeared, as the attorney of *Fabyan*. The exceptions state, "that the defendant objected, that it is no where in the plaintiff's writ alleged to appear of record, that the defendant was indorser of said original writ, *Fabyan* v. *Wheeler*, *Jr.*" The exceptions do not show any decision of the Judge in relation to this objection, unless in the closing one. "The presiding Judge decided, that upon inspection it is found, that there is such a record, as is set forth in the plaintiff's writ, and that the facts contained in the defendant's brief statement are not sufficient to bar the action." The exceptions state, that the defendant pleaded the general issue, and "also filed a brief statement setting forth several grounds of defence," but the contents of the brief statement do not appear in the exceptions, or in any paper to which reference is made. The defendant excepted.

The case was continued to be argued in writing, but no arguments have been received by the Reporter.

May, for the plaintiff.

S. W. Robinson & Lothrop, for the defendant.

The opinion of the Court was drawn up by

Emery J. — In this *scire facias* the plaintiff attempts to charge the defendant, as indorser of an original writ, brought by one *John Fabyan* against the plaintiff, before a Justice of the Peace, who rendered judgment against *Fabyan*, and he appealed to the Court

of Common Pleas. That Court rendered judgment upon the appeal in favor of the plaintiff against said *Fabyan.* On this *scire facias* the plaintiff produced in evidence the record of that judgment, which corresponded with the one declared on in the plaintiff's writ.

We do not perceive, that the Judge in the Court of Common Pleas did any injustice to the defendant in receiving the certified copy of the Judgment of Justice *Fuller*, for said *Wheeler* against said *Fabyan*, and an appeal therefrom by said *Fabyan* to the Court of Common Pleas. It would have been totally irregular to receive the parol testimony of the magistrate that there was no record of such judgment, which he in his official capacity had certified to exist. It is true that the plaintiff was obliged to use due diligence to obtain payment of his costs from *Fabyan.* But the conclusion is incorrect, that he must seek his remedy first against the sureties for prosecuting the appeal, before he could resort to the defendant. The statute throws upon the indorser of the writ, the responsibility of answering for the costs of the defendant in the original suit upon the avoidance or inability of the plaintiff.

The return of the arrest of *Fabyan* and commitment on the execution, and his subsequent discharge by taking the poor debtor's oath, exhibit satisfactory evidence of the inability of said *Fabyan* to satisfy the costs, for which remedy is now sought, unless this evidence is impeached, and no attempt of that kind was made.

The fact that the present defendant was the only surety for the prosecution of the appeal, and that he had brought forward, and entered the action, did not exonerate him as indorser of the writ, nor impose on the plaintiff the obligation to seek redress against him as surety for prosecuting the appeal. He could only recover, in such suit, the costs after the appeal. The remedy in the present suit is more comprehensive. The defendant's handwriting on the original writ, having been proved, his liability is established. By the plea and brief statement, the fact of having indorsed the original writ was not in truth contested.

We coincide with the Judge of the Court of Common Pleas, that the facts contained in the defendant's brief statement are not sufficient to bar the action.

The exceptions are therefore overruled.

Robert P. Ridley *vs.* Otis Perry.

In an action of slander, the defendant cannot give evidence of any other crime than the one charged, either in bar of the action, or in mitigation of damages.

This was an action of slander in which the plaintiff alleged, that the defendant charged him with stealing sheep. The defendant pleaded the general issue, and filed a brief statement, wherein he set forth, that he expected to prove, that prior to the commencement of this action, the plaintiff had stolen boards and meal. At the trial before Weston C. J. the defendant offered to prove, that the plaintiff had stolen boards and meal. The Chief Justice ruled, that the evidence was inadmissible and rejected it. The verdict for the plaintiff was to be set aside, if the testimony offered ought to have been received.

The arguments were in writing.

Wells, for the defendant, contended, that the evidence offered should have been received in mitigation of damages. The value of the plaintiff's character is to be estimated by the Jury. If he is in reality a thief, he is a corrupted and degraded man. The crimes that he has committed may not have been so notorious as to establish a general character, that he is a thief. His caution and hypocrisy may have concealed his crimes from the majority of his acquaintance. Unless the proof offered is admitted, then it follows, that when a man, really guilty of stealing horses, is charged with stealing sheep instead of horses, he recovers the same damages, as one whose conduct is free from blame. The testimony should also have been admitted, because it shows less malice, than would otherwise appear. It shows the plaintiff's character in its true light, and lessens the criminality of the defendant, and justice requires its admission. In support of his argument, he referred the court to *Starkie on Slander*, 405; *Earl of Leicester* v. *Walter*, 2 *Camp.* 251; *Ross* v. *Lapham*, 14 *Mass. R.* 279; *Bradley* v. *Heath*, 12 *Pick.* 163.

Evans, for the plaintiff, argued, that evidence of the kind offered here had uniformly been excluded, and to admit it now would over-

turn principles long established, and invariably practised upon. *Bodwell* v. *Swan*, 3 *Pick.* 376; *Larned* v. *Buffington*, 3 *Mass. R.* 546; *Wolcott* v. *Hale*, 6 *Mass. R.* 514; *Alderman* v. *French*, 1 *Pick.* 1; *Underwood* v. *Parks*, *Strange*, 1200.

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

WESTON C. J. — The facts set forth in the brief statement, and which were offered to be proved at the trial, constituted no defence to the action. It is not pretended, that they did; but it is insisted, that the testimony should have been received in mitigation of damages. We consider the law upon this point well laid down in *Alderman* v. *French*, and in *Bodwell* v. *Swan et ux.*, cited in the argument, that evidence of general character only, and not of particular facts, can be received in evidence. Such has been the practice in this state, without any exception, which has come to our knowledge. When facts, suspicions and rumors have obtained such credence, as to enter into and to form general character, what that general character is, may be shown in evidence. Every man, who institutes an action for an injury done to his character, runs this hazard. But he is not called upon to repel particular facts or charges, except such as are stated in the declaration, when the truth of the defamatory words is relied upon in defence. It would be very inconvenient to relax this rule. The field of inquiry would otherwise be indefinite, and whoever would vindicate his character against specific charges would thereby expose his whole life to severe legal scrutiny. In certain cases, where the defendant's position, and his occasion for speaking negatives malice, it is sufficient, if he had reasonable cause to believe, what he may affirm to be true. But this is matter in defence, and turns upon a principle not applicable to this case.

In the case of the *Earl of Leicester* v. *Walter*, 2 *Camp.* 251, the testimony there received of a general suspicion of the plaintiff's character and habits, can be justified only as evidence of general character. If it went farther than that, which may perhaps be fairly inferred, it is certainly at variance with our law, whatever may be said of the law of *England*. In *Underwood* v. *Parks*, 2 *Strange*, 1200, it was decided, that the truth of the words spoken

could not be given in evidence in mitigation of damages. If this is not permitted, it would seem that testimony, to prove the truth of other charges, could not with any propriety be received. The same doctrine was held in *Mills* v. *Spencer*, 1 *Holt*, 533. *Gibbs C. J.* there says, that general character may be gone into, but not particular facts.

Judgment on the verdict.

Dudley Moody *vs.* Nathaniel Nichols.

Where the parties agree upon and mark out a line of boundary, and the possession is in accordance with it for such length of time as may give a title by disseizin, the line cannot be disturbed, although found to have been erroneously established, unless there be clear proof that the possession was not adverse.

The declaration of the grantee, made to a third person more than twenty years after the line was agreed on by the parties, that he claimed no more than the number of acres stated in the deed, and that if he had more in his possession it was occasioned by mistake, without any acts of either party, can have no influence upon their rights.

Where land is described in a deed by boundaries on three sides, and is to extend west so far as to include a certain number of acres, and the parties to the deed afterwards agree upon and mark that line, and a fence is erected thereon, and the possession is according to it for many years, and no other line is known between them; and the grantor then makes a deed of land to another person, describing it repeatedly as bounding on that side, upon the west line of land previously sold; no land passes by this deed east of that line.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Trespass *quare clausum* for cutting timber. Plea, general issue. The facts in the case will be understood from the statement of them in the opinion of the Court. The Judge instructed the jury, that the making the deed by *Chandler* in 1805, and sending his surveyor to run out the land to the grantee, and the running it out and marking the west line, and the possession accordingly until the same grantee made his deed in 1835, created a fee in the grantee, which could not be defeated by parol, or by any act proved by the de-

fendant, and that the plaintiff was entitled to recover in this action. To this the defendant excepted.

The case was argued by *R. Williams*, in writing, and *J. H. Williams*, orally, for the defendant, and by *Wells*, in writing, for the plaintiff.

The counsel for the *defendant* argued in support of these propositions :—

1. The legal effect and construction of the deed of 1805, from *Chandler* to *Gilman Moody*, under whom the plaintiff claims, is that the grantee took but one hundred acres; and therefore the land in controversy is not included.

2. The subsequent survey did not enlarge the extent of the tract described in the deed.

3. The possession and occupancy of the land in dispute, under the facts proved, do not constitute a disseizin and prevent the defendant, claiming under *Chandler* by an after deed, from contesting the extent of the grant to *Gilman Moody*.

4. The acts and declarations of *Gilman Moody* and the plaintiff are competent and admissible to prove, that they did not claim beyond such a line as would make one hundred acres.

They cited *Brown* v. *Gay*, 3 *Greenl.* 126; 5 *B. & Ald.* 223; 1 *Stark. Ev.* 303; *Little* v. *Libby*, 2 *Greenl.* 245; 3 *Dane*, 287; *Webb* v. *Winslow*, *Cumb. Co.* 1799; 3 *Dane*, 398; 1 *Story's Eq.* 376; 6 *Johns. Ch. R.* 166; 1 *Johns. Ch. R.* 354; *Hill* v. *Crosby*, 2 *Pick.* 466; *Lamb* v. *Cove*, 15 *Wend.* 642; *Gove* v. *Richardson*, 4 *Greenl.* 327; 3 *East*, 294; *Storrs* v. *Barker*, 6 *Johns. Ch. R.* 166.

Wells, for the plaintiff.

1. The giving of the deed of one hundred acres; the survey, and marking of the line by direction of the grantor; the assent and claim to this line by the grantee, erecting his fence there, and both parties acquiescing for twenty-nine years; fix that as the line of the land, according to the deed, irrevocably. The marking of the trees at the time of the survey made them monuments, as much as if they had been mentioned in the deed.

2. But if the locus in quo remained in *Chandler*, when he made the second deed, and if that deed included it, nothing passed by it,

as *Chandler* was most clearly disseized at that time. *Hathorn* v. *Haines*, 1 *Greenl.* 238; *Linscott* v. *Fernald*, 5 *Greenl.* 496, in which case *Webb* v. *Winslow* is well doubted to be law.

3. *Gilman Moody's* declarations to a third person were inadmissible; and had they been admissible, they could not have been material. They could not change a line, which had then been fixed for twenty-three years. *Blanchard* v. *Chapman*, 7 *Greenl.* 122; *Little* v. *Libby*, 2 *Greenl.* 242.

4. Nor were the declarations of the plaintiff admissible. At that time he was not the owner of the land. And had he then received his deed, his title would have been perfect, and could not have been transferred by such conversation.

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

SHEPLEY J. — The deed from *John Chandler* to *Gilman Moody*, conveyed one hundred acres and no more. The grantee having sold twenty acres, the remainder during the same or following year was surveyed by the direction of the grantor, and a line was marked on the westerly end of the lot to define its extent. This line was never in dispute between these parties. The grantee erected a brush fence upon it extending nearly across the lot, and has continued it more than twenty years. By this the grantee will acquire a title to the extent of his possession, if there be not proof of his acts or declarations to defeat it. But if the title were so acquired, it would not be by virtue of the rule, that where monuments are named in a conveyance and are afterward erected by the parties to conform to it, such monuments are to be regarded as the ones named in it; but by virtue of a rule equally well established, that the parties may agree upon a line of boundary, and when they have so agreed, and the possession is in accordance with it, such boundary after an acquiescence for so long a time, as to give title by disseizin, will not be disturbed, although found to have been erroneously established, unless there be clear proof that such possession was not adverse. *Jackson* v. *Van Corlear*, 11 *Johns. R.* 123; *Stuyvesant* v. *Dunham*, 9 *Johns. R.* 61; *S. C.* 11 *Johns. R.* 569; *Gove* v. *Richardson*, 4 *Greenl.* 327.

The declaration made by the grantee to the surveyor employed by the town, that if more than eighty acres were found in his lot

he did not claim it, it was a mistake, and he wished it set to the grantor, would not change the possession. It does not appear, that the surveyor then marked any new line, although upon the plan of his survey then made the surplus was designated as the land of the grantor. Nor that the grantor or grantee had any knowledge of, or recognised this act of the surveyor. And without any assent or recognition of these parties it can have no influence upon their rights. It was under these circumstances, that the grantor in 1834 made a deed of conveyance of the adjoining land to the *Andrews*, from whom the defendant derives his title. In that deed the line of boundary commences "on the *west line* of land," sold to *Gilman Moody*, and after the other lines are described, it returns "to the *west line* of land sold to said *Moody*, thence south 22½° west on the *west line* of said *Moody* land to the place of beginning."

When the grantor conveyed to the *Andrews*, he knew, that no monument or line had been established on the west end of the lot at the time of the first conveyance, and that a line had been afterward agreed upon and marked, and that it had so remained for many years undisputed. The language of the deed is peculiar. Whenever it has reference to the westerly end of the *Moody* lot it speaks of the *west line*, and when to other parts of the lot it is "to *land sold* to *Gilman Moody*."

It is not reasonable to conclude that such peculiarity, occurring by the use of one phrase twice, and the other thrice in the same deed, was accidental. And if not it indicates the intention of the parties, that the land conveyed to the *Andrews* should be bounded by the "west line," of the *Moody* lot as it had been long agreed upon and established by the parties.

It was decided in *Crosby* v. *Parker*, 4 *Mass. R.* 110, that where a line of boundaries commenced upon "*Joseph Wilson's* land," it must refer to land owned and not to land occupied by *Wilson*. And where one lot is bounded on the line of another lot, which is to be ascertained from monuments, it may not usually be intended to designate any other, than the true line of the lot. But in this case, there was no line on the west end of the lot to which the deed could refer other than the one which had been agreed upon, unless it can be supposed, that the parties had reference to some imaginary line to be ascertained by admeasurement. Taking

into consideration the language of the deed in connexion with the facts proved, such a supposition is inadmissible; and the intention is apparent, that the land conveyed to the *Andrews* should be bounded by the *Moody* lot, as the west line had been before established. Such intention must be respected, and the result is, that the defendant acquired no title to the lot upon which he entered, and cannot defend against the plaintiff, who had at least a possessory title, which can be disturbed only by some person exhibiting a better one.

Exceptions overruled.

JOTHAM CRANE *vs.* ENOCH S. MARSHALL.

A deed forty years old at the time of the trial, which was in the possession of the party claiming under it, and where the possession of the land had followed the deed, is admissible in evidence without proof of its execution.

The declarations of one setting up a title by disseizin that he held in subordination to the title of the owner, are admissible in evidence.

But his declarations to a stranger to the title, that he held adversely to the owner, are not admissible in evidence to prove a disseizin.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

This was a petition for partition, wherein the petitioner claimed a moiety of the premises under a deed to him from *Reuben Smith*, dated *Oct.* 2, 1835; and to prove his title, offered in evidence a deed from *Peter Sanborn* to *Enoch Smith*, father of *Reuben* and *Samuel Smith*, of this and other land, dated *Nov.* 12, 1794, and recorded *Oct.* 20, 1814. The respondent required proof of this deed, but the Judge admitted it without proof. *Enoch Smith* died in 1819, leaving *Reuben* and *Samuel* his only heirs. The respondent claims under a deed from *Samuel Smith's* administrator, the same having been sold on license for the payment of debts, *Oct.* 29, 1835. The respondent set up a title by disseizin, and proved that *Enoch Smith* lived in *New-Hampshire*, *Reuben Smith* in *Readfield*, at the distance of several miles, and that *Samuel*, living

adjoining to this, had occupied it, and paid taxes therefor; and that as early as 1812 had enclosed the same with a fence, and had retained the possession until his death in 1833. A division was made between *Reuben* and *Samuel* of real estate, which descended to them as heirs of *Enoch Smith*, after his death in 1819, a part of which was contiguous to this and separated only by a road; and at this time *Samuel Smith* said, that the premises were in the form of a heater, and difficult to divide, and that he intended to buy out his brother *Reuben's* share therein. The petitioner also proved, that in 1825, the witness was employed as a surveyor jointly by *Reuben* and *Samuel Smith* and jointly paid by them to run out the division lines where the estate had been divided; that *Samuel* then told him they had not divided this land; that it was difficult to divide it; that he intended to buy out *Reuben;* and that was the reason why it had not been divided. The respondent objected to the admission of the declarations of *Samuel*, but the objection was overruled. The respondent then offered to prove other declarations of *Samuel Smith*, made at different times while he had the possession, that he claimed the premises in his own right, and denied that *Reuben* had any interest therein; but did not propose to prove, that *Reuben* had any knowledge thereof. The Judge refused to admit the evidence, and the respondent filed exceptions.

Wells, for the respondent.

The deed from *Sanborn* to *Enoch Smith* should not have been admitted without proof, as the possession did not accompany the deed. 3 *Johns. R.* 298; 1 *Stark. Ev.* 344, note and cases cited; 9 *Johns. R.* 169; *Stockbridge* v. *West Stockbridge*, 14 *Mass. R.* 261; *Tolman* v. *Emerson*, 4 *Pick.* 160. The facts show a disseizin. *Small* v. *Proctor*, 14 *Mass. R.* 498. The declarations of *Samuel Smith* were erroneously admitted. *Van Deusen* v. *Turner*, 12 *Pick.* 532; *Dana* v. *Newhall*, 13 *Mass. R.* 498; *Clark* v. *Waite*, 12 *Mass. R.* 439; 9 *Johns. R.* 61; 10 *Conn. R.* 13. But if the petitioner may give these declarations in evidence, then surely such of his declarations as were offered to be proved by the respondent, ought not to have been excluded. The jury should, on the whole evidence of his declarations, have settled, whether here was a disseizin or not. *Kinsell* v. *Daggett*, 2 *Fairf.* 309; *Cummings* v. *Wyman*, 10 *Mass. R.* 464; *Knox* v. *Sillo-*

way, 1 *Fairf.* 211; *Shumway* v. *Holbrook*, 1 *Pick.* 114; *Fisher* v. *Prosser*, *Cowper*, 217.

Emmons, for the petitioner.

The deed was properly admitted without proof after the lapse of thirty years. *Stockbridge* v. *West Stockbridge*, 14 *Mass. R.* 257; 1 *Stark. Ev.* 344. The deed of *Sanborn* gave *Enoch Smith* a seizin of the land. *Ward* v. *Fuller*, 15 *Pick.* 190. *Samuel Smith* entered under his father's title, and his co-tenant could not be disseized by him. *Barnard* v. *Pope*, 14 *Mass. R.* 434. The declarations of *Samuel Smith* were clearly admissible. *West Cambridge* v. *Lexington*, 2 *Pick.* 536; *Church* v. *Burghardt*, 8 *Pick.* 328; *Alden* v. *Gilmore*, 13 *Maine R.* 178. His declarations in his own favor were rightly excluded. *Carter* v. *Gregory*, 8 *Pick.* 168.

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

Weston C. J. — The deed from *Peter Sanborn*, conveying the premises to *Enoch Smith*, was admissible without proof. It was more than forty years old at the time of the trial, was in the possession of the party claiming under it, and the possession of the land had followed the deed. *Stockbridge* v. *West Stockbridge*, 14 *Mass. R.* 257; *Buller's N. P.* 255; 1 *Stark.* 343.

Samuel Smith, the son of *Enoch*, went into the occupation of the premises, after the date of this deed. There can be no doubt from the evidence, that *Samuel* went into possession under his father, and enjoyed the land by his permission; for in 1819 and in 1825, he recognized it as a part of the inheritance which descended to him and his brother *Reuben*.

The declarations, which proved that he held in subordination to the title of his father, are clearly admissible. *West Cambridge* v. *Lexington*, 2 *Pick.* 536; *Church* v. *Burghardt*, 8 *Pick.* 327; *Alden et ux.* v. *Gilmore*, 13 *Maine R.* 178. They prove, that he was the tenant at will of his father, from the time he went into possession, until the death of the father, and they further prove, that he continued afterwards to occupy, as a tenant in common with *Reuben*. His occupancy of the whole, and within fences, was entirely consistent with the title, under which the petitioner

claims. As to his declarations of an adverse title, a tenant is not permitted to set up his possession as a disseizin of his lessor, except at his election.

Having regard to the origin of his possession, and the circumstances, under which it was continued, his declaration to others could not have the effect to oust his co-tenant, whose title he had repeatedly acknowledged. It does not appear, that he had notice of any adverse claim, nor was there any thing in the nature of his occupancy, calculated to put him upon his guard. The facts bear a near resemblance to the case last cited, in which an attempt thus to convert a tenancy at will into a disseizin, was not suffered to be successful. The tenant has succeeded to the title of *Samuel Smith* his father, which was a tenancy in common. He has continued the occupancy of his father; and we perceive nothing in the case, which could give or secure to him a greater interest.

Exceptions overruled.

Henry E. Prentiss *v.* John Russ.

Although there was a written contract between the parties, this does not preclude parol proof of other allegations made at the time, for the purpose of showing fraud.

If one in a contract of sale take a warranty, he is not thereby precluded from rescinding it, if he can prove that it was effected by the frand of the other party.

Fraud may be committed by the artful and purposed concealment of facts, exclusively within the knowledge of one party, and known by him to be material, and where the other party had not equal means of information.

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

Replevin for a chaise. The defendant claimed the chaise under a contract dated *April* 4, 1837, wherein the plaintiff sells to the defendant the chaise in question, and *Rust* sells to *Prentiss* a note given by one *Pinkham* to him, and indorsed, and promises, that if *Prentiss* cannot collect the note of *Pinkham* on execution, he will pay him the amount, and guaranties to *Prentiss*, that execution can be obtained on the note for principal and interest. On the

trial, the plaintiff contended, that the contract of sale had been rescinded; and to establish this fact, offered evidence to prove that the note was void through an entire failure of consideration; that the defendant well knew the fact, but when the contract was made fraudulently represented to the plaintiff, that the note was collectable, and that *Pinkham* had no defence to it; that an action had previously been brought upon it in the name of one *Butler*, which was defended by *Pinkham*, and discontinued because the defence would have been successful, and the costs paid by *Russ;* and that these facts, though well known to the defendant, were by him concealed from the plaintiff. The defendant objected to this evidence, because that the contract was in writing, and parol evidence could not be admitted to vary, control, or explain it; and because the plaintiff could have upon that contract all the remedies, if any, to which he was entitled. The Judge overruled the objections, and the testimony was admitted. The plaintiff, on finding the truth, tendered back the note, notified the defendant that the bargain was rescinded, and demanded the chaise.

The Judge instructed the jury, that if at the time of making the contract, *Pinkham* had a valid defence to the note, and if the defendant, knowing that fact, did nevertheless fraudulently represent to the plaintiff, that the note was due and collectable, and that *Pinkham* had no defence to it; or if there had been a previous action brought upon said note, with the knowledge and for the benefit of *Russ*, which had been discontinued on account of the defence set up by *Pinkham;* and if the knowledge of that fact would probably have dissuaded the plaintiff from parting with his chaise on the terms set forth in the written contract; and if said *Russ* artfully and purposely concealed that fact from the plaintiff; then it would be competent for the plaintiff to rescind the contract and sale. On the return of a verdict for the plaintiff, the defendant's counsel filed exceptions.

H. Belcher, for the defendant, argued in support of the objections made at the trial; and cited *Sherwood* v. *Marwick*, 5 *Greenl.* 295; *Cross* v. *Peters*, 1 *Greenl.* 378; and *Richards* v. *Killam*, 10 *Mass. R.* 239.

Wells, for the plaintiff, argued, that where fraud is practised, it vitiates all contracts induced by it, whether by parol or in writing.

If a sale be made in consequence of the fraudulent representations of the vendee, whether a written bill of sale be made or not, the vendor may rescind it. *Boyce* v. *Grundy*, 3 *Peters*, 219; *Thornton* v. *Winn*, 12 *Wheat.* 183; *Chitty on Con.* 223. Mere common honesty required, that the defendant should have disclosed, that the note had been in suit, and defended, that the plaintiff might be informed, that if he took the note, he took a lawsuit with it; and the law requires it also. *Jeremy's Eq.* 387; 2 *Kent's Com.* 481. The verdict under the charge shows, that the plaintiff would not have made the contract, if the truth had been told to him.

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

SHEPLEY J. — As the contract between the parties was reduced to writing, it is contended, that parol evidence should not have been admitted to prove, that other allegations were made, than those contained in it; and the case of *Richards* v. *Killam* is relied upon as in point. In that case the assignment of the bond was made under seal, and the action was assumpsit complaining indeed of deceit and fraud but the declaration was drawn in such a manner, that the court say, that the allegations "are insufficient to enable us to give to this action or the evidence to support it, the effect of an action for a deceit and fraud, considered as a tort, and not as a breach of contract." And it appears to have been upon that ground, that the evidence was held to be inadmissible. In the case of *Boyce* v. *Grundy*, it was decided, that a party was not precluded from introducing testimony of other allegations made at the time than those contained in the written contract for the purpose of proving fraud.

Nor is one, who has in a contract of sale taken a warranty, precluded from rescinding it, if he can prove, that it was obtained from him by fraud; because the whole contract whatever may be its character is avoided by the fraud, and the parties are left to assert their rights as they would, if no contract had been made.

Fraud may be committed by the *suppressio veri* as well as by the *allegatio falsi*, if the means of information are not equally accessible to both, but exclusively within the knowledge of one of the

parties, and known to be material to a correct understanding of the subject; and especially when one of the parties relies upon the other to communicate to him the true state of facts to enable him to judge of the expediency of the bargain. The instructions given required the jury to find, that the former action was discontinued on account of the defence set up, and that this was artfully and purposely concealed, and that it would have had a material influence, had it been known, upon the contract. The case of *Hill* v. *Grey*, 1 *Stark. Rep.* 352, fully justifies this part of the charge.

The jury having found the contract fraudulent, the plaintiff had a right to rescind it, and having elected to do so, and performed what was necessary on his part, is entitled to recover.

Exceptions overruled.

Dexter H. Baldwin *vs.* Thomas Whittier.

A writ, unlawfully sued out in the name of another by the defendant, and irregularly served by his procurement, can afford him no protection in taking the property of another under color thereof.

It is no part of the duty, nor is it within the power of an overseer of the poor to bring an action of replevin for property alleged to belong to the town.

A writ of replevin cannot be legally served before the plaintiff has given such bond to prosecute the action as the statute requires.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Trover to recover the value of a cow. With the general issue the defendant filed a brief statement, justifying the taking by an officer, whose servant the defendant was, by virtue of a writ of replevin sued out by the town of *Rome* against the plaintiff. The plaintiff proved, that he owned the cow when the writ was sued out, and his possession of her, and that the defendant was with the officer, and assisted in taking the cow. The writ of replevin was returnable before a Justice of the Peace, and the bond returned with it named the town of *Rome*, as principals, and *J. S. Whittier*, as surety, and was signed by "*Job N. Tuttle*, *Thomas Whittier*, Overseers of the Poor of said town," with one seal, and by *J. S.*

Whittier, with a seal. The writ was sued out by the direction of the defendant, who neither proved nor pretended any authority, except from the fact of his being an overseer, prior to the suit, but the town afterwards paid his expenses in going for the writ. The defendant proved, that on the day before the writ was returnable, the plaintiff paid the costs of the suit, and agreed to relinquish his right to the cow, and the cow was delivered by the officer to the defendant, claiming to act as an overseer, and he delivered her to a pauper of the town, to be by him used for his benefit, who soon after killed her. The plaintiff introduced evidence to show, that at the time he settled the action, and paid the costs, the defendant and other officers of that town falsely represented to him, that the town held a perfect title to the cow, acquired prior to that of the plaintiff. The counsel for the defendant requested the Court to instruct the jury, that the action could not be maintained. The instruction given was, that if they were satisfied, that the defendant by his false representations had deceived the plaintiff, and had thereby induced him to make the settlement, he ought not, and in law would not be bound by it, so as to be precluded from recovering in this action; and that if such were the case, the plaintiff had a right to recover of the defendant the value of the cow. The defendant excepted to the instructions.

D. Williams, for the defendant, contended, that the writ was a complete justification of the officer, and of the defendant acting as his servant. He had authority as overseer to sue out the writ, and whether he had or not, his acts were afterwards ratified by the town. There was no conversion by the defendant, as he merely received the cow from the officer as the servant of the town, and passed her to another person. *Sanford* v. *Nichols*, 13 *Mass. R.* 286; *Stetson* v. *Kempton*, *ib.* 272; *Haskell* v. *Sumner*, 1 *Pick.* 459; 3 *Stark. Ev.* 1496.

May, for the plaintiff, contended, that the defendant, as overseer of the poor, had no authority to bring an action of replevin, and that the process was no protection to him. *Stat.* 1821, *c.* 114, *sec.* 7; 5 *Conn. R.* 367. If the overseers had the power, it could only be exercised by the majority. *Cram* v. *Pro. Bangor House*, 3 *Fairf.* 354; *Trott* v. *Warren*, 2 *Fairf.* 227. The writ was

void, because there was no bond according to the statute. *Cady* v. *Eggleston*, 11 *Mass. R.* 282; *Rathbone* v. *Rathbone*, 5 *Pick.* 222; *Morse* v. *Hodsdon*, 5 *Mass. R.* 314. The town was not bound by the bond, and it was therefore invalid. *Damon* v. *Granby*, 2 *Pick.* 345; *Stetson* v. *Patten*, 2 *Greenl.* 358. As the writ was settled and never entered, the consequences are the same as if it had never been made. *Hayden* v. *Shed*, 11 *Mass. R.* 500; *Nelson* v. *Merriam*, 4 *Pick.* 249; *Smith* v. *Snyder*, 15 *Wend.* 324. The taking of the cow, and delivering her to the pauper, was a conversion. *Adams* v. *Adams*, 13 *Pick.* 384; 1 *T. R.* 12; 10 *Johns. R.* 369.

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

Weston C. J. — The defendant having procured the writ to be instituted, under which he defends, cannot thereby justify himself, unless he had sufficient authority to cause the action to be brought. And we are well satisfied he had no such authority. It is no part of the duty, nor is it within the power of an overseer of the poor, to bring such an action. Besides, the writ could not be legally served, until the inhabitants of *Rome*, the plaintiffs, had given bond to prosecute their action, which was not done. The two overseers, who signed the bond, had no power thus to bind the town.

The writ, unlawfully sued out by the defendant, and irregularly served by his procurement, could afford him no protection. It appears to have been mere color, to aid the defendant in his fraudulent purpose of depriving the plaintiff of his property. The action was dropped, and the plaintiff was made to acquiesce in what was done, to pay the costs, and to give up his property, by the false representations of the defendant. Upon this developement, it would be a reproach to the law, to suffer the defendant to shield himself under an abuse of its process.

Exceptions overruled.

WILLIAM TRUE *vs.* JAMES THOMAS.

If the maker of a check, payable instantly, has no funds at the time in the bank upon which it is drawn, it is, when unexplained, deemed a fraud; and the holder can sustain an action upon it, without presentment for payment, or notice.

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

The form of action, facts in the case, and ruling in the Court of Common Pleas, appear in the opinion of the Court. The paper offered was a common bank check, of which the following is a copy.

"*Commonwealth Bank.*

"$140,00 *Boston, Nov.* 6, 1830.

Pay to *W. True*, or bearer, one hundred forty dollars.

To the Cashier. *James Thomas.*"

Vose, for the plaintiff.

The words, *for value received*, are not necessary. *Bayley on Bills*, 24, 25, and cases cited. Where the drawer has no funds in the bank on which the check is drawn, demand and notice are unnecessary. *Bayley on Bills*, 188; *Peake's Rep.* 232; 1 *T. R.* 405; 12 *East*, 170; 1 *Caines*, 157; 4 *M. & Selw.* 226; *Campbell* v. *Pettengill*, 7 *Greenl.* 126.

Wells, for the defendant, contended, that the principle was, that demand and notice could be dispensed with, only where it is shown by the holder, that the drawer had no funds, nor any right to expect, that the money would be paid. The holder must show all that will excuse him for neglect. *Chitty on Bills*, 412, 413; *Cruger* v. *Armstrong*, 3 *Johns. Cas.* 5; *Bayley on Bills*, 303, 309, 310; *Campbell* v. *Pettengill*, 7 *Greenl.* 126. There is no consideration stated in the check, or proved, and it is not of itself evidence of a debt. *Hemmenway* v. *Hickes*, 4 *Pick.* 497; 7 *T. R.* 463; *Brown* v. *Gilman*, 13 *Mass. R.* 158; *Ball* v. *Allen*, 15 *Mass. R.* 433.

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

EMERY J. —This is a suit for money had and received, as stated in the first count. In the second count is set forth a check on the

Cashier of the *Commonwealth Bank*, dated *Nov.* 6, 1830, directing the Cashier to pay to *W. True*, or bearer, one hundred forty dollars, signed by the defendant, and averring a demand, refusal of payment, and notice to the defendant. No proof of presentment of the check for payment, or notice of its non-payment was exhibited. A nonsuit was directed in the Court of Common Pleas. And the question now is, whether the plaintiff can sustain his action on the proof that he does exhibit in the testimony of the Cashier of that Bank — That "it doth not appear by the books of said Bank, that said *Thomas* had any funds therein on the 6th of *Nov.* 1830. That he should not have paid the check if presented at the Bank, if *Thomas* had no funds there deposited. That it does not appear by the books of the Bank, that said *Thomas* ever deposited any money in the Bank, and the deponent has not any recollection of his having done so at any time."

Under these circumstances there is *prima facie* evidence, that there was no reasonable expectation that the funds were in the Bank on which the check was drawn, at the date of the check. On such a state of facts it is not necessary for the holder to present such a check at the Bank for payment, in order to sustain an action upon it. The drawing of it, unexplained, must be deemed a fraud, depriving the drawer of all right to require presentment and demand of payment. *Franklin* v. *Vanderpool*, 1 *Hall's R.* 78.

The plaintiff ought to have been permitted to present his case to the jury. The exceptions are therefore sustained, and a trial may be had here.

Stephen Keniston *& ux. vs.* Frederick Rowe.

If the mother of a bastard child marry before a prosecution, and one be afterwards instituted, the husband should join in the complaint.

A prosecution under the bastardy act, *(stat.* 1821, *c.* 72,*)* may be maintained, although the accusation and complaint are made, after the birth of the child.

The statute of limitations furnishes no bar to such prosecution.

As not only the present maintenance of the child, but the future liability of the town for its support, are sought by such prosecution, the process will not be defeated by the fact, that the child needed no support at the time of the commencement, or of the trial of the complaint.

Testimony of the resemblance of the child to the alleged father, or of the want of it, not being matter of fact, but merely of opinion, is not admissible.

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

This was a complaint, founded on the statute in relation to bastardy, in which it was alleged that on or about *Oct.* 18, 1822, that said *Sarah Keniston,* then unmarried, was begotten with child by said *Rowe*, and that she was delivered of the child, *August* 12, 1823. The complaint to the Justice was made and sworn to, *Oct.* 13, 1837. A declaration was filed at the trial, containing the same facts, and also that during the time of travail she had accused *Rowe* of being the father of the child, and had continued constant in the accusation. With the general issue, *Rowe* filed a brief statement, that the process and subject matter thereof were barred by the statute of limitations. The trial in the Court of Common Pleas was at *April Term,* 1838, and it was proved, that about ten years before that time the complainants intermarried ; that she was more than twenty-one years of age at the birth of the child ; that she was then residing in the family of her father, with whom the child, a female, has always lived ; that the child was for a time feeble, but when the complaint was made, and at the time of the trial, was in good health and able to support herself without assistance ; that by the procurement of her father a magistrate came to the house in *April,* 1823, and she made a complaint against *Rowe*, charging him with being the father of the child, on which he was arrested, but which in some way, not appearing in evidence, was settled on some terms by the father, *Rowe* however paying the

officer for serving the warrant; that *August* 18, 1823, she made another accusation and complaint before the same magistrate, and a warrant was issued, but *Rowe* could not be found. This last mentioned complaint was produced at the trial, but the first was not. *Rowe* had been out of the State until the time of the arrest on this warrant.

Rowe, by his counsel, objected, 1. This complaint cannot be sustained by the husband and wife for a bastard child begotten upon the wife while sole and unmarried. 2. That the complaint or accusation and examination, authorized to be made by the statute, must be made before the birth of the child, and as it was made *Oct.* 13, 1837, it could not be maintained. 3. That the complaint was barred by the statute of limitations, and by the lapse of time. 4. That it could not be maintained, because the child at the time of the complaint, as well as at the time of the trial, was able to support herself without assistance. The Judge overruled all the objections. *Rowe* offered to prove, that the child did not resemble him in form or complexion. The Judge excluded the testimony. The verdict was against the defendant, and he filed exceptions.

E. Fuller and Wells, for the defendant, argued in support of the several objections made at the trial in the Court of Common Pleas. and cited *stat.* 1821, *c.* 72, *sec.* 1; 1 *Root*, 229; 3 *Dana*, 453; 1 *Kent's Com.* 464; *Bac. Ab. Bastardy, B; stat.* 1821, *c.* 62, *sec.* 14; *Wilbur* v. *Crane*, 13 *Pick.* 284; 2 *Conn. R.* 357; 3 *Mason*, 161. The testimony excluded by the Judge, ought to have been admitted. 1 *Stark. Ev.* 17, 449, 450, 452.

Emmons, for the plaintiff, insisted in his argument, that the objections were all untenable, and cited *Somerset* v. *Dighton*, 12 *Mass. R.* 383; *Wilbur* v. *Crane*, 13 *Pick.* 284; *Wilkie* v. *West*, 1 *Murphy*, 319; 2 *Stark. Ev.* 137; *Drowne*, v. *Simpson*, 2 *Mass. R.* 441; *Dennett* v. *Nevers*, 7 *Greenl.* 399; 2 *East*, 333; 5 *Esp. R.* 92; *Hill* v. *Wells*, 6 *Pick.* 104; 2 *Dane*, 519, *sec.* 4; 6 *T. R.* 148; *Bott's Poor Laws*, 501. There was no error in excluding the testimony offered. 8 *Pick.* 560.

The opinion of the Court was subsequently drawn up by

SHEPLEY J. — It was decided in the case of *Wilbur* v. *Crane*, 13 *Pick.* 284, that when the woman marries after the birth of her child, the husband should join in a prosecution of this description.

The statute in terms authorizes the prosecution to be commenced after the birth, and there is nothing in the other provisions so inconsistent as to authorize courts to deny the right. The process is one of a peculiar character, existing only by statute, and any attempt to class it with actions, or suits at common law of any description, will afford little light. It is not comprehended under any term used in the statutes of limitation, nor does it appear to have been designed to be limited by any of them. The facts disclosed in the case remove any legal presumption, if any could arise, on account of the length of time, which has elapsed.

The fact, that the child needs no assistance cannot operate as a bar to the prosecution, for it is not the present maintenance only, which is to be secured; the party is required to give bond to secure the town against future liability. And it does not enter into the consideration of the case until after there has been a judgment respecting the reputed parentage, when it will become the proper subject of examination and of consideration.

It is said, that the testimony offered should have been admitted, because the color of the child might have been such as to prove conclusively, that the defendant was not the father of it. But it was not the color, or any peculiarity of conformation, or form of features, as matters of fact, that were proposed to be proved, it was to prove a resemblance, which is matter of opinion; and witnesses, if they could have sight of the persons, might be indefinitely multiplied, without affording any satisfactory ground of judgment for a jury. Witnesses except in some art, trade, or profession, requiring peculiar skill or science, are not called to form comparisons and to testify to opinions arising from them.

The facts being proved, the jury were to be the judges of the effect of similarity or dissimilarity in form or complexion.

Exceptions overruled.

Central Bank *v.* Elisha H. Allen.

It is not necessary to allow one day for every twenty miles travel from the place of caption to the place of holding the court, *after the taking of a deposition*, if a reasonable time be given to travel in the ordinary mode from one place to another.

Where the maker of a note is entitled to grace, the indorser has the same privilege.

Where a note is made payable at a particular bank, and before the day of payment arrives, that bank has no place of business, and ceases to exist, and another bank does business in the same room; if it be necessary to make a presentment of the note for payment, it is sufficient, if made at that room.

Where a note is made payable at a particular place, the reply which is there made on presentment for payment, is admissible in evidence.

Where the maker of a note has removed before it falls due, and his residence cannot be ascertained by reasonable diligence, if it be necessary to make a demand, it may be made at his former residence.

The replies, made on inquiry for the maker's place of abode, are admissible in evidence.

The contents of a notice, sent to the indorser of a note, informing him of a demand on the maker and non-payment, may be given in evidence without notice to produce the paper.

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

Assumpsit against the defendant as indorser of a promissory note made to him by one *N. Norton*, dated *April* 7, 1835, payable at the *Branch Bank* in *Portland* in two years from date with interest annually. The plaintiffs introduced two depositions taken in *Portland*, *March* 31, 1838, at 10 o'clock, A. M., to be used at the then next term of the Court holden at *Augusta*, on the third day of *April;* the distance between the places is more than fifty and less than sixty miles. The first day of *April* was on *Sunday*. These depositions were objected to because a sufficient number of days did not intervene between the time of taking and the Court to allow the defendant suitable time to attend Court. The depositions were admitted by the Judge. It appeared from these depositions, that the plaintiffs sent the note to *Portland* for collection to a bank there; that on *April* 10, 1837, a notary public took the note and carried it to the room occupied by the *Branch Bank* when the note was given and while that Bank did business

in *Portland*, and there presented it and demanded payment of the Cashier of the Bank of *Cumberland*, then doing business in the same room, and that the Cashier of the latter Bank refused payment, and informed him, that *Norton* had no funds there, and that the *Branch Bank* had closed business in that city. It was proved that the *Branch Bank* had closed business in *Portland* in 1836, and had no place of business there afterwards. On the same day the Notary made diligent search in *Portland* for *Norton*, and was informed by *Norton's* brother and others, that he had left *Portland* and gone to the western country. The Notary then left a demand and notice in writing at the place where *Norton* last boarded in *Portland*, and on the same tenth of *April*, the Notary prepared a written notice directed to the defendant at *Bangor*, his place of business, and deposited it the same day in the post office in *Portland*. This notice, he testified, described the note, stated that it was not paid by the promissor, and demanded payment of the defendant as indorser. To the admission of all this testimony the defendant objected. The Judge admitted it, and instructed the jury, that if believed by them, it was sufficient to prove a demand and notice. The verdict was for the plaintiff, and the defendant filed exceptions.

Wells, for the defendant.

The depositions ought not to have been received, because the party is entitled to time to return before the Court. *Stat.* 1821, *c.* 85, *sec.* 2; *Ulmer* v. *Hills*, 8 *Greenl.* 326. The demand was too late to charge the indorser. *Stat.* 1824, *c.* 272. If the Bank of *Cumberland* was the place of payment, because the *Branch Bank* had ceased to do business there, the note should have been in the Bank during banking hours. *Berkshire Bank* v. *Jones*, 6 *Mass. R.* 524; *Woodbridge* v. *Brigham*, 13 *Mass. R.* 556. The declarations of the Cashier are not admissible, for he is a mere stranger. *Carle* v. *White*, 9 *Greenl.* 104. As there was no *Branch Bank* at *Portland*, at which the demand could be made, it should be made at the usual place of abode of the payee, if to be found. This was not done, nor was due diligence used to find where his place of abode was. *Hill* v. *Varrill*, 3 *Greenl.* 233. No notice was given to the defendant to produce the notice sent to

him, and therefore the contents of it were improperly given in evidence.

Clark, for the plaintiffs, afterwards furnished the Court with a written argument.

In his argument, he cited *stat.* 1821, *c.* 85, *sec.* 1, 2; *Wyman* v. *Dorr*, 3 *Greenl.* 183; *Clapp* v. *Balch*, *ib.* 216; 4 *Pick.* 302; 5 *Pick.* 528; *State Bank* v. *Hurd*, 12 *Mass. R.* 172; *Shed* v. *Brett*, 1 *Pick.* 413; *Williams* v. *Bank of U. States*, 2 *Peters*, 96; *Widgery* v. *Munroe*, 6 *Mass. R.* 451; *North Bank* v. *Abbott*, 13 *Pick.* 465; *Church* v. *Barlow*, 9 *Pick.* 547; *Chitty on Bills*, 314; 2 *Stark. on Ev.* 160; *Eagle Bank* v. *Chapin*, 3 *Pick.* 180; 6 *Wheat.* 104.

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

Weston C. J. — We do not think the presiding Judge was bound to reject the depositions, because taken at so late a day at *Portland*. No decision has gone that length. The defendant, in the present facilities for travelling, had ample time, if he chose to be present at the caption, without violating the Sabbath, to go from that city to *Augusta*, before the sitting of the Court, for which it was taken.

The note having been left at a bank for collection, the maker was entitled to grace, by the express provisions of the *statute* of 1824, *c.* 272. If the maker was entitled to grace, it results, that the indorser, who was collaterally liable, has the same privilege. *Pickard* v. *Valentine & al.* 13 *Maine R.* 412.

The maker had promised to pay it at a day and place certain. The place, the *Branch Bank* in *Portland*, was well known and understood at the date of the note. Before its maturity, that Bank ceased to have a place of business in that city. It has been held, that where a bill is drawn and accepted, payable at a particular house, going to that house with the bill on the day of payment, and finding it closed, is a sufficient presentment. *Bailey*, 200. And we are inclined to the opinion, that the *Branch Bank* having ceased to operate, if their banking house had not been occupied by a similar institution, presentment would have been excused. If this was the place of demand, and upon the facts we think it was,

there is evidence of a sufficient presentment at that place. It must be taken to have been made in business hours, the Bank being open, the presentment having been made to the Cashier, and payment demanded of him. *Berkshire Bank* v. *Jones*, 13 *Mass. R.* 556; *Nichols* v. *Goldsmith*, 7 *Wend.* 160; *Shaw* v. *Reed*, 12 *Pick.* 132.

The answer of the Cashier of the *Cumberland Bank*, that the maker had provided no funds there, wherewith to pay the note, was properly a part of the *res gesta*, and as such admissible. But if it had not been, the holder is not bound to prove, that such funds had not been provided. If they had, it was matter of defence, to be proved by the indorser. *Bank of U. States* v. *Carneal*, 2 *Peters*, 543.

But if the discontinuance of the *Branch Bank* at *Portland*, has the same effect as if no place of payment had been appointed, we are of opinion, that such diligence was used by the messenger of the holder, as excused a personal demand upon the maker. He testifies, that he made diligent inquiry for his place of residence, which it appears had been at *Portland*, and was informed that he had gone into the western country, and particularly, that he had this information from the maker's brother, who had been connected with him in business. The answers he obtained upon these inquiries, were very clearly admissible as a part of the *res gesta*. The holder was under no obligation to send into the western country to make demand, but the written demand of payment, left at *Moorhead's*, his former residence in *Portland*, was sufficient. *McGruder* v. *Bank of Washington*, 9 *Wheat.* 598; *Anderson* v. *Drake*, 14 *Johns. R.* 114. In any point of view, in which the case can be considered, there is no evidence of laches in the holder, but there is evidence of sufficient diligence on his part.

As to the proof of notice to the defendant, it was such as is uniformly received, without first giving notice to the party to produce it. *Eagle Bank* v. *Chapin*, 3 *Pick.* 180.

Exceptions overruled.

* THE INHABITANTS OF AUGUSTA *vs.* JABEZ LEADBETTER.

A town may purchase or receive a negotiable note for the purpose of meeting an expected claim upon the town by the payee; and may maintain a suit thereon, as indorsers, in the name of the town.

This power may be exercised by the town agent and selectmen without a vote of the town.

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

The action was brought by the plaintiffs as indorsees of a note given by the defendant to one *Armstrong* and by him indorsed. At the time of the trial in the Court of Common Pleas, there was an action pending in the same Court against the town for injuries alleged to have been sustained by *Leadbetter* by reason of a defective road within the town. The defendant called *Potter*, the attorney of the plaintiffs, who testified, that the promisee brought the note to him before this action was commenced, the witness being then the general agent of the plaintiffs, their treasurer, and one of their selectmen, and indorsed and delivered the note to him, and he gave *Armstrong* an accountable receipt therefor; and that after consulting with the other selectmen, with their assent, he brought this action. At the time the note was received of *Armstrong*, no action had been commenced against the town by *Leadbetter*, nor was it certain, that any suit would be brought by him. The witness stated, that he had disclosed all the authority he had to institute and prosecute the suit. The counsel for the defendant thereupon objected, that this action could not be maintained, because the note did not come into the hands of the plaintiffs in the regular course of business which towns are authorized to do; that the town never legally gave their assent to bringing the suit in their name, and had no interest therein; that neither the town agent, nor the selectmen, nor the treasurer, nor all combined, could legally assent to the using of the name of the town in bringing the suit; and that even the town by vote could not lawfully authorize the suit in their name, it not being within the corporate purposes for which towns are created so to lend the use of their name, or in any

* The Chief Justice, being an inhabitant of *Augusta*, did not sit in the hearing or determination of this case.

way to assume the prosecution of suits in which they have no interest. The Judge overruled all the objections, and instructed the jury, that on the facts the action could be maintained in the name of the plaintiffs. The verdict was for the plaintiffs, and the defendant filed exceptions.

May, for the defendant, argued in support of the objections made by him to the maintenance of the action at the Court of Common Pleas, and cited *Stetson* v. *Kempton,* 13 *Mass. R.* 272; *Bussey* v. *Gilmore,* 3 *Greenl.* 191; *Parsons* v. *Goshen,* 11 *Pick.* 396; *Willard* v. *Newburyport,* 12 *Pick.* 227; *stat.* 1821, *c.* 121, *sec.* 7; *Greene* v. *Bailey,* 3 *Fairf.* 254; *First P. in Sutton* v. *Cole,* 3 *Pick.* 240; *Bayley on Bills,* 47, *note A; stat.* 1821, *c.* 59, *sec.* 26; *Griswold* v. *North Stonington,* 5 *Conn. R.* 367; *Sherwood* v. *Roys,* 14 *Pick.* 172.

Potter, for the plaintiffs, argued, that the town, as a corporation, had power to bring and maintain a suit of this description; that this was one of the acts of the town exercised properly by their agent and selectmen in behalf of the town; that the town had authority by their officers to discharge the action, receive payment of the note, and give it up to them, and therefore sufficient authority to bring the suit; and that the common practice of transacting all such affairs by the officers of the town, and the great inconvenience of assembling the inhabitants to vote respecting every bargain, should have great weight, in giving a construction to the statute. He cited 2 *Kent's Com.* 274, 290; *Angell & A. on Cor.* 60, 94; *Willard* v. *Newburyport,* 12 *Pick.* 227; *stat.* 1821, *c.* 59, *sec.* 26; *Little* v. *O'Brien,* 9 *Mass. R.* 423; 3 *Cranch,* 208; *Marr* v. *Plummer,* 3 *Greenl.* 73.

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

Shepley J. — The promissory note upon which this action is brought, was payable to *William Armstrong* or order, and by him indorsed, directing it to be paid to the plaintiffs or their order. This is sufficient to pass the property to them, unless there is some legal objection to their title, arising out of their want of capacity to take for the purpose for which it was received, or out of the man-

ner in which it was acquired. Although it was received before the town agent knew, that the defendant would institute a suit against the town, yet it appears to have been taken in contemplation of such an event, which took place before this action was brought. Towns are authorized to commence and prosecute suits and may for this purpose appoint agents or attorneys. *c.* 114, *sec.* 7. The powers of the agent are limited only by the capacities of the corporation and by the nature of his employment. The selectmen are also agents to manage the prudential affairs of their towns, but they cannot assume powers, which do not belong to the towns for which they act. The law also contemplates, that towns may be the lawful holders of notes and other securities, but such power does not enlarge the capacities of towns, and enable them to take them for other purposes than those provided for by the law. This is not one of those cases in which the treasurer is empowered to sue in his own name; for it is only when the note or security is given to him, or to his predecessor, in their official character, that he can sue in his own name. *c.* 59, *sec.* 26. The action may then be well maintained in the name of the town, if the note was received for purposes coming within the legal action of the town, the title being lawfully acquired. Towns are obliged to keep their highways in repair, and are subjected to the payment of damages to the party injured by their neglect. And they may use all lawful means to defend themselves against the recovery of damages, and to provide for the adjustment and payment of any such damages. For this purpose they may borrow money, or purchase grain or other merchandise. For they would be acquiring property for the very purpose of enabling them to perform a duty enjoined by law. Can there be any doubt that for such a purpose the plaintiffs might by a legal vote have acquired the property in the note now in suit? If not, there can be none here, and the objection fails arising from their want of capacity to take. Whatever of authority could be legally exercised by the agent and selectmen existed in this case. The selectmen might draw an order to pay damages recovered against the town and thus bind the town. They and the agent might settle the suit brought by the defendant against the town, and bind the town by their acts. If they have power to accomplish an object have they not the choice of the legal means

by which it may be done? If they may settle and pay the defendant for the injuries, which he has sustained, may they not, if his carriage have been injured, procure materials and cause it to be repaired? When a traveller's horse has been injured may they not procure another for him to prevent delay and additional damages? And if they may do these things may they not at his request purchase from one of his creditors his note and deliver it to him in payment? And can his consent enlarge their power and authorize them to do that, which without it, they could not do? If the power to purchase a note for such a purpose be admitted, it no more implies a general power to traffic in notes, than the power to purchase materials and repair a carriage implies a general power to trade.

It has been decided that overseers of the poor may bind the town by their promise to pay for the support of a pauper chargeable to their town. *Belfast* v. *Leominster*, 1 *Pick.* 123. And that the selectmen acting as overseers may bind their town not to take advantage of a defect in a notice respecting a pauper. *Hanover* v. *Eaton*, 3 *N. H. Rep.* 32. And in this state, that the selectmen acting in that character may bind their towns by advancing money and prosecuting a suit to enable a female to charge one as the putative father of her bastard child, to avoid a contingent liability for its support. *Dennett* v. *Nevers*, 7 *Greenl.* 399.

The selectmen while acting upon the prudential affairs of their towns would upon the same principles possess a similar authority. The cases of *Davenport* v. *Hallowell*, 1 *Fairf.* 317, and *Blake* v. *Windham*, 13 *Maine R.* 74, and *Willard* v. *Newburyport*, 12 *Pick.* 227, exhibit the exercise by town officers of powers quite as extensive, which seem to have been approved.

In the case of *Griswold* v. *Stonington*, 5 *Conn. R.* 367, it was decided, that the selectmen had not power *virtute officii* to submit a claim on the town for the support of a pauper to arbitration; upon the principle, that where special powers are given by statute as in that state, the delegation of such special power excludes the general authority which might otherwise exist. The principle is doubtless correct, but it is not applicable to our legislation, where their powers in relation to the management of the prudential affairs of their towns are not defined by statute.

Exceptions overruled.

Levi Bean *vs.* Ezekiel Simpson.

Proof of the assignment of a chose in action and of notice thereof to the debtor, without exhibiting the security or offering evidence of the assignment where no request is made therefor, is sufficient to protect the assignee against subsequent payments to the assignor.

If no place be appointed in the contract for the delivery of specific articles, it is the duty of the debtor to ascertain from the creditor where he would receive them; and if this be not done, the mere fact that the debtor had the articles at his own dwellinghouse at the time, furnishes no defence.

The averment in the declaration of a demand, not required by the contract, or by law, may be rejected as surplusage, and need not be proved.

The action was assumpsit on a contract in writing to deliver certain specific articles to the plaintiff, dated *Jan.* 5, 1835. The declaration averred a demand of the articles on the last day of *May*, 1836. No time, or place, for the delivery of the articles was named in the contract. On the back of the contract was an assignment under seal from *Bean* to one *Sherman*, dated *April* 27, 1836. On the first day of *May*, 1836, *Sherman* gave verbal notice of the assignment to the defendant, and demanded the articles, but did not exhibit to *Simpson* the assignment, or give any evidence of it, nor did *Simpson* request it, but offered to pay the amount, if *Sherman* would deduct a sum alleged to be due from *Bean* to one *Eaton*. To this *Sherman* refused to assent. The defendant gave in evidence a paper dated *July* 2, 1836, signed by *Bean*, containing his acknowledgement that he had received payment in full for the articles specified in the contract. The defendant offered to prove, that on the last day of *May*, 1836, he was at his dwellinghouse during that day, and then and there had the articles mentioned in the contract, and was ready to deliver them to *Bean*, or to his assignee. The Judge refused to admit this evidence, as no notice was shown to have been given to *Bean*, or to his assignee, of the time or place of the intended payment. The Judge was requested by the defendant to instruct the jury, that before the defendant could be compelled to pay the assignee, he must prove that he had furnished the defendant with evidence of the assignment before the commencement of the action. The Judge declined, and instructed the jury, that it was not necessary

that any such evidence should be furnished the defendant, as he had never requested it. He also insisted, that it was necessary for the plaintiff to prove a demand of the articles at the defendant's dwellinghouse, and requested the Judge so to instruct the jury, as the plaintiff had in his declaration alleged, that he had made a demand on the defendant on the last day of *May*, 1836. The Judge declined, and did instruct them, that no such demand was necessary, and that it was not therefore necessary to prove the averment. The Judge instructed the jury, that the assignment, being under seal, and purporting to be for a valuable consideration, is to be presumed to have been *bona fide*, and for a valuable consideration, unless the same should be disproved by the defendant; that the defendant might be allowed by way of deduction from the amount for any payments he had made to *Bean* prior to notice to the defendant of the assignment, but that unless he should prove that payments had been made before the notice, they could not be allowed. The verdict was for the plaintiff, and the defendant filed exceptions to the rulings and instructions of REDINGTON J.

Smith argued in support of the propositions contained in the requests for instruction, and contended, that the instructions given were erroneous. He cited *Davenport* v. *Woodbridge*, 8 *Greenl.* 17; *Wood* v. *Partridge*, 11 *Mass. R.* 488; *Wyman* v. *Winslow*, 2 *Fairf.* 398; *Robbins* v. *Luce*, 4 *Mass. R.* 474; *Penniman* v. *Hartshorn*, 13 *Mass. R.* 87; *Damon* v. *Osborn*, 1 *Pick.* 476; *Briggs* v. *Mason*, 16 *Mass. R.* 453; *Douglas*, 668; 3 *B. & P.* 456; 1 *Chitty Pl.* 209; 7 *Johns. R.* 321; 10 *Johns. R.* 365.

Z. Washburn, for the plaintiff, argued in support of the rulings of the Judge, and insisted that the requests for instruction were rightly refused. He cited *Bixby* v. *Whitney*, 5 *Greenl.* 195; and *Davenport* v. *Woodbridge*, 8 *Greenl.* 17.

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

WESTON C. J. — That the contract, originally given to *Bean*, was assigned to *Sherman*, in *April*, 1836, has been proved, and is not disputed. The defendant, having had notice the following month, could not subsequently make payment to *Bean*, so as to defeat *Sherman*. This was expressly decided in *Davenport* v. *Woodbridge*, 8 *Greenl.* 17.

No place was appointed for the delivery of the specific articles, which are the subject matter of the contract. It was then the duty of the defendant, the debtor, to ascertain where the creditor would receive them. His readiness to pay at his own dwelling-house, on the day appointed, afforded him no defence. *Bixby* v. *Whitney*, 5 *Greenl.* 192.

The plaintiff proved all that was necessary to maintain the action. The averment of a demand, not required by the contract, or necessary by law, was impertinent, and as such may be rejected as surplusage. *Bristow* v. *Wright, Douglas*, 665.

Exceptions overruled.

JOHN WELLINGTON *vs.* JAMES A. DREW.

Where goods were left by the plaintiff with another for safe keeping merely, and the defendant came to the bailee of the goods, and saying that he had authority from the plaintiff to make sale thereof, took the goods and sold them, and paid a portion of the proceeds of the sale to the bailee, with the request to pay the same to the plaintiff; and where the plaintiff received this money without objection, and requested the bailee to call on the defendant for the remainder; *it was held*, that *trespass de bonis asportatis* could not be maintained, although the defendant did not show any authority from the plaintiff to make the sale.

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

The form of action was *trespass de bonis asportatis*. The evidence, the grounds taken by counsel, and the ruling of the Judge as it appears in the exceptions, will be found in the opinion of this Court.

Emmons, for the plaintiff.

F. Allen, for the defendant.

The opinion of the Court was by

EMERY J. — This comes before us on exceptions from the Court of Common Pleas, against the Judges' ruling in an action of *trespass de bonis asportatis*. The plaintiff's witness testified, that the

plaintiff left in his possession at *Houlton*, in *November* or *December*, a quantity of tanned calf skins, to be kept safely for him till he came back in *February* following, that the witness had no authority from the plaintiff to sell the skins, nor right to authorize or permit another to do so, that he, the witness, never did sell the skins, nor give permission to any one else to do so; that the defendant came to witness' house with one *Whitney* to examine the skins, saying the plaintiff had authorized him to dispose of the same. Witness shew them the skins. On a subsequent day, the defendant sold the skins with others of his own, in exchange for broadcloth, to said *Whitney*. That the skins were taken away from his, the witness', house accordingly, that the defendant brought the witness eight dollars, as part of the proceeds of the sale of the skins, and requested him to give the same to the plaintiff, which he did, and the plaintiff received the same, and requested the witness to call upon the defendant for the balance. The witness could not say whether he called upon the defendant for the balance or not. Upon this evidence the Judge ruled, that the action of trespass could not be maintained, as the evidence disproved any tortious taking.

It is contended, that it ought to have been left to the jury whether the taking was tortious or not, and that the plaintiff did not contemplate or assent to any sale for broadcloth. That it can make no odds to defendant whether he is charged in trespass or assumpsit, and that it was not competent for the Court to order a nonsuit. It does not appear that the Judge did order a nonsuit. The exceptions are against the ruling of the Judge, that the action of trespass could not be maintained, as the evidence disproved any tortious taking. Whereupon the plaintiff was nonsuit.

But we think the ruling of the Judge was entirely correct. There was no secresy in the defendant's proceeding. He stated that the plaintiff had authorized him to dispose of the skins. A portion of the money received as the proceeds of the skins was paid to the plaintiff. On receiving it, not a syllable of complaint was uttered, but the witness was requested to call on the defendant for the balance, thus ratifying the doings of the defendant and confirming his representation to the witness. And we cannot doubt of the good judgment of the plaintiff's counsel in adopting a nonsuit, rather than hazard the taking of a verdict.

The exceptions are overruled.

Alfred B. Morton *& al. vs.* David White *& al. Executors.*

When a deputy-sheriff attaches goods, he has the custody of them in his official character until the suit is determined, whether he continues in office or not, and is officially bound to deliver them to any officer who may seasonably demand them on the execution; and the sheriff is liable for his neglect or misdoings in relation thereto.

A demand of the property may be waived by the deputy, although out of office; and proof of such waiver will be equivalent to proof of a demand, in an action against the sheriff.

The vender, who has made a bill of sale of goods as security for certain liabilities wherein the terms, upon which the conveyance was made, were particularly stated, will not be permitted to testify to the contents of such bill of sale, when the paper could have been produced with due diligence.

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

The facts in the case, and the ruling of the Judge of the Court of Common Pleas, will appear sufficiently in the opinion of the Court. The exceptions were filed by the defendants.

D. Williams, for the defendants.

Where an officer attaches property on a writ, the execution must be given to him within thirty days after judgment, or to another officer who shall demand the property within the thirty days, or he will not be held. *Howard* v. *Smith*, 12 *Pick.* 202. The sheriff is not bound for any but the official acts, or admissions of his deputy; and therefore the deputy could not legally waive a demand of the property after he went out of office; and if he did, it would bind only himself, and not the sheriff. *Marshall* v. *Hosmer*, 4 *Mass. R.* 60; *Bond* v. *Ward*, 7 *Mass. R.* 123; *Blake* v. *Shaw*, *ib.* 505. It was a perfect defence, if the property did not belong to the debtor, when attached. *Fuller* v. *Holden*, 4 *Mass. R.* 498; *Tyler* v. *Ulmer*, 12 *Mass. R.* 163. The testimony rejected ought to have been admitted. *Blood* v. *Harrington*, 8 *Pick.* 552.

Wells, for the plaintiff.

The property was in the hands of the deputy in consequence of an official act, for which the sheriff was liable. His going out of office would not remove the liability to account for the property.

Being equally liable before and after going out of office, an admission or waiver binds the sheriff, as much after as before. But the exceptions merely state, that he ceased to act as deputy, not that he ceased to be a deputy. *Bridge* v. *Wyman*, 14 *Mass. R.* 190. The witness could not be permitted to prove the contents of a written instrument. There was no necessity of giving notice to produce the paper, as *the plaintiff* did not propose to give evidence of its contents. The paper might have been produced, if the defendant had taken the proper course to procure it.

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

SHEPLEY J. — On the trial of this action, which was brought against the legal representatives of the former sheriff, for default of his deputy, *Thing*, the jury were instructed, that a demand must be proved to have been made of the deputy within thirty days after judgment, "unless the said *Thing* by his acts or admissions had waived such demand." It is said, that the waiver was not made by him while in office, and that if it had been, the sheriff was not bound by it. It does appear, that he had ceased to act as a deputy. When a deputy attaches goods, the law supposes him to have the custody of them in that character, until the suit is determined, whether he continues in office or not; and he is officially bound to deliver them to any officer, who may have the execution. But he may decline doing so, until such officer makes known his right to demand them. This demand being for his own personal security and convenience may be waived, and he remain liable in the same manner as if the demand had been made; and his principal will be answerable for his neglect to deliver the goods, it being the neglect of an official duty.

The defendants introduced the debtor to prove, that he was not the owner of the property attached. And it is insisted, that his testimony ought to have been submitted to the jury; and it is supposed to be like that received in the case of *Blood* v. *Harrington*. In that case the writing was but a bill of parcels. In this case it was a bill of sale, as the witness said, to secure to the purchaser certain liabilities, and the terms upon which the property was conveyed were particularly stated in the bill of sale. The terms of such a contract were of importance, and the contract itself was

the best evidence of them. It is said, that the bill of sale was in the hands of the purchaser, and that the defendants had not the control of it. They were obliged to prove their defence by the best evidence, and there is no apparent reason, why the purchaser might not have been required to attend and produce it.

Exceptions overruled.

IRA THING *& al. vs.* OLIVER LIBBEY.*

Where the defendant, while under the age of twenty-one years, purchased goods and gave his note therefor, and made sale of most of them in the ordinary course of business, and transferred and assigned the residue to secure the payment of a debt; the retaining of these goods for sale by the minor, as the servant of the assignee, until after he became of full age, does not deprive him of the right to set up infancy as a defence to the note.

If a promise made by an infant be renewed or ratified by the promisor, when of full age, but after the commencement of a suit thereon, *that suit* cannot be sustained thereby.

ASSUMPSIT on a note dated *May* 17, 1834, for $317,17, signed by the defendant, on demand with interest. The action was commenced *July* 22, 1834. The parties agreed on a statement of facts. *Libbey* did not become twenty-one years of age until *June* 23, 1834. The note was given for goods sold by the plaintiffs to the defendants several months before it was given. The facts are sufficiently apparent in the opinion of the Court.

The arguments were in writing.

S. W. Robinson, for the plaintiff.

The plea of infancy is a privilege given to minors to be used as their shield against oppression and fraud, and not as an instrument of injustice. An infant may affirm after coming of age. Affirmation may be by expressly assenting to the contract, or may be by any act or conduct of his, showing a determination to retain the benefits of the contract. And if he affirms a contract in part

* *Shepley J.* did not sit in this case, the arguments having been handed in before his appointment. The opinion was not received by the Reporter until after the last volume was printed.

he ratifies the whole. Retaining property after full age, is affirmation. *Hubbard* v. *Cummings*, 1 *Greenl.* 11; *Dana* v. *Coombs*, 6 *Greenl.* 89; *Lawson* v. *Lovejoy*, 8 *Greenl.* 405; 3 *Burrow*, 1717; *Com. Dig. Enf. c.* 6. He insisted that on these principles the plaintiff ought to recover.

H. W. Fuller, Jr. for the defendant.

There has been no express promise to pay the note, and the law must imply one from the facts, or the plaintiff cannot prevail. The demand of the plaintiff on the defendant to deliver up the goods, and his refusal, is a nullity. 1. Because not made until after the action was instituted. 2. The note was not offered to be given up. 3. Because the remnant of goods had been sold to *Page*, while the defendant was a minor, and were retained by the defendant merely as the servant of *Page*. He could not in good faith avoid to contract with *Page*. *Badger* v. *Phinney*, 15 *Mass. R.* 359; *Hubbard* v. *Cummings*, 1 *Greenl.* 11; *Dana* v. *Coombs*, 6 *Greenl.* 89; *Willis* v. *Twambly*, 13 *Mass. R.* 204; *Roberts* v. *Wiggin*, 1 *N. H. Rep.* 73. The case *Lawson* v. *Lovejoy*, 8 *Greenl.* 405, carries the doctrine of ratification as far as any case, but not far enough to enable the plaintiff to sustain his action. He urged, that on the settled principles on this subject, the decision should be in favor of the defendant.

The opinion was drawn up by

Emery J. — The expectation of the plaintiffs in this case is to charge the defendant, who was a minor at the time of giving the note in suit, for a stock of goods sold and delivered to the defendant several months previous to its date. Such of the goods as remained on hand, to the amount only of fifty dollars, several weeks before giving the note, the defendant had in good faith assigned and transferred to one *Samuel Page* to secure him for certain debts due to *Page*, and liabilities on his account. All the rest of the goods had been fairly sold. After this mortgage of the goods to *Page*, which were delivered to him on the assignment, they were left in the defendant's possession in trust to sell and apply the proceeds to *Page's* benefit, and it is insisted, that these acts of the infant, shewing a determination to retain the benefits of the contract, amount to a ratification of the whole contract.

The cases of *Hubbard & al.* v. *Cummings*, 1 *Greenl.* 11; *Dana & al.* v. *Coombs*, 6 *Greenl.* 89; *Lawson* v. *Lovejoy*, 8 *Greenl.* 405; 3 *Burr. Rep.* 1717; *Com. Dig. Enf. c.* 6, are relied on to support this position.

In *Lawson* v. *Lovejoy*, the defendant had sold the property after he became of age.

In the present case, the defendant had only a qualified right of possession in trust for *Page*. He could not under these circumstances have legally delivered them for any purpose inconsistent with the trust. The court in *Lawson* v. *Lovejoy*, say they do not decide whether the law would afford any remedy for one who had sold his chattels to an infant by whom they had been converted into cash during his infancy, there being no subsequent confirmation of the contract. No new promise has actually been made by the defendant. And such a promise must be made before the commencement of suit or it cannot be given in evidence. *Ford* v. *Phillips*, 1 *Pick.* 202.

The demand subsequent to the commencement of the suit, and the refusal to release the residue of the goods because they were *Page's*, we think ought not to be regarded as amounting to a ratification of the contract so as to charge the defendant upon this note. There was no offer by the plaintiffs to give up the note at the time the demand was made. If the doctrine be, that the privilege extended to infants should be a shield, it would seem, that his acts which amount to a confirmation ought to be of such an unequivocal nature as to establish a clear intention to confirm the contract, after coming of age, after a full knowledge that it was voidable. *Tucker* v. *Moreland*, 10 *Peters*, 75, 76.

This was in case of a deed, it is true. But it should be voluntary, not obtained by circumvention, nor under ignorance of the fact that he was entitled to claim the privilege.

The plaintiff must be nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1839.

Inhabitants of BLOOMFIELD *vs. Inhabitants of* SKOWHEGAN.

In the act incorporating a portion of an old town into a new one, it was provided, that those, who should afterwards become chargeable to the towns as paupers, should be considered as belonging to that town, "*on the territory of which, they had their settlement at the time of the passing of this act, and shall in future be chargeable to that town only;*" a pauper had gained a settlement in the old town at its incorporation, by residing therein on that part of it made into the new town, but when the new town was incorporated, had removed into a different part of the old town, and there remained until this territory was incorporated into a third town; the pauper, who had never gained any settlement unless by these acts of incorporation, was held to have a settlement in the second town, under the special provision in the act of incorporation.

FROM the statement of facts agreed by the parties, it appeared, that *Susan Ireland*, the pauper for whose support the action was brought, was the legitimate child of *Jonathan Ireland*, who was the legitimate son of *Abraham Ireland*. *Abraham Ireland* resided in the town of *Canaan*, at the time of its incorporation in 1789, in that part of it which is now *Bloomfield*, and gained a settlement there by the act of incorporation. *Jonathan Ireland* had a settlement derivatively from him. Before *Bloomfield* was incorporated, *Jonathan Ireland* removed into that part of *Canaan* now *Skowhegan*, and died there in 1812 without ever having been in a condition to gain a settlement in his own right. The family of *Jonathan Ireland*, includ-

ing the pauper, remained in the same place until after the incorporation of *Milburn*, now *Skowhegan*, in 1823, but the pauper has never gained a settlement in her own right, unless by the incorporation of *Milburn*. *Bloomfield* and *Skowhegan* were wholly taken from *Canaan*. In the act incorporating *Bloomfield*, in 1814, was the following provision. "Be it further enacted, that the said town of *Bloomfield* shall be holden to support their proportion of the poor of the town of *Canaan* which are now chargeable to said town, which proportion shall be ascertained by the present valuation of the town; and all persons who may hereafter become chargeable as paupers to the said towns of *Canaan* or *Bloomfield* shall be considered as belonging to that town, on the territory of which they had their settlement at the time of the passing of this act, and shall in future be chargeable to that town only." The only question submitted was, in which town was the settlement of the pauper.

Tenney argued for the plaintiffs, and cited Settlement act of *Massachusetts*, 1791, second and tenth modes; *Great Barrington* v. *Lancaster*, 14 *Mass. R.* 255; *Windham* v. *Portland*, 4 *Mass. R.* 390; *Hallowell* v. *Bowdoinham*, 1 *Greenl.* 129.

Kidder argued for the plaintiffs, and cited the act passed in 1814, incorporating the town of *Bloomfield*, and *Princeton* v. *West Boylston*, 15 *Mass. R.* 384.

By the Court. — The settlement of the pauper is derived from her father, *Jonathan Ireland*, who derived his settlement from *Abraham Ireland*, his father. The settlement of *Abraham* was in that part of *Canaan*, which is now *Bloomfield*. It does not appear, that the grandfather, father or daughter subsequently obtained any settlement elsewhere. It is very clear then, that by the act incorporating *Bloomfield*, the derivative settlement of the paupers remains in that town.

Plaintiffs nonsuit.

JOSEPH KINSMAN *vs.* JOHN GREENE.

Where a grant of a township of land is made by the State to certain proprietors, reserving a lot of land near the centre of the township, and the proprietors afterwards assign to the State a lot near the side line of the town, which is accepted as the reserved lot, the title thereby becomes vested in the State.

If another be in possession of land, claiming title, at the time the owner makes a lease thereof, this does not destroy the effect of the lease, when the lessee comes into possession under it.

Although it may well be questioned, whether a person can be considered as holding lands by virtue of a possession and improvement against the State; yet if the State, by mere release without covenants, convey lands in the occupation of another, without expelling the occupant, he will be entitled to *betterments* against the grantee of the State, in the same manner as he would have been, if the title had been in the hands of a private person.

Where the demandant recovers the land, and the tenant is entitled by the verdict to *betterments*, and the election is made by the demandant to pay therefor, he may set off his costs of suit in payment of the betterments.

THIS was a writ of entry, commenced *Sept.* 1, 1836, demanding three hundred and twenty acres from the west end of lot No. 17, in *Madison*. With the general issue the defendant filed a request for the allowance of *betterments*. The jury found, that the tenant was entitled to betterments on twelve acres, and no more. The demandant made his election to pay for the betterments, and moved to set off his costs in part payment thereof, if the court should order judgment to be entered on the verdict. The reservation in the deed from the Commonwealth to *Barnard* and others was in these words. "Reserving four lots of three hundred and twenty acres each for public uses, *viz.* one for the first settled minister, one for the use of the ministry, one for the use of schools, and one for the future appropriation of the government, to be laid out near the centre of said township, and to average in goodness with the other lots." The lot demanded was claimed, as the one last mentioned. The only notice of the *assignment* to the Commonwealth in the case was in these words. "The demandant read in evidence an assignment of the public lots in the town of *Madison*, made under the statute, at the Court of Common Pleas for this county, *March Term*, 1820, by which the demanded premises were assigned to *Massachusetts* as the lot reserved for the use of

the Commonwealth." The material facts are given in the opinion of the Court.

Bronson, for the tenant, contended, that the Commonwealth could not have been seized of the premises demanded, lying on one side of the town, by any right retained by the reservation in the original deed to the proprietors; that the assignment could vest no right in the State; nor could the State become seized without judgment of law, after the disseizin of the proprietors, and could convey no title to the demandant. He cited *Fisk* v. *Briggs*, 3 *Fairf.* 373.

Boutelle, for the demandant, argued, that the four lots had never been conveyed away by the Commonwealth, and therefore no disseizin could take place; but were it otherwise, and the land passed to the proprietors, the occupant held under the proprietors, and his possession could not defeat any conveyance or assignment to or from the State. *Burghardt* v. *Turner*, 12 *Pick.* 534; *Ward* v. *Bartholomew*, 6 *Pick.* 409; *Knox* v. *Hook*, 12 *Mass. R.* 329; *Shaw* v. *Bradstreet*, 13 *Mass. R.* 241; *Kenn. Pur.* v. *Kavanagh*, 1 *Greenl.* 348.

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

Shepley J. — In the grant from the Commonwealth to *Barnard* and others in 1792, there was a reservation of four lots for public uses, "to be laid out near the centre of said township," one of which was for future appropriation. The premises now in controversy are upon lot No. 17, adjoining the lot on the north west corner of the township. In the case of *Porter* v. *Griswold*, 6 *Greenl.* 430, a doubt was expressed, whether the language used in deeds of this description would amount to a legal reservation of the title. Considering the situation of this lot there may be difficulty in regarding the title as remaining in the Commonwealth, although she might well receive it, when assigned to her for that use. Supposing the title to the lot to have passed to the grantees could they so assign it to the Commonwealth in 1820, that she could convey it to the plaintiff? If so it is immaterial to decide, whether or not the title remained in her by the reservation. The improvements made by *McDonald* do not appear to have been of a character to affect the rights of any one. The occupations of *Moses Greene*,

and of his widow and children, appear to have continued to about the year 1817 when she removed; and *Asa Greene* a son of *Moses* continued to occupy until 1823 or 1824. On the 24th of *October*, 1810, he took a lease of the premises, of the agents of the proprietors, obliging himself to improve the same until the proprietors should sell; and then to deliver the same up with all improvements made thereon. He was in possession in 1820, when the proprietors assigned this land to the Commonwealth. They were then seized, their tenant being in possession, and could well convey the title. It is objected, that when he took the lease another was in possession, but that would not destroy the effect of the lease when he came into possession. He could not set up his title against the title of his lessors. The assignment being effectual to pass the title to the Commonwealth, her title then became good, if she had before parted with it. Having the title in 1820 and not being liable to be disseized, she could convey a good title to the plaintiff in 1835.

Whether a person can be considered as holding lands by virtue of a possession and improvement against the State may well be questioned, but it is not now necessary to decide. The deed from the Commonwealth to the plaintiff conveys only all its right, title and interest in the lot, and is without covenants. And considering her usual regard for settlers as exhibited in her conveyances to the grantees and others, she may be understood as designing to allow any settler to set up his claims in the same manner as he might have done, if the title had been in the hands of a private person. And the plaintiff cannot under such a title interpose the rights of the State when she did not choose to do it, against the claim of the defendant for his improvements.

Judgment on the verdict.

Let the set off be made agreeably to the motion on file.

JOSEPH MOORE *vs.* JOEL FLETCHER.

If the proprietor of land on which are a mill and mill privilege grant to one son "the use, privilege and benefit of one half of a saw-mill," and on the same day grant to another son a tract of land, including that whereon the mill stood, "excepting the privilege of one half of a saw-mill conveyed to" the other son, "and his heirs;" the grant and the reservation are to be construed together to ascertain the intention of the parties; and one half of the mill and mill privilege pass by the grant.

The words, *mill privilege*, or *the privilege of a mill*, in a grant are to be understood as meaning the land on which the mill and its appendages stand and the land and water then actually and commonly used with the mill and necessary to the enjoyment thereof.

The omission to use a portion of the mill-yard for a single year will not prevent its becoming a part of it by appropriation and long use.

Nor can the quantity of land be lessened by proof, that the mill might have been well used by the occupation of less land, than was in fact used.

IN a writ of entry the demandant claimed an undivided half of a small tract of land in *Anson*, on which stood a brick blacksmith's shop. The testimony on the trial, before EMERY J., is given at length in the report, but the questions of law arising thereon will be understood from the facts stated in the opinion of the Court. The counsel for the tenant requested the Judge to instruct the jury that by the deed of *John Moore, Sen.*, to the demandant, the soil of the premises did not pass; that if the soil might have passed by the deed as being necessary to the use of the saw-mill, the same did not pass inasmuch as there are no bounds mentioned in the deed, or that it is void for uncertainty; that the deed gave to the demandant nothing but the saw-mill and right of using water sufficient for the same, and land enough adjoining it for a mill brow, or land which was absolutely necessary to the using of the mill. The Judge declined to give these instructions, and did instruct the jury, that if from the evidence they did not find, that previous to the execution of the deed from *Moore, Sen.* to the demandant, the demanded premises had been used as a mill-yard appurtenant to the mill for depositing logs and boards, and was necessary as a privilege for the enjoyment and use of the saw-mill, they would find a verdict for the defendant. They also requested, that the jury should be instructed, that if they did not find, that the demanded

premises were uniformly used as a place for laying logs and boards every year after the mill was built until the deed was given, they ought to find for the defendant. The Judge declined to give this instruction. The defendant offered evidence to show, "that the saw-mill might be well used with the use of land enough for a mill brow and without the use of almost one half an acre of ground for a mill-yard," which evidence the Judge refused to receive. The verdict was for the demandant.

Boutelle, for the tenant, argued in support of the positions taken at the trial, and cited *Howard* v. *Wadsworth*, 3 *Greenl.* 471; *Leonard* v. *White*, 7 *Mass. R.* 6; *Blake* v. *Clark*, 6 *Greenl.* 436; *Worcester* v. *Greene*, 2 *Pick.* 425; *Tyler* v. *Hammond*, 11 *Pick.* 193; *Hasty* v. *Johnson*, 3 *Greenl.* 282; *Thompson* v. *Androscoggin Bridge*, 5 *Greenl.* 62; *Gayetty* v. *Bethune*, 14 *Mass. R.* 49; 1. *B. & P.* 370; *Grant* v. *Chase*, 17 *Mass. R.* 443.

Tenney, for the demandant, contended, that the grant and the reservation should be construed together, and had the same meaning, which manifestly was, that not only the use of the mill then standing, but the land and mill privilege also should pass to the demandant. And the extent of the mill privilege is determined by the quantity of land then used for that purpose with the mill. He argued, that the denial of the Judge to give the instructions requested was proper, and that the instructions given were correct. *Hathorn* v. *Stinson*, 1 *Fairf.* 233; *Vickerie* v. *Buswell*, 13 *Maine R.* 289; 2 *Black. Com.* 105; *Worthington* v. *Hylyer*, 4 *Mass. R.* 205; 5 *Serg. & R.* 107; *Farrar* v. *Stackpole*, 6 *Greenl.* 154; *Story* v. *Odin*, 12 *Mass. R.* 157; 4 *Kent*, 456; *Barney* v. *Norton*, 2 *Fairf.* 350.

The opinion of the Court was subsequently prepared by

SHEPLEY J. — On the 12th of April, 1808, *John Moore, Senior*, being the owner of the tract of land including the premises, with a saw mill standing thereon, conveyed a part of that tract, not including the premises, to his son the demandant, and "also the use, privilege, and benefit of one half of a saw mill." And on the same day by another deed conveyed to his son *John Moore, Jr.*, under whom the defendant claims, a part of the estate, includ-

ing within the bounds the premises, "excepting the privilege of one half of a saw mill conveyed to *Joseph Moore* and his heirs." The rights of the parties depend upon the true construction of these clauses in the deeds.

The application of the rule of law, that ambiguous language is to be construed strictly, as in the case of *Howard* v. *Wadsworth*, 3 *Greenl.* 471, is claimed for the tenant. The rule is not properly applicable to this case, because the grantor at the time he created the exception, conveyed to the demandant what was excepted, making reference in that deed to the exception. Both deeds being of the same date, and thus connected by reference are to be examined together to ascertain the true intention of the parties. Was it the design to convey to the demandant only the right of use of one half of the saw mill then standing, or was it to convey an estate in the mill and privilege, as it had been before used?

The use, the benefit, and the privilege of a saw mill may refer only to the right of occupation. The words use, and benefit, have that appropriate signification. And the word privilege in common acceptation, means some immunity, or advantage. When used in connexion with a mill it has in this part of the country acquired a peculiar meaning well understood. By the privilege of a mill, or its equivalent, mill privilege, is understood the land and water used with the mill, and on which it and its appendages stand. There might be some doubt in what sense the word was used in the deed to the demandant on account of its connexion with the words, use and benefit. If those words had been omitted, the deed would have read, also the privilege of one half of a saw mill; and there could then have been but little doubt, that the design was to convey under that phraseology, a title to the land and water power. Whatever of doubt might arise from such connexion is removed by the language of the exception in the other deed. The exception is of the "privilege of one half of a saw mill conveyed to *Joseph Moore* and his heirs." This language has acquired such a meaning, that it would be a forced construction, that should hold, that it meant no more, than the privilege of using a saw mill while it might remain standing.

The decisions respecting mills, and privileges have necessarily been made with reference to the peculiar phraseology in each deed

or devise. In the case of *Howard* v. *Wadsworth*, 3 *Greenl.* 471, the exception was, "exclusive of the grist mill now on said falls, with the right of maintaining the same."

From the use of different language in the grant and in the exception, the words, mill privilege, being used in one, and the word, privilege, being omitted in the other, from the use the word now and from the right being given to maintain it, which would not be appropriate when a fee was granted, the Court concluded, that the intention was to except only the mill then standing, and not any part of the privilege, after it ceased to exist.

In the case of *Blake* v. *Clark*, 6 *Greenl.* 436, "the saw mill," without other description, was assigned to one of the heirs of the estate. And it was decided, that the fee of the land on which it and its appendages stood, and the use of the water, and any easement used with, or necessary to its enjoyment, would pass, but not the fee of the mill yard formerly used with the mill. The intention to convey no greater estate than an easement in the mill yard was inferred from the language used in assigning the widow's dower, and in the division of the other portions of the estate.

In the case of *Whitney* v. *Olney*, 3 *Mason*, 280, the devise was of a moiety of "two paper mills," and "appurtenances."

Mr. Justice *Story* was of opinion, that "all the land under the mill, and necessary for the use of it, and commonly used with it, passed to the devisees."

In this case, the terms, privilege, and mill, are both used, which ordinarily would pass both the mill and privilege, and the doubt has arisen from their arrangement and connexion with other words, which may be accounted for by the want of skill and knowledge in the scrivener.

The exception and grant cannot be considered void for uncertainty, as they must refer to the saw mill, upon the premises conveyed to *John Moore, Jr.*

The extent of the privilege or mill yard was properly left to the jury under the instructions. The rights of the oil mill, nail mill, and potash appear to have been defined by deed, and could no otherwise affect the rights of these parties than as evidence of the use made of the *locus* demanded. The omission to use any portion of the mill yard for a single year could not prevent its becom-

ing a part of it by appropriation and long use. Nor could it be curtailed by proof, that the mill might be well used by the occupation of less land than was in fact used.

The jury have found, that the demanded premises have been used as a mill yard for depositing logs and boards and were necessary as a privilege for the enjoyment and use of the mill.

Judgment on the verdict.

The STATE *vs.* BENJAMIN K. ADAMS.

A log taken "from the bank of a river, twelve or fifteen feet from the water, where grass grew, which was annually mowed, but which was covered by water in freshets of an ordinary height," is not taken from the river, within the meaning of the log act, *stat.* 1831, *c.* 521.

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

The indictment charged, that *Adams* took certain mill logs from the *Kennebec River* contrary to the provisions of the *stat.* 1831, *c.* 521. Several questions were raised at the trial, and urged in the argument, of which but one is noticed in the opinion of the Court. The logs were not taken from the water, but, in the words of the witness, "from a spot on the bank of the river, twelve or fifteen feet from the water in the river, where grass grew, and was actually mowed each year, but which is covered by water in freshets of ordinary height." The counsel for *Adams* objected, that the evidence did not show that these logs were lying or being in the river within the meaning of the statute. On this point the Judge instructed the jury, that if they believed the logs were taken from the spot described by the witness, and that they had been floated to that spot by the waters of the *Kennebec River*, they were "lying or being in the river," within the meaning of the statute.

Tenney, for *Adams*, argued in support of the objection made at the trial. To show that penal statutes, as he contended this was, should be construed strictly, he cited 1 *Black. Com.* 88; 5 *Jacob's Law Dic.* 130, *penal laws;* 6 *Dane*, 588, *sec.* 16; 3 *Caines*, 359; 2 *John. R.* 379; 1 *Pick.* 55.

D. Goodenow, Attorney General, insisted that the statute was remedial and not penal, mitigating the common law which made the offence larceny. The offence is within the mischief of the statute, and should be punished by it. If the log was carried by the waters of the river to the place where it was taken, it should be considered as taken from the river. It should at least be considered as taken from an *inlet*, if not from the river; and if so, the verdict should not be set aside, because it was right, though the instruction gave a wrong reason for it. *Farrar* v. *Merrill*, 1 *Greenl.* 17.

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

WESTON C. J. — We are well satisfied the case before us is within the mischief, intended to be punished and suppressed by the statute, under which the defendant was convicted, statute of 1831, *c.* 521, yet it being a criminal prosecution for a penalty, we cannot feel justified to decide that the place from which the log was taken, was the river, although we come reluctantly to so narrow a construction of the statute. The log was taken from the bank of the river, twelve or fifteen feet from the water, where grass grew, which was annually mown. Had it been in the ordinary bed of the river, at a point from which the water had receded, at a dry season of the year, or had it been lodged on a rock or islet in the river, we should have regarded it as a case within the statute. Upon the whole we think it better, that there should be some further legislative interposition, if necessary, than that a penal statute should be extended by construction to a case, not clearly within it.

Exceptions sustained.

Inhabitants of New Portland *vs. Inhabitants of* New Vineyard.

An act annexing a part of one town to another is a public act.

When a part of one incorporated town is taken off and annexed to another, the inhabitants living on the territory thus annexed, and having a settlement at the time in the town from which it is taken, acquire thereby a settlement in the town to which the annexation is made.

If an inhabitant, thus acquiring a settlement, remove from the territory annexed into a different part of the town to which the annexation is made, and there remain until after the act is unconditionally repealed, his settlement continues, and is not transferred back by the repeal of the act.

From the facts agreed by the parties, it appeared that the action was brought for the support of one *Ami R. Videto* and family, whose settlement was alleged to be in *New Vineyard*; that the paupers had a lawful settlement in *New Vineyard*, and were not then paupers, on the fourth day of *March*, 1834; that by an act of the legislature, passed on that day, a part of *New Vineyard* with the inhabitants thereon, including the land whereon the paupers then resided, was set off to *New Portland;* that twenty-nine days after the recess of the legislature of 1834, *April 11th*, the paupers removed from the territory taken from *New Vineyard*, and annexed to *New Portland* into the part of *New Portland*, as it was before the act passed, and have since resided there; and on the 12th of *March*, 1835, the legislature passed an act repealing the annexation act of *March* 4, 1834, the paupers then residing within the original limits of *New Portland.* There was no provision respecting the poor contained in either act. The settlement of the paupers alone was in controversy.

The case was submitted on the briefs of counsel by

J. T. Leavitt, for the plaintiffs, and by

R. Goodenow, for the defendants.

Leavitt cited the annexation act of *March* 4, 1834; the repealing act of *March* 12, 1835; the acts of 1834, respecting the time when public acts shall take effect, *c.* 92, and *c.* 135; *Commonwealth* v. *Springfield*, 7 *Mass. R.* 9; *Pierce* v. *Kimball*, 9 *Greenl.* 54; *Gove* v. *Brazier*, 3 *Mass. R.* 540; *Holbrook* v. *Holbrook*, 1 *Pick.* 258; *Bac. Ab. Statute F; Hallowell* v. *Bowdoinham*,

1 *Greenl.* 129; *New Portland* v. *Rumford,* 13 *Maine R.* 299; *Fitchburg* v. *Westminster,* 1 *Pick.* 144; *Sutton* v. *Dana,* 4 *Pick.* 117.

The opinion of the Court was prepared and delivered at another term by

SHEPLEY J. — By the act of *March* 4, 1834, *Spec. Laws, ch.* 474, part of *New Vineyard* was annexed to *New Portland;* and the rights of the parties may depend upon the time, when that act took effect. And that may be determined by its being a public or a private act. Those are to be regarded as public acts, which regulate the general interests of the state or any of its divisions. Private acts are such as affect the rights of individuals named. The act in question must be regarded as a public act, and operative as such. By the act of the 25th of *January,* 1834, *ch.* 92, the public acts of that session passed after that time, were prevented from taking effect on the day of their approval. The act provides, that they shall be published within twenty days after the close of the session, and that they shall begin to take effect in twenty days from the date of their publication, unless otherwise provided.

By the act of *March* 12, 1834, *ch.* 135, the public statutes were to take effect in thirty days from the recess of the legislature passing them, unless otherwise provided, and the act of the 25th of *January* is repealed. It may be said, that the act itself did not take effect until the thirty days had elapsed; but such cannot be admitted to have been the intention of the legislature. And if it were, the act of the 25th of *January* would not be repealed until it did take effect, and the same result would be produced, unless it appeared, that the act was published so early as to take effect within thirty days.

The effect of the act of *March* 4, 1834, was to change the legal settlement of those who dwelt and had their homes upon that territory at the time when it took effect. This act was repealed by the act of the 12th of *March,* 1835, *Spec. Laws, ch.* 565. And it is insisted, that such a construction should be given to both these acts as to prevent their having any influence upon the rights and duties of the two towns. Such ought to be their effect, if no change of residence had taken place. The repealing act restored

the territory to *New Vineyard* and would have the same operation to change the legal settlement of those then having their homes upon it, as if there had been a special enactment restoring it, and no greater. In the provision for paupers, it is not equity but the positive enactment that must decide. But there is not in this case, such strong equity as the argument supposes in favor of holding that those, who removed from the territory during the year, should have their legal settlement again changed upon the restoration of that territory. For it may be, that others, whose residence was before in *New Portland* or other towns, took the places of those, who during the year removed, and had their settlements changed to *New Vineyard.* And to require her to support those, who had removed, and those who took their places, would be to impose a double burthen, instead of placing things upon their original footing.

Upon the facts as agreed, the removal of the paupers, taking place before the act took effect, their legal settlement would be in *New Vineyard.*

A motion is made supported by affidavit, stating that the time of removal was erroneously stated in the agreed facts, and that this has been since ascertained. As the question is one of importance to these towns, and as there is reason to fear, that their rights may not be legally determined upon the facts agreed, the agreed statement is discharged and the action is to stand for trial.

JAMES T. LEAVITT *vs.* JOSEPH SAVAGE *& al.*

A surety is entitled to have his contract executed according to its terms; and if the creditor before the day of payment make a new contract without the consent of the surety, whereby he gives time, and disables himself from compelling payment at the day by a suit at law, or places himself in such position that the debtor can in equity obtain an injunction against his proceeding, the surety is discharged.

If the contract be by an instrument under seal, the surety may be discharged by an extension of the time of payment, or of performance, by a writing *without seal.*

Yet if the contract extending the time be without consideration, it is not binding upon the creditor, and the surety will not thereby be discharged from his liability.

But the mere delay of the party to enforce payment at the time or in the manner provided in the contract, does not release a surety. Nor will the liability of the surety be discharged by the neglect of the creditor to enforce payment by a suit against the principal on the request of the surety.

DEBT on a bond from *Savage* as principal, and *Dinsmore* as surety, to the plaintiff, dated *June* 7, 1836, reciting that *Savage* had been arrested on an execution in favor of the plaintiff, and which bond was to be void, if *Savage* should within six months notify the creditor and submit himself to an examination, &c. *Savage* notified the plaintiff, and submitted himself to an examination within the six months, on *Nov.* 14, 1836, and went through a partial examination before the Justices, but in their opinion he was not entitled to take the poor debtor's oath. The plaintiff and *Savage*, without any consideration paid, then entered into the following agreement in writing under their hands, but not under seal. "*Nov.* 14, 1836. I hereby agree not to commence any suit on the bond given by *Joseph Savage* and *Thomas Dinsmore*, surety, to me, when he was committed on my execution *June* 7, 1836, until the first day of *October*, 1837, and if by that time the said *Savage* shall pay me one half of said execution and all fees and costs, together with interest on the whole, and at the same time give me undoubted security for the balance, the said bond shall be considered as cancelled, otherwise to remain in full force. *James T. Leavitt.*"

There was sufficient time after the date of the writing for a new citation and examination before the expiration of the six months.

Dinsmore never requested the plaintiff to proceed on the bond. The parties agreed upon the facts, and submitted for the opinion of the Court, the question, whether *Dinsmore*, the surety, was discharged in consequence of said agreement.

The case was submitted without argument, by

E. Allen & Leavitt for the plaintiff, and by

Bronson & Hutchinson for the defendant, *Dinsmore.*

The opinion of the Court was by

SHEPLEY J. — A surety is entitled to have his contract executed according to its terms, and if any change be made in it to his prejudice and without his consent, he is discharged. The mere delay of the party to enforce it at the time or in the manner provided does not change the contract, or entitle the surety to complain of it, for it is his duty to see, that the principal performs as he has agreed. Nor can the surety by a request to have the contract terminate, or to have it enforced, change it, or avoid his liability. If the creditor does not proceed against the debtor at the proper time, the surety may file his bill *quia timet* to have the principal perform, and to obtain his own discharge; or he may upon equitable terms be substituted and proceed against the principal in the name of the creditor; or he may in many cases by indemnifying the creditor compel him to proceed against the principal. And if the creditor so conducts as to destroy or impair any of these rights of the surety he cannot call upon him to perform. These rights are impaired when the creditor has disenabled himself to proceed against the debtor at law; or has placed himself in such a position, that the debtor can in equity obtain an injunction against his proceeding; for if the creditor by reason of such obstacle cannot enforce the contract, the surety is deprived of the power of doing it. When therefore the creditor before the day of payment makes a contract without the consent of the surety, whereby he gives time, and is thereby prevented from compelling payment at the day, the surety is discharged. But such contract like all others, to be binding must be based upon a sufficient consideration. *Dewey* v. *Derby*, 20 *Johns. R.* 462; *Norris* v. *Crummey*, 2 *Rand.* 333; *McLemore* v. *Powell*, 12 *Wheat.* 554. These rules appear to be well established; but whether giving time, by a parol agreement, to the obli-

gor of a bond, or other instrument under seal, will discharge the surety may be more questionable; for the authorities are contradictory and cannot be reconciled.

In an action of debt upon a recognizance of bail, it was decided in the court of Exchequer, that a parol contract giving time to the principal, did not discharge the surety; and this decision was affirmed in the Exchequer Chamber and House of Lords. *Bulteel* v. *Jarrold*, 8 *Price*, 467. And in an action of debt on a bond, where the time of payment had been extended by parol, the court of King's Bench considered itself bound by the strict rule of law, that an obligation existing by an instrument under seal can be discharged only by one of equal dignity; and that the surety must resort to equity for relief. *Davey* v. *Pendergrass*, 5 *B. & Al.* 187. In an action upon a replevin bond, where the proceedings in the replevin suit had been stayed by agreement pending a reference, the Court of Common Pleas decided that the surety was not thereby discharged. *Moore* v. *Bowmaker*, 6 *Taunt.* 379, and 7 *Taunt.* 97. The surety however, filed his bill on the equity side of the court of Exchequer and obtained an injunction upon that judgment; that court upon full consideration having come to the conclusion, that he was discharged. 3 *Price*, 214. And in the case of *Archer* v. *Hale*, 4 *Bing.* 464, the decision in *Moore* v. *Bowmaker* was overruled in the Court of Common Pleas, and a surety under like circumstances was discharged. *Mr. Theobald*, however, does not consider the cases in 3 *Price*, and 4 *Bing.* as at variance with the rule adhered to in *Davey* v. *Pendergrass*, because the reference being made a rule of court, and containing in itself the agreement to stay proceedings, may be regarded as a record. *Theob. Prin. & Sur. sec.* 156. In a note to *Hunt* v. *Bridgham*, 2 *Pick.* 585, 2*d ed.*, it is said that "it is no defence at law to an action on a bond against a surety, that by a parol agreement time has been given to the principal," and several cases are cited, but they do not appear upon examination, to add much to the weight of those before named, unless the case of *Fullam* v. *Valentine*, 11 *Pick.* 156, may be so regarded. But that case does not appear to have been decided upon the principle, that a parol agreement could not discharge, but upon the ground that by their stat-

ute provisions, "the rights of the bail in regard to the principal were not affected by the agreement in the case."

The time of the performance of the condition of a bond may be enlarged by parol. *Fleming* v. *Gilbert*, 3 *Johns. R.* 528; *Langworthy* v. *Smith*, 2 *Wend.* 587. And in the latter case it is said that the party thereby "loses his remedy upon the covenant itself, and must seek it upon the agreement changing the time of performance." If so, it is very obvious, that the remedy of an obligee upon his bond may be destroyed by a parol contract; and such was the decision in *Ellenwood* v. *Dickey*, 9 *Greenl.* 125. It will be perceived that the cases, which deny that a surety on a contract under seal can be discharged at law by parol, admit, that the surety may resort to equity, and obtain relief. If that be correct, so may the principal, when the parol contract is attempted to be violated. It has been before shewn, that in such case, the rights of the surety are impaired. And when his rights are impaired, according to the modern decisions he has a legal defence. Upon principle therefore, the soundness of the decisions, which deny, that the surety is in such cases discharged at law may be doubted.

The surety on a bond was held to be discharged by the obligee's taking the notes of the principal and thereby giving time. *Rees* v. *Berrington*, 2 *Ves. Jr.* 540. This was in equity, but the Lord Chancellor says "where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond he discharges the security." In the case of the *Bank of Ireland* v. *Beresford*, 6 *Dow*, 233, the Lord Chancellor in delivering his opinion in the House of Lords says, "with respect to principal and surety in a bond, where the creditor enters into an agreement or binding contract with the principal debtor to give him further time without the concurrence of the surety, the surety is discharged." But whatever of doubt there may be in *England* upon this question, there is great weight of authority in the decisions in this country which determine, that a surety on a sealed instrument may be discharged by a parol agreement giving time to the principal. This question arose in the case of *United States* v. *Howell*, 4 *Wash. C. C. R.* , and in speaking of the case of *Davey* v. *Pendergrass* it is said, "if in this case the court meant to lay it down as law, that a surety in a bond conditioned for the payment of

money, or the performance of certain acts by a third person, cannot be discharged from his obligation except by some instrument of equal dignity, I must be permitted to dissent from such a doctrine; and to maintain, that it is insupportable by a single authority." After giving certain reasons why such cannot be the law, that eminent Judge says, "the question at law, then is, whether the contract of the surety has without his consent been changed by the obligee? If it has, the obligee has by his own act defeated the condition of the surety's bond, and consequently discharged him from his obligation at law as well as in equity." Other courts of the highest character have come to like conclusions. *Rathbone* v. *Warren*, 10 *Johns. R.* 587; *Norris* v. *Crummey*, 2 *Rand.* 333; *Bank of Steubenville* v. *Adm'rs* of *Carrol*, 5 *Ham.* 207; *Sprigg* v. *the Bank of Mount Pleasant*, 10 *Peters*, 257.

By the facts agreed in this case, it appears, that the contract for delay was made before the bond was forfeited; and it partakes of all the elements required to discharge the surety, if there is proof of a sufficient consideration to make it a binding contract. It is signed only by the plaintiff. The defendant did not become a party to it, or in any other way bind himself to perform what the contract contemplated that he should do. Nor does it appear, that he paid any thing, or sustained any injury, or parted with any right. There was sufficient time remaining before the bond was forfeited, to have notified the plaintiff anew, and made a new disclosure; and having removed the obstacles, he might have been discharged, and thus performed the condition of his bond. In this mode he might have rendered the contract signed by the plaintiff wholly inoperative. Nor does it appear that he omitted to do this in consequence of the paper signed by the plaintiff. There is nothing in the agreed statement from which the court can infer, that there was any consideration whatever for the contract signed by the plaintiff. It appears to have been a mere voluntary offering, of which the defendant might avail himself, or disregard it, and exercise all his rights, at his own pleasure; and the Court is constrained to come to the conclusion, that the agreed statement does not disclose any consideration to render the contract binding, and that it can have no influence in the case. According to the agreement the defendants are to be defaulted.

CHARLES EMERSON *vs.* PEARSON COGGSWELL *& al.*

If a contract be not under seal, the authority of one person to contract for others may be proved by their subsequent recognition.

Where one party contracts with the other to fix on a proper location and to build a mill, the acceptance of the mill, after it is finished, is a waiver of any objection to the location, or to the time, or to the manner of building.

If a Judge do not himself decide a question of law, but leave it to the decision of the jury, and the verdict is right, it will not for that cause be set aside.

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

The action was assumpsit on a written contract to build a mill, purporting to be signed by the plaintiff on the one part, and by *Coggswell* for himself, and for *L. Holmes & Co.* on the other part. The other defendants, *Holmes & Hogins*, denied the authority of *Coggswell* to bind them in the contract. The whole evidence given at the trial appeared in the exceptions, and will be sufficiently understood from the opinion of the Court. The report states, that the Judge instructed the jury, that the letters of *Holmes & Hogins*, were full and perfect evidence to charge them as parties to the contract; that they would judge whether the letters from *Holmes & Hogins*, taken in connexion with *Hogins'* proposition for removing the mill, were or were not an acceptance of it; that they would judge whether the term "general building of the mill" in the contract did not include the location of it, and all things connected with the job; that if they found an acceptance of the mill, they would allow the contract price and interest, deducting a proportionate part of the contract price for the defects, if any; and that in selecting the site for the mill, it might be done by an agent, and that he was not bound at his peril to select the best possible location, but only to conduct as discreet, prudent and judicious men would do in acting for themselves. There were some other instructions in relation to the bearing of the evidence, the whole charge being set down in the exceptions. The verdict was for the plaintiff, and the defendants filed exceptions.

The case was submitted on the briefs of Counsel by

Tenney, for the defendants, and by *Boutelle*, for the plaintiff.

To show that the meaning of words, and general construction of writing, are for the Court, and not to be left to the jury, *Ten-*

ney cited 1 *Stark. Ev.* 429; 3 *Stark. Ev.* 1032, 1033; 16 *Johns. R.* 14; 4 *East*, 130. Evidence may be admitted to show the meaning of a term, but not the meaning of a sentence. 7 *Cowen*, 202; *Boies* v. *McAllister*, 3 *Fairf.* 308. There must be a cause of action when the suit was commenced to maintain it. 1 *Caines*, 69; 4 *Kent*, 120. The plaintiff could not delegate the power to select the location for the mill to another, but must do it himself. *Stoughton* v. *Baker*, 4 *Mass. R.* 530; *Tippets* v. *Walker*, *ib.* 597; *Emerson* v. *Prov. H. Man. Co.* 12 *Mass. R.* 237.

Boutelle cited, as to the acceptance of the work and the measure of damages and waiver, *Hayden* v. *Madison*, 7 *Greenl.* 76; *Gage* v. *Coombs*, *ib.* 394; *Wyer* v. *Merrill*, *ib.* 342; and *Brinley* v. *Tibbets*, *ib.* 70.

The opinion of the Court was by

Weston C. J. — *Coggswell* executed the contract avowedly for himself, and for *Holmes* and company. Who was connected with *Holmes* other than *Coggswell* in this business, does not appear from the instrument itself; but it does manifestly appear, from the correspondence, to have been *Hogins*, and that from his letters to the plaintiff. It not being a contract under seal, the authority of *Coggswell* to contract for the other two, may be proved by their subsequent recognition. And that is very clearly and fully proved. It appears from the contract and letters, in which each is implicated by his own admission, that they were jointly concerned in procuring the mill in controversy to be built. *Hogins*, in his letter of *June* 1, 1835, states that he had the contract in his possession; and aside from the community of purpose and interest, which would affect each with a knowledge of what had been notified to either, it is fairly to be implied from the letters of *Holmes*, that he had a full understanding of the whole business.

By the contract, the mill was to be built at or near the outlet of *Moosehead* lake, on the east branch. Whether its actual position was to be determined by the plaintiff, or by the defendants, or by both parties in concert, we hold it unnecessary to determine, as after it was built, the defendants made no objection to its location. *Hogins* states his apprehensions upon some other points, but is silent as to its site. If the location was not satisfactory, they should

have interposed their objections at an earlier period. They were not only silent upon this point, but their acquiescence in the site, is fairly deducible from their letters.

And they made no complaint, that the mill was not finished within the time limited in the contract, but acknowledged the justness and fairness of the plaintiff's claim. As to the execution of the work, *Holmes*, under the date of *November* 25th, 1835, advises the plaintiff, that there was no necessity for him to send any one to examine it, as "it is not disputed." And he adds, that for the same reason, it would be a useless expense to procure an appraisal of the work. He further advises, that he had written to *Coggswell*, that their affairs ought to be closed for reasons, which he thought would bring him to a settlement. And *Hogins*, by his letter to the plaintiff the next month, although he expresses some apprehensions about the sill and the floom, states that it is entirely unnecessary, that the construction of the mill should be examined, as they did not object to that. *Coggswell* also, by his letter to the plaintiff, of *December* 13th, 1835, expresses his belief, that they will settle soon, and advises the plaintiff to take their notes upon a further extension of credit.

We are of opinion, that the authority of *Coggswell* to contract for the other defendants, a waiver of any objection in regard to time, an acquiescence in the site, and an acceptance of the mill are fairly to be drawn from the correspondence, implicating all the defendants. As the verdict therefore is right, it is immaterial, whether the Judge did or did not leave to the jury a part of what he should have decided himself.

Exceptions overruled.

Sally Hobbs *vs.* William Harvey.

Where the husband took a conveyance of land, and at the same time gave a mortgage to the grantor to secure notes for the purchase money, and the notes and mortgage were sold and delivered over by the mortgagee to a third person, who some years subsequently delivered the same notes with the mortgage, which had never been recorded or transferred in writing, to the mortgagor, and took a note and mortgage to himself for the balance then due in which the wife did not join; the widow of the mortgagor was held entitled to dower.

In the assignment of dower any improvements made by the grantee or his assignee, after the alienation by the husband, are to be excluded.

This was an action of dower, wherein the only questions were, whether the former husband of the demandant was so seised of the premises during the coverture as to entitle her to dower; and if he was, whether dower was to be assigned in the whole property, as it then was, or as when the sale was made by the husband. *February* 24th, 1814, during the coverture, one *Blackstone* conveyed the premises to *Hobbs*, and at the same time took back from him a mortgage deed to secure notes for the purchase money. The mortgage was never recorded, and soon afterwards *Blackstone* verbally assigned to one *Knowlton* a part of the notes, and delivered over the mortgage to him, without any written assignment. *October* 22, 1817, *Knowlton* gave up the notes and mortgage to *Hobbs*, and took from him new notes with a mortgage for the balance due, which was recorded. The demandant did not release her claim to dower in either deed. These notes were principally but not entirely paid by *Hobbs* and a balance still remains due. It did not appear, that the defendant claimed under the mortgage, or that improvements had been made.

The case was submitted without argument by *R. Goodenow*, for the demandant, on his brief, citing *Walker* v. *Griswold*, 6 *Pick.* 416; and *Smith* v. *Eustis*, 7 *Greenl.* 41.

H. Belcher, for the defendant.

The opinion was prepared by

Shepley J. — The mortgage deed to *Blackstone*, signed by the plaintiff, having been delivered to *Knowlton* and by him re-de-

livered to the grantor without being recorded, became inoperative as against the second mortgage made to *Knowlton* at that time, which was recorded.

No title can therefore be acquired under the first mortgage.

It does not appear from the case, that the plaintiff relinquished her right of dower by the second deed, nor does it appear, that the defendant claims to hold under it; while there is good reason to believe, that the debt has been fully paid and the title thereby extinguished. The plaintiff is entitled to her dower excluding in the assignment of it any improvements made by the grantee or his assignee since the alienation.

Judgment on the verdict.

DAVID KIRBY *vs.* ABEL WOOD.

Where error in law is alleged, a writ of error lies only to correct such errors as are apparent upon the record.

Papers presented to a common law court and acted upon only as matter of evidence, are no part of the record.

Where the action was a writ of entry, wherein the demandant declared merely that he was seised of the demanded premises in fee and in mortgage, a mortgage deed and note found filed with the papers in the case, but not particularly referred to in the declaration, are not a part of the record.

THIS was a writ of error brought to reverse a judgment of this Court rendered in favor of *Wood* against *Kirby* at the *March Term*, 1831. The first error assigned was this. "1. That in the conditional judgment rendered in said suit, the principal in the note mentioned in the mortgage referred to was not due at the time when said judgment was entered up for the sum of $600,71." The decision of the Court on this, covers the whole of the objections appearing in the assignment of errors, or in the argument of counsel. This renders it unnecessary to notice the others. The facts appear in the opinion of the Court. The arguments were in writing.

Boutelle, for the plaintiff in error, cited the statute respecting mortgages, *stat.* 1821, *ch.* 39, which provides, "that if the mort-

gagor &c. shall pay to the mortgagee &c. such sum as the court shall adjudge due &c., and contended, that the plaintiff therefore was obliged to produce to the Court his mortgage deed, and this referring in the condition to the note, it was necessary to produce that to the Court, in order that it might determine what was due, so that the note is a part of the record. For this reason the case is not like, and does not fall within the principles of the case, *Pierce* v. *Adams*, 8 *Mass. R.* 383. The plaintiff had no remedy by petition for review, even if the three years had not elapsed. *Sturdivant* v. *Greely*, 4 *Greenl.* 534; *Elden* v. *Cole*, 8 *Greenl.* 211.

Tenney, for the defendant in error. As this action is for error in law arising upon the record and face of the proceedings, no facts or evidence aside from the record can affect it. It must stand or fall by itself. If any evidence which can be imagined to have been presented to the Court, when the conditional judgment was rendered, would support it, it cannot be reversed on error. 3 *Black. Com.* 407; 5 *Dane*, 61, *sec.* 1; *Sturdivant* v. *Greely*, 4 *Greenl.* 539; *Storer* v. *White*, 7 *Mass. R.* 448; *Pierce* v. *Adams*, 8 *Mass. R.* 388; *Jarvis* v. *Blanchard*, 6 *Mass. R.* 4; *Fairfield* v. *Burt*, 11 *Pick.* 246.

The opinion of the Court was drawn up by

Shepley J. — The errors assigned are, that the damages were illegally assessed; and that the conditional judgment was entered in such a manner as to require the payment of more than was then actually due to prevent the issuing of the writ of *habere facias*. Where error in law is alleged, the writ of error lies only to correct such errors as are apparent upon the record. This record only shews, that the original suit was entry upon plaintiff's own seisin demanding a certain tract of land described, and alleging, that he was seized of it in fee and in mortgage.

There is no description in the record of the deed of mortgage under which the plaintiff claimed title. There is a mortgage deed and a note referred to in the mortgage filed in the case, but nothing, except the presumption which may arise from their being thus filed, to prove, that they were the exhibits presented to the court, from which the amount due was ascertained. They no more constitute any part of the record, than they would in a case submitted to the

jury. The court does indeed by statute make up the amount of the conditional judgment, but in so doing it acts upon proof introduced by the parties, not upon inspection of the record; and such proof in a common law suit is no more entered upon the record when a judge acts upon it than when a jury acts upon it.

In the case of *Storer* v. *White*, 7 *Mass. R.* 448, the note was described in the declaration, and a note was filed, corresponding to such description in all respects except that it does not appear to have been alleged to be payable in foreign money. The defendant was defaulted and the court say "although such a note as was described in the assignment of errors was filed in the case, yet we cannot take notice of it as a part of the record, any more than we could a deposition or other piece of evidence filed." So in the case of *Pierce* v. *Adams*, 8 *Mass. R.* 383, the court say "it cannot appear to us, that the note, a copy of which is sent up with the record, was the note on which the action was brought. But at any rate, it was merely evidence." The argument for the plaintiff in error endeavors to make a distinction between those cases and the present, and says it was the duty of the Court in this case to make up the judgment, and that would have brought before it the mortgage deed describing the note, and thus bring the note before the court, and thence infers, that it became part of the record. The error in this reasoning consists in the conclusion, that whatever is before a court of common law is part of the record. It is not so, when presented to the court and acted upon as matter of evidence; and that is the only manner in which it could have been presented in this case. There is less to identify it even as evidence than there was in the case of *Storer* v. *White*.

Judgment affirmed.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF PENOBSCOT, JULY TERM, 1839.

PRESIDENT & TRUSTEES OF WILLIAMS COLLEGE *vs.* SAMUEL T. MALLETT.

Filing a brief statement of the special matter of defence to the action, under the *statute* of 1831, *c.* 514, "to abolish special pleading," is a substitute for special pleading at common law; and the party filing such statement is entitled to the same rights under it as he would have had at common law, before the statute, by pleading the same subject matter in a special plea, and no more.

In a real action, where the general issue is pleaded, the demandant is holden to prove his seisin within the time upon which he has counted in his writ; and this may be repelled by the tenant, by showing that another was seised at the same time. But proof that the demandant had conveyed his title after the commencement of the suit, having no tendency to disprove the seisin of the demandant alleged in his writ, is not of that repelling character, and cannot be given in evidence under the general issue.

Where the tenant in his disclaimer alleges, that he had conveyed all his title and interest to a particular individual named, proof that he had conveyed to a different individual is inadmissible.

Where the tenant disclaims, and alleges that he had conveyed to another, who had become seised and possessed of the premises, the declarations of such other person, that he did not claim and never had claimed the premises under that conveyance, are admissible evidence in determining the truth or falsehood of those allegations in the disclaimer.

THIS was a writ of entry on the seisin of the demandants wherein they demanded six thousand acres of land in the town of

Lee, in common and undivided, alleged to have been conveyed to them by the tenant by deed of mortgage dated *June* 5, 1827. The tenant pleaded the general issue, and filed a brief statement disclaiming all title and possession in himself, and alleging that before the commencement of the suit, he had conveyed the same by deed of release to *Joseph Mallett*, who entered into the same and became seized and possessed thereof. After the demandants had shown their title, a deed from them to *John Webber*, made after the commencement of this suit, was read in evidence, conveying to him the demanded premises. The remaining facts, necessary for understanding the questions of law, will be found in the opinion of the Court.

The counsel for the tenant, at the trial before SHEPLEY J. requested the Court to instruct the jury, that the conveyance by deed from the tenant to *Joseph Mallett* was operative to pass all his interest in the premises to *Joseph*, provided there was no adverse possession, and that any declarations of *Joseph* that he had no claim to any of the lots do not defeat the operation of the deed. The Judge instructed the jury, that while the law was correctly stated in the request, yet when considering the truth of the tenant's brief statement, they might take into consideration the declarations of *Joseph*, that he did not claim and never did claim any thing under that deed except in the four lots which he enumerated. The counsel for the tenant also requested the Judge to instruct the jury, 3. That there being a reservation in the deed of *Ingersoll* to *Mallett*, referred to in his deed to the demandants, of nine lots and sixty acres for public use, making in all 960 acres, that a quantity ought to be deducted from the 6000 acres in proportion as said 6000 acres bear to the whole township. 4. That it being proved, that there are 1000 acres of water in the township and which were never located, that a quantity ought also to be deducted from the 6000 acres, in the proportion that the 6000 acres bear to the number of acres in the whole township, less the number of acres contained in the public lots. 5. That it being proved, that the demandants have assigned their interest in the mortgage declared on by a regular deed of assignment, the present action cannot be maintained in the name of the demandants, although the deed may have been made since the commencement of this action. These instructions

the Judge declined to give. The verdict was for the demandants, and was to be set aside, or amended and made to conform to the legal rights of the parties, if any errors in law appeared on the trial.

F. H. Allen, argued for the tenant. That the defence, that the tenant in the writ was not tenant of the freehold, might properly be made under the pleadings in this case. That the demandants were bound to show title in themselves, not only at the time when the action was brought, but also at the time of trial. 3 *T. R.* 186; 1 *Douglas*, 106. That the conveyance to *Webber* defeated the right of the demandants to recover. This is not the case of a deed where nothing passed by reason of a disseizin at the time, but the title passed. This may be given in evidence under the general issue to rebut the seizin of the demandants. *Wolcott* v. *Knight*, 6 *Mass. R.* 418; *Green* v. *Watkins*, 7 *Wheat.* 27. And that the third and fourth instructions requested should have been given.

Rogers argued for the demandants, and cited *Olney* v. *Adams*, 7 *Pick.* 31; *Keith* v. *Swan*, 11 *Mass. R.* 216; *Somes* v. *Skinner*, 3 *Pick.* 52; *Stearns*, (2d Ed.) 190, 230, 233, 234; *Pray* v. *Pierce*, 7 *Mass. R.* 381; *Stevens v. Winship*, 1 *Pick.* 317; *Little* v. *Libby*, 2 *Greenl.* 242; *Howard* v. *Chadbourne*, 5 *Greenl.* 15.

The opinion of the Court was by

Weston C. J. — The tenant pleaded the general issue, with a brief statement. Under the general issue, the demandants are holden to prove, that they were seized within the time, upon which they have counted in their writ. They did so. This the tenant might repel, by showing that another was seized at that time. Proof that the demandants had conveyed their title, after the commencement of the suit, was not of this repelling character. It had no tendency to disprove the seizin, upon which the demandants counted.

In *Wolcot et al.* v. *Knight et als.*, 6 *Mass. R.* 418, it was held, that the tenant might plead in bar a conveyance by the demandant to a third person, under which he does not claim, but that he can not give it in evidence, under the general issue, unless to rebut the demandant's evidence of seizin. Special pleading is now abolished;

and a brief statement is substituted, where such pleading was formerly necessary. If therefore the tenant would have made the conveyance to a third person, since the commencement of this action, available in his defence, he should have set it forth in his brief statement. Not having done so, it is a point from which he is precluded.

Besides the general issue, the tenant relies upon a disclaimer, set forth in his brief statement, in which he alleges a conveyance of all his interest, prior to the commencement of the action, to one *Joseph Mallett.* There was evidence that the tenant lived with his family on a part of the land, and that portions of it were occupied and controlled by him. This would have disproved the disclaimer, and was sufficient to maintain the action against him, the demandants counting on a mortgage. *Penniman* v. *Hollis,* 13 *Mass. R.* 429. The tenant did prove a conveyance by him made of lot number eleven in the fifth range, upon which he lived, to *David Mallett,* in *August,* 1829, but he proved none to *Joseph Mallett,* as set forth in his brief statement, except a general release of his interest in the township, of a subsequent date. And *Joseph* disclaiming all title to this lot, we are of opinion, that the brief statement was not made out in proof, and that the jury were upon this point properly instructed by the presiding Judge.

The demandants' count conforms to their title, derived from the tenant's deed. They must have judgment according to their count, which can embrace no lands, which upon a just construction should be deducted. And they must at their peril take possession according to their title. There was no occasion then for the third and fourth requests, and they were properly declined by the Judge.

Judgment on the verdict.

JOHN WEBBER & *al.* *vs.* DAVID MALLETT & *al.*

The mortgagor of an undivided portion of a tract of land cannot, without the consent of the mortgagee, by an after conveyance by metes and bounds of any part of the mortgaged premises, withdraw from the lien created by the mortgage the part so conveyed.

Where an undivided portion of a tract of land was conveyed, and the grantor afterwards conveyed to others particular parts by metes and bounds, and the grantee of the undivided portion then petitions for partition, his share of the land should be so set off and assigned as not to embrace any part of the land thus conveyed by metes and bounds, if he can otherwise have a fair and equal partition.

Where the extent of an execution is made on a specified number of acres in common and undivided in a township, as the property of one of the tenants in common thereof, it must be understood to mean such fractional proportion of the whole, as the number of acres taken bore to the whole number owned in common in the township by the debtor.

THIS was a petition for partition, wherein the petitioners claimed to have assigned to them in severalty 6478 acres in the township of *Lee*. To support their claim, the petitioners gave in evidence a deed of mortgage from one *Samuel T. Mallett*, dated *June* 5, 1827, of 6000 acres in the township, in common and undivided, to *Williams' College*, he then owning more than 7000 acres in the same township; and a levy made by *Nathaniel Ingersoll*, *July* 18, 1832, on 478 acres in common and undivided in the same township, as the property of said *S. T. Mallett;* and shew that the title of the College by the mortgage deed, and of *Ingersoll* by the levy was in them at the time of the institution of this process. It seems to have been taken as a fact, that the whole of the interest of *S. T. Mallett* in the township had been assigned to him by some mode of partition, after the mortgage was made to the College, but the time or mode, does not appear. The respondent, *Joseph Mallett*, read in evidence a deed of release from *S. T. Mallett* to him of all interest in the township, dated *May* 30, 1830, and the respondent *David Mallett* read a deed from *S. T. Mallett* to him conveying a tract of land, described, dated *August* 12, 1829. The other seven respondents claimed particular lots, described by their numbers under conveyances from *S. T. Mallett*, or his grantees, made after the mortgage to the College, and before the levy of *Ingersoll*.

The petitioners contended, that the deeds from *S. T. Mallett* to *Joseph* and *David Mallett*, his sons, were fraudulent as to his prior creditors, and void; and to prove the deed to *David* fraudulent, the petitioners offered evidence to shew, that the only consideration paid, was an obligation given by *David* to *Samuel* to support him during life, and that the deed to *Joseph* had been given to prevent *Ingersoll* from obtaining payment of his debt. The respondents introduced opposing testimony. The parties agreed, that the only questions to be put to the jury should be whether the deeds to *David* and *Joseph* were or were not fraudulent. SHEPLEY J. before whom the trial was had, instructed the jury, that if they believed that the only consideration of the deed to *David Mallett* was the obligation to maintain his father, they must regard that as fraudulent in law as against the prior creditors of *Samuel;* and that the deed to *Joseph* should be regarded as fraudulent, if they found from the testimony, that it was the intention of both grantor and grantee thereby to defeat or delay the creditors of *Samuel,* although a full and valuable consideration might have been paid or secured. The jury found both deeds to be fraudulent. It was agreed by the parties, that judgment might be rendered according to the legal rights of the parties respectively.

F. H. Allen, for the respondents, contended, that the partition between *Mallett* and the other tenants in common confined the claim of the petitioners to the land set off to *Mallett,* though made after the mortgage. *Crosby* v. *Allyn,* 5 *Greenl.* 453. That the levy of *Ingersoll* on the 478 acres was void, as where the land is held by tenancy in common the law does not authorize a levy on any particular portion of it, and cannot prevail against any of the respondents. *Bartlett* v. *Harlow,* 12 *Mass. R.* 348. The same consequence does not follow in our title, as the petitioners claim by levy, where the statute must be pursued, and we claim by deed, where the parties can make such contract, as they choose. He also contended, that as there was sufficient land to satisfy all legal claim of the petitioners, and the seven respondents, that the interest of the petitioners should be so set off, as not to interfere with the lots of those respondents.

Rogers argued for the petitioners, and cited *Adams* v. *Frothingham*, 3 *Mass. R.* 360; *Worthington* v. *Hylyer*, 4 *Mass. R.* 205; *Bridge* v. *Wellington*, 1 *Mass. R.* 227; *Vose* v. *Handy*, 2 *Greenl.* 350; *Child* v. *Fickett*, 4 *Greenl.* 473; *Drinkwater* v. *Sawyer*, 7 *Greenl.* 369; *Mussey* v. *Sanborn*, 15 *Mass. R.* 155; 9 *ib.* 34; 13 *ib.* 57; 17 *ib.* 282; 12 *ib.* 348.

The opinion of the Court was by

WESTON C. J. — With regard to the six thousand acres, mortgaged to the trustees of *Williams' College*, by *Samuel T. Mallett*, by deed dated *June* 5, 1827, subject to the exceptions therein mentioned, the same having been assigned to the petitioners, nothing can be clearer, than that it is not legally competent for the mortgagor, without the consent of the mortgagees or their assigns, by a conveyance of any part of the mortgaged premises by metes and bounds, to withdraw from the lien created by the mortgage, the parts so conveyed.

As the lands, of which the respondents claim to be sole seized, were subject to the mortgage, their plea of sole seizin against the petitioners, the assignees of the mortgagees, cannot be sustained. It having been agreed, that judgment is to be rendered, according to the legal rights of the parties respectively, the principal question is, whether in addition to their title as mortgagees, the proportion of the petitioners is to be increased in consequence of the levy made by *Nathaniel Ingersoll*, in *July*, 1832, his title under that levy, whatever it was, having passed to the petitioners. For whether the respondents, or either of them, had or had not a right to redeem the land from the operation of the mortgage, need not be decided, as no such right, if it existed, has been attempted to be exercised.

It appears, that *Samuel T. Mallett*, in addition to the land by him mortgaged to the College, held by other titles in the township, about thirteen hundred acres, in common and undivided, until the greater part of his interest was set off in severalty, in 1828. The deed of release by him made in 1830 to *Joseph Mallett* cannot affect the levy, the same having been found fraudulent. Until the levy in 1832, *Mallett* had a right to sell by metes and bounds, the lots set off to him in severalty, subject to the paramount title of the

mortgagees. All the land claimed by the respondents, had been conveyed in severalty by *Mallett*, and the deeds from him were duly recorded, prior to the levy; but the conveyance to *David Mallett* is out of the question, the same having been found to be fraudulent. There being land enough for the mortgagees, and also for the seven respondents, who claim by deeds not liable to be impeached for fraud, justice requires that the lands to be set off to the mortgagees, should not embrace any part of what has been conveyed to these respondents, if they can otherwise have a fair and equal partition.

This just and equitable course being taken, the title of the respondents to their lots is to be preferred to that derived from the levy, for prior to the time when that was made, the title of *Mallett* in these lots was transferred, so that his grantees would hold by estoppel, when the claims of the other co-tenants should be satisfied, by taking their lands elsewhere. It is true the title of these grantees might be defeated by setting off their lots to the petitioners, representing the mortgagees, but for that very reason it cannot equitably be done, if the mortgagees can have elsewhere their just proportion. It would seem, that *Mallett* had land enough, without touching these lots, to satisfy both the mortgagees, and what was set off by the levy. If so, in our judgment, the petitioners' claim to this part also is well sustained, for the levy is not by metes and bounds, but the proportion taken by the levy in common, although described as so many acres, must be understood to mean such a fractional proportion of the whole, as the number of acres taken, bore to the whole number owned by *Mallett*. Judgment for partition is to be entered for the petitioners, and commissioners to make partition are to be appointed, and the petitioners' part being set off, upon the principles before stated, final judgment will be entered accordingly.

ZEBEDIAH ROGERS, *in Eq.* *vs.* JAMES SAUNDERS, JR.

It is a matter of discretion in the Court, whether or not to decree a specific performance, not dependent however upon the arbitrary pleasure of the Court, but regulated by general rules and principles.

When a contract is in writing, is certain, fair in all its parts, is for an adequate consideration, and is capable of being performed, it is a matter of course for a court of equity to decree performance.

And performance may in a proper case be decreed, where the party has lost his remedy at law.

But laches and negligence in the performance of contracts are not thereby to be countenanced or encouraged; and the party seeking performance must show, that he has not been in fault, but has taken all proper steps towards performance on his own part, and has been ready, desirous and prompt to perform.

A written agreement concerning lands may be enforced in equity, although binding only on the party to be charged.

Where the binding efficacy of a contract has been lost at law by lapse of time, a court of equity will grant relief, when time is not of the essence of the contract.

But where the party who applies for a specific performance, has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and where there is nothing in the acts or conduct of the other party, that amounts to an acquiescence in that delay, the Court will not compel a specific performance.

Nor will they do it where the remedies are not mutual, and where the party who is not bound, lies by to see whether it will be a gainful or a losing bargain, to abandon it in the one event, and in the other to consider lapse of time as nothing, and claim a specific performance.

If the contract be in relation to wild and uncultivated lands, where the principal value is timber, time may be of the essence of the contract.

THIS case was heard on bill, answer and proof. The claim of the plaintiff for relief, and the defence set up in the answer, as well as the proof in the case, will be sufficiently understood in the opinions given by the majority and minority of the Court, without repeating the same here. The following is a copy of the contract referred to. "*Oleman, July* 11, 1832. I agree to give *Z. Rogers* a bond for a deed of ½ of 6 lots of land, being the same that I and *J. O. Rogers* bo't of the State in *Dec.* 1830, the consideration of said bond when said *Rogers* pay, cause to be pay to the

State their claim, and then I agree to deed to order, and I further agree to give up all claim for stumpage cut on said land by other people. *James Saunders, Jr.*"

The case was argued at the adjourned term in *August*, 1836, before the CHIEF JUSTICE and EMERY J., PARRIS J. having resigned, and no successor having been then appointed, by *Rogers*, for the plaintiff, and by *F. Allen*, for the defendant. The Judges disagreed, and no opinion was given. It was again argued at the *June Term*, 1838, by *Rogers* and *J. Appleton*, for the plaintiff, and by *F. Allen*, for the defendant, before the whole Court, and the opinions of the Court were delivered at the *July Term*, 1839.

For the plaintiff, it was argued, that although the contract was an agreement to give a bond of the land, it was an ordinary case of equitable jurisdiction, where specific performance is decreed. *Story's Eq. sec.* 722, 729; 1 *Sim. & St.* 66; 16 *Ves.* 416; 3 *Ves.* 59. The defendant resists performance by setting up in his answer a condition at variance with the contract. There is no proof of this, and the answer is not evidence, because it is not responsive to the bill. 4 *Paige*, 33; 2 *Stuart*, 280; 3 *Mason*, 383. And because it sets up a condition not in the contract. 8 *Pick.* 119; 2 *McCord's Ch. R.* 156; 1 *Gill & John.* 272; 1 *Har. & Gill*, 13; 1 *Munf.* 373. When the answer admits certain facts, and relies on other facts by way of avoidance, such facts must be proved. 2 *Johns. Ch. R.* 62; *Flagg* v. *Mann*, 2 *Sumner*, 486. The respondent alleges in his answer, that he is not bound by his contract, because it was not mutual. Under the statute of frauds, even at law, mutuality is not necessary. *Sug. Vend. & Pur.* 43; 2 *Story's Eq.* 715, 751; 1 *Munf.* 48; 3 *Dess.* 514. Equity will compel one to perform his contract, although the other party is not bound. 2 *Dess.* 271; 1 *McCord's Ch. R.* 39; 1 *Edw.* 1; 1 *Sim. & St.* 63; 1 *Russ.* 391; 4 *Munf.* 177; 2 *Jac. & W.* 425; 14 *Johns. R.* 485; 4 *Greenl.* 360. But here acts of possession and part performance are joined with the contract, and that is always sufficient. 6 *Har. & John.* 288; 14 *Johns. R.* 15; 4 *Har. & McH.* 252. It is objected in the answer, that specific performance of the contract is barred by lapse of time. But time here was not of the essence of the contract, and therefore no bar. The delay was no injury to the defendant. 2 *Ball*

& B. 228; 12 *Ves.* 326; 4 *Greenl.* 360; 2 *Brockenb.* 185; 2 *Har. & J.* 46. But here the plaintiff has been in possession, exercising acts of ownership, and paying taxes on the land. In such case, lapse of time is no bar to a specific performance. 4 *J. J. Marshall,* 157; 4 *Munf.* 332; 14 *Johns. R.* 15; 2 *Hovenden on Fr.* 20.

For the defendant, it was argued, that the paper called a contract is so loose and uncertain, that no specific performance of it can be decreed. The Court will not undertake to conjecture the intention of the parties, and exercise its own discretion in making a bargain for them. 6 *Johns. Ch. R.* 222. It is without consideration, and therefore no decree can be founded upon it. It is said that it is not necessary to state any in the bill or declaration, where the statute of frauds interposes. If so, it does not dispense with proof of it, and none is here given. The want of mutuality is decisive against the plaintiff's claim. *Powell on Con.* 221; *Newland on Con.* 152. The plaintiff must have performed on his part, before he can call on the other party to perform. It is said in the bill, that he arranged with the land agent of *Massachusetts* for delay. This is denied in the answer, and there is not the slightest proof of it. It was never done, but if it had been, it would have been wholly unavailing, because it is not pretended, that it was done with our assent. And further, we specially notified him to perform, and he neglected. As no time was fixed in the paper, it should be done within a reasonable time. The law will not permit a party to lie by, and permit him to have advantage of the rise of property, and at the same time be under no obligation to take it, should it fall in price. 6 *Wheat.* 524; 4 *Dallas,* 345. Time is the essence of the contract in all such cases, and indeed in all cases whatever, where but one party is bound. He must show strict compliance on his part, or he cannot call on the other party to perform. 9 *Cranch,* 456; 2 *Wheat.* 336; 1 *Peters' Cir. C. Rep.* 380; *Sug. on Vend. & P.* 246; *Powell on Con.* 235; *Newland on Con.* 242; 5 *Cranch,* 278; 3 *Mass. R.* 12; 10 *Wheat.* 152; 6 *Cranch,* 51; *Fonb. Eq.* 48, 482. A court of equity will not interfere where there is a perfect remedy at law, as there is here, if the defendant has failed to perform any contract. 16 *Pick.* 357; 4 *Peters,* 428.

The opinion of a majority of the Court was drawn up, and delivered by SHEPLEY J.

A dissenting opinion was delivered by EMERY J.

SHEPLEY J. — It appears from the bill and answer to be admitted, that on the seventeenth day of *December*, 1830, the defendant and *J. O. Rogers* purchased of the State, six lots of land in township number two in the old Indian purchase, the defendant taking the whole title and giving his notes payable in one, two, three, and four years with interest annually, and securing the payment of them by sureties and by a mortgage of the premises. These notes remaining unpaid on the eleventh of *July* 1832, the defendant agreed to sell his half of these lots to the plaintiff according to the terms of the contract now sought to be enforced. It is important in the first place to ascertain the intention of the parties and their rights as exhibited in their contract; and the position of the parties upon the answer and proof introduced. The contract is informally and loosely drawn. The word consideration was used for, or intended to convey, the same idea as the word condition, and with the following words to express the terms to be inserted in the condition of the bond, and required to be performed before a conveyance could be demanded. It could not have been the intention, that the plaintiff should pay each note as it became due, for one had become due and remained unpaid. On the contrary, it could not have been the intention of the parties to permit the whole principal and interest to remain unpaid for an indefinite period, thereby constantly increasing the amount to be paid. The deed could not be given and the whole contract settled before the last instalment became due; and the plaintiff could not have expected, nor did the contract contemplate, upon the most liberal construction of it, a longer delay. Perhaps the most correct construction would be, that the plaintiff was to pay the note, which had become due, in a reasonable time, and the others as they should become payable. This only would save the defendant from harm and danger. The contract not only requires the defendant to give a bond, but to convey the land upon the plaintiff's performing on his part. The fair conclusion from the testimony of *Jordan* is, that some advance upon the price was secured to the defendant in his settlement with

the plaintiff, and that would constitute a good consideration for the contract. The whole amount of principal and interest having become payable on the seventeenth of *December*, 1834, remained unpaid until the 30th day of *March*, 1835, when it was paid by the defendant. The plaintiff having wholly failed to comply with the terms of the contract, can have no right at law, unless he proves a waiver or assent to this delay. He alleges in his bill, that not being convenient for him to pay the notes at maturity, he made an agreement with the agent of the State, that they should remain uncalled for so long as he should permit the property to remain in the same condition; and that in consequence of it, the notes remained uncalled for until paid by the defendant. The answer expresses the defendant's disbelief of any such agreement, and denies, that he was advised of it or assented to it. There is no proof of it, and it must be regarded as having no existence. The answer alleges, that the plaintiff gave the defendant a note payable in four months, and that it was agreed, that before the expiration of that time the sums due to the State should be paid and the whole business be finally closed; and that he was to be paid for his expense and trouble about the business; and that the timber which had been cut upon the land should be sold and the proceeds applied to the payment of the notes to the State. These allegations contradict the written contract, are not responsive to the bill, are without proof and must also be regarded as having no existence. The rights of the parties rest therefore upon the contract. It is not necessary to detail the testimony introduced to prove an assent to the delay or waiver of the time of performance by the defendant. All the acts and declarations took place, before the last instalment became payable; and the most that can be made of them is, that the defendant considered the contract as subsisting, and assented to all the previous delay, or waived his objections to it. From the time when the plaintiff, in the autumn of 1834, demanded of the defendant the execution of the bond, and was refused, to the time when the defendant paid the notes, there is no proof of any act or declaration of either party. The land was covered with a growth of wood and timber which appears to have constituted its principal value. On the 17th of *December*, 1830, the six lots were

purchased for $1170,40 and one undivided half of them sold on the first of *May*, 1835, for $7839,73.

It remains to state some of the principles upon which courts of equity will or will not decree a specific performance; and to apply them to the facts presented in this case. It is a matter of discretion in the court, whether or not to decree a specific performance, not dependent however upon the arbitrary pleasure of the Judge, but regulated by general rules and principles. When the contract is in writing, is certain, fair in all its parts, is for an adequate consideration, and is capable of being performed, it is a matter of course for a court of equity to decree performance. 2 *Story's Eq.* § 751. And performance may in a proper case be decreed where the party has lost his remedy at law. *Radcliffe* v. *Warrington*, 12 *Ves.* 331. But laches and negligence in the performance of contracts are not thereby to be countenanced or encouraged, and the party seeking performance must shew, that he has not been in fault, but has taken all proper steps towards a performance on his own part, and has been ready, desirous, and prompt to perform. *Milward* v. *Earl Thanet*, 5 *Ves.* 720, *note (b)*; *Fonb. Eq.*, *ch.* 6, § 2.

There has been some difference of opinion whether a contract, which could be enforced by one party only, ought to be decreed to be specifically performed. *Chancellor Kent*, in *Clason* v. *Bailey*, 14 *Johns. R.* 485, says the weight of argument is in favor of the construction, that the agreement concerning lands to be enforced in equity should be mutually binding; but he reviews the cases, and says the point is too well settled to be now questioned, that it may be thus enforced, if binding upon one party only. This appears now to be the generally received doctrine, and it has been admitted in this State. *Getchell* v. *Jewett*, 4 *Greenl.* 350. The grounds upon which courts of equity have proceeded in such cases appears to be, that the statute of frauds, as decided in the courts of law, requires only the signature of the party to be charged to become legally binding upon him; and equity, finding a contract legally binding, will decree its performance. Where the contract is binding at law therefore, the want of mutuality is no objection. *Flight* v. *Bolland*, 4 *Russell*, 298. Where its binding efficacy has been lost at law by lapse of time, courts of equity are in the

habit of relieving, when time is not essential to the substance of the contract. Time is of the essence, where the thing sold is of greater or less value according to the effluxion of time, and the sale of a reversion, and of stock, are put as examples of the rule. So when a house is known to have been purchased for a residence at a particular time, and when the parties have by their contract expressly so agreed, time is essential. And in these cases no relief is given against the lapse of time. It is not of the essence of the contract, where the object is security for the payment of money; and in the ordinary case of the sale of an estate, the general object being the sale for an agreed sum, the time of payment is regarded as formal, and that stipulation as meaning, that the purchase shall be completed within a reasonable time, regard being had to all the circumstances. 1 *Young & Collyer*, 415. Time is not however in such cases to be altogether disregarded, but to entitle him to relief where time is not essential, the party asking it must show, that circumstances of a reasonable nature have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived. Where he has been guilty of laches, and offers no satisfactory reason for it, and the other party has not waived or acquiesced in it, no relief can be granted. In *Lloyd* v. *Collett*, as reported in 4 *Ves.* 689, note *(b,)* the chancellor says, "I want a case to prove, that where nothing has been done by the parties, this court will hold in a contract of buying and selling, a rule that certainly is not the rule at law, that the time is not an essential part of the contract. Here no step has been taken from the day of sale for six months after the expiration of the time at which the contract was to be completed. If a given default will not do, what length of time will do? It is true the plaintiff must have considered himself bound after the day; so he was; he could not take advantage of his own neglect." In *Guest* v. *Homfray*, 5 *Ves.* 818, the master of the Rolls says, "the only question is, whether the plaintiff has done enough to show, he took all the pains he could to be ready to carry into execution the agreement." "The plaintiff does not seem to me to have done all he ought to have done. It rests entirely upon that point." In *Benedict* v. *Lynch*, 1 *Johns. Ch. R.* 375, this question was very much considered by the chancellor, who states the rule to be, "that

where the party who applies for a specific performance, has omitted to execute his part of the contract by the time appointed for that purpose, without being able to assign any sufficient justification or excuse for his delay, and where there is nothing in the acts or conduct of the other party, that amounts to an acquiescence in that delay, the court will not compel a specific performance." And again, "from the review which I have taken of the cases, the general principle appears to be perfectly established, that time is a circumstance of decisive importance in these contracts, but it may be waived by the conduct of the party; that it is incumbent on the plaintiff calling for a specific performance to show, that he has used due diligence, or if not, that his negligence arose from some just cause; that it is not necessary for the party resisting the performance to show any particular injury or inconvenience; it is sufficient if he has not acquiesced in the negligence of the plaintiff, but considered it as releasing him." In such cases, the party is regarded in equity as having abandoned his contract. Nor will equity give relief against the lapse of time, where there has been a very material change in the value of the property making a great change in the condition of the parties. In such cases, the utmost watchfulness is expected of the party not to let the contract fall. In *Paine* v. *Mellen*, 6 *Ves.* 349, the vendor did not perform in time, but the purchaser consented to complete the contract upon certain terms, and before the deeds were executed, the houses were burnt. It was held, that the vendor could be relieved only by proving an actual acceptance of the terms by the purchaser before the loss. In *Brashier* v. *Graty*, 6 *Wheat.* 539, it is said, "another circumstance, which ought to have great weight is the change in the value of the land." "Had the land fallen in value, he could not have paid the purchase money." Where the price agreed for in the original contract greatly differs from the value, it is an ingredient, which associated with others, will contribute to prevent the interference of a court of equity. *Cathcart* v. *Robinson*, 5 *Peters*, 264. Nor where from a change of circumstances since the contract, performance would be attended by peculiar hardship. *Perkins* v. *Wright*, 3 *Har. & McHen.* 324. Nor where the remedies are not mutual, and the chance for gain is all upon one side, and that of loss all upon the other. In *Alley* v. *Deschamps*, 13 *Ves.* 228, the chan-

cellor says, "it would be very dangerous to permit parties to lie by with a view to see whether the contract will prove a gaining or losing bargain, and according to the event, either abandon it, or considering the lapse of time as nothing to claim a performance." In *Brashier* v. *Graty*, it is said, "*Mr. Brashier* then if he did not execute his part of the contract with punctuality, ought to have executed it before a great change of circumstances took place." "This total want of reciprosity gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article." Mr. Justice *Story*, in his treatise, says, "but if circumstances of a reasonable nature have disqualified the party from a strict compliance, or he comes *recenti facto* to ask for a specific performance, the suit is treated with indulgence, and generally with favor by the court. But then in such cases it should be clear, that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract. 2 *Story's Eq.* 87. So where one was entitled to a renewal of a lease for lives, when one life should drop, but was not obliged to renew, having let two lives drop before he applied for a renewal, equity could give no relief. *Bayley* v. *Corporation of Leominster*, 1 *Ves. Jr.* 475; *The City of London* v. *Mitford*, 14 *Ves.* 41. And a change of possession, or an advance made as a partial payment will not in such cases make any difference. *Alley* v. *Deschamps*, and *Guest* v. *Homfray*, before cited.

It will be perceived, that the court cannot in this case decree a specific performance without a violation of these well established rules. Allowing that the defendant had waived all compliance up to the time when he refused to give the bond, that left the parties upon their legal rights, and should have put the plaintiff upon his guard to perform punctually, when the time arrived for a final close of the business, and not to cast himself upon the favor of one, who had just admonished him, that he did not mean to perform, if he could avoid it. This refusal to give a bond might have justified the plaintiff in refusing to pay, if the bond had been essential to enable him to obtain the title, but it was not; the contract which he had, was sufficient for that purpose, for it is agreed in it, that a deed is to be given upon payment. The plaintiff offers no reason for neglecting to pay from the 17th of *December* to 30th of *March*,

and during that time there is no proof of a waiver or acquiescence on the part of the defendant. And this takes place in a case in which the plaintiff was required by the change in value to be especially watchful against any thing, that would entitle the defendant to be discharged. Could it be admitted, that the plaintiff has not been guilty of laches, there is no mutuality in the remedy; and although this is no objection, where there is a compliance, yet where there is not, as Mr. Justice *Story* states the law, it is an insuperable one. In addition to this, there has been a most extraordinary change in the value of the property since the contract; it having been sold for more then eleven times the amount agreed to be paid; and while this change has been taking place, all the chance for gain has been on the side of the plaintiff, while the defendant, if there had been a loss occasioned by fire, by trespassers, or otherwise, must have borne it, for he could not compel a performance. According to the rules applicable to sales of estates in *England*, there could not in this case be a decree for a specific performance, and there is less reason for it in this country, and especially in a case relating to lands covered with a growth of timber, and having no fixed or certain value, but rising and falling in price according to the market for lumber, and greatly affected in value by other causes. In this particular hey more nearly resemble stocks; and time is of the essence of the contract in such cases, and no relief can be given. The remark of *Livingston* J., in *Hepburn* v. *Auld*, 5 *Cranch*, 279, applies with great force to this case. Speaking on this subject, he says, "but there is a vast difference between contracts for land in that country and this. There the lands have a known, fixed, and stable value. Here the price is constantly fluctuating and uncertain. A single day often makes a great difference; and in almost every case time is a very material circumstance." But while the plaintiff is not entitled to a decree, the defendant has no claim upon the court for any thing, which they are not obliged by law to give him, for he has refused to give the bond according to his contract, has attempted to vary the contract by parol proof, and has set up other improper grounds of defence, and failed to support them, and he is not entitled to costs.

Bill dismissed without costs.

EMERY J. — Dissenting from the opinion of the majority of the Court.

The bill asks for specific performance and relief. He who asks it, should show that he is in a condition to perform his own part of the contract. And in general that the remedies are mutual; that there has been no change of circumstances affecting the character or justice of the contract; that compensation for delay can fully and beneficially be given, and that he has shown himself ready, desirous, prompt and eager to perform the contract. If he has been guilty of gross laches, or applies for relief after a long lapse of time, unexplained by equitable circumstances, his bill will be dismissed.

Yet a Court of Equity frequently decrees specific performance, where the action at law has been lost by the default of the very party seeking the specific performance, if it be notwithstanding, conscientious, that the agreement should be performed. And in *Lennon* v. *Napper*, 2 *Sch. & Lef.* 684, the Lord Chancellor says, that in all cases of contracts for estates in land, courts have been in the habit of relieving, when the party from his own neglect had suffered a lapse of time, and from that and other circumstances, could not maintain an action to recover damages at law. And even where nothing exists to prevent his sueing at law, so many things are necessary to enable him to recover at law, that the formalities alone render it very inconvenient and hazardous so to proceed. Nor could in many cases, the legal remedy be adequate to the demands of justice. Relief is granted to the man who has acted fairly, though negligently. 2 *Sch. & Lef.* 684. The courts of equity regard time so far as it respects the good faith and diligence of the parties. But if circumstances of a reasonable nature have disabled the party from a strict compliance, or he comes *recenti facto*, to ask for a specific performance, the suit is treated with indulgence, and generally with favor by the Court.

In the ordinary course of the purchase of an estate, and the fixing of a particular day for the completion of the title, the Court seems to have considered that the general object, being only the sale of the estate for a given sum, the particular day named is merely formal. And the stipulation means in truth, that the purchase shall be completed within a reasonable time, and regard being had to all the circumstances of the case, and the nature of the

title to be made. *Hepwell* v. *Knight*, 1 *Young & Collyer*, 415.

If the contract be unobjectionable, it is as much a matter of course to decree specific performance as to give damages at law. 3 *Cowen*, 445, 505. In the sale of lands, time may make part of the essence of the contract, and on default at the day without any just excuse, or any acquiescence, or subsequent waiver, by the other party, the Court will not help the party in default. *Benedict* v. *Lynch*, 1 *Johns. Ch. R.* 370.

It would be very dangerous to permit parties to lie by with a view to see whether the contract will prove a gaining or a losing bargain, and according to the event either to abandon it, or considering the lapse of time as nothing to claim a specific performance, which is always the subject of discretion. *Alley* v. *Deschamps*, 13 *Ves. Jr.* 225.

If one come to a court of equity for a specific performance, he must be able to state some contract, legal or equitable, concluded between the parties, which the other one refused to execute. 14 *Ves. Jr.* 408. The jurisdiction is not dependent upon the form or affected by the form or character of the instrument. The Court will be satisfied that in substance, the transaction amounts to, and is intended to be, a binding agreement for a specific object, whatever may be the form, or the character of the instrument. If a bond with a penalty should be made upon a condition to convey certain lands upon the payment of a certain price, it will be deemed in equity an agreement to convey the land at all events, and not to be discharged by the payment of the penalty, though it has assumed the form of a condition only. *Newl. on Contracts*, *c.* 17, *p.* 307 to 310; 2 *Story's Eq.* 22. And the purchaser of land is considered as the equitable owner of the land, and the vendor as the owner of the money. The purchaser may devise it as land even before the conveyance is made in equity. *Lingan* v. *Sowray*, 1 *P. Wm.* 172; 2 *Vern.* 679.

Our own *stat.* of *February* 28, 1829, *c.* 431, provides, that the interest which any one has by virtue of a bond or contract in writing, to a conveyance of real estate upon conditions to be by him performed, whether he be original obligee or assignee, may be attached on mesne process, or on execution and sold, and the purchaser have remedy to compel conveyance by bill in equity. This

would seem to be a great step towards bringing upon us all the evils or blessings, which are by some, so earnestly desired to be brought to bear upon us, by a court of chancery.

We must dispose of this cause upon an unequivocal meaning of the contract of the parties, and their various acts, which have a relation to the execution of the contracts. *Pratt & al.* v. *Low & Campbell*, 9 *Cranch*, 456, 488.

The bill *affirms distinctly, that the plaintiff was in embarrassed circumstances at the time of making the agreement*, of which he claims specific performance. This *is not denied in the answer*, nor is it pretended that the fact was unknown to the defendant *when* on the 11th of *July*, 1832, he made the contract with the plaintiff. So that there does not appear to have been any change for the worse on the part of the plaintiff. It *does not* present *a case of bankruptcy*, arising *after* the entering into the contract, which might furnish strong reasons for considering it abandoned. The answer admits the purchase of the State of the six lots, and the mode of payment secured by the suretyship of *Jacob O. Rogers* and the plaintiff to the four notes signed by the defendant, alleges that timber was cut on the premises, and it was agreed, that the proceeds should be appropriated to the payment of the notes to the State, and extinguishment of the mortgage, and that the principal part of the timber remained in the stream, into which it was hauled, till after the 11th of *July*, 1832. And the plaintiff received the proceeds to his own use. The answer further alleges, that the defendant being apprehensive that controversies would ensue between him and said *Rogers* on the settlement of their dealings relating to the lands, and being desirous of a speedy adjustment of the same, and to be fully discharged from all further costs and trouble, and to be wholly exonerated from his liability to the State, by reason of said notes, agreed to relinquish to the plaintiff his interest in the lots, and for that purpose, gave the written agreement, referred to in the bill, but the answer also says, that he, the defendant, was also to be paid the costs, expenses, and trouble he had incurred in procuring a deed of the lots, and in the care and management about cutting the timber, which was to be the plaintiff's property. It has been said by high authority, that the motives inducing a party to enter into a contract are not to be considered, unless expressed in

the contract itself. *Bochan* v. *Wood*, 1 *Jacob & Walker*, 422. The answer further alleges that an adjustment was made of their dealings, and the note for $88,27 payable in four months was made on the 11th of *July*, 1832, before the expiration of which, it was agreed, that the whole business should be finally closed. *This establishes a valuable consideration for the contract.* That nothing more was really due to the defendant than the amount of the notes to the State, and the $88,27 seems strongly inferrable from a part of the answer, because the defendant *said unless they were paid,* he should not consider himself holden by the agreement, and would not thereafter be bound by it, nor give a bond, nor a deed.

That part of the answer, which says the plaintiff did not express any intention to perform, appears to be contradicted by the defendant's witness, *Patten,* who says, that on the 7th of *Nov.* 1833, when the defendant asked the plaintiff to pay a note of hand he had against him then, so that he could send the money to *Boston* by the deponent, and take up defendant's note, given to the State for some land, and if he did not, the defendant should not feel bound, or consider himself holden to give *Rogers* a deed of the land, *Rogers* said he would bring or send the money to pay the notes to *Bangor*, before the witness left *Bangor.* The answer further says, the defendant never agreed nor consented to any such arrangement, procured from the land agent as stated in the bill, disbelieves it, *but does not call for proof.* And if he did, it might be very difficult to make it out directly, as the land agent is dead. But the defendant asserts that he was not advised of it, and has never assented to any delay, and it was in violation of the agreement with the plaintiff. The defendant also says, the agreement was not mutual, and he, the defendant could not compel the plaintiff to perform.

The procurement of the bond and offer of it by *Rogers* to the defendant to be executed, is admitted, and so is the tender, on the 1st of *April*, 1835. But the defendant objects, that these acts were not till long after *Saunders* had demanded of the plaintiff performance, and notified him that he would not be holden. And the defendant further alleges, that from the plaintiff's neglect, the defendant was induced to believe that the plaintiff did not intend to comply, unless after the lapse of time, the enhanced value of

said lots or other favorable circumstances should render it expedient for him so to do. And that the defendant on the 30th of *March*, 1835, paid to the Treasurer of the State, his aforesaid notes and interest, and caused the mortgage to be cancelled and discharged. If the right of the plaintiff to redress depends on his having paid the notes to the treasurer, he has no right, for he has not paid them. But is not the substantial meaning of the contract, that so much money shall be the consideration of the deed, and when that was paid, the plaintiff should have the conveyance made agreeably to his direction? Does not the whole case resolve itself into the question whether in a court of equity, the time of performance be of the essence of the contract? And if so, whether there has been a reasonable excuse for the omission to pay?

At the time of entering into the contract of *July* 11, 1832, none of the notes to the State had been paid. One had been payable seven months, and *Saunders*, if he did not know that delay had afterward been procured from the land agent, remarked to *Rogers*, that the State would be glad to take the land back again, if he could not pay the notes. If he did not cut the timber off would give him lenity; he had no doubt he could get lenity. *Saunders* said there was nothing further to be done by said *Rogers* to entitle him to the bond. It does not appear that the land agent had ever felt insecure, or urged the payment of the notes. And all this goes to corroborate the statement of the plaintiff as to the arrangement about the notes, the last of which was not payable till the 17th of *December*, 1834. The plaintiff was surety on the notes for the defendant, to the State, and yet the plaintiff had no indemnity. The whole title was in the defendant, subject to the mortgage. When the agreement of *July* 11, 1832, was made, the plaintiff was amenable for the purchase money. And had he been compelled afterwards to pay it, and had sought from the defendant an indemnity, and the same proof had been introduced in a suit at law, as has been here, no court or jury acting on equitable principles, would have permitted a recovery against the defendant, provided he had tendered a deed of his interest in the land to the plaintiff.

In the fall of 1833, an action was commenced in the names of the defendant and *Jacob O. Rogers*, for taking logs from the land in controversy, against *Daniel A. Cressy*, and he settled it with the

plaintiff by giving him his note for $60. And in the spring of 1834, *Saunders* called at his store for *Rogers* to get pay for the aforesaid trespass, and advised the deponent to settle it; said he had sold out his half of the land to *Rogers*, and that he, the defendant, had no interest in the suit.

In the fall of 1834, *Rogers* made a demand of *Saunders* for a bond for a deed as set forth in the bill. A written bond was presented, which *Saunders* declined executing. In 1834, the plaintiff paid the taxes. In the fall of 1833, the defendant told *Jefferds* he had sold his interest in the land to plaintiff.

Aaron Ingalls testified, that in *October*, 1834, the plaintiff employed him to examine this land, to see if any one was trespassing on it, and he did examine it. And a few days after, saw defendant, and asked him if he and plaintiff was going to give permits to cut timber, defendant replied, he had sold his interest in the land to the plaintiff. Two or three years ago, perhaps more, he told *Charles Bailey*, he had sold out his part or right in the land back of *Rogers'* mills to the plaintiff. In *June*, 1834, he told *Jacob O. Rogers*, that he had sold out his interest in the land for which they had given their notes to the State to the plaintiff, and inquired if the notes had been paid, and was informed that they had not been demanded, when it was demanded they would see it paid.

No one has heard the plaintiff say, that he abandoned the agreement. None of his acts look like having abandoned it. It is true he did not pay. And certainly, in looking at the contract, informally drawn as it is, there is not in its terms any thing that binds him to pay at a certain time. This is a transcript, "*Oleman, July* 11, 1832, I agree to give *Z. Rogers* a bond for a deed of ½ of 6 lots of land, being the same that I and *J. O. Rogers* bo't of the State, in *December*, 1830, the consideration of said bond, when said *Rogers* shall pay, cause to be pay to the State their claim, and then I agree to deed to order, and I further agree to give up all claim for stumpage cut on said land by other people. *James Saunders, Jr.*" A court of equity is to be governed by this principle. It is to examine the contract, not merely as a court of law does to ascertain what the parties have in terms expressed to be the contract, but what is in truth the real intention of the parties, and to

carry that into effect. But in so doing, it would be prudent in the first place, to look carefully at what the parties have expressed; because in general, they must be taken to express what they intend, and the burden ought in good reason to be thrown on those, who assert the contrary. If the thing sold be of greater or less value according to the effluxion of time, it is manifest, that time is of the essence of the contract. And a stipulation as to time, must then be literally complied with in equity, as well as in law. The cases of the sale of stock, and of a reversion, are instances of this. So also, if it appear that the object of one party, known to the other, was, that the property should be conveyed on or before a given period, as the case of a house for residence, or the like. If the parties choose even arbitrarily, provided both of them intend so to do, to stipulate for a particular thing, to be done at a particular time, such a stipulation is to be carried literally into effect, in a court of equity. That is the real contract. The parties had a right to make it. *Why then should a court of equity interfere to make a new contract which the parties have not made? Hepwell* v. *Knight*, 1 *Young & Collyer*, 415. Looking at the contract of *Saunders*, is it not manifest that no time was intended to be limited, but that as long as the State would omit to enforce the demand, that the plaintiff should have the benefit of the indulgence, provided he was contented with the engagement of the defendant to deed to his order when he should have paid the claim of the State, after having assured the plaintiff that the State would be glad to take back the land, if he did not cut off the timber, and that he could obtain lenity? And the plaintiff had thus been encouraged by the defendant to expect it, and indeed was then enjoying it. Would it be consonant with good faith to destroy that expectation, by urging a more speedy payment than the State saw fit to enforce? I think that the statement of the *four months being the period*, as alleged in the answer *is countervailed by the contract itself, the testimony of Jordan and other circumstances proved. Morphet* v. *Jones*, 1 *Swans.* 172.

A reasonable excuse is made for the omission to pay. Taking into consideration all these circumstances, it may well be doubted whether the defendant was really serious in his notice on *Nov.* 7, 1833. And if he were so, his subsequent conduct up to *October*,

1834, when he had the conversation with *Ingalls*, goes to show an acquiescence in the proceedings of the plaintiff. For in *June*, 1834, he was apprised that no demand had been made of the notes, that they were not paid. And he did not express any dissatisfaction then to *Jacob*, nor afterwards to *Ingalls* in *Oct.* 1834, against the plaintiff for his delay, although the subject of granting permits for cutting timber, was brought directly to his notice. In the fall after this transaction, he declined giving the bond to the plaintiff. And yet the last note had not become payable.

[I am aware of the argument of *Livingston* J. in *Hepburn* v. *Auld*, 5 *Cranch*, 279, raised in respect to a claim originating in 1799, to assign a certain contract in payment of a debt, but think it cannot be invoked as bearing on the facts in this case. That contract respected 6000 acres of land in *Ohio*, and after great delay of nearly twenty years, to get a good title to the land, the bill was brought to compel the defendant to take the assigned property and discharge the debt. And though that bill was dismissed not because time was material, which the court omitted to decide, but held that if a good title could be procured at the decree, the specific performance would be granted. The bill was dismissed, but in effect supported by the result of a suit to compel payment of the debt, by *deciding that the tender of the assignment was good*, which had before in the Supreme Court's judgment been held not to have been presented to the court *in pleading, as well tendered. Hepburn & Dundas* v. *Auld*, 1 *Cranch*, 321. And though the bill was dismissed, one of the court said he supported the decision because the person who sought payment of the debt would now get his pay in no other way than by the assignment. Besides, if the English rule suggested by *Livingston* as *inapplicable* to our country, be considered in regard *to value*, it should also be considered as *inapplicable to our modes of dealing*. For in all the English cases, there is not a single one precisely like this, nor indeed substantially. So of *Brazier* v. *Gratz*, 6 *Wheat.* 528. *Gratz* of *Philadelphia* had purchased of one *Craig* of *Kentucky*, a tract of land, of 1000 acres by the survey. No patent had then issued. Afterward, one was issued in *Craig's* name, who sold part to *Keyser. Gratz* sued *Craig & Keyser* to compel a conveyance; *Gratz* in the mean time having sold 824 acres of it to *Robert Barr.*

Brazier, who married *Barr's* daughter, came to *Philadelphia*, and on the 2d of *March*, 1807, purchased the residue of the land of *Gratz*, estimated at 302 acres, while the suit was pending, and gave his notes for $6795, payable in 6, 12 and 18 months, deducting $250 allowed *Brazier* toward costs of prosecuting the suits pending, which *Brazier undertook to manage at his own expense.* No progress was made in the suits till 1811, and *Gratz* had to pay the officers of the court their fees. Then *Gratz* offered to convey the land to *Brazier*, if he would pay his notes, or to rescind the contract. In 1811 *Gratz* died. *Brazier* had for some time been embarrassed, and then became notoriously insolvent. In *July*, 1812, the heirs of *Gratz* offered to convey on payment of *Brazier's* notes. No payment being made, the heirs of *Gratz* prosecuted the suits with vigor, and they were successful in 1813. The lands soon after rose in value. Then *Brazier* made an arrangement with one *Saunders;* and the heirs considering the contract with *Brazier* of no validity, acknowledged the tender in *Dec.* 1813; and then *Brazier* sued in *Kentucky* for specific performance. Thus, almost 7 years after the contract, could any thing *like diligence be pretended in managing the suits at his expense.*

The case of *Lloyd & Young* v. *Collat*, 4 *Brs. C. C.* 469, cited *Harrington* v. *Wheeler*, 4 *Ves. Jr.* 689, noticed again in *Omerod* v. *Hardman*, 5 *Ves. Jr.* 737. The chancellor says, that the conduct of the parties, inevitable accident, &c., might induce the court to relieve. And he inquires, is there any case in which without any previous communication at all between the parties, the time has been suffered to elapse. In most of the cases there have been steps taken. That was a case by vender, who had given no abstract nor filed a bill till 16th *November*, though the contract was to have been completed on the 25th of *March* preceding. The Lord Chancellor considered the conduct of the vendee, as evidence of an abandonment of his contract.

The defendant on the 10th of *August*, 1792, agreed by writing to purchase the premises for £2609,17 the purchase to be completed on or before the 25th of *March*, 1793, and the defendant paid *Young*, the auctioneer, £100 as a deposit. In defendant's answer, he stated that the value of the ground rents had diminished £560 and upwards.

In *Gibson* v. *Patterson*, application was made to the defendant within the time, and he said he *would not*, but *would go to Scotland to avoid being compelled to do so*, performance decreed, if good title could be made and costs. That too was the case of vendor. *Guest* v. *Homfray*, 5 *Ves.* 818, was a case by vendor to obtain specific performance of an agreement to sell unfinished houses in *Cardiff*, in fee for £800 by instalment. The agreement was *Jan.* 31, 1798. Keys were then delivered to defendant. No abstract was delivered till *April* 18, though demanded the 1st. Objections were made against the title, not obviated at the hearing. *June* 2d, 1798, defendant took another house in *Landaff*. The master of the Rolls still says, that if they had cautioned the defendant, and *told him they were going* on to make out the title, *and were in hopes of doing it*, and shown *a probable ground* to him that they might make a good title, "*I should perhaps not have thought a year too long*. Stress too was laid in that case, that the defendant had stated that the contract was at an end, and the plaintiff's solicitor had not stated that the conversation was not so. But there was no evidence that even when the abstract was sent back, he said the defendant was to be still bound, and was not released; and desired him *to take notice of that*.

Bayley v. *Corporation of Leominster*, 1 *Ves. Jr.* 475. On neglect to apply for a renewal from 1763 to 1792, the plaintiffs should have applied when *one life dropt*, but omitted till *two lives had expired*. Defendants were held not bound to renew. In *City of London* v. *Mitford*, 14 *Ves.* 41, a renewal of a lease for 40 years and covenant to renew every 40 years was claimed. The city had taken possession of part of the property for public purposes, between 1736, when the first lease of 40 years was executed, and 1773, and attempted to gain some advantage by obtaining a lease from a widow, *Mrs. Turner*, of a moiety of which she was seized for life. It remained till *Mrs. Turner's* death in 1800. In 1802 the plaintiffs filed their bills, and in 1807 it was determined. And the question was, whether after the change in the property, without the consent of defendants, the city can call for the execution of a lease in its nature and terms such, that the enjoyment of the property in the mode in which it was to be enjoyed, is utterly impracticable. And if the city have

thus put it out of the power of the lessor to grant a lease, securing the enjoyment according to the stipulations, they cannot insist, that as the lessor has thus lost his right as between him and the committee of the bridge, he shall therefore execute the lease. The chancellor thought, the circumstances make it impossible at this day to give a specific execution of this contract. The bill was dismissed with costs.

In the present case, though no act was done between the demand of the bond in the fall of 1834, and it was refused, and the time when the defendant chose without notice to take up the notes; *yet that was a fault on the part of the defendant, and he ought not to be allowed to shelter himself from accountability on that account; the very refusal constituted an apology and excuse for the plaintiff.*

What is evidence of being ready, desirous, prompt, and eager according to English decisions? In *Milward* v. *Earl of Thanet,* in note to 5 *Ves.* 720, *the parties differed as to the construction of an agreement,* and the bill was delayed 7 years! Can it be surprising that the bill was dismissed? Yet this case was the origin of the remark of Lord *Alvanly,* then master of the rolls, that a party cannot call upon a court of equity for a specific performance, unless he had shown *himself ready, desirous, prompt and eager.* This was in *March,* 1801. But in the case, the *Marquis of Hartford* v. *Barre,* and *Aston* v. *Barre,* 5 *Ves. Jr.* 719, on the 6th of *Feb.* 1801, the court held, that *the filing of a bill by a vendor* 14 *months after the correspondence upon objections to the title had ceased, was in season, defendant returning no answer to a letter threatening a bill, nor having called for his deposit.* It was referred to a master. The defendant in his answer submitted that at that distance of time, he was induced to consider the contract abandoned. The chancellor observed, that "the plaintiffs took a good deal of time, upon their saying they should be under the necessity of filing a bill, but one may *easily imagine circumstances might have happened that would have made it peevish to have done it immediately.*"

No change in the character or justice of the contract is here made known, 2 *Story's Eq.* 87, and compensation for the delay can be fully and beneficially given. Rules in equity cannot be

more exclusive and positive than statutes, and in them a reasonable and just construction is to be made, so as not to multiply forfeitures or penalties. Yet *here a forfeiture* is *intended to be effected!*

In *Arminger* v. *Clark*, *Bunb. Rep.* 111, 112; the Lord Chief Baron took this difference, if a man comes for a specific performance as to the land itself, a court of equity ought to carry it into execution, because there is no remedy at law, but if it is to have performance in payment of money, they may have remedy for that at law.

In the *Earl of Ross* v. *Elizabeth Worsop*, Widow *& al.* 1 *Brown's Parliamentary cases*, 281; it was held, that where a lessor covenants for the perpetual renewal of a lease, upon the lessee's naming a new life and paying a fine within a certain time after the death of any of the *cestui que vies*, a court of equity will, upon slight circumstances, relieve the lessee against a forfeiture for not literally complying with the terms of the covenant, and in this case, determined in 1740, Sir *Dudley Rider & J. Browne*, opposing the application for renewal, argued, that the proviso was intended to be strictly and precisely executed. And the rather because there was not a mutual stipulation for renewal, the Earl being bound to renew upon payment of the fine, and naming a new life within the time limited for that purpose, but Sir *Thomas Worsop* and his heirs though liable for the payment of the £100 upon the death of a certain *que vie*, were not obliged to add any farther life or accept of a renewal. The renewal was decreed before the appeal to Parliament, and that decree was affirmed with costs. The defendant is more in the nature of a trustee, who is not permitted to buy for his own advantage. See 10 *Ves. Jr., Ex parte Bennett*, 381, at page 393, 394; *Legard* v. *Hodges*, 1 *Ves. Jr.* 477. The demand of the bond was made in the fall of 1834 and refused, and supposing that " the most that can be made of the acts and declarations before that time be that they go to show that the defendant considered the contract as subsisting, and assented to all the previous delay;" *the bond being* then *refused*, was *enough to paralize exertions of the plaintiff.* Certainly it would relieve the case from the pretence, that hazard was thrown on the defendant from hazard of fire between that time and the 30th of *March*, 1835, when the defendant chose to pay. *No one has heard of timber land suffering from fire late in the Autumn and Winter.* " When-

ever it is attempted to lay down fixed principles, care is to be taken that they are to be applied according to the circumstances of each case. If a case stand directly on the same ground in every word and circumstance with that which is being decided, it should be governed by it. 1 *East*, 541. So if the facts cannot be distinguished in effect. 3 *Barn. & Adolph.* 36."

"A favored right the court should not suffer to be defeated by a technical and critical interpretation of a concession made by an ignorant man in a case in which the justice as well as the law was strongly with him. The rule of construction ought to be plain and simple without refinement and subtlety."

In the case, *Alley* v. *Deschamps*, 13 *Ves. Jr.* 225, a bankruptcy of *Horne* had intervened. The agreement was in 1797. Having paid £100, he became bankrupt in 1800. The premises had been purchased by the *London Dock Company*, for £3500, and the assignee claimed part of the money. The Lord Chancellor called it an extravagant case. And he took it that the agreement was not abandoned or rescinded, though there was evidence for that. This was decided in 1806. Afterwards, in 1807, in *Hearne* v. *Tenant*, 13 *Ves. Jr.* 287, on a motion to restrain an ejectment, the plaintiff was assignee of a lease of a house demised by the defendant. Upon the expiration of the lease, a treaty for a new lease took place, the defendant insisting upon a rent of £84, and the sum of 1000 guineas. The plaintiff, after fruitless endeavors to procure an abatement, consented to give that rent and premium. A memorandum was put down in writing, dated the 23d of *Oct.* expressing that the lease was to be granted for 24 years, to commence upon the expiration of the old lease, *upon condition* of the plaintiffs paying on or before the end of the month 1000 guineas. Two copies of the memorandum were signed, plaintiff taking one the defendant the other. After the expiration mentioned in the memorandum, for payment of the 1000 guineas, the plaintiff calling on the defendant apologized for not bringing the money. Plaintiff produced the memorandum. The defendant, taking it, observed, that the time of payment was expired, and therefore the memorandums were of no use, and it was better to destroy them, and he then took the other out of the bureau and tore them both. The answer stated as to that transaction, that the plaintiff did not ex-

press any disapprobation nor did he say he agreed to it, but entreated a week or fortnight further time. The Lord Chancellor says, the true standard now is, that though the party has not a title in law as he has not complied with the terms, so as to entitle him to an action, as to the time, for instance, yet if the time though introduced, as some time must be fixed where something is to be done on one side, as a consideration for something to be done on the other, is not the essence of the contract, a material object, to which they looked on the first conception of it? Even though *the lapse of time* has *not arisen from accident.* A court of equity will compel the execution of the contract upon this ground *that the one party is ready to perform, and the other party may have a performance, in substance,* if he would permit it. And this the Lord Chancellor says, is the principle upon which the Court acts now, upon all the authorities brought to the true standard. The injunction was granted until the hearing. On the plainest principles of law, if one having covenanted to convey, acts *mala fide,* and refuses to convey, because the property has increased in value, and with a view of putting the enhanced value in his own pocket, he is liable to an action for damages. *Baldwin* v. *Munn,* 2 *Wend.* 399.]

Returning now to *Rogers* and *Saunders,* the parties now in conflict, we become convinced, that afterward on the 29th of *March,* 1835, *without apprizing the plaintiff of his design, and without any new demand being made of him, and without any intimation from the State that payment was required, Saunders,* the defendant, proceeds to pay the notes to the Treasurer, and have the mortgage cancelled. *For what purpose could this have been done but to speculate on events?* As soon as the plaintiff was informed of this course, he came freshly and zealously to preserve his rights. And on the first day of *April,* 1835, tendered all the money to defendant, and demanded a deed. It was refused. And on the 8th of *April,* 1835, he filed his bill in this suit for relief.

Without any inclination to encourage laches, I am not satisfied that the plaintiff has conducted unfairly; and his negligence may, at first, have received some countenance from the defendant. It appears, to *me, that the defendant,* on being paid the amount of all the notes and interest given to the State, and the balance of the

plaintiff's note to the defendant, *ought to execute, deliver and acknowledge to the plaintiff a deed of the moiety claimed in the bill.*

But I should not give costs.

See 1 *Vesey, Jr.* 477, *Legard* v. *Hodges.* The Lord Chancellor "considers it a universal maxim, that whenever persons agree concerning any particular subject, *that,* in a court of equity, as against the party himself, and any claiming under him voluntarily, or with notice, raises a trust."

The original opinion drawn by Judge *Emery,* was returned to him on the 27th of *February,* 1839. It was accompanied by that drawn by Judge *Shepley.* After perusing this last, Judge *Emery* could not concur in the conclusion, at which the Chief Justice, and Judge S. had arrived, and therefore made to his own opinion the additions contained between the [on the 109th and the] on the 115th page. All the rest is as the opinion was originally drawn, and communicated to the Chief Justice and Judge *Shepley,* excepting the above extract from 1st *Ves. Jr.* 477.

NOTE. The Reporter has taken the liberty to insert the printed pages in place of those in the manuscript opinion.

BENJAMIN G. CAMPBELL *& al. vs.* JOSEPH THOMPSON.

In an action for a quantity of tin ware, where the defendant justified the taking as a justice of the peace, under *stat.* 1821, *c.* 71, against hawkers, pedlers, &c., the person from whose possession the property was taken, if not interested, is a competent witness for the plaintiff, although a complaint is pending against him for the penalty.

And if the defendant object generally, that the witness is inadmissible from interest, and the plaintiff then release all claim upon him for the property in controversy, and he is then admitted, and he afterwards on the examination, states, "that he was hired by the plaintiff by the month, and was to be paid in proportion to his earnings," this is not such interest as will render him incompetent.

But if an interest had been disclosed, the defendant should have renewed his objection, when the witness made such statement, and cannot take advantage of it on his first objection.

A justice of the peace has no power to secure and detain articles, liable to detention under that statute, until after a complaint made under oath.

Where the complaint and the detention are on the same day, parol proof is admissible to show, that the detention was prior to the oath.

Whether a trial shall be postponed on account of the absence of a witness, or shall proceed, rests in the discretion of the Judge; and the refusal to postpone presents no cause for a new trial.

Where criminal prosecutions originate, under a statute, *on complaint*, one under oath or affirmation is implied, as a part of the technical meaning of the terms.

The *stat.* of 21 *James* 1, *c.* 12, requiring actions against magistrates for acts done under colour of their office to be brought in the county in which they live, is not in force here.

TRESPASS to recover the value of certain tin ware, alleged to have been the property of the plaintiffs and to have been taken and converted by the defendant, *Oct.* 8, 1835. The defendant shew that he was a justice of the peace for the county of *Waldo*, and justified the taking under the *stat.* 1821, *c.* 171, "against hawkers, pedlers, and petty chapmen." At the trial before EMERY J. the plaintiffs offered as a witness, one *Barker*, the driver of the cart in which the tin was when taken by the defendant. To his admission the defendant objected, because the witness had the tin in his custody, and had been complained of, and because of his interest. The plaintiffs released *Barker* from all claims against him for the property in controversy, and he was admitted to testify.

The whole testimony in the case is given in the report, from which it would seem, that on the cross examination of *Barker*, he was asked what amount of tin he had sold before it was taken by the defendant, which the witness declined to answer, because it might be prejudicial to him on the trial of a complaint then pending against him before the defendant for selling without license, and the Judge ruled, that he was not obliged to answer. The witness also stated on cross examination, "that the plaintiffs hired him by the month, no stated price agreed, witness left it to them to give him what he earned, that he was to be paid in proportion to his earnings." The plaintiffs resided at *Bangor*, and the tin ware was sent out by them for sale by *Barker*, in a cart owned by plaintiffs, drawn by a horse owned by *Barker*, and that the tin was seized at *Frankfort*, in the county of *Waldo*, by the defendant, on the same day that a complaint was made to him against *Barker* by one *Watson*, for selling without license. No license was shown, nor did the name of the plaintiffs appear upon the cart. *Barker's* name was on the cart printed upon tin.

The counsel for the defendant, requested the Judge to instruct the jury, 1. That if they were satisfied, that the plaintiffs had no license for selling and peddling tin ware, and that the articles sued for, were sent out by them to be sold by a pedler, that this was contrary to law, and that the goods were forfeited, and that the plaintiffs could not recover therefor in this action. 2. That if the defendant, in his character as a justice of the peace, upon a complaint made to him under oath did issue a warrant, and did stop said property and detain it for the purpose of abiding the decision of the court on said process, and if there was no evidence that the defendant appropriated any part to his own private use, that this action being commenced after this complaint was made, is not maintainable. 3. That this action, being commenced for acts done officially as a justice of the peace in the county of *Waldo*, could not be supported in this county. 4. That by the statute, the defendant was authorized to detain the property, to abide the final decision of the Court on the process.

The Judge declined to give the first instruction requested. He did not give the second precisely as requested, but did direct the jury that if from the evidence they were satisfied, that the seizure

was made before the oath was administered to the complainant, about which they would carefully examine, the action was maintainable. He declined to give the third. As to the fourth requested instruction, the Judge declined giving it precisely as stated, but instructed the jury, that if from the evidence they believed, that the defendant had received the evidence of the complaint of the offence against the statute alleged, under oath, previous to the seizure and detention of the property, about which they would carefully examine, they might find a verdict for the defendants, otherwise for the plaintiffs. The jury found a verdict for the plaintiffs, and also found that the oath was not made before the property was seized.

There was also a motion for a new trial filed, because the Judge refused to postpone the trial of the cause, on account of the absence of a material witness, whose attendance the defendant had unsuccessfully endeavored to procure.

E. Brown, for the defendant, argued in support of the various grounds taken in defence at the trial, and contended that *Barker*, the witness, was interested, and that the instructions given were erroneous, and that there was error in putting the whole case to the jury on the single question, whether the oath was or was not before the seizure of the goods. He cited 3 *Stark. Ev.* 1741; *Stat.* 1821, *c.* 71; *Bull* v. *Loveland*, 10 *Pick.* 9; *Crowell* v. *McFaden*, 8 *Cranch*, 94; 1 *Esp. N. P.* 338; 1 *Mass. R.* 59; *Stat.* 1821, *c.* 76.

Cutting argued for the plaintiffs, and cited *Const. of Maine, art.* 1, *sec.* 6; 10 *Petersdoff's Ab.* 300; *Amendment of Con. U. S. art.* 4; *Con. of Maine, art.* 1, *sec.* 5; *Butler* v. *Ricker*, 6 *Greenl.* 268; *Pearce* v. *Atwood*, 13 *Mass. R.* 355.

The opinion of the Court was drawn up by

Weston C. J. — The prosecution criminally of the witness, *Lewis Barker*, did not render him incompetent in this suit. That prosecution is not liable to be affected by the result of this action. The witness has no claim to be acquitted, because the justice may not be able to sustain his justification here. Another objection to the witness, was based upon what was said at the trial, by the opening counsel for the plaintiff. What that statement was, does

not appear. After the objections were overruled, and the witness admitted, he testified, that he was hired by the plaintiffs by the month, and was to be paid in proportion to his earnings. If it was believed by the counsel for the defendant, that this fact rendered the witness incompetent, he should have renewed his objection, and requested the judge to rule distinctly upon this point.

Objections of this sort, if not taken at the trial, are considered as waived, because if taken, they may often be obviated and removed. But if now open, no interest in the witness is proved. It does not appear, that his compensation was to depend upon the profits, the plaintiffs might ultimately realize in this branch of their business. Whether he earned more or less, would more obviously depend upon his diligence and fidelity. He did not undertake to be responsible for losses, to which the plaintiffs might be subjected by exposing their property to legal forfeiture. To exclude the witness, the interest should be shown affirmatively; and in our judgment it has not been proved, that the compensation of the witness is subject to be increased or diminished, by the judgment, which may be rendered in this action. It may further be matter of grave consideration, whether the results of a traffic, carried on in violation of law, can furnish the basis of an action for either against the other.

The jury have found, that the seizure of the plaintiffs' ware by the defendant, was prior to any complaint being made to him on oath. We entertain no doubt it was a fact properly submitted to their consideration, although the seizure and the complaint were made on the same day. Proof of the priority of the seizure, does not contradict the complaint or warrant. Where criminal prosecutions originate upon complaint, one made under oath or affirmation is implied. This may fairly be understood as a part of the technical meaning of the term, whenever used in a statute, providing for the prosecution of an offence in that mode. By *art.* 1, *sec.* 5, of the constitution, no warrant can issue to seize either person or thing, unless upon complaint, supported by oath or affirmation. The right to seize depended entirely upon the statute, and it is authorized only upon complaint. In *Crowell et al.* v. *McFaden*, 8 *Cranch*, 94, the collector was justified in detaining a vessel, if in his judg-

ment, there was an intention to evade the embargo laws. This course of proceeding was not there, as it is here, made to depend upon a previous complaint.

As to the point taken, that the action is brought in the wrong county, the statute of 21, *James* 1, *c.* 12, upon which it is founded, is not in force here. *Pearce* v. *Atwood*, 13 *Mass. R.* 324.

Judgment on the verdict.

With regard to the motion for a new trial, because the defendant could get no postponement on account of the absence of a witness, it rested in the discretion of the Judge, and does not present a ground for our interference.

Motion overruled.

JAMES CROSBY, *Treasurer, vs.* JOSEPH SNOW *& al.*

A licensed common victualler has a right to sell spirituous liquors in small quantities for the use of such as call for them, in his place of business, to a limited extent, but not to drunkenness or excess.

The board for granting licenses in a town, or city, under the provisions of the *stat.* 1834, *c.* 141, "for the regulation of innholders, retailers, and common victuallers," have no authority by their rules and regulations to impose restraints upon the persons licensed in addition to those imposed by the statute; and a bond given to enforce such restraints is void.

AT the trial before SHEPLEY J. it appeared that the action was debt on two bonds from the defendants to the city of *Bangor*. The condition of one bond recited, that the defendants, *Snow & Burr*, had been licensed in the city of *Bangor* as retailers, and that of the other, that they had been licensed as common victuallers. The conditions of the bonds required, that the laws should not be violated, and that they should act in conformity to "such rules and regulations in reference thereto as may be prescribed by the board granting this license." The licensing board of the city, acting, as they alleged, under the *stat.* of 1834, *c.* 141, ordered, "1. No person who shall be licensed as a retailer of wine, brandy, rum or other strong liquors, shall suffer any person to drink any

spirituous liquors in his shop, store, or place of business. 2. No person, who shall be licensed as a common victualler, shall sell or furnish any person with wine, brandy, rum or other strong liquors, or suffer the same to be drank in his cellar, shop, store or place of business." It was admitted, that *Snow* and *Burr* were duly licensed in the city as retailers and as common victuallers, and also that they sold liquors and permitted them to be drank in their place of business. All objection was waived to the bringing of the action in the name of the treasurer. A nonsuit was ordered by consent, subject to be set aside, if in the opinion of the Court the action could be maintained.

W. Paine, City Solicitor, for the plaintiff, contended, 1. That the bond was good at common law. There was a sufficient consideration, and besides the defendants are estopped to deny it. They voluntarily made the bond, taken to preserve good morals, and not to destroy them. 2. The bond conforms to the principles of the *stat.* 1834, *c.* 141. The board are limited to licensing such as they think proper, but they have power to impose such reasonable restrictions as they please. *Lunt's case*, 6 *Greenl.* 412.

Rogers, for the respondents.

Independent of the statute, there is no restraint on the business, and all have equal rights. This bond, being given in restraint of these rights, is void at common law. Unless the towns have authority to alter the law by their own regulations, the acts of the respondents were legal. *State* v. *Burr*. 1 *Fairf.* 438. The legislature have determined what a person duly licensed may, or may not, do, and the towns have only to determine who shall have licenses. They have no power to add to or take from the law. The legitimate argument is the reverse of that urged for the plaintiff, where the legislature have imposed some restraints; not that the towns may add as many more as they choose, but that no others can be imposed, but by the legislature.

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

Weston C. J. — The case finds, that *Snow* and *Burr*, for whose delinquency this action is prosecuted, were duly licensed as common victuallers. It has been decided, that a common victualler

has a right to sell spirituous liquors in small quantities, for the use of such as call for them, in their house, cellar or place of business, to a limited extent, but not to drunkenness or excess. *State* v. *Burr*, 1 *Fairf.* 438.

It is admitted, that *Snow* and *Burr* sold strong liquors, and permitted them to be drunk in their place of business. As no excess is found or stated, this must be understood to be to a limited extent. And this is so far from being a violation of the law, that it was done in the exercise of legal rights, which had been settled and recognized. It is true, the board of Aldermen had been pleased to prescribe, that this privilege should no longer be enjoyed, and when they granted the license, by which the defendants claim to be protected, they required that the bonds now in suit should be given, to secure the inhibition.

However laudable may have been the motives, by which the board were actuated, we cannot but regard it as an attempt to change the law, which transcended their authority. Whatever rules and regulations of the board granting the license, in reference to the business, provided for in the statute form of the bond, it may have been competent for them to establish, we are satisfied, that power is not given to them to take away the immunities, the license legally confers. It cannot be consistent with the policy of the law, to enforce contracts, the object of which is, to deprive a class of citizens of privileges, which the law has conferred upon them, when licensed in pursuance of its requirements. Still less can this be permitted under color of official authority.

Nonsuit confirmed.

ALLEN GILMAN *vs.* AMASA STETSON.

Where the rights of third persons, claiming under the execution debtor, will not be affected thereby, the Court will permit the officer to amend his return of an extent on land, by stating by whom the appraisers were in fact chosen, thereby correcting an error, although after a lapse of nearly twenty years.

Where the petitioner for partition alleges seizin in himself, and the respondent claims to be sole seized, the affirmative is on the petitioner to show his interest in the estate.

Where judgment has been rendered for the land demanded in favor of the demandant, by a court of competent jurisdiction, and he has made an actual entry, his title and seizin is thereby established, although no writ of possession has been issued.

But in an action for the recovery of lands, in which betterments were claimed under *stat.* 1831, *c.* 47, where a verdict had been returned for the demandant, and the value of the land and of the improvements had been found by it; and where the demandant did not abandon or pay for the improvements within one year from the rendition of the judgment, and had not paid the costs of the tenant; the demandant is not entitled to his writ of possession, and cannot maintain a new action, or lawfully enter into possession by virtue of such judgment.

The *stat.* of 1821, *c.* 62, *sec.* 5, has reference only to an entry without judgment of law.

Yet the tenant may waive his right to retain the land for the payment of his improvements, and leave the effect of the judgment unimpaired.

THIS was a petition for partition, filed at *Oct. Term*, 1835, wherein the petitioner alleges, that he is seized of an undivided fourth part of a piece of land in *Bangor*. The respondent claimed to be sole seized. The whole evidence in the case at the trial before EMERY J. appears in the report, the conclusion of which is as follows. "Upon the foregoing evidence, a verdict was returned in favor of the petitioner, subject to the opinion of the full Court, and to be altered or amended, or a nonsuit entered, agreeably to that opinion." The respondent claimed one eighth part of the premises under a title derived from the extent of an execution thereon in favor of *Zadok French*, against *Robert Lapish, Oct.* 16, 1819. The petitioner objected, that nothing passed by this extent, because the return of the officer shew, that the creditor chose two of the appraisers. That part of the return was thus expressed. "The said *Wiggins Hill* being chosen by the creditor, and the

said *Joseph Leavitt* being chosen by the creditor, and the said *William Bruce* being appointed by myself." The officer made affidavit, that *Leavitt* was in fact chosen by the debtor, and that its appearing otherwise, arose from a mere mistake of his which he wished to correct. The petitioner made no title under *Lapish*, nor did it appear that any claim was made to this part of the land by any one under *Lapish*, except under that extent. The Judge ruled, that the objection was well taken, whereupon the respondent moved for leave for the officer to amend his return by stating that *Leavitt* was chosen by the debtor, but the Judge declined to grant the amendment. The facts in relation to the betterments, as well as in relation to the title of the respondent to a portion of the premises under a sale to him by the administrator of the estate of *Zadok French*, to which the petitioner objected for alleged informalities, sufficiently appear in the opinion of the Court.

E. Brown and *F. H. Allen* argued for the respondent. That this was a mere clerical error, and might be amended, as the rights of third persons had not intervened. *Buck* v. *Hardy*, 6 *Greenl.* 162; *Howard* v. *Turner*, *ib.* 106; *Litchfield* v. *Cudworth*, 15 *Pick.* 23. That the amendment might well be permitted also because the petitioner does not claim under *Lapish*, but sets up an independent title, and cannot object. That the petitioner claiming under *Harlow* had no title. *Harlow* v. *Fvench*, 9 *Mass. R.* 192. That the judgments establishing the title of the respondent and *French* and *Lapish* gave them a seizin without executing their writs of possession. *McNeal* v. *Bright*, 4 *Mass. R.* 282; *Gilbert* v. *Bell*, 15 *Mass. R.* 44. That the possession was voluntarily surrendered up by the petitioner, and no writ of possession was therefore necessary. That the sale by the administrator of *French* was good, and if not, the petitioner, a mere stranger, cannot object to any informalities. *Knox* v. *Jenks*, 7 *Mass. R*, 488; *Gray* v. *Gardner*, 3 *Mass. R.* 399; *Colman* v. *Anderson*, 10 *Mass. R.* 105; *Perkins* v. *Fairfield*, 11 *Mass. R.* 227; *McLellan* v. *Whitney*, 15 *Mass. R.* 137; *Watkins* v. *Green*, 7 *Wheat.* 27.

Rogers argued for the petitioner, and cited *stat.* 1821, *c.* 47; *Means* v. *Osgood*, 7 *Greenl.* 146; *Coburn* v. *Ansart*, 3 *Mass. R.* 319; *Ladd* v. *Blunt*, 4 *Mass. R.* 402; *Prescott* v. *Pettee*, 3 *Pick.* 331.

The opinion of the Court was drawn up by

WESTON C. J. — The return of the officer, who caused the levy to be made on the execution, which issued on the judgment, *French* v. *Lapish*, that two of the appraisers named were chosen by the creditor, there is much reason to believe must have been made by mistake. The officer could not but know that the creditor was not authorized to choose two of the appraisers. The petitioner has not connected himself with the title of *Lapish*, nor does it appear that the title of any third party claiming under him, is to be affected. And we are of opinion, that it would not be an improper exercise of discretion on the part of the Court, to allow the proposed amendment to be made; and it is accordingly allowed.

The affirmative is on the petitioner to show, that he has an interest in the estate, of which he prays partition. He derives title from *Nathaniel Harlow*. The petitioner has however been unable to sustain that title at law. It appears, that the title of *Stetson*, *Lapish* and *French*, derived from the commonwealth of *Massachusetts*, has prevailed in the Circuit Court of the *United States*, and in this Court, by direct adjudications against the petitioner, the whole of which, taken together, cover the entire property in controversy. The judgments in favor of *Stetson* and *French*, have been consummated by actual entry, which is sufficient, even without writs of possession. *McNeal* v. *Bright & al.*, 4 *Mass. R.* 300. And the title of the respondent to three quarters under these judgments, is not controverted, the petitioner claiming to be seized only of one fourth.

After the judgment in favor of *Lapish*, the right of the petitioner must depend on the fact, that the increased value of the premises, demanded by *Lapish*, found by the jury in favor of the petitioner, has not been paid, either by *Lapish*, or any one claiming under him. The demandant did not elect to abandon the premises to the petitioner, and could not therefore entitle himself to a writ of possession, unless he had paid within one year from the rendition of judgment, the sum awarded to the petitioner. *Stat.* of 1821, *c.* 47, *sec.* 1. Nor could he without violating the same statute, maintain a new action for the premises. And we think it is deducible, by fair implication, that the demandant could not lawfully enter, without such payment. Nor does it appear to us that this implica-

tion is removed by the remedy afforded by the statute of 1821, *c.* 62, *sec.* 5, which has reference manifestly to an entry, without judgment of law.

The balance due the petitioner over the amount of the bill of cost, recovered by *Lapish* against him, was short of ten dollars; and it would seem, from the testimony of *Mr. McGaw*, that the petitioner abandoned and gave up the premises, leaving the small balance to be liquidated by *French*, who had the title of *Lapish*, upon the assurance of *McGaw*, that *French* would pay it. If such is the fact, the petitioner waived his right to retain the premises, for the non-payment of the increased value, and surrendered it up, upon the judgment against him. But this fact is controverted; and some opposing testimony was introduced at the trial. It does not appear, that the jury have passed upon this fact, which is a question peculiarly for them; and we set aside the verdict, and grant a new trial, that it may be settled.

As to the title of the respondent to the part in controversy, the decision of this cause does not require, that it should be determined, if the petitioner has failed to prove any remaining interest in himself. We are of opinion however, that whatever right *French* had, passed to the respondent, under the sale made by the administrator. That was made in virtue of a license duly obtained. It would not have the effect to deprive the petitioner of any right, resulting to him from the failure of payment of the increased value awarded to him, which is left in full force, the sale notwithstanding. But if the petitioner has waived, abandoned and surrendered that right, we are aware of no reason, why he should be received to question the regularity of that sale, to which he was a stranger.

JEREMIAH ROWE *& al. vs.* ARD GODFREY, JR.

Mem. SHEPLEY J. was attending the trial of indictments, and did not sit in this case.

Where depositions are taken before a magistrate, with notice to the opposing party, objections to the form of the questions as leading, must be made at the time the questions are put, or they will be considered as waived; and if the opposite party neglects to attend at the taking, he cannot make such objections at the trial.

AT the trial, before EMERY J. the plaintiffs introduced the depositions of *Samuel Getchell* and *Robert Getchell.* The counsel for the defendant objected to the admission of the answers to ten of the questions put to the witnesses, because the questions were leading. The following are some of those objected to, and others were similar.

"2d interrogatory by *N. Wilson, Esq.* Atty. to plff's. Was or was not *Ard Godfrey, Jr.* frequently at the shop of *Rowe* and *Turner*, and did he not himself give the directions in relation to the aforesaid work, and did you or not hear him engage to pay them for the said work? Answer by the deponent. I did hear him agree to pay for the work done, and he was in the shop as often as once a day, and frequently three or four times a day, to give directions about the work done." "6th question to *Robert Getchell*, by same. Did you see or know of any one, at the time you were in the employ of *Rowe & Turner*, exercising any acts of ownership or control over the said shop or the business of said shop, except said *Rowe & Turner?* Answer by deponent. I did not." The defendant was duly notified, but did not attend at the taking of the deposition. The objection was overruled by the Judge, and the questions and answers were permitted to be read. The verdict was for the plaintiffs, and the defendant filed exceptions.

Cutting argued for the defendant: 1. That the testimony taken by deposition should be as near as possible to that delivered upon the stand, if the deponent were personally in Court. 2. The interrogatories in both cases should be propounded in such form, as not to suggest to the witness or deponent the answers which he is

to give; otherwise they are leading, especially if they can be answered by yes and no. *Woodman* v. *Coolbroth*, 7 *Greenl.* 184; 1 *Stark. Ev.* 122 and note. He contended, that these answers should have been excluded. The omission to attend the taking of the deposition is not a waiver by the defendant of any right to make this objection in Court. There can be no waiver, except when the party is actually present, and does not make the objection. The authorities go to that extent and there stop. *Woodman* v. *Coolbroth*, 7 *Greenl.* 183; 3 *Binney*, 130; *Potter* v. *Leeds*, 1 *Pick.* 313.

J. Appleton and *Wilson*, for the plaintiffs, said that the objection was merely formal, and that it was very questionable, whether the questions were leading. 1 *Stark. R.* 82. And they contended, that if they were leading, the objection should have been made at the time of the taking, or it was waived. *Woodman* v. *Coolbroth*, 7 *Greenl.* 181; 10 *Sergt. & R.* 63; *Talbot* v. *Clark*, 8 *Pick.* 55. And not only must the objection be made, but the grounds of it must be stated. *Allen* v. *Babcock*, 15 *Pick.* 56. And if the party does not choose to attend, such formal objection is waived. 1 *Pennsyl. R.* 305.

The opinion of the Court was by

EMERY J. — The counsel for the defendant objects to the admission of the "depositions of *Samuel Getchell* and *Robert Getchell*, so far as respected the answers to *certain questions put by the plaintiff as being leading*. He does so," as he says, "because he apprehends injustice has been done to his client, and because he wishes the Court to discountenance the practice," and he declares that the "future reputation of the *Penobscot* bar demands it, that the practice is to be arrested, or a witness is to be reduced to the position of an automaton, governed and controled solely by the pulleys and wires attached to him and the counsel."

Attempts to lead a witness to communicate false impressions of facts to a court or jury call for severe animadversion. It is not to be doubted that questions are proposed which are characterized as leading. Such questions, when seasonably and properly presented to the consideration of the court by objection, are rejected for that cause. Still the great object of examination in chief and cross ex-

amination of witnesses is to extract the truth. The superiority of the personal presence of a witness before the tribunal, finally to decide on the effect of his testimony, over the written statement in depositions, for eliciting truth, is with us, in common law proceedings, universally acknowledged. It has, however, long been deemed requisite for the administration of justice in civil cases to resort to written depositions. To a certain extent all examinations in a certain sense, must be leading. The best settled forms of interrogatories begin with inquiries, helping to obtain the description of the witness, his acquaintance with the parties, and the subject of controversy. Some indulgence must be allowed to direct the mind of the witness to the developement of *all that he knows bearing* on the issue to be tried. For courts have not favored motions for new trials on account of omissions fully to interrogate a witness, and extend but little charity to the *want of a witness' recollection of matters connected with the merits*, when he is on the stand, and a fair opportunity given to test his perception and memory of what he is called to relate, because of the great danger of pretended want of recollection at an after period. Whether testimony be produced on the stand, or in depositions, it is highly proper in examination in chief, that purely leading questions should be prevented; though "it is not a very easy thing to lay down any precise general rule as to leading questions."

In 2 *Stark. Rep.* 105, 110, *Rex* v. *Watson*, on its becoming necessary on the part of the crown to identify three other prisoners, charged in the same indictment with the prisoner, *Watson*, it was objected, that the attention of the witness was too directly pointed to them. But the court held that the counsel for the prosecution might ask in the most direct terms, whether any of the prisoners was the person meant and described by the witness.

And in *United States* v. *Gibert & al.* 2 *Sumner*, 92, it was objected that the witnesses for the government were allowed, with the chart of the *Mexican's* route on her voyage before them, to be asked the question, whether under the circumstances stated of the supposed time of starting of both vessels, the *Mexican* and *Panda* would or would not be likely to meet at the point marked on the chart The objection proceeded on the ground that under the circumstances the question became the leading question. Mr. Justice

Story declared "his opinion that the objection was unfounded in law. The chart of the *Mexican* was already in the case. It was the true and appropriate question which the witnesses were called upon to solve in the negative or affirmative according to their own skill, judgment and experience in nautical affairs. The form of the question could not lead them, and it could not mislead them."

Where the question was so framed as to indicate particularly the answer which the plaintiff wished, as in 6 *Binney's R.* 483, *Lessee of Snyder & al.* v. *Snyder*, "the words were," by the court, said to be "put into the witness' mouth." The question was, "did said *Bower* assign to you as a reason why he would not bid more for the *Isle of Cue*, that he could buy *Billing's* land for £3 an acre, and that in yearly instalments, which in his opinion was equally good with the *Isle of Cue?*" Answer: "He did tell me so, but I can't tell at what time." By *Tilghman & Breckenridge* the objection was holden to be good.

It would certainly seem in the present case, that the 4th and 5th interrogatories to *Samuel Getchell*, and the 6th to *Robert Getchell*, were nearly as objectionable. In 2 *Starkie R.* 65, *Nichols* v. *Dowdy & Kemp*, Lord *Ellenborough* says, if the answers yes or no would be conclusive, the question would be objectionable, but in general, no objections are more frivolous than those which are made to questions as leading ones.

But the inquiry still returns, notwithstanding the interrogatories were deserving of the severe animadversions which they have received from the defendant's counsel, whether there is for that reason cause for opening the action to another trial. It is to be recollected that the defendant was duly notified of the taking of these depositions but did not attend. We must therefore regard the neglect to attend as voluntary. And we cannot, under these circumstances, extend to him any greater advantages than we should if he had attended. Had he been present, and without objection, permitted the questions to be propounded, he would have been precluded from availing himself of the objection at the trial. By his interposing an objection before the justice, the question might have been varied, and addressed to the witness in a form free from any objectionable character. *It is too late.* 7 *Greenl.* 181, *Woodman* v. *Coolbroth*, and cases there cited.

In *Stratford* v. *Sanford*, 4 *Conn. R.* second series, 275, the question came up directly. And the Chief Justice, *Hosmer*, observed "as a general rule, leading questions are not allowed on the examination in chief. Yet if the witness appears to be in the interest of the other party, or unwilling to give evidence, the Court will, in its discretion, permit the examination in chief to assume the form of a cross examination. 1 *Phil. Ev.* 205; 1 *Stark. Ev.* 122, 127. *It is then not a peremptory and exclusive rule,* but is always subject to the Court's discretion, and in all events is not a ground for a new trial."

We do not perceive that injustice has been done to the defendant by the verdict of the jury, nor any call for the exercise of discretion to set it aside. We overrule the exceptions.

Judgment on the verdict.

Simon Chase *vs.* Ira Fish *& al.*

Filing a brief statement of the special matter of defence to the action, under the *stat* of 1831, *c.* 514, "to abolish special pleading," is a substitute for special pleading at common law; and the party filing such statement, is entitled to the same rights under it as he would have had by pleading the same subject matter in a special plea before the statute, and no more.

And in an action on a bond, where the defendants pleaded the general issue, and filed a brief statement, alleging that the bond was obtained by duress, they were limited to the same grounds of defence as they would have been before the statute, had they pleaded the general issue, and pleaded specially, that the bond was obtained by duress.

An officer, who acts according to his precept in making an arrest, is not a trespasser, although the party arrested is privileged from arrest.

One who has been elected a member of the legislature, but who has not taken his seat, may waive any privilege from arrest existing by virtue of such election.

Where one who had been elected a member of the legislature, on his way to the place of meeting, was arrested on an execution, having waived his privilege from arrest as a member, and was committed to prison, and there gave the poor debtor's bond to obtain his release, such bond is not void for duress.

The action, commenced *April* 30, 1836, was debt upon a bond dated *Jan.* 2, 1836, given by *Fish* as principal, and the other de-

fendant as surety, to procure the liberation of *Fish* from prison, conditioned that he should continue a true prisoner, within the limits of the jail yard, until lawfully discharged, and to surrender himself, and go into close confinement in nine months and three days, unless sooner lawfully discharged. The general issue was pleaded, and a brief statement filed, alleging that the bond was obtained by duress. Before the arrest of *Fish* upon the execution, he had been elected a Senator, to represent the county of *Penobscot*, in the Legislature of the State for the year 1836. A deputy sheriff received the execution on which the arrest was made, with orders to collect it or commit the debtor forthwith, and on the last *Monday* of *Dec.* 1835, called on *Fish* at his residence in *Lincoln*, and disclosed his orders. *Fish* replied, that he should be in *Bangor* on *Friday* of that week, and should rather be committed there, than to go down on purpose, but that he should protest against being committed at all, as he was a member of the legislature, and could not legally be committed. The officer told him, that he could not go to *Bangor* at that time, but for *Fish's* accommodation would hand the execution to another officer who would be there at the time proposed. The officer to whom the execution was delivered, saw *Fish* at *Bangor* on the following *Friday*, *Jan.* 1, who agreed to be committed the next morning, but at the same time protested against the right to commit him, and said, if he was committed, he must give a bond. He was committed the next morning, and liberated on giving the bond declared on to procure his discharge. On *Monday* morning next following, *Fish* left *Bangor* for *Augusta*, and attended to his duty on *Wednesday* of that week, the first day of the session, as a member of the legislature, and continued his attendance until the adjournment. The distance from *Augusta* to *Bangor* was agreed to be sixty-six miles, and from *Bangor* to *Lincoln*, fifty miles; and that stages passed every day between *Augusta* and *Bangor*, and every day but *Sunday*, between *Bangor* and *Lincoln*.

The trial was before SHEPLEY J. who instructed the jury, that if it was proved to their satisfaction, that it was agreed between *Fish* and the first officer, and was their design to give the officer the same right to arrest *Fish* on *Friday*, which he had the preceding *Monday;* and that it was agreed and designed that the officer

should have the same right to arrest *Fish* on *Saturday* as on *Friday*, then they might consider *Fish* as having waived his privilege from arrest on *Saturday*; that being different officers would not alter or change the right to arrest; and would then find a verdict for the plaintiff; but if not so proved, they would find for the defendant. The jury found, that the privilege of *Fish* had been by such agreement waived; that he was on his way to attend the legislature when arrested; and that he was not taking an unreasonable time to travel from his home to attend the legislature. They found a general verdict for the plaintiff, which was taken subject to the opinion of the whole Court.

A. G. and *D. T. Jewett*, for the defendants, contended, that by the *stat.* 1835, *c.* 195, jail yards were abolished, and that the condition of the bond had not been broken, when this suit was brought, the nine months not having then elapsed; that as a member of the legislature, *Fish* was at the time privileged from arrest; that he did not waive any rights, because at the time he protested, that he was not liable to arrest, and because he had no power to waive his right to attend the legislature, for it was the right of his constituents; that a privilege from arrest was a privilege from imprisonment, and that *Fish* had the constitutional right to attend the legislature without subjecting himself to an action; and that the bond was void, as against public policy. They cited *Const.* of *Maine*, *Art.* 4, *part* 3, *sec.* 8; same *Art. part* 2, *sec.* 4; 2 *Petersdorff's Ab.* 209; 2 *Com. Law Rep.* 388; *Baylies* v. *Fettyplace*, 7 *Mass. R.* 338; 1 *Binney*, 77; 1 *Dallas*, 297; 4 *Munroe*, 539; 4 *Har. & McHen.* 295.

Rowe, for the plaintiff, argued, that the only matters put in issue by the pleading of the defendants are what would be triable at common law, under the pleas of *non est factum*, and of duress; and therefore that the objections now taken, though not made at the trial, that the bond was not according to the provisions of the statute, and that the action was brought too early, are inadmissible. Whatever is not denied by the pleas is admitted. 1 *Chitty's Pl.* 425; *Saund. Pl. & Ev.* 191, 407, 445; *Wheaton's Selw.* 493; *Stark. Ev. Bail Bond.* He also argued, that if it were competent for the defendants to make these objections, that they must be unavailable as a defence. He contended, that *Fish* was not privileged from arrest. Privileges are to be construed strictly. *Coffin*

v. *Coffin*, 4 *Mass. R.* 28; 2 *Johns. Cases*, 415; *ib.* 222. Although decisions on this particular part of the constitution may not be found, yet there are in principle decisions in our favor. *Hobbs* v. *Getchell*, 8 *Greenl.* 187; 4 *Bac. Ab.* 233, *Priv. C.* 4. That privilege may be waived, is never questioned in *England*, but constantly admitted. 2 *H. Black.* 267, 299; 2 *Moore & Scott*, 581; 6 *Barn. & Cr.* 84. And in this country it has been expressly so decided. 4 *Dallas*, 107; *Brown* v. *Getchell*, 11 *Mass. R.* 14. But in this case no privilege had attached when the officer would have arrested *Fish*, had he not voluntarily for his own convenience substituted a later day.

The opinion of the Court was drawn up by

Weston C. J. — This is an action of debt on bond. The defendants have pleaded the general issue, under which by virtue of the *stat.* 1831, *c.* 514, they are entitled to give any special matter in evidence, upon filing in the cause a brief statement of such special matter. Under this statute, the defendants have filed a brief statement, assigning duress as a special ground of defence. As this is a substitute for special pleading, the defendants have the same rights, and no more, as they would have had, if before the statute, under leave to plead double, they had pleaded the general issue, and a special plea in bar, that the bond had been obtained by duress. The execution of the bond is not controverted. The plaintiff therefore is entitled to judgment, unless duress has been made out; to which single point, as the only special matter set forth in the brief statement, the defendants are now limited.

The ground of duress relied upon, is an unlawful arrest or imprisonment. The officer had an execution in favor of the plaintiff, against the principal defendant, *Fish*, in which he was commanded to arrest his body. *Fish*, as a Senator for the State of *Maine*, claims to have been exempted from arrest, by virtue of *art.* 4, *part* 3, *sec.* 8 of the constitution. In our judgment, the officer, obeying his precept, was not bound to decide at his peril, first, that *Ira Fish* was a Senator of the State, secondly, that the execution debtor was the same person, and thirdly, that he was on his way to attend a session of the legislature. If he was entitled to the immunity claimed, there are legal modes, by which his privilege might

be vindicated. It might have been done by order of a court of competent jurisdiction, or by a Judge on habeas corpus, and possibly under the authority of the body, of which he was a member.

An officer, who acts in accordance with his precept, is not a trespasser, although the party arrested may be privileged from arrest. *Carle* v. *Delesdernier*, 13 *Maine Rep.* 363; *Tarlton* v. *Fisher*, *Douglas*, 671. In the latter case, *Buller J.* holds the officer excused in arresting a peer, if such is the mandate in the process he executes. And that case is a strong authority to show, that the responsibility of determining the legal validity of the exemption, is not thrown upon the officer. *Mr. Fish* had not taken his seat in the Senate; and it belonged to that body to determine definitively, whether he was duly elected.

In *Comyn's Dig. title Dignity*, (F. 3,) it is said, if a peer be arrested by a process, which names him a peer, a supersedeas shall go. If he never sat as a peer, nor be named so, he ought to plead. And the court refused to try the right of a peer, who had never sat in parliament as such on motion. *Lord Banbury's* case, 2 *Ld. Raymond*, 1247. The case of the *Earl* of *Lonsdale* v. *Littledale*, 2 *Hen. Bl.* 267, 299, and of *Digby* v. *The Earl of Sterling*, 2 *Moore & Scott*, 581, show the strictness required, where the privilege of peerage is asserted. Privileges of this character, although founded upon what the public interest is supposed to require, when set up at the instance of the party, are regarded as personal, and such as may be waived expressly, or by implication, when not asserted at the proper time and in the proper manner.

In this case, the jury have found an express waiver of privilege, by the principal defendant. And they were well warranted in this deduction, from what he said to officer Haynes, who thereupon desisted from arresting him at a certain time, when, very clearly, the exemption claimed had not attached. In connection with this testimony, the jury might understand, that the protestation he afterwards made to Saunders, amounted to little, if any, more than this, that although he agreed to be committed, which he then did, the officer, nevertheless, had no right to commit him. But we are of opinion, that the arrest, being made in obedience to the precept, and upon a waiver of privilege by the principal defendant, the point of duress, taken in defence, is not sustained.

Judgment on the verdict.

EDWARD BEETHAM *vs. Inhabitants of* LINCOLN.

If but one incorporated town adjoin an unincorporated plantation, still such town is not liable, under *stat.* 1821, *c.* 122, § 9, for the support of a pauper residing on the plantation, unless the inhabitants thereof are usually taxed in that town.

If an inhabitant of a plantation furnish supplies to a pauper found therein, having a settlement in an adjoining town, he cannot recover therefor against such town, under the same statute, § 18, on an implied promise.

But if the expenses were incurred at the request of a majority of the overseers of the town, or upon their promise of repayment, an action may be sustained.

A pauper, supported by a town wherein his settlement is, within the limits of a plantation at the time of its incorporation into a town, does not thereby acquire a settlement in the new town.

THE plaintiff, an inhabitant of an unincorporated plantation, called *Number One*, adjoining upon the town of *Lincoln*, but on no other town, brought this action *for the support of one Benjamin Crocker*, from *September* 15, 1833, to *April* 22, 1834. It was not proved that this plantation was taxed in *Lincoln*. On the 26*th* of *February*, 1834, the plantation was incorporated into a town by the name of *Chester*, at which time *Crocker* was residing in the family of the plaintiff, on the plantation, and supported by him as a pauper. Prior to the incorporation, and subsequent thereto, unless his settlement was thereby transferred to *Chester*, *Crocker* had a legal settlement in *Lincoln*. On the 21*st* of *September*, 1833, the plaintiff gave a written notice to the overseers of *Lincoln*, that *Crocker*, an inhabitant of their town, was at his house, in need of immediate relief. The plaintiff introduced evidence tending to show, that one or more of the overseers of the poor of *Lincoln* had promised the plaintiff, that he should be paid, if he would take care of *Crocker;* that *Crocker* was poor and in need of immediate relief; and that he had supported him during the time charged. The defendants introduced evidence tending to show, that no such promise had been made by the overseers, or either of them.

The *Counsel* for the defendants requested the Judge to instruct the jury that the action could not be maintained, there being no provision in the *stat.* 1821, *c.* 122, for a plaintiff, residing in an

unincorporated plantation, not taxed in an adjoining town, to maintain his action for the support of a pauper, even upon an express promise; that the action could not be maintained upon an express promise, unless it were made by two or more of the overseers; and that if the action could be maintained, the plaintiff could not recover after *February* 26, 1834, because *Crocker* then had a settlement in *Chester*, by the act of incorporation. The trial was before *Emery J.* who declined thus to instruct them, and gave them the following. If the said *Crocker* had fallen into distress and stood in need of relief, and was supported as alleged, to find their verdict for the plaintiff for the whole time charged. And the Judge directed the jury to consider and be prepared to answer, whether if an express promise had been made with the plaintiff, it had been made by one or more of the overseers of *Lincoln.*

The jury found a verdict for the whole time, and answered, that there was an express promise made, but made by one of the overseers only. After the jury had separated, the plaintiff requested the Court to inquire of the jury, if the other overseers did not assent to such express promise, which the Judge declined to do.

Abbott, for the defendants, argued in support of the grounds taken at the trial, and also contended, that he was entitled to judgment, notwithstanding the verdict. He cited *stat.* 1821, *c.* 122; *Mitchell* v. *Cornville*, 12 *Mass. R.* 333; *Blakesburg* v. *Jefferson*, 7 *Greenl.* 125; *Dalton* v. *Hinsdale*, 6 *Mass. R.* 501; *Windsor* v. *China*, 4 *Greenl.* 298; 1 *Tidd's Pr.* 616; 2 *Tidd's Pr.* 840; *Hagar* v. *Weston*, 7 *Mass. R.* 110.

F. H. Allen and *Poor*, for the plaintiffs, controverted the positions taken in defence, and contended that they ought to retain their verdict. They cited, and relied on, the same statute, § 9; *Hallowell* v. *Gardiner*, 1 *Greenl.* 93; *Belfast* v. *Leominster*, 1 *Pick.* 123; *East Sudbury* v. *Waltham*, 13 *Mass. R.* 460; *East Sudbury* v. *Sudbury*, 12 *Pick.* 1.

The opinion of the Court was by

Weston C. J. — We are not satisfied, that the facts present a case, under the ninth section of the act for the relief of the poor, *stat.* of 1821, *c.* 122, as it does not appear, that the inhabitants of the unincorporated place, where the pauper resided, were usually

taxed in *Lincoln*. It is admitted, however, that the pauper had his legal settlement in that town. By the third section of that statute, it is made the duty of every town, to relieve and support all poor and indigent persons, lawfully settled therein, whenever they shall stand in need of relief. And in the fourth section, the overseers are charged with the performance of this duty.

As the place, where the pauper resided, adjoined no other town, they could not be relieved from the duty by the overseers of any other town, under the ninth section. Upon these facts, we entertain no doubt, that the overseers of *Lincoln* had authority to provide for the support of the pauper in question. It imposed no additional burthen upon the town, but was done in the discharge of a legal liability, in a matter within their proper department.

If, however, the plaintiff supplied the pauper, without the authority and direction of the overseers, we perceive no sufficient ground for an implied promise against the town. Nor could the plaintiff, not being an inhabitant of the town, entitle himself, under the eighteenth section of the same law, to an action for the reimbursement of his expenditures, after notice to the overseers. But if the expenses, sought to be recovered in this action, were incurred at the request of a majority of the overseers, or upon their promise that they should be repaid, we are of opinion, that the action may be sustained. Upon this point, the finding of the jury is not explicit, and for this reason, we set aside the verdict. If it should turn out, that the pauper was supported as such by the overseers of *Lincoln*, within the bounds of what is now *Chester*, at the time of its incorporation, we do not think that he thereby gained a settlement in *Chester*. The generality of the terms used, in this mode of gaining a settlement, has been limited in analogous cases. As where a residence of ten years, by which, and the payment of taxes five, a settlement might be gained, was part of the time as a pauper, at the expense of another town. *East Sudbury* v. *Waltham*, 13 *Mass. R.* 460; *East Sudbury* v. *Sudbury*, 12 *Pick.* 1. Nor can minors not emancipated, or femes covert gain a settlement in this mode, distinct from their parents or husbands. *Hallowell* v. *Gardiner*, 1 *Greenl.* 93.

New trial granted.

ROBERT R. HASKINS *& al. vs.* EPHRAIM H. LOMBARD *& als.*

If the obligor in a bond, so written that it appears to have been contemplated by the parties that it should be signed by several, sign and seal the paper, and at the same time annex a reservation or condition to his act, that it shall not be binding upon him, unless signed by the other obligors named, he will not be bound by it, unless signed also by the others named as obligors; but if the bond be signed and delivered without any condition or reservation annexed, although under an expectation, that it would be signed by the others, it is his deed, and it will be binding upon him, although the others do not sign it.

Where one party, by a writing under seal, agreed to make a certain discount on demands not then payable, if the other party would by a certain time "give good and reasonable security for the payment of the balance" by a time fixed; an agreement made by responsible persons with the obligee to pay the sums due to the obligors, with a power authorizing the enforcement of payment in the name of the obligee for the benefit of the obligors, they having received advantage from it without making known any objection, was held to be a substantial compliance by the obligee with the agreement.

If a covenant be by several with one, if the interest be separate, and the performance cannot be made jointly, the covenant must be regarded as several, unless the intention of the parties appears to have been, that each should be bound for the performance of the other.

The pendency of a bill in equity, claiming the specific performance of a contract, does not preclude the plaintiff in equity from making a defence at law in a suit by the other party against him.

ASSUMPSIT on a note from the defendants to the plaintiffs for $2169,04, dated *Jan.* 1, 1833, payable in two years from date. The defendants read in evidence a paper under seal, dated *August* 16, 1834, signed by the plaintiffs and by *Abbe* and *Bradley*, which is referred to in the opinion of the Court. This paper recited the previous transactions between the parties; the embarrassment of *Lombard* and the other defendants, and that "whereas the undersigned are desirous of procuring from said *Lombard* further and better security for the payment and discharge of said notes and obligation, after making the deduction hereinafter agreed by us —now therefore in consideration that the said *Lombard* will on or before the first day of *Jan.* next, give us good and reasonable security for the payment of the balance of what is now due from said *Lombard* to us or either of us," that they would make him a dis-

count of five thousand dollars; and that if by the time aforesaid, he would give security "for the payment of any part of said premises, we will make the deduction in the same proportion." The defendant filed a bill in equity in the County of *Kennebec*, claiming a specific performance of this contract. The facts in the case, and the grounds taken in the argument, appear in the opinion of the Court.

At the trial before SHEPLEY J. the plaintiffs contended, that the paper of *August* 16, 1834, was not binding upon them, because not signed by *Niles*, and that when they signed it, they did so only with the reservation or condition, that it should be signed by *Niles* before it was delivered to *Lombard*. The Judge instructed the jury, that if the plaintiffs, when they signed and delivered the paper annexed such reservation or condition to their act, it would not be binding upon them unless *Niles* also signed; but if they did not annex any reservation to their act of signing and delivering, it would bind them, although they might have expected *Niles* to sign; that it would in such case be the disappointment of an expectation, and not a violation of a contract or condition annexed. He also instructed them, that if they found the paper to be the deed of the plaintiffs, they would then examine the testimony submitted to them to prove that *Lombard* had made the security required by the bond, and within the time required by it; and if they found that *Lombard* had made the security required by the bond, and within the time required by it; and if they found that *Lombard* had performed on his part within the time required, he would be entitled to the allowance claimed; and that it might be made in this action, although no claim was filed in set-off. The verdict for the defendants was to be set aside, if the instructions were erroneous. There was also a motion to set aside the verdict, as against evidence.

The case was argued by *Rogers*, for the plaintiffs, and by *J. Appleton*, for the defendants.

Rogers cited 13 *Johns. R.* 359; *Cutter* v. *Whittemore*, 10 *Mass. R.* 442; *Bean* v. *Parker*, 17 *Mass. R.* 591; *Bond* v. *Farnham*, 5 *Mass. R.* 174; 5 *Johns. R.* 101; 12 *Johns. R.* 99.

Appleton cited *Scott* v. *Whipple*, 5 *Greenl.* 336; 3 *Harrison's Dig.* 2336; 10 *Wend.* 310; *Phelps* v. *Johnson*, 8 *Johns. R.* 54; 4 *Wend.* 360.

The opinion of the Court was drawn up by

SHEPLEY J. — This case having been argued upon a motion for a new trial as well as upon the report, without a full report of the testimony, it becomes necessary to state briefly some of the prominent facts which do not appear in the report. Before the first of *January*, 1833, the plaintiffs, and *Abbe* and *Bradley*, and *Salmon Niles*, had purchased of the State one undivided half of the west part of township numbered four in the first range of townships north of the *Bingham Penobscot* purchase, and had given their notes to the State to pay for the same in yearly instalments, each party giving his own note for his own share. And on that day they conveyed the same to the defendant; the plaintiffs conveying one fourth, *Abbe* and *Bradley* one eighth, and *Niles* one eighth. The defendant, to secure the payment, gave them obligations to pay the notes which they had given to the State, and mortgages of the same property to secure performance; and to each his note with surety to secure the payment of his proportion of the advanced price. Before these notes became due, the defendant and some of his sureties became embarrassed; and on the 16*th* of *August*, 1834, the obligation, referred to in the report, was made and afterward executed by the plaintiffs and by *Abbe* and *Bradley*, but not by *Niles*, although written to be executed by him also. On the 12*th* of *September* following, the defendant conveyed the fourth, which he purchased of the plaintiffs, to *Prentiss Whitney* and others, and took from them an obligation to himself, to pay the notes which the plaintiffs had given to the State. This obligation he lodged in the office of the Treasurer of the State, who had the custody of the plaintiff's notes, with a power attached, authorising them to institute a suit for their own benefit, in case of failure of performance. It appeared that all the notes, due from the plaintiffs to the State, had been paid, excepting one for $1191, not payable; and that all due from defendant to plaintiffs, were paid or secured before the 1*st* of *January*, 1835, excepting the one now in suit.

The defendants introduced the obligation of the 16*th* of *August*, with this and other proof of a compliance with its terms, as a defence to the note.

The first objection taken by the counsel for the plaintiffs, is, that the obligation, not being signed by all, was not delivered as their deed, or binding upon them.

Where a deed is prepared to be signed by several and is not signed by all, whether it is the deed of those who do sign it, depends upon the fact whether it was signed and delivered as an escrow only until signed by the others, or was delivered as the deed of the party signing. In the case of *Johnson* v. *Baker*, 4 *B. & A.* 440, it was stated in the meeting of those interested before the deed was executed, that if all the creditors of one *Bulpin* did not execute it, that it should be void. The defendant after this at the same interview executed it, and all the creditors did not. The court were of opinion, that the conversation, which took place immediately previous to the execution, must be taken as part of the transaction, and so the subsequent delivery was conditional, and the defendant not bound by it.

In *Cutter* v. *Whittemore*, 10 *Mass. R.* 442, the bond, as in this case, was written to be executed by three parties, and it was executed but by two of them. *Jackson J.*, in delivering the opinion of the court, says, "if there had been any agreement or condition at the time, that it should not be delivered as their deed unless the third person named as obligor should also execute it, this would shew, that it was delivered as an escrow." In the absence of such evidence it was decided to be binding upon those who did execute it.

In *Scott* v. *Whipple*, 5 *Greenl.* 336, the deed was signed by three of the four persons named in it as parties of the first part; and it was contended, that the deed must be regarded as an escrow, because it was not signed by all, but having been delivered without any condition annexed, it was determined to be their deed, although it was admitted, that those who signed, "expected *that* one would sign also." It will be perceived, that the distinction taken in the charge between a condition or reservation annexed to the delivery and an expectation, that another would sign, had already received the approbation of the Court. The testimony to prove the char-

acter of the execution, and delivery, was submitted to the jury with proper instructions, and there does not appear to be any sufficient cause for a new trial on this point of the case.

The second question for consideration is, whether the defendant performed so as to entitle himself to the deduction provided for in the obligation. The testimony on this point was at the trial agreed to be received without requiring formal proof from the public office of what took place there, and the court must now consider, that it was properly received. From the certificate of the Treasurer it is apparent, that the contract signed by *Whitney* and others, must have been deposited in his office before the time appointed for making the security. There is now no reason to doubt the fact; but it is objected, that such contract did not give to the plaintiffs any security, they not being parties to it. They had power to institute a suit for their own benefit in the name of the defendant, and that right would have been protected in a court of law against any release or interference of the defendant. The obligation does not prescribe the security to be given, and any such security as would be both legally and beneficially available may, after they have received an advantage from it without making known any objection to it, be regarded as a substantial compliance. The question whether the defendant had on his part complied with the terms of the obligation, involving many matters of fact, was necessarily submitted to the jury; and it may be, that instructions were not given upon the construction of the papers so specific as may now be perceived to have been desirable. But if the points had then been made, it is presumed the instructions would have been given, or some exception would have been taken, or request made for more particular instructions.

The third question is, whether these facts constitute a defence to this suit. It is objected, that the obligation is a joint one, and that there can be no severance of it, and an application of part of the sum only to the defendants. The facts show, that each of the three parties to it conveyed his separate share of the estate and received his separate security upon it. And the obligation provides, that the defendant may give security "*to us or either of us;*" and being given, that "we will make the deduction *in the same proportion;*" and that a release from the mortgages shall be given of

"such part of the premises as we shall receive security for." As the securities and mortgages were separate these deductions and releases must of necessity have been separate acts; and the defendant was authorized to give security to either separately. Where the interest of the covenantees is several, each may sue separately, although the obligation be joint. So where the interest of the covenantors is separate, and performance cannot be made jointly, the covenant must be regarded as several, unless the intention of the parties appears to have been, that each should be bound for the performance of the other. If the intention of the parties was, that each should make the deduction and release in proportion as he should be secured, and that they were not to be bound for each other, and this they had carefully avoided in all the prior proceedings, this objection would prove to be without foundation. If this be doubtful, yet upon the principle of the case of *Phelps* v. *Johnson*, 8 *Johns. R.* 54, the defendant might claim the benefit of the joint obligation as payment *pro tanto* of the note. In that case, two agreed by sealed notes to pay, and one of them afterward gave a bond and mortgage for the amount due upon the notes, and the promisee covenanted with him to deliver up the notes. It was decided, that this covenant with one was a bar to an action against both upon the notes. The Court say this construction is necessary to avoid circuity of action, for the defendant would be entitled to recover back under the covenant the same sum in damages which would be recovered on the notes. So the defendant in this case might recover against the plaintiffs and others, the precise sum recovered upon the note, and might collect the whole of it from the plaintiffs alone. And as the obligation is to deduct from the note it may operate as a receipt in part payment or as a release of so much as should be deducted.

Nor does the pendency of the bill in equity preclude the defendant from making his defence at law if it will avail him there. It is said that he should not be permitted to make this defence upon the principle of abatement, the pendency of that process taking away such right. But in abatement, the party is defeated upon strict legal principles; while none such exist in this case to prevent the party from using his obligation and testimony as a legal defence.

He may defeat his bill in equity, but its pendency cannot take away his right to defend against the note.

Judgment on the verdict.

NATHANIEL HATCH *vs.* STEPHEN KIMBALL.

Where one pays to the holder of a mortgage the amount due thereon, and takes a deed of quitclaim, if the intention to extinguish the mortgage appear at the time, it is decisive of the question; but if no such intention appear, equity presumes the mortgage to be outstanding, or extinguished, as the interest of the party paying may require.

The courts of common law in *Massachusetts* and *Maine* have adopted this rule of chancery.

A merger is prevented, and the mortgage upheld, where there is a strong equity in favor of it, but never where it is not for an innocent purpose.

If the owner of land knowingly stands by, and suffers another to purchase it and expend his money thereon, under an erroneous impression that the legal title is acquired thereby, without making his own title known, he shall not afterwards be permitted to exercise his legal right against such purchaser.

Parol evidence is admissible to prove the conduct of the party, to the end, that he should not be permitted to have the benefit of an equitable presumption in his favor.

The question whether an equitable presumption shall, or shall not, be allowed in a court of law, acting upon equitable principles, is to be decided by the Court.

But the Court may however, for their own information, direct certain facts to be found by the jury.

THIS is the same writ of entry which was before the Court on the then state of facts of which report is found in 14 *Maine R.* 9. The additional facts appearing on the new trial will be found in the opinion of the Court now given. The counsel for the tenant requested EMERY J. before whom the trial was had, to instruct the jury, that if they were satisfied that the tenant did not upon inquiry by the creditors disclaim any right or interest in the property, then they should find their verdict for the tenant. The Judge declined to give the instruction requested, and directed them, that if from the evidence they were satisfied, that *Stephen Kimball*, at

the time of the levy, knew that the bond was executed and delivered to him, and that he was present at the levy, and pointed out the bounds of the property, and made no claim to it, knowing it was to be taken as *Daniel Kimball's* property, and became tenant to the execution creditors, and continued to hold under them and the plaintiff, and assisted in repairs, making no claim to the property, they would return a verdict for the plaintiff, otherwise for the defendant. The verdict was for the demandant.

Abbott, for the tenant, argued, 1. That the instructions given were erroneous. The paper title is with the defendant. If there had been ground to charge fraud, the question whether there was fraud or not, was for the jury and not for the Court. If the statements or acts of the defendant were made or done under a mistake of the law, it was no evidence of fraud, and ought not to prejudice him. The possession of the defendant was notice of the bond, equal to recording. 2 *Johns. R.* 510; 1 *Johns. Ch. R.* 394; 1 *Story's Eq.* 392; *Hurd* v. *Cushing*, 7 *Pick.* 169; *Tucker* v. *Buffum*, 16 *Pick.* 46. 2. The parol evidence ought not to have been admitted to destroy or take away a title. 6 *Johns. R.* 21; 7 *Johns. R.* 186; 16 *Johns. R.* 302; 4 *Wend.* 474; 4 *Cowen*, 587; 5 *Cowen*, 175; 6 *Cowen*, 751; *Whitney* v. *Holmes*, 15 *Mass. R.* 152.

Rogers, for the defendant, and *Hatch*, *pro se*, said that the record title was with them, and the other party must defeat it, or there was no defence. It is not defeated by the bond from *Daniel Kimball* to the tenant. It was never recorded, and cannot be good against creditors without notice. *Stat.* 1821, *c.* 39, *s.* 1. *Newhall* v. *Pierce*, 5 *Pick.* 450; *Same* v. *Burt*, 7 *Pick.* 157. Nor does the fact of the continued possession of the tenant, under the circumstances proved, amount to implied notice. *Newhall* v. *Pierce*, 5 *Pick.* 450; *Lawrence* v. *Tucker*, 7 *Greenl.* 195, and cases there cited. The tenant has acquired no title under the mortgage to *Peabody*. *Somes* v. *Skinner*, 3 *Pick.* 52; *Fairbanks* v. *Williamson*, 7 *Greenl.* 96. The mortgage was not assigned, but paid and discharged. *Wade* v. *Howard*, 6 *Pick.* 492; *Popkin* v. *Bumstead*, 8 *Mass. R.* 491; *Wade* v. *Howard*, 11 *Pick.* 289; *Gibson* v. *Crehore*, 3 *Pick.* 475, and 5 *Pick.* 146; *Free-*

man v. *Paul*, 3 *Greenl.* 260. The doctrine of upholding a mortgage instead of considering it a discharge is one of equity. 3 *Ves.* 339; 15 *Ves.* 173; 3 *Johns. Ch. R.* 53; 6 *Johns. Ch. R.* 417; 5 *Johns. Ch. R.* 35 and 314. A man who has the title, and stands by and sees another purchase it under the supposition that he acquires a good title, and is silent, is guilty of a fraud, and shall be bound by the sale. 1 *Johns. Ch. R.* 354; 6 *Johns. Ch. R.* 166; 1 *Story's Com. on Eq.* 377; 12 *Ves.* 84; 2 *Atk.* 83; 1 *Sch. & Lef.* 73; 5 *Ves.* 688. The parol evidence was admissible to show the character and intention of the possession of the tenant. *Little* v. *Libby*, 2 *Greenl.* 242; *Sewall* v. *Sewall*, 8 *Greenl.* 194; *Dennett* v. *Crocker*, 8 *Greenl.* 239.

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

Shepley J. — When this case came before the Court on a former occasion, 14 *Maine Rep.* 9, the tenant was allowed the benefit of an equitable presumption, it being for his interest to keep the mortgage on foot and thereby obtain a title, that he did not intend, by paying it off, to extinguish it. It was, however, perceived, although there was then no testimony in the case to establish it, that he might by his conduct have forfeited all claim to such equitable presumption. It was then stated, that if he had disclaimed the title, he would not afterward be permitted to set it up to the injury of others. The case having been again submitted to a jury, it now appears, that after the tenant had paid off the mortgage, and taken a release of the premises, having deeded to *Daniel Kimball*, and being still in possession, he knowingly suffered two executions to be extended upon part of the premises, as the property of *Daniel*, without making any claim of title. He pointed out the bounds at the time of levy, and agreed to become a tenant under that title, and to pay rent. This tenancy he appears to have continued to 1829, and to have rendered to the plaintiff an account of repairs made by him, as tenant, during that time. The plaintiff then commenced repairing the buildings, and between that time and the year 1832, made important alterations in the house, expending between one and two thousand dollars upon it, and putting another tenant into part of the premises for one year. No claim appears to have been asserted by virtue of the mortgage, until after the

plaintiff, knowing all these facts, had purchased the title, and was about to take possession. It does not appear, that any inquiries were made of him, or that the tenant made any disclaimer of the title. It was not to be expected, that inquiries would be made whether one owned an estate, which he had treated as the estate of another, by submitting to his title, and agreeing to pay him rent.

The question is, whether, after such a course of conduct, without any disclaimer in words, that mortgage can be set up against a title derived from the tenant himself.

It is, in each case, a question of intention, whether or not there is an extinguishment of the charge upon the estate. If, at the time the mortgage is taken in, the intention to extinguish it appears, that is decisive. If it does not, equity presumes it to be outstanding, or extinguished, as the interest of the party may require. 18 *Ves.* 384; 3 *John. Ch. R.* 53. The common law courts in *Massachusetts* and *Maine*, appear to have adopted the rule in chancery. This merger is prevented and the mortgage is upheld only in special cases, where there is a strong equity in favor of it. And never where it is not for an innocent purpose. *Kent* says, that no instance is to be found, where the charge has been kept on foot by the court, when a fraud would be committed, if the merger was not admitted to operate according to the principles of law. *James* v. *Johnson*, 6 *Johns. Ch. R.* 417.

Again he says, "there is no principle better established in this court, nor one founded on more solid considerations of equity and public utility, than that which declares, that if one man, knowingly, though he does it passively by looking on, suffers another to purchase, and expend money on land, under an erroneous opinion of title, without making it known, he shall not afterward be permitted to exercise his legal right against such person." 1 *Johns. Ch. R.* 344. The same principle is recognized in 2 *Sum.* 206. The principles of merger are not strictly applicable to this case, for the tenant, at the time when he paid off the mortgage, had not the legal title to the equity of redemption. But he stood in such relation to it, that upon an inquiry whether the mortgage was extinguished or not, he is bound by the same rules. The deed of release from *Buck* to him recites a payment of the balance due upon the mortgage, and there is nothing in the transaction to show that

it was intended to be kept alive. The tenant has, for a long time, conducted as if he considered it as extinguished. And it is now only to be kept on foot by calling in aid the equitable principle, that it was most for his interest. This equitable presumption cannot be admitted, because it is rebutted by a stronger equity on the part of the demandant, and because it would allow the tenant to make use of it for fraudulent purposes. The tenant must be presumed to have designed to conduct honestly, and such could not have been his design unless he regarded the mortgage as extinguished.

It is objected, that the jury found only certain facts, and not fraud. If this had been a case in which a deed was to be decided to be fraudulent, and void on account of the fraud, that should have been found by the jury. But the question here presented, was, whether the tenant should be allowed the benefit of an equitable presumption, and that, when a common law court acts upon equitable principles, must be decided by the court. And the finding of the facts by the jury, is only useful to establish the facts for its information.

The testimony admitted does not fall within the rule, established by the cases cited for the tenant, that parol testimony cannot be received to destroy or take away a title. The conduct of the party was admitted to be proved, not to destroy a title, though it might have been received to make out a fraud for that purpose, but to prevent his having the benefit of an equitable presumption.

This case presents an instance, in which a common law court, by having adopted equitable principles, is obliged to modify its proceedings before the jury, and its ultimate results, in conformity to them.

Judgment on the verdict.

Reuben Bagley *vs.* William Bailey.

Where an equity of redemption is seized on execution, the subsequent proceedings necessary to make the levy available, have reference to the time of seizure.

If one officer commence the levy of an execution by seizing an equity of redemption, and on the same day another officer commence the extent of an execution on land, no time of day being fixed by either, the court will not construe the extent to be prior to the levy.

The mode of proceeding to satisfy an execution, whether by levying on the right of redeeming mortgaged premises, or extending upon the land by appraisement, must be determined by the state of the title *at the time of the seizure on execution.*

The discharge of the mortgage, subsequent to the seizure of the equity on execution and prior to the day fixed for the sale, does not take away the right to sell the equity.

A sale of an equity of redemption may be good, although the time of sale be fixed more than thirty days after seizure on execution and notice thereof.

Writ of entry. The demandant claimed under a deed from *Nathaniel Harlow* and *Mary Parker*, dated *May* 14, 1829, acknowledged, *June* 6, 1831, and recorded *March* 11, 1833. The tenant then read in evidence, a mortgage deed from *Bagley* to *Harlow* and *Parker*, of the same date of the first to secure the purchase money, but not acknowledged or recorded. Also a judgment in favor of one *Hazletine* against the demandant at the *Oct. Term*, C. C. Pleas, 1831, an execution duly issued thereon, and proof that it was given to an officer within thirty days of the judgment, *Nov.* 12, 1831, the equity of redemption having been attached on the writ, *Dec.* 24, 1830. By the officer's return, it appeared, that on *Nov.* 12, 1831, he seized the equity on the execution, and advertised the same for sale, to be sold on *Dec.* 26, 1831, and that on that day he sold the same to one *McDougal*, and gave a deed thereof to him. He also produced the officer's deed to *McDougal*, and a deed thereof from the latter to him, dated *Feb.* 11, 1835. The demandant then produced evidence, that the notes of *Harlow* and *Parker* against him had been put in suit, judgment recovered against him thereon at the same *Oct. Term*, C. C. Pleas, 1831, an execution issued thereon, and that the same was duly satisfied by an extent on other lands of the demandant on the same

12th of *Nov.* 1831. No time of the day on which the transactions took place was mentioned in any of the proceedings. The officer's return is dated *Nov.* 12, 1831, and he states, that he gave the notice to the debtor, and posted them up, more than thirty days before the day of sale, but does not state, that the same was done within thirty days of the judgment, unless by reference to his date at the commencement of his proceedings. The Court were to enter a nonsuit, or default, as their opinion should be.

Cutting, for the demandant, argued—

1. The mortgage having been discharged before the sale, nothing passed by virtue of it. There should have been a levy on the premises and not a sale of the equity. *Stat.* 1821, *c.* 60, *s.* 1; *Bullard* v. *Hinckley*, 5 *Greenl.* 272; *Freeman* v. *McGaw*, 15 *Pick.* 84; *Forrester* v. *Mellen*, 10 *Mass. R.* 421; *Chickering* v. *Lovejoy*, 13 *Mass. R.* 51.—2. No title passed to *McDougal* by the officer's sale of the equity and deed. Unless the return shows every essential requisite of the statute complied with, the sale is void. *Davis* v. *Maynard*, 9 *Mass. R.* 247. Here it does not appear, that the notice was given to the debtor, or the notices posted up, within thirty days of the time of judgment, to hold the equity on the attachment. *Stat.* 1821, *c.* 60, *s.* 17.—3. The attachment was lost, because the sale was more than sixty days after judgment, which cannot be done but by adjournment.

Abbott argued for the tenant. The mortgage deed, though not acknowledged or recorded, is good against the demandant, who was the grantor. *St.* 1821, *c.* 36, § 1; *Marshall* v. *Fisk*, 6 *Mass. R.* 30. As no time of day is fixed by either officer, in selling the equity and in levying the execution, they must be considered as commencing simultaneously; and if so, the sale was good, as the mortgage was then subsisting. 14 *Pick.* 414; 13 *Mass. R.* 529. The seizure alone would not discharge the mortgage. *Chandler* v. *Furbish*, 8 *Greenl.* 410; *Ladd* v. *Blunt*, 4 *Mass. R.* 402. If the succeeding acts of the officer making the levy, relate back to the time of seizure, so do all the acts of the officer, selling the equity. If, at that time, the mortgage was subsisting, he must sell the equity, and no after transactions of others could alter the rights acquired.

The opinion of the Court was drawn up by

WESTON C. J. — Although the deed of mortgage, given by the demandant to *Nathaniel Harlow* and *Mary Parker*, was neither acknowledged nor recorded, it was good against the demandant and his heirs. *Stat.* 1821, *c.* 36. On the twelfth of *Nov.* 1831, they were seized of the demanded premises in fee and in mortgage, the equity of redemption remaining in the demandant. On that day, *Hazeltine*, his judgment creditor, caused his execution to be levied on the equity then existing, and liable to be taken to satisfy the same. The subsequent proceedings, necessary to make the levy available, have reference to that day, and depend upon the state of the title, as it then existed. The demandant would defeat the title under the levy, by showing the mortgage discharged. He proved that on the day of the levy, the debt, for which the premises were pledged, was paid by an extent upon other land. There is nothing in the evidence, by which that extent appears to have been prior to the levy; and there is no equitable consideration, which requires that it should have precedence by construction. The rights of the creditor are not to be defeated by transactions, to which he was not privy, and which were not consummated prior to his levy.

The *stat.* of 1821, *c.* 60, *sec.* 1, has made provision, that where mortgaged premises have been attached upon mesne process, and pending the attachment, they are redeemed by the mortgagor, the lien of the creditor shall attach to the fee, and the execution be levied accordingly. This assumes, that the mortgage has been extinguished prior to the levy. How the execution shall be levied, whether upon the fee, or upon the equity, depends upon the facts, as they exist, when the levy is commenced. If it were otherwise, the debtor might defeat the creditor, by secretly paying the mortgagee on the day of the levy, of which neither would be legally bound to give notice to the creditor.

It is however insisted, that whatever may have been the state of things, at the commencement of the levy, the mortgage was extinguished before the actual sale of the equity, and that this course of proceeding was therefore not warranted by law. In *Bullard* v. *Hinkley*, 5 *Greenl.* 272, the point decided was, that the deed relied upon, as an extinguishment of the mortgage, could not have

that effect, not having been delivered, until after the sale of the equity; although it is intimated by the late Chief Justice, that it might have been otherwise, if it had been delivered before. In *Freeman & al.* v. *McGaw & al.* 15 *Pick.* 82, *Shaw C. J.* was of opinion, that the mode of levying an execution, must depend upon the debtor's title at the time of the levy. And upon consideration, we are of opinion, that no act of the mortgagee, or of the debtor, can defeat the right of the creditor to sell the equity as such, after he has once seized it on execution.

If the sale of the equity is no longer lawful, if the mortgage is paid at any time before the day of sale, intervening attachments or conveyances may be let in, to the prejudice of the creditor. The day appointed for the sale is often sixty days, and may be more, after judgment. The lien is preserved and extended to the fee, only when the premises are redeemed, pending the attachment on mesne process, and prior to the levy. If payment after the seizure would have the effect contended for, the lien of the creditor might be destroyed by the act of others, and that notwithstanding the utmost vigilance on his part. Nor would a construction, which refers the rights of the creditor to the time of the levy, operate oppressively upon the debtor, if the mortgage is paid prior to the sale. He has a year, within which to redeem his land, if it has been sold for less than its value.

A sale of the equity on the 24th of *December*, is perfectly consistent with a seizure of the same, under the execution, on the 12th of the preceding *November*. The officer is to give public notice of the time and place of sale, and also to the debtor, at least thirty days before the time appointed. There is nothing however which forbids his giving notice a much longer period, before the day. It is true, that to preserve the lien, created by the attachment on mesne process, the notice must be given within thirty days after the judgment. From the return of the officer on the execution, this may or may not have been done. If this were a question between an intervening grantee or attaching creditor and the tenant, it might deserve consideration, whether it should not appear affirmatively, that such notice was given; but we do not hold this to be necessary between the demandant, the debtor, and a purchaser of the equity.

Demandant nonsuit.

President, &c. Casco Bank *vs.* Joel Hills *& al.*

Mem. Shepley, J. being interested, did not sit at the hearing, or in the determination of this case.

Where, after the decease of one of three partners, the survivors published a notice, that "the business of the late firm will, for the present, be carried on in the same name, under the charge of J. H. (one of the partners) who will continue, who is duly authorized to adjust and settle all matters relative to the same;" *it was held*, that the surviving partners, by such notice, held out to the world, that they would continue to transact business under that name, and that a note given by J. H. under the name of that firm, would bind both.

Where two persons so held themselves out to the world as partners, as to make a note, given by one in the partnership name, binding upon both, the indorser of a note, thus given, will not be permitted to testify, that it was given for a consideration not authorized by the terms of written articles of copartnership between them, in a suit by one, ignorant of the terms of such written articles.

Assumpsit on a note, dated *April* 28, 1835, payable to *C. A. Stackpole*, or order, at the *Suffolk Bank* in *Boston*, in eight months from date, signed *Hills, Rice & Co.*, in the handwriting of *Hills*, and indorsed by *Stackpole*. The action was against *Joel Hills* and *William McLellan*. It was proved, that there was a company doing business in *Bangor*, in the name of *Hills, Rice & Co.*, of which the defendants were members, and that the business was continued in the same name as late as the last of *October*, 1836. *A. P. Rice*, who was once a member of the company, died, *March* 27, 1834. The plaintiffs proved the publication, in the *Bangor Daily Whig*, a newspaper published in *Bangor*, in *July*, 1834, a notice, which was read to the jury, from the paper. The following is a copy:

"Notice.—The partnership of *Hills, Rice & Co*, was dissolved the 27th of *March* last, by the death of *Mr. Rice*.

Wm. McLellan.

"*Bangor, July* 5, 1834. Joel Hills.

"The business of the late firm will, for the present, be carried on in the same name, under the charge of *Mr. J. Hills*, who will continue, who is duly authorized to adjust and settle all matters relative to the same. Wm. McLellan.

"All persons having demands against the late *Albert P. Rice*, are requested to leave copies of the same with the subscriber.

"J. HILLS."

McLellan did not reside in *Bangor*, but was frequently there. The defendants offered in evidence the partnership agreement between the defendants and *Rice*, dated *Nov.* 2, 1833, and then offered *Stackpole*, the indorser of the note, as a witness, and proposed to prove by him, that the note was given for a consideration not authorized by the terms of the copartnership agreement. Objection was made by the counsel for the plaintiffs, and EMERY J. who presided at the trial, ruled that the same was inadmissible. A default was entered, by consent, which was to be taken off, and the case was to stand for trial, if, in the opinion of the Court, the action could not be maintained, or if the evidence rejected should have been admitted.

J. Appleton, for the defendants, argued that *McLellan* was not liable on this note. The partnership of *Hills, Rice & Co.* was dissolved by the death of *Rice*. 1 *Rawle*, 221; *Collyer on Part.* 62; *Carey on Part.* 163; 15 *Johns. R.* 82. Like the case of a power of attorney, which becomes extinct on death of the principal. *Harper* v. *Little*, 2 *Greenl.* 14. After the dissolution of the partnership, no one has the right to use the name of the firm, in giving or indorsing notes, even to adjust the business of the firm. 3 *Esp. R.* 108; *Coll. on Part.* 314; *Carey on Part.* 187; 2 *Johns. R.* 300; 4 *Johns. R.* 224; 3 *Vermont R.* 82; 1 *Stark. Rep.* 71, 375; 1 *Peters*, 373. Nor can it be said, this was given to renew an old debt from the company. There is no evidence of it, and the Court cannot presume it. 11 *Wend.* 99; 1 *Wend.* 461; 3 *Wend.* 415; 5 *Conn. R.* 574; 1 *McCord*, 169; 6 *Vermont R.* 275. By the notice in the paper, *Hills* was made a mere agent to settle the partnership concerns, but no new partnership was created by it. *Stackpole*, the indorser, was not called to invalidate the note, but merely to show for what it was given, and he should have been admitted. 3 *Wend.* 415; 12 *Pick.* 566.

Cutting, for the plaintiffs, contended, that *Hills* had the right to bind *McLellan*, by signing the company name; by the advertisement published by him; and by his acts proved. That even if

Hills had no right to bind *McLellan* as a partner in any new transactions, he had the right to do so, both by law, and by the authority given in the advertisement, in the settlement of any old affairs. And a note made by one partner, in the name of the firm, will be intended in law to have been made in the course of the partnership dealings. 19 *Johns. R.* 345; 11 *Johns. R.* 544; 15 *Johns. R.* 422; 16 *Wend.* 505. The testimony, offered to be proved by *Stackpole*, was inadmissible. 1. It was not proved, that the plaintiffs knew the terms of the partnership, and therefore wholly immaterial whether limited or not. *Montague on Part.* 10; *Livingston* v. *Roosevelt*, 4 *Johns. R.* 270, and cases there cited. 2. Being a party to the note as indorser, he is an incompetent witness. *Deering* v. *Sawtel*, 4 *Greenl.* 191.

By the Court. — We are of opinion, that the advertisement of *July* 5, 1834, under the signature of *William McLellan*, held out to the world, that he and *Joel Hills* would continue to transact business, under the name of the old firm of *Rice, Hills* and company, and that notes given by *Hills*, under the name of that firm, would bind *McLellan*. If the articles of copartnership did not justify the giving of this note, it would nevertheless bind *McLellan*, unless the holders knew that fact, of which there is no proof.

Judgment for plaintiffs.

DANIEL STEARNS *vs.* BENJAMIN GODFREY *& al.*

If a condition subsequent be followed by a limitation over, in case the condition is not complied with, or there is a breach of it, it is termed a conditional limitation, and takes effect without any entry or claim, and no act is necessary to vest the estate in the party to whom it is limited.

Where the Commonwealth of *Massachusetts* granted a tract of land to B and F by name, and to certain settlers named only in the habendum, each settler to have a hundred acre lot, including his improvements on which he lived, "on condition that each of the grantees aforesaid, pay to said B and F five pounds in lawful money, within one year from this time, with interest till paid," followed by these words, "provided nevertheless, if any settler, or other grantee aforesaid, shall neglect to pay his proportion of the sum or sums aforesaid, to be by him paid, in order to entitle him to one hundred acres as aforesaid, in that case the said B and F shall be entitled to hold the same in fee, which such negligent person might have held by complying with the condition aforesaid on his part;" the title of any settler, who failed to perform the condition within the year, vested in fee in B and F, and was out of the reach of legislative control.

The owner in fee of land cannot be disseized thereof by his own tenant, except at his election.

Where a mortgage has been cancelled and discharged, and a new security on the same land has been taken for the debt, the mortgage is to be considered as if it had never existed, and intervening incumbrances or attachments are let in.

THIS was a writ of entry, brought to recover a tract of land in *Orrington*, being part of No. 25. The facts in the case sufficiently appear in the opinion of the Court. At the trial before SHEPLEY J. the counsel for the tenant requested the Judge to instruct the jury —

1. That the deed from the Commonwealth to *Brewer* and *Fowler* operated to convey a title to the premises to the settler represented by *Gould*, and that their deed to *Sweat* would not operate to convey it to *Sweat*.

2. That *Gould* being in possession and claiming to hold, and actually occupying it as his own property at the time of the deed from *Brewer* and *Fowler* to *Sweat*, that deed could not convey it to *Sweat*, because they were disseized at the time.

3. That at the time of the deed from *Sweat* to *Wilkins*, *Gould* was in possession under the title of *Neal*, and claiming and exclusively occupying by virtue of that title, and the title in *Wilkins* by that deed was defeated, *Sweat* being disseized at that time.

The Judge instructed the jury — 1. That the title did not pass to the widow *Ary* by the deed to *Brewer* and *Fowler*, nor to *Gould* after the designation of the lot by *Dummer*.

2. That when *Gould* purchased of the widow *Ary*, if he did so with the design to take her right as a settler, and to obtain a title through *Brewer* and *Fowler* by complying with the terms stated in their deed, and have his lot assigned to him as a settler, then his possession would not be adverse to the title of *Brewer* and *Fowler*, but in submission to it, and there would be no disseizin; but if he claimed and occupied with a design not to take a title under them, but claimed to hold against them, being in the exclusive occupation, then they would be disseized, and no title would pass by their deed to *Sweat*.

3. That if, at the time *Sweat* conveyed to *Wilkins*, *Gould* claimed to hold the premises as *Neal's* property, and exclusively occupied as such, then no title would pass by that deed. But if he procured the deed from *Sweat* to *Wilkins*, and did not claim to hold against that title, but yielded to it, and intended it should pass the title to *Wilkins*, then the title would pass, and there would be no disseizin. And if a disseizin had not been proved in either of those ways before stated, the demandant is entitled to recover; but if a disseizin had been proved in either of those ways, then their verdict should be for the tenants.

The verdict was for the demandant, and was to be set aside, if the instructions were erroneous.

Rogers, for the defendant, argued in support of the grounds taken in the requests for instruction, at the trial, and cited *Shep. Touch.* 75, 76; 4 *Com. Dig. Fait, E* (9); 4 *Kent*, 468; and commented on the several resolves of the Commonwealth of *Massachusetts*, in relation to this land.

Cutting, for the demandant, argued in support of the ruling of the Judge.

The opinion of the Court was by

Weston C. J. — Until *March* 25th, 1786, the title to the land in controversy was in the Commonwealth of *Massachusetts*. On that day, it was included in a large tract granted and conveyed, by a committee in behalf of the Commonwealth, to *John Brewer* and

Simeon Fowler, and certain settlers on the tract, mentioned by name as grantees in the deed, among whom are *Hannah Ary*, widow, and *Solomon Sweat*. The deed contained the following clause in respect to these settlers, "on condition that each of the grantees aforesaid pay to *John Brewer* and *Simeon Fowler*, five pounds in lawful money, within one year from this time, with interest till paid." Taking the deed together, we must regard it as conveying to each of the settlers named, one hundred acres of the land, subject to be defeated upon the non-performance of the foregoing condition, within the year. Generally an entry of the grantor or his heirs is necessary to defeat an estate thus granted, upon condition subsequent; and the estate could not be divested by the entry of a stranger. But the deed contained a further clause, which is in these words, "provided nevertheless, if any settler, or other grantee aforesaid, shall neglect to pay his proportion of the sum or sums aforesaid, to be by him paid, in order to entitle him to one hundred acres as aforesaid, in that case the said *John Brewer* and *Simeon Fowler* shall be entitled to hold the same in fee, which such negligent person might have held, by complying with the condition aforesaid on his part."

It is a rule of law, that if a condition subsequent is followed by a limitation over, in case the condition is not fulfilled, or there is a breach of it, that is termed a conditional limitation. 2 *Black.* 155; 4 *Kent*, 121; *Pells* v. *Brown*, *Croke James*, 590. This limitation takes effect without entry or claim, and no act is necessary to vest the estate in the party, to whom it is limited. The land then was conveyed to the settlers named, with a conditional limitation over to *Brewer* and *Fowler*, if they or either of them, failed to fulfil the condition, within the time appointed. There was a failure on the part of the settlers; whereupon at the end of the year, in *March*, 1787, the fee of the land in question vested in *Brewer* and *Fowler*. The settlers having petitioned the legislature to interfere in their behalf, a resolve was passed on the twenty-fourth of February, 1791, proposing, that if *Brewer* and *Fowler* would quiet the settlers for a less sum, than they were originally to receive, the difference should be made up by the Commonwealth. The rights of *Brewer* and *Fowler* were recognized in that resolve which, having become vested, were out of the reach of legislative

control. The settlers were treated with indulgence, both by the Commonwealth and by *Brewer* and *Fowler*, who discovered no unwillingness to accede to the proposition made to them.

On the twentieth of *December*, 1794, one *Ames* and his wife, the same who had been the widow *Ary*, conveyed their title to the *Ary* lot to *Nathaniel Gould*, the elder. Although the legal title to the land was in *Brewer* and *Fowler*; yet as they were willing to release their right to the settlers, upon the payment of a small sum, the beneficial interest was regarded as in the latter. It does not appear that *Gould* resisted or denied the title of *Brewer* and *Fowler*, while it remained in them, and the jury have found, that they were not disseized by *Gould*.

In consequence of the mistake of *Nathaniel Dummer*, who acted under the resolve of *March* first, 1799, *Gould's* lot was assigned to *Solomon Sweat*, and *Sweat's* lot to *Gould*. In *February*, 1804, they both accepted from *Brewer* and *Fowler*, deeds of each other's lots, having paid to them the sums stipulated. Whether *Dummer* had authority thus to locate to each his lot, or whether what he did was binding upon them, if they had refused to acquiesce, it is not necessary to decide, as the parties concerned were satisfied to abide by the arrangement.

Up to this period, there is nothing in the case, except perhaps the mortgage to *Neal*, tending to show, that *Gould* claimed adversely to *Brewer* and *Fowler*, but that he held in subordination to their title. He witnessed the deed of his lot to *Sweat*, of the contents of which he could not be supposed to be ignorant, as he himself received a deed of *Sweat's* lot. They must have been given at their instance, and upon payment of money. *Gould* set up no adverse seizin, and interposed no objection, so that as far as he was concerned, there was nothing to prevent the operation of the deed to *Sweat*. As he still occupied the land, he must be considered as holding as *Sweat's* tenant at will, and subject to the duties of that relation. It is true he violated those duties, by a conveyance of the land in fee to *Neal*, in *July*, 1806. This, at the election of *Sweat*, might have been treated as a disseizin. But *Gould* remained in as before, recognizing *Sweat's* title; for in 1810, he requested him to convey to *John Wilkins*, he himself conveying the land, of which he had taken a deed to *Sweat*. From *July*, 1806,

Gould, the elder, may have professed to *Neal* and his agent, that he held under him; and as between them, *Gould* was *Neal's* tenant at will; but he previously stood in the same relation to *Sweat*, who had prior claims to his fidelity as tenant. Unless *Sweat* elected to consider himself disseized, for the sake of his remedy, he had a right still to treat *Gould* as his tenant. In the conflict of duties, which *Gould* assumed, he was doubtless playing a double game for his own purposes; and there is much reason to believe, that his object was to defraud *Neal*. But there is no evidence, that the tenant had any notice of it, or that it is in any degree imputable to him. He is entitled to stand upon his rights; and if by the rules of law, the title is in him, it must be so adjudged. If the title of *Neal* is not to be traced back to a period anterior to *July*, 1806, the seizin and the fee were then in *Sweat*. He could not be disseized by his own tenant, *Gould*, except at his election. *Blunden* v. *Bangle*, *Cro. Charles*, 302. If there was no disseizin, the tenant has connected himself with *Sweat's* title, and must prevail.

It may be insisted, that *Neal's* title commenced when the mortgage deed was executed to him by *Gould*, in 1797, and that he then succeeded to *Gould's* seizin. If so, *Gould* could do nothing in 1804, or subsequently to impair *Neal's* right. It is not improbable, that the justice of the case, in some of its aspects, might be best promoted by sustaining these positions, if they were in accordance with the facts. The fraudulent practices of the elder *Gould* would thereby be defeated, and the heirs and assigns of *Neal* would enjoy the fruits of his purchase. But the rights of other persons, not conusant of the fraud, if any existed, have intervened; and if it has appeared, that *Neal* has waived an advantage, he might have retained, his heirs and assigns must abide the consequences. In *July*, 1806, he cancelled his mortgage, and took a new conveyance from *Gould*. The mortgage having been discharged, no rights can be predicated upon it, or deduced from it. Intervening incumbrances or attachments, if any had existed, would thereby have been let in. *Neal* could not have set up prior rights, arising from the cancelled mortgage. We cannot regard it as having any more effect upon the cause, than if it had never existed. If *Neal* would have preserved his title under the mortgage, he should have

refused to discharge it without payment, and declined the arrangement proposed by *Gould.*

As the lot in question vested in *Brewer* and *Fowler*, in *March*, 1787, the instruction first requested, was properly withheld, as were also the second and third, the jury having negatived the facts, upon which they were based. The jury were instructed, that the title did not pass to the widow *Ary*, by the deed to *Brewer*, *Fowler* and others, but as it passed to *Brewer* and *Fowler*, at the end of a year, *viz.* in *March*, 1787, by a conditional limitation, the legal effect was the same, as if it had never vested in the widow *Ary*, so that the tenants were not unfavorably affected, by this instruction. The other instructions given to the jury were substantially correct.

Judgment on the verdict.

WIGGINS HILL *vs.* JAMES T. HOBART *& al.*

Where two defendants had received payment in full for a tract of land, and had given a bond to the plaintiff, conditioned, that they should "in a reasonable time after request, make and execute to the plaintiff, or his assigns, a good and sufficient deed to convey the title to said premises," a request for the deed may be good, without the production of the bond at the time.

The obligors are bound to *make* and execute the deed.

Although the title be in but one, the deed must be executed by both obligors.

The making of a subsequent demand is no waiver of a prior one.

When the facts are clearly established, or are undisputed, or admitted, what *is* a reasonable time, or what is a waiver of right, is a question of law. But where what is a reasonable time, or what is a waiver of right, depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to the jury, before the court can make any determination thereon.

Where a party can, if he pleases, proceed by bill in equity, and obtain a specific performance of a contract to convey land, he is not compelled to resort to that remedy, but may elect to proceed at law, and may recover in damages the value of the land, at the time the conveyance should have been made.

When the contract stipulates for the conveyance of the land, or estate, or for a title to it, performance can be made only by the conveyance of a good title. And when it stipulates only for a deed, or for a conveyance by a deed described, performance is made by giving such a deed or conveyance as the contract describes, however defective the title may be.

A contract to make and execute "*a good and sufficient deed to convey the title to said premises*," is not performed, unless a good title to the land passes by the deed.

THIS was an action of debt, commenced, *Feb.* 18, 1836, upon a bond made by the defendants, *James T. Hobart* and *Sylvanus L. Mitchell*, to the plaintiff, dated *June* 15, 1835, which recites that the defendants had received the full consideration, $44,998,33, for a tract of land described, and concludes thus, "Now if we in a reasonable time after request shall make and execute to said *Hill*, or assigns, a good and sufficient deed to convey the title to said premises, then this obligation is to be void, otherwise to remain in full force and effect." It is believed, that the case will be sufficiently understood from the requests for instruction, from the instructions given, and from the opinion of the Court, without a particular statement of the facts.

At the trial before SHEPLEY J. the defendants' counsel requested the Judge to give the following instructions. 1. That a demand was not good without the production of the bond, and the offer of a deed drawn, and designation of the parties. 2. A deed from *S. L. Mitchell* alone, if the title was in him, was sufficient to answer the condition of the bond, and if *Hobart* had no title in him, it was not necessary for him to sign the deed. 3. If there was a demand in *August*, and also a promise to deliver a deed at *Bangor* in the fall when *Mitchell* came down, yet if *Hill* afterwards made another demand in *November*, and a deed was given to him, it was so far a waiver of rights under the first demands, that those first demands may be laid out of the case, and the rights of the parties depend upon the last demand, and the proceedings thereupon. 4. That a deed from *S. L. Mitchell*, if he had a clear title except the two mortgages, was sufficient to convey the title to the premises. 5. That if *Hayward* upon inquiry was told, that the mortgages existed, and he took the deed notwithstanding, and if *Hill* knew at the time the deed was sent to him, that the mortgages were still existing, by keeping the deed the time he did, he waived all objections on account of the mortgages. 6. That if the plaintiff is entitled to recover any damages, having shown no special damage, and the defendants having in *July*, 1836, removed all incumbrances, and having afterwards, on the 3d of *August*, 1836, again offered the deeds, he can recover nominal damages only. That if the incumbrances existed at the time of giving the deeds, and had never been removed by the defendants, the utmost extent of the damage in such event would be the amount of the incumbrances. 7. That the plaintiff can compel by law or in equity the delivery of the deed to him at any time.

The Judge did not give any of the instructions thus requested, and instructed the jury as follows: That if they were satisfied from the testimony, that a demand had been made of either of the defendants for a deed, such demand would be good, although the person making it did not have the bond with him, when it was made; that it was the duty of the defendants, both by their contract and by law, to make, execute, and deliver the deed, and that it was not the duty of the plaintiff to have it prepared and tendered to them for execution; that a deed from *Mitchell* alone,

even if the title was good in him, would not be a performance of their contract; that the deed of the 20th *Nov.* would not be regarded as a compliance, as there was a defect in two particulars, in not being signed by *Hobart* and in not conveying a perfect title, it being proved and admitted, that there were incumbrances upon the land by two mortgages upon the same; that the deed of *Nov.* 20, could not therefore be regarded as a performance by the defendants, unless from the circumstances under which it was received by *Hayward*, referring them to the proof in relation thereto, it was received with a full knowledge of the defect of title, and with a design to accept the same, and not for the purpose of transmitting it to the plaintiff for him to decide for himself by the consent of the defendants, and that if from the proof they believed it to have been received by the plaintiff himself without a knowledge on his part, whether the title was then free from incumbrances, and that he retained it only a reasonable time for him to obtain that information and then returned it, that would not amount to an acceptance on his part so as to prevent him from insisting upon a legal performance, nor would it amount to a waiver of his legal rights. In relation to the amount of damages, the jury were instructed, that the rights of the parties must be determined by the state of the facts at the time this action was brought, and that all subsequent proceedings might be laid out of the case; that the obligation of the defendants required them to convey the title to the land described; that if they had not complied with it, the injury to the plaintiff was the loss of the title to the land, and that the proper and legal compensation was the value of the land at the time of a demand made and a refusal or neglect to perform, and that in finding that value, they might take into consideration the price agreed by the parties, and such other evidence as there was in the case. The jury found a verdict for the plaintiff for the consideration money, and interest thereon, which was to be set aside, if there was error in withholding the instructions, or in giving such as were given.

F. Allen, for the defendants, contended that the instructions requested at the trial, ought to have been given, and that the instructions actually given, did not meet the case, or were erroneous. He cited *Sugden on Vend.* 162; *Parker* v. *Parmlee*, 20 *Johns. R.* 136; *Atwood* v. *Clark*, 2 *Greenl.* 249; *Freeman* v. *Boynton*, 7

Mass. R. 483; *Fuller* v. *Hubbard*, 6 *Cowen*, 13; *Hackett* v. *Huson*, 3 *Wend.* 249.

Rogers and *E. Brown* argued for the plaintiff, citing *Lawrence* v. *Parker*, 1 *Mass. R.* 191; *Porter* v. *Noyes*, 2 *Greenl.* 22; *Sanford* v. *Aiken*, 5 *Mass. R.* 494; *Barney* v. *Norton*, 2 *Fairf.* 350; *Bean* v. *Mayo*, 5 *Greenl.* 94; *Ketchum* v. *Evertson*, 13 *Johns. R.* 359; *Newcomb* v. *Brackett*, 16 *Mass. R.* 161; *Eames* v. *Savage*, 14 *Mass. R.* 425; *Com. Dig. Condition.*

The opinion of the Court was drawn up by

SHEPLEY J. — The bond, declared upon in this case, differs, in one important particular, from those numerous bonds given within the last few years to convey real estate, upon payment or security of the purchase money. It recites an entire payment of the purchase money; and no act, other than to demand one, remained to be done by the plaintiff, to entitle himself to a conveyance. And this demand he was at liberty to make whenever he pleased.

The rights of the parties are supposed, by the defendants' counsel, to be presented in their requests for instructions, which were declined; and it became necessary to examine and decide upon them.

He first alleges, that a demand for a deed would not be good, unless the person making it had the bond then present with him; and that it was the duty of the plaintiff to prepare and present the deed. When a demand is made for the payment of a note, it should be present, that if paid it may be surrendered or cancelled. And such might have been the case here, if the deed was to have been delivered at the time of demand, but such was not the agreement of the parties. The contract obliges the defendants to deliver the deed, not upon request, but "in a reasonable time after request." And it is sufficient, if the bond were ready to be delivered up upon delivery of the deed, for it is only then, that the defendants have any right to call for its production. The contract plainly declares it to be the duty of the defendants, to "make and execute" the deed; and such was decided to be their legal duty, in the case of *Tenney* v. *Ashley*, 15 *Pick.* 546.

The second and fourth requests allege, that a deed, executed by one of the obligors would have been a compliance with the con-

tract, the title being in him; because the contract does not require any covenants in the deed. The cases cited do decide, that when the contract does not explicitly, or by reference, require any covenants, the party cannot insist upon them. These cases proceed upon the principle, that the contract is to be performed precisely according to its terms, and upon that principle, the plaintiff is entitled to a performance according to the agreement. One party to a contract cannot set up, as a justification for not performing, that it would have been of no service to the other party. It is only when the question of damages arises, that he can enter upon that inquiry. The plaintiff may have an important interest in having both execute the deed; for if the title should fail to be conveyed by a deed without covenants, when the contract was for a good title, it is by no means certain, that the consideration may not be recovered back; for it is where the party takes the title at his own risk, that it has been decided, that he cannot recover back the consideration. And the plaintiff was entitled to have both names to the deed, that he might, in equity or at law, proceed against both for the purpose of having a decision upon his right to some redress, in case of a failure of title, which was agreed to be made good.

The third request alleges, that the last demand, and the reception of the deed afterward, was a waiver of the previous demands. The common understanding would be, that the more frequently he insisted upon it, the more earnest he was for a performance. And so far as any thing could be inferred from a reception of the deed, the effect of it upon the rights of the parties, under all the circumstances attending it, was submitted to the jury. If the deed was received as a compliance, it would be a satisfaction, rather than a waiver of all the demands; if not so received, but taken by consent, for examination, and returned within a reasonable time, it would be neither a waiver nor a satisfaction of any existing rights or claims. It is said, that whether it was returned within a reasonable time, should have been decided by the Court, and not have been left to the jury. Where the facts are clearly established, or are undisputed, or admitted, reasonable time is a question of law. But where what is a reasonable time depends upon certain other controverted points, or where the motives of the party enter into the question, the whole is necessarily to be submitted to a jury, be-

fore any judgment can be formed, whether the time was or was not reasonable. And such was the state of matters in this case, that a court could not decide, without first determining several litigated questions, which were properly to be argued and submitted to the jury.

The fifth request, that if the plaintiff and his agent, when the deed was received, knew of the existence of the mortgages, he, by keeping it so long, waived all objection on account of them. It would have been improper to have instructed the jury, that the detention of the deed for that time, was, of itself, a waiver, without allowing them to consider for what purpose it was received, and what necessity existed for so long a detention. And with these accompanying circumstances, it was submitted to their consideration. The instructions given, required the jury, if they found for the plaintiff, to find that it was received by him without a knowledge, whether the title was or was not free from incumbrance, and that the detention was for the purpose of obtaining that information.

The sixth request relates to the measure of damages, and the seventh supposes, that the plaintiff may in equity obtain the deed at any time. When a party has a covenant for a title, he may in a proper case, if the other party can perform, obtain a specific performance in chancery. If the other party cannot perform, he must be content with his remedy at law. If he elect to proceed at law, and recovers damages, that is a satisfaction of the contract, and he cannot afterward in chancery obtain the title. He has an election and may proceed at law, and when he does, he is entitled to a complete indemnity and to no more. By a performance he would have received the land, and not receiving that, if he obtains the value at the time, that is the exact measure of his loss. As the plaintiff had performed on his part he was entitled to the land, or to its value, and the instructions were correct. *Hopkins* v. *Lee*, 6 *Wheat.* 109.

The next objection relates to the testimony excluded. The answers of the witness, *Chamberlain*, which were not admitted, relate to conversations and proceedings before the execution of the bond, and cannot be admitted to explain or alter its terms. It is not material, nor would it affect the rights of the parties to prove, that the

defendants did not seek the contract, or that they were induced by others without fraud to make it.

The instructions are alleged to have been erroneous in requiring from the defendants, the conveyance of a title free from incumbrance. This is a point of such importance, that a careful examination might be expected. The rule in equity is clear and well established, requiring a perfect title to be made, unless the contrary has been agreed. A person is never supposed to be desirous of purchasing a lawsuit, or a title attended with doubt and vexation, instead of one upon which he can quietly repose. *Mr. Sugden* says, "a court of law will look as anxiously to see, that the title is clear of doubt as a court of equity would." *Sug. V. & P.* 244. Among the cases at law examined, there are several, where the contract has been decided to be performed by giving a deed, when there were defects in the title. Such decisions have usually turned upon the peculiar phraseology of the contract. Without asserting that they can all be perfectly reconciled, it is believed, that the general principle to be collected from them is, that when the contract stipulates for a conveyance of the land or estate, or for a title to it, performance can be made only by the conveyance of a good title. And when it stipulates only for a deed, or for a conveyance by a deed described, performance is made by giving such a deed or conveyance as the contract describes, however defective the title may be.

In this case, the defendants covenant to make and execute "a good and sufficient deed to convey the title to said premises," they speak of the title as an entirety, and the deed is not sufficient, unless it is conveyed. The language does not authorize the conclusion, that a partial or defective title was intended. It is the deed which is to be good and sufficient, but it is to be so for the purpose of conveying the title. And the intended purpose was not accomplished without conveying it.

If it be matter of regret that parties by their neglect should subject themselves to great losses, the administration of justice must proceed upon fixed rules, which cannot accommodate themselves to their relief from consequences arising from the want of foresight and vigilance.

Judgment on the verdict.

WILLIAM HAMMAT *vs.* JOHN RUSS *& al.*

In an action of trespass, where the trespass was alleged to have been committed on a certain day, subsequent to the date of the writ, the declaration may be amended by fixing the time prior to the date of the writ.

Where the defendant has been permitted to read to the jury a complaint against a third person for damages, signed by the plaintiff, for the purpose of proving his declarations, the defendant cannot introduce the record of the proceedings upon it, to show that the plaintiff had recovered damages against such third person.

It is not the duty of a Judge, on the trial of a cause, at the request of a party, to give instructions to the jury upon legal propositions, merely hypothetical, and not pertinent to the facts proved.

Trespassers are liable for all such damages as necessarily arise from their acts; and so are liable not only for the materials of a sluiceway to a mill, destroyed by them, but also for the damages sustained by the owner of the sluiceway, in being deprived of the use of it.

TRESPASS *quare clausum* and *de bonis asportatis.* The plaintiff had leave to amend his writ, and amended by altering the time when the trespass was alleged to have been committed, and the defendants objected to the amendment. From the papers, referred to in the case, it appeared that on *Aug.* 14, 1833, one *Bennock* conveyed certain lands, adjoining *Penobscot River,* to *R. M. N. Smyth*, one of the defendants, "reserving, however, the right of keeping a board sluice, on or near the place where *William Hammatt's* board sluice now is, and also the right to the said *Hammatt* of rafting boards, and laying rafts at the shore of said river." By an indenture between the plaintiff and *Bennock*, made the same day, *Bennock* conveyed to *Hammatt* the rights reserved in his deed to *Smyth.* The other facts appear sufficiently in the opinion of the Court.

At the trial before SHEPLEY J. the counsel for the defendants requested the Judge to instruct the jury, that if the defendants, in the removal of the sluice, acted with due care and caution, and did no unnecessary injury to the sluice, and that their acts were necessary to the enjoyment of their rights of property, that this action could not be maintained against them for a temporary displacement of the sluice, for the purposes aforesaid. The Judge declined to give the instruction requested, and instructed the jury, that the ac-

tion on the first count could not be maintained; that if the defendants did displace said sluice and remove the same from the spot where the plaintiff had placed it, they were trespassers, and the action was maintained; that if they were authorized, for the purpose of erecting their mills, to occasion a temporary obstruction of the plaintiff's rights, or were not answerable in this form of action for such damages, had the same been seasonably replaced, or had notice been given to the plaintiff or his agent, that the same could have been replaced, that their neglect to do either would make them answerable in this action, and that the plaintiff would be entitled to recover, not only the value of the materials removed, if the sluice had been taken and carried away as alleged, but also such injury as the plaintiff had sustained from not being able to use the sluice, from the time it was broken up, to the time of the commencement of this action, if the use thereof was destroyed by the acts of the defendants, and not by the canal. The verdict was for the plaintiff, and the defendants excepted.

Rogers, for the defendants, argued that the amendment could not be allowed. As the declaration stood, there was no cause of action, and the amendment is the very substance of the writ. *Bennock's* reservation, in the deed to the defendants, was of a mere easement. The plaintiff claims only under this, and cannot maintain trespass, *quare clausum*, for the interruption of this easement. *Hasty* v. *Johnson*, 3 *Greenl.* 282; *Thompson* v. *Androscoggin Bridge*, 5 *Greenl.* 62. The record of the process, on the plaintiff's complaint for damage by the *Canal Company*, should have been permitted to be read. It would have shown that the plaintiff had recovered his damages of others. The instruction requested should have been given. *At or near*, in the reservation, implies that we have the right to remove the sluice *to another place.* We were entitled to the enjoyment of our rights, if the plaintiff was put to some inconvenience thereby. 2 *Conn. R.* 529; 2 *Esp. N. P.* 639. The instruction given was erroneous. 3 *Stark. Ev.* 1437; 4 *Mass. R.* 266; 9 *Johns. R.* 108. In this action of trespass, no damages could be recovered, in consequence of the neglect of the defendants to replace the sluice.

J. Appleton, for the plaintiff, said, that much of the argument for the defendants, had gone upon the ground, that the verdict was

on the first count, when it was only on the count *de bonis asportatis*, and that to so much he should not reply. The amendment was rightly allowed. 3 *Greenl.* 183; 1 *Pick.* 156. By the terms *at or near*, in the reservation, the election is given to the *plaintiff*, to remove his sluice, but not to the defendants. But even if the election was given to the defendants, still they are trespassers, as the removal was without notice to us. The instruction requested, had relation to a mere hypothetical case, not warranted by any evidence given on the trial, and was therefore properly withheld. 2 *Fairf.* 350. The instructions were correct. The sluice was carried away and destroyed, not merely removed to another place. The rule of damages, given to the jury, was correct. *White* v. *Moseley*, 8 *Pick.* 356.

The opinion of the Court was by

Shepley J. — The writ was dated on the 30th of *May*, 1836, and the trespass was alleged to have been committed after that date on the first day of *July*, 1836. This shews the date of the trespass to have been a false, or an impossible one, and exhibits some error or mistake. A deed is not destroyed by a false or impossible date. *Com. Dig. Fait, B*, 3. And there does not seem to be sufficient reason for giving such a date more effect upon a count in a writ than upon a deed.

If the amendment may be said to give to the plaintiff a cause of action, when by reason of the material defect none existed before, that is no valid objection to it. For the fifteenth rule of this Court allows amendments in matters of substance, which implies the necessity of removing a material defect. Amendments in such cases are allowed, when the action or plea is not thereby changed, and when no new subject matter is introduced. 3 *Mass. R.* 208; 7 *Mass. R.* 440; 2 *Pick.* 23.

The defendants, for the purpose of proving the plaintiff's declarations, having been permitted to read a complaint signed by him, claimed to introduce the record of the proceedings upon it between him and the canal company to prove, that he had recovered damages against the company. If admissible for the defendants to prove damages had been recovered, it should have been admissible for the plaintiff to prove the contrary, in case none had been re-

covered. Such a course would have the effect to prejudice one party by the acts or omissions of others in a case to which he was not a party. The defendants might have proved on this trial, if practicable, that the injury was done by the company, and not by them. The record not being between parties or privies was properly excluded.

The instruction, which was requested and not given, applies to "a temporary displacement of the sluice," and does not appear to have been authorized by any testimony in the cause, there being no evidence of a mere temporary interruption, or of any attempt to replace it. The instructions given, are complained of, because the jury were informed, that the defendants would be trespassers by removing the sluice from the spot where it was placed. And it is said the plaintiff's rights were only to have it remain "on or near the place," where it then was. The instructions might have been liable to objection, if the proof had been, that the defendants only removed it without injury to a place equally convenient and near the other, but applied to the testimony in the case they were correct. What was said of the consequence of not replacing the sluice, does not appear to have communicated the idea, as supposed in the argument, that by neglecting to do so, they became trespassers, *ab initio;* for it had already been stated, that they were trespassers by the original removal. The object seems to have been to distinguish this case from the case of a temporary removal and replacing of it without injury.

The defendants were responsible for all such damages as would necessarily arise from their acts, and the instructions did not authorize the assessment of other damages.

Judgment on the verdict.

JOHN HARRIS & *al.* *vs.* JOHN R. BLEN.

Where by the terms of a contract one party was to perform certain labor, and the other, in consideration thereof, was to pay a sum of money *in a certain month*, an action commenced *on the last day of that month* is prematurely brought and cannot be maintained, although a demand of the money had been made by the plaintiff on the same day before suing out the writ.

ASSUMPSIT on a special contract by which the plaintiffs agreed to cut and split for the defendant 600 cords of wood, at 75 cents per cord; and the defendant promised to pay the plaintiffs one half in *April*, 1836, and the other half in *May*, 1836. The writ was dated and served *May* 31, 1836. At the trial before SHEPLEY J. the Judge instructed the jury, that if they believed a demand was made on the thirty-first day of *May*, previous to the issuing and service of the plaintiffs' writ on that day, they would find for the second instalment due, otherwise not. The jury returned their verdict for the second instalment, and found specially, that a demand was made *May* 31, 1836, before the issuing of the writ. To this instruction the defendant filed exceptions. Several other questions arose at the trial, and were argued on the hearing of the exceptions, but do not appear here because no opinion was given in reference to them.

A. W. Paine, for the defendant, contended, that as the defendant had the whole of the last day of payment in which to pay the last instalment, the amount of it was improperly included in the verdict; and as the first instalment was overpaid, the action could not be maintained. The only case where an action can be maintained on the last day of payment, after making a demand, is that of bills of exchange and promissory notes. That is an exception to the general rule.

J. Appleton, for the plaintiffs, contended, that there was no difference between bills and notes and other contracts, with respect to the time when the suit can be commenced. As soon as a demand is seasonably made on the last day of payment, a suit can be maintained. *Greely* v. *Thurston*, 4 *Greenl.* 482; *Badger* v. *Phinney*, 15 *Mass. R.* 359; *Graves* v. *Ticknor*, 6 *N. H. Rep.* 537.

The opinion of the Court was by

WESTON C. J.—In *Greely et al.* v. *Thurston*, 4 *Greenl.* 482, it was decided that bills of exchange and negotiable notes, should be paid on demand, if made at a seasonable hour, on the day they fall due, and if not so paid, that the acceptor of a bill, or the maker of a note, might be sued on that day. But this was placed, expressly upon the ground, that by the custom and usage of merchants, these instruments formed an exception to the law upon this point, applicable to other contracts. That, generally, if money is to be paid, or a duty to be performed, the contracting party has the last moment of the day of the maturity of the contract, to pay or perform what he has undertaken to do.

In *Leftley* v. *Mills*, 4 *T. R.* 170, *Lord Kenyon* so lays down the law, for which he cites a number of authorities, intimating that he had found no opposing case. *Buller J.* while he assents to the correctness of the general doctrine, insists upon an exception, in respect to bills of exchange. And in the case first cited, the opinion of the court manifestly is, that bonds, mortgages, and instruments in writing, other than negotiable notes and bills of exchange, are not suable, until the day after they are payable.

By the contract between these parties, which does not fall within the exception, the defendant had all the month of *May*, 1836, within which to pay the second instalment. It results, that he was not liable to be sued upon it, until the first day of *June*. As there has been a fair trial between these parties, upon the points really in controversy, and this objection does not go to the merits, it is with regret that we disturb the verdict; but as it is a legal point, which the defendant has a right to take, it must be set aside, and a new trial granted.

HENRY HOMES *& al. vs.* WILLIAM SMYTH.

In an action on a promissory note against the maker by an indorsee, to whom it was indorsed before it became payable, and without any notice of a defence, *in payment of a pre-existing debt*, want of consideration, or the failure of it, cannot be given in evidence in defence.

THE action was by the plaintiffs, as indorsees of a note, dated *May* 4, 1835, signed by the defendant, payable in one year, to *E. & S. Smith*, or order, and indorsed in blank by them, and by *Levi Cram*, and by *Cram, Dutton & Co.* The note was negotiated to the plaintiffs by *Levi Cram*, eight or ten months before it became payable, without any knowledge by the plaintiffs of the consideration on which it was given, "in payment of a debt long before that time due from said *Cram* to the plaintiffs." It appeared in evidence, the plaintiffs objecting to the admission thereof, that the note in suit was taken by *Cram* in part payment of the consideration mentioned in a deed of warranty from *Cram* to the defendant, dated the same day of the note, conveying to him a tract of land. Before this conveyance was made, *Cram* had mortgaged the same land to one *Lewis* to secure the payment of notes to him to an amount exceeding one half the consideration of the deed from *Cram* to the defendant, and before the trial the defendant had paid *Lewis* towards removing the incumbrance an amount exceeding the note in suit.

At the trial, SHEPLEY J. directed the jury to return a verdict for the plaintiffs. The verdict for the plaintiffs was to be set aside, if the action could not be maintained upon such testimony as was properly admissible.

Rogers and *J. Appleton*, for the defendant, contended, that the same defence might be made to the note, as if it had still remained in the hands of the payee. To preclude such defence, the indorsee must take the note in the usual course of trade, and must pay money, or part with value for it at the time it is received. When a creditor receives a negotiable note in payment of a precedent debt, he takes it subject to all the equities between the original parties, and not as a bona fide purchaser for value. 20 *Johns. R.* 637; 9 *Wend.* 170; 10 *ib.* 85, as directly in point; 12 *Wend.* 246; 13 *ib.* 570; *ib.* 605. The testimony objected to was ad-

missible, and furnished a good defence to the note. A total failure of title to the land, which was the consideration of the note, may be given in evidence to defeat an action for the consideration money; and so may a partial failure *pro tanto*. *Rice* v. *Goddard*, 14 *Pick.* 293; *Dickinson* v. *Hall*, 14 *Pick.* 217; 11 *Conn. R.* 432. And where the note is indorsed, this defence may be given in evidence without filing in set-off. *Peabody* v. *Peters*, 5 *Pick.* 1.

M. L. Appleton, for the plaintiffs, contended, that the note was taken in the regular course of business, in the actual discharge and payment of a debt, and the plaintiffs are as much holders for value, as if they had loaned money or sold goods to the amount. If there was a defence against the note in the hands of the payee, there can be none when indorsed, as this was. *Bailey on Bills*, 439; *Tucker* v. *Smith*, 4 *Greenl.* 415. Even in *New-York*, where a note is received in payment of a note paid and cancelled thereby, it is held for value. 20 *Johns. R.* 637, cited for the defendants. In *New-York*, the receiving of another note for a pre-existing debt is not a payment of it, and the original security remains and may be enforced. 2 *Johns. Cases*, 71, 438; 5 *Johns. R.* 68. But even there they seem inclined to abandon the doctrine. 16 *Wend.* 659. But the cases cited for the defendants, have no application here, because by our law, the reception of the note by the plaintiffs was a full and complete discharge and payment of their precedent debt. The evidence objected to was inadmissible, not only because the plaintiffs were indorsees for value before the note fell due, but because if the suit had been between the original parties, still no defence would have been furnished by it. *Lloyd* v. *Jewell*, 1 *Greenl.* 352; *Howard* v. *Witham*, 2 *Greenl.* 390; *Knapp* v. *Lee*, 3 *Pick.* 452. The case cited for the defendant from 14 *Pick. Rice* v. *Goddard*, is full against them, that a partial failure of title gives no defence. Here the land passed by the deed, and there was merely an incumbrance upon it. The only remedy was on the covenants of the deed. *Smith* v. *Sinclair*, 15 *Mass. R.* 171.

The opinion of the Court was by

Shepley J.—These notes were transferred to the plaintiffs before maturity, and without any notice of a defence, in payment of

a pre-existing debt, due to them from the second indorser. And the question is, whether the same defence may be made, as if they were in the hands of the promisee. If the plaintiffs are holders for a valuable consideration, paid in the usual course of trade, they are entitled to recover. What is to be regarded as such a consideration, has been frequently discussed; and *Eyre C. J.* in the case of *Collins* v. *Martin*, 1 *B. & P.* 648, states the rule, "if it can be proved, that the holder gave no value for the bill, then indeed he is in privity with the first holder, and affected by all that will affect him." In the case of *Coddington* v. *Bay*, 20 *Johns. R.* 637, *Woodworth J.* says, "the reason of such a rule would seem to be, that the innocent holder, having incurred loss by giving credit to the paper, and having paid a fair equivalent, is entitled to protection." And that in every case, "it appeared that the holder gave credit to the paper, received it in the way of business, and gave money or property in exchange." And that the true question is, "have they paid value for the notes, or made any new engagements, as the consideration of the transfer." *Spencer C. J.* in the same case, says, the principle is, that when the holder has given credit to the appearances of ownership of the person in possession, and "has been induced to part with his money or property, *bona fide*, and that, as between him and the real owner, there must be loss on one side or the other, the law will not divest him of fruits he has honestly acquired, without the possibility of remuneration. In other words, the equities of the parties being equal, the law leaves him in possession, who already has it." These extracts are made, for the purpose of exhibiting the principle upon which the *New-York* cases are based. And this is done, because, as the law is received in this and some of the other states, in relation to the effect of negotiable paper, taken for a pre-existing debt, there will be found expressions in the *New-York* cases apparently contradicting the principles set forth in them. While those expressions may not be liable to any just objection there, they would be likely to lead one into error, who does not take into consideration the difference in effect, in that state and this, of negotiable paper taken for a pre-existing debt. In the case of *Rosa* v. *Brotherson*, 10 *Wend.* 85, relied upon in the defence, in the statement of the case, it is said, "the action is against the maker of a promissory

note, transferred by the payee to the plaintiff, *in payment* of a precedent debt," and in good faith and without notice. And *Savage C. J.* says, he must have made advances, or incurred responsibilities upon the credit of the paper. If the holder has done neither, but has taken it for a previous claim, his condition is improved, if he recovers, but he loses nothing, if he fails; his equity is not superior to the owner." And *Spencer C. J.* says, in *Coddington* v. *Bay*, he must "take them in his business, and as payment of a debt contracted at the time." The English doctrine was, that a bill of exchange or negotiable note, whether of the debtor or of a third person, taken for a pre-existing debt, was not payment. *Ward v. Evans*, 2 *Ld. Raym.* 928. And this appears to be the law there still, with the qualification introduced by the *statute* of 3 and 4 *Anne*, *c.* 9, *sec.* 7, which provides, that it shall be payment, if the holder does not take due course to obtain payment of the bill so received. In *New-York*, a bill or note so taken is not payment, *Tobey* v. *Barber*, 5 *Johns. R.* 68; *Johnson* v. *Weed*, 9 *Johns. R.* 309, unless expressly agreed to be received in payment. *New-York State Bank* v. *Fletcher*, 5 *Wend.* 85. The law of this, and of some of the other states, is known to be different, and negotiable paper, received for a pre-existing debt, is payment of it, unless the contrary be made to appear. While, therefore, in *New-York*, the taking of such paper, if not collected, would occasion no loss, in this state, it would cause the loss of the whole debt. They are deciding in accordance with the principles admitted in all the cases, when they hold, that in the hands of an indorsee, who takes it for a pre-existing debt, the same defence may be made as between the original parties. While, to adopt the same rule here, in the state of our law, would be to violate those principles. A note so taken there, is, in effect, taken, not in payment, but as collateral security only; and if so taken here, our decisions would accord with theirs. In the state of our law, to yield to their rule, would not only violate principle, but would throw the loss upon the party in possession for value innocently paid, instead of upon the party, who has not an equal but a less equity, having parted with his paper in a manner to enable another to use it to their injury and loss, unless they are entitled to recover. Upon principle

and upon authority, as our law is, the equity is with the plaintiffs, and they are entitled to recover.

It is not necessary to decide, whether as between the original parties, the defence would be good. Whenever there may be a re-examination of the question, it will be found, that the tendency of the later decisions has been to allow a total failure or want of consideration to be a good defence, especially where the contract was for land and there has been an eviction. And in some of the states a partial failure is allowed to be a good defence *pro tanto*, while there are very strong authorities against it. But the more carefully the English and American cases are examined, the more clearly will one perceive the truth of the remark of *Kent*, that "the cases are in opposition to each other and they leave the question how far and to what extent a failure of title be a good defence, as between the original parties, to an action for the consideration money, on a contract of sale, in a state of painful uncertainty." 4 *Kent*, 473. In this case, there has been but a partial failure in consequence of an incumbrance, and no eviction.

Judgment on the verdict.

HENRY HOMES *& al. vs.* EDWARD SMITH *& al.*

In an action on a promissory note, or inland bill of exchange, the original records of a deceased notary public, are admissible in evidence to prove demand and notice.

A copy of the record of a deceased notary, duly attested by the clerk of the court in the county where such record is filed, is admissible in evidence to prove demand and notice, under *stat.* 1821, *c.* 101, "concerning notaries public."

The statute requires all copies furnished by the notary to be under his hand and seal; but it does not require, that the record itself should be under seal, or that the clerk of the court should affix a seal to his copies thereof.

Although the records of the notary are admissible to prove demand and notice, yet in this State they are not the only evidence, but the facts may be proved by other testimony.

ASSUMPSIT by the plaintiffs, as indorsees, against the defendants, as indorsers of a promissory note, made by *William Smyth* to them

or order, and indorsed by them and by *L. Cram*, and by *Cram, Dutton & Co.*, dated *May* 4, 1835, and payable in one year from date. To prove a demand upon the maker and notice to the defendants, the plaintiffs offered a copy of the notarial records of *Mr. Starrett*, who died before the trial, certified by the clerk of the court of the county. They also offered the original records of the notary, which were on file in the clerk's office. Neither the records nor the copy had any impression of a seal thereon, but only the letters, (L. S.) written in the margin. This testimony was objected to by the defendants, as inadmissible, and as insufficient, if admitted, because it was made *May* 7, 1836, one day too late. The maker and indorsers lived in *Bangor* in this State. If the action could be maintained, a default, and if it could not, a nonsuit was to be entered.

M. L. Appleton, for the plaintiffs, contended, that the evidence was both admissible and sufficient; and cited *stat.* 1821, *c.* 101; *Welsh* v. *Barrett*, 15 *Mass. R.* 380; *North Bank* v. *Abbott*, 13 *Pick.* 465; *Halliday* v. *Martinet*, 20 *Johns. R.* 168; *Nicholls* v. *Webb*, 8 *Wheat.* 326; *Amer. Jurist*, *No.* 37, 159, citing 1 *Harrington*, 10.

Rogers, for the defendants, argued, that at common law, a protest is not evidence to prove demand and notice in case of an inland bill or note. *Chitty on Bills*, (*8th Ed.*) 499; *Bayley on Bills*, (*P. & S. Ed.*) 170, 332; case cited for plaintiffs, from 8 *Wheat.* 326. That it is not made so by statute in this State. *St.* 1831, *c.* 88, *c.* 101. The seal is the authentication of the protest, and where there is no seal, there is no protest. Neither the record nor the copy is under seal. The letters in the margin are not a seal. In case of foreign bills, the protest is the only evidence, and the same consequence must follow in inland bills and notes, if the protest is evidence. He also contended, that a demand made on the seventh of *May* was too late.

The opinion of the Court was by

Shepley J. — Without reference to the provisions of the statute of this State, the original records of the deceased notary are legally admissible to prove demand and notice. Such testimony has been received by judicial tribunals of the highest character af-

ter the most full consideration. 15 *Mass. R.* 380; 13 *Pick.* 465; 20 *Johns. R.* 168; 7 *Wend.* 160; 1 *Harrington*, 10. Nor is there any doubt, that the copy of the record of the notary, duly attested by the clerk of the Courts, is admissible by statute, 1821, *ch.* 101. By that a notary is authorized to give "all notices to indorsers of promissory notes, and it necessarily implies the authority to demand payment of the makers. It provides in case of his death, that his records shall be deposited in the office of the clerk of the Judicial Courts in the county where he resided; and the clerk is authorized to give attested copies, which are declared to be as valid as if given by the notary. The objection is, that neither the record, nor the copy is under seal, and that the statute requires, that the notary should keep a seal, and that his acts should be under his official seal. The statute does require that "all copies or certificates shall be under his hand and notarial seal." But the record itself is not required to be authenticated by a seal, and the records of a court of record are not usually authenticated in that manner, and yet the seal of the court is in certain cases necessary to authenticate a copy. When the clerk makes a copy of the notary's record, he can have no more right to use his seal, than to affix his signature; and the intention of the statute must have been, to make an attested copy by the clerk as good evidence as a copy, under the hand and seal of the notary, would have been. When inland bills and notes are by statute required to be protested by a notary, his acts only can be admitted in proof, as in the case of foreign bills. But when, as in this state, there is no such provision, the notary being only authorized to do it, his records, and certificates under his hand and seal, are admissible, yet not required, to prove demand and notice.

The note being payable "one year from date," it is said, that the demand should have been made upon the sixth, and not upon the seventh of *May*.

But in such cases, the day of the date is to be excluded in the computation. *Windsor* v. *China*, 4 *Greenl.* 304; *Bigelow* v. *Willson*, 1 *Pick.* 485. And the demand appears to have been properly made, and due notice to have been given.

Default to be entered.

LEONARD JACKSON *vs. The Inhabitants of* HAMPDEN.

When there are three members of the superintending school committee, two of them have no power to dismiss a schoolmaster, under the provision of *stat.* 1834, *c.* 129, *sec.* 3, "to provide for the instruction of youth," unless due notice has been given to the third, that he might have an opportunity to attend and act with them.

ASSUMPSIT to recover compensation for the plaintiff's services in teaching a school ten weeks, in district No. 15, in the town of *Hampden*, but composed partly of inhabitants of *Hampden*, and partly of inhabitants of *Newburgh*, of which towns *Hampden* was the oldest. The plaintiff had been duly contracted with, by the legal agent of the district, to teach the school; had procured the requisite certificates, and commenced teaching the school. After he had kept the school about two weeks, complaint was made to two of the three superintending school committee, the other member of the committee being absent from town, and not being notified of any of the proceedings, and taking no part therein, and those two members of the committee visited the school, and examined it and the master, and found him, as they said, unfit, and verbally discharged and dismissed him; and, in a few days afterwards, made and signed a written statement to the same effect, and caused it to be delivered to the plaintiff. The agent of the district, knowing all the facts, immediately made a new contract with the plaintiff to teach the school, and directed him to proceed, and he did go on and complete the original contract.

At the trial before SHEPLEY J. the plaintiff's counsel contended, that two of the committee could not legally act and dismiss the master. The Judge ruled that they could, to which the plaintiff filed exceptions. Several other questions were raised at the trial, and argued to the court, but are omitted, because the opinion is based on this, alone.

A. G. and *D. T. Jewett*, for the plaintiff, argued that the acts of the two members of the committee were void, because the third was not notified of their meeting or proceedings. The whole committee must act in all affairs between individuals, to make their decision binding; and although, in public affairs, a majority can act

in some cases, no act of the majority can be legal, unless the whole were notified, and had an opportunity to act on the subject. *Commonwealth* v. *Ipswich*, 2 *Pick.* 70; 1 *Bos. & P.* 236; 2 *Kent*, 293, 633; *Towne* v. *Jaquith*, 6 *Mass. R.* 46; 6 *Johns. R.* 39; 2 *Wend.* 491; 5 *Binney*, 485; 9 *Serg. & R.* 99; 7 *Serg. & R.* 444; *Stat.* 1834, *c.* 129; *Searsmont* v. *Farwell*, 3 *Greenl.* 450.

H. Hamlin, for the defendants, contended, that the powers of the superintending school committee, like those of selectmen of towns, may be exercised by a majority, and that it was not expected, or intended that all should be present to make the acts of the majority valid. The case of *Searsmont* v. *Farwell*, cited for the plaintiff, is directly in our favor. But here the third member of the committee was out of town, and there was no committee to act, except those who did act. They had the same power, as they would have had, if the third had been dead.

The opinion of the Court was drawn up by

Shepley J. — When the master was dismissed from the further charge of the school, the superintending committee consisted of three persons, two of them only acted, the third being absent from town was not notified. There is no provision in the statutes, authorizing a majority to act, as there is authorizing selectmen and assessors in certain cases. The powers of this committee in executing the public trust confided to them, must be ascertained by the application of the principles of the common law. And it seems to be well settled, that when power is entrusted to several for private purposes, they must all join in the execution of it; but when the power is conferred for public purposes, a majority may act.

This bill of exceptions states, that the counsel "contended, that two of the committee could not legally act and dismiss the master, but the judge ruled otherwise." This ruling, in the manner stated, was correct; but it appears in the case, that the third committeeman was not notified; and the Judge does not appear to have particularly noticed that fact, or to have given the proper instructions in relation to it. This would not afford sufficient cause for setting aside the verdict, if it were not of vital importance in the case. Although it be true, that in the execution of a public trust, a ma-

jority may decide, yet the whole should be notified, that all may have opportunity to attend and take a part in the deliberations and decisions of the body. *Grindley* v. *Barker*, 1 *B. & P.* 236; *Baltimore Turnpike*, 5 *Bin.* 481; *McReady* v. *Guardians of the Poor*, 9 *S. & R.* 94; *Ex parte Rogers*, 7 *Cow.* 526; *Crofoot* v. *Allen*, 2 *Wend.* 494; *Damon* v. *Granby*, 2 *Pick.* 345. And it is important to require this notice to avoid the possibility, that a majority should intentionally exclude the minority from all participation in their deliberations and proceedings; and thus deprive the public of their services, prevent the exercise of a legal right, and perhaps accomplish purposes, which otherwise never could be accomplished.

In this case, it is not probable, that a notice to the third member of the committee would have been of any practical utility, because it is understood, that he was so situated that he would not have been present if notified. But that does not allow the majority to dispense with the rule requiring notice. They are not, in such cases, constituted the judges, whether the notice would be effectual to secure his attendance. Nor would it be entirely safe to entrust to them such a power, as it would afford an opportunity to select an occasion, when they might judge that a notice would be ineffectual, and thus, by neglecting to give it, free themselves from the presence of a dissenting minority. And if notice be always required, it may often happen, that those will be able to attend, who were believed to be so situated, that their attendance could not be expected. Nor is there any difficulty in giving the requisite notice in such cases, as one left at the usual place of residence would be sufficient. Such a course may cause some delay and embarrassment in the execution of some of their duties, but whether this will be a greater evil than those alluded to, and that of allowing majorities to act in all cases without the knowledge and assistance of minorities, thus constituting the majority in effect the whole committee, the legislature must judge. The court can only apply the rule of law as it finds it established.

The proceedings of the committee must be regarded as illegal and ineffectual to dismiss the master, because the third member of the committee was not notified.

Exceptions sustained.

JAMES JACOBS *vs. Inhabitants of* BANGOR.

When a highway is defective, it becomes the duty of the town immediately to repair it; and if the repairs are of such character as to require the way to be wholly obstructed, the town would be justified in closing it until the repairs can be made. If the town concludes, that the repairs can be made without interrupting the travel, and proceeds to repair, without making known, that the way is not in a condition to be used, or that there is danger in using it, the liability of the town for injuries, as in other cases, remains; although there may not have been any other neglect on the part of the town, than that of having permitted the way to be out of repair.

The traveller cannot, however, when he perceives that a way is under repair and much incumbered for that purpose, and that but a narrow and difficult passage is open for him, claim to drive with the same rapidity, and to exercise only the same attention, which would be allowable on a smooth and unincumbered way; but is bound to exercise that degree of watchfulness and caution, which men of ordinary prudence would do under such circumstances.

When irrelative or inadmissible testimony has been received at a trial, without objection, that it was considered by the jury affords no just cause for a new trial.

In cases where there is no certain measure of damages, the court will not substitute its own sense of what would be the proper amount for the verdict of a jury; and will not set aside a verdict, because the damages are excessive, unless there is reason to believe, that the jury were actuated by passion, or by some undue influence, perverting the judgment.

THIS was an action to recover damages sustained in *November*, 1835, by the plaintiff, while passing along a public street in *Bangor*, by reason, as he alleged, of the negligence of the defendants. There was no special averment in the declaration of the expense incurred by medical attendance and nursing. At the trial before EMERY J. it appeared, that the injury took place in passing in the daytime over a portion of the road across a deep ravine, which had once been built up at great expense, but the earth had been pressed out, and had fallen down, and it became necessary to make repairs. The city had made a contract with one *Adams* to have the repairs made. The width of the elevation of the earth was 28 feet at the top and wider at the bottom. It had been deemed necessary, that trenches should be dug wherein to insert long pieces of timber to preserve the work, and secure the railing. While the work was in execution, very long string pieces of timber were laid

on each side of the embankment, or bridge, to be used as might be required, and a passage way of from ten to twelve feet in width was left in the middle for teams and carriages to pass. The plaintiff, (while they were repairing the bridge,) came from *Hermon*, a town in the vicinity, with the intention to pass to a mill beyond the bridge, and was riding over in an open two wheeled carriage, or gig without a top, drawn by one horse, which was trotting slowly. In passing along the narrow part between the timbers, one wheel scraped against the side of a log, and the plaintiff attempted to check the horse, but he went faster, and in going ten or twelve feet the other wheel struck the end of a stick which projected farther than the others, and the plaintiff was thrown out, and his leg was badly broken.

At the trial the defendants contended, that they were not liable, and requested the Judge to instruct the jury, that if they should find, that the defendants had taken reasonable care to provide a passage way over the bridge during the repairs, they are not liable. This was given as an instruction, but accompanied with the remark that if from the evidence the jury were satisfied, that the plaintiff was driving moderately, and with proper and ordinary care, and that the injury was occasioned by the incumbrance in the highway, without the fault of the plaintiff, the defendants were liable. The jury found for the plaintiff, and assessed damages in the sum of $1700. If the instructions ought to have been given without the accompanying addition, the verdict was to be set aside. There was a motion for a new trial, because the verdict was against evidence, and because the damages were excessive. The whole evidence was given in the report, but it is sufficiently noticed above and in the opinion of the Court, to understand any question of law arising in the case.

Rogers and *W. Paine*, for the defendants, contended, that the instructions requested, when they were given, should not have been attended with such additional ones, as destroyed the effect of them. As this accident happened, not from neglecting to repair the road but from doing what the law required of them, putting it in a state of repair, the city was not liable during the process, if they had taken reasonable care to provide a passage way over the bridge. The plaintiff must have seen, that the road was then in the process

of repairing, and therefore had notice of it, and if he chose to proceed upon the road in that state, he did so at his own risk, if the defendants made the repairs in a reasonable and careful manner. No action will lie against a town, unless an indictment can be supported for the same neglect. The jury must have misunderstood the charge of the Judge, if it required the plaintiff to use a degree of care in proportion to the difficulty he had to encounter, if he persisted in going over in that place instead of a little farther round. They also argued, that the verdict should be set aside, because it was against evidence, and because the damages were so excessive. They cited *Howard* v. *North Bridgwater*, 16 *Pick.* 189; *Smith* v. *Smith*, 2 *Pick.* 621; 2 *Taunt.* 314; 11 *East*, 60; *Coffin* v. *Phœnix Insurance Company*, 15 *Pick.* 291; *Shute* v. *Barrett*, 7 *Pick.* 82.

A. G. Jewett, for the plaintiff, insisted, that the instructions actually given by the Judge, were more favorable to the defendants, than if he had merely given the instruction requested. The Judge instructed the jury, that the plaintiff could not recover without he made use of due care, and was entirely free from fault or negligence himself, and there was fault or negligence in the defendants. The counsel also contended, that the verdict was fully warranted by the proof, and that the damages were moderate. He cited *Thompson* v. *Bridgwater*, 7 *Pick.* 188; *Smith* v. *Smith*, 2 *Pick.* 625; and *Frost* v. *Portland*, 2 *Fairf.* 271.

The opinion of the Court was drawn up by

Shepley J.—This case is presented to the consideration of the Court to have the verdict set aside; 1. on account of the instructions given, and those withheld; 2. because the verdict is against the weight of evidence; and 3. because the damages are excessive. Whether the instruction requested should have been given will depend upon the duties of the parties under the circumstances proved in this case. The city was making the necessary repairs upon the street, and for that purpose was obliged to permit it to be in some degree incumbered, and in a less safe condition for travellers, than is ordinarily to be expected. And it is contended, that while the street was thus necessarily under repair the defendants are not lia-

ble, unless they have been guilty of some neglect or want of due diligence in the business of repairing.

When a highway is defective, it becomes the duty of the town immediately to repair it. And if the repairs are of such a character as to require it to be wholly obstructed, as in building or repairing a bridge may be the case, it would be justified in closing it until the repairs can be made. When the town concludes, that the repairs can be made without interrupting the travel, and proceeds to repair without making known that the way is not in a condition to be used, or that there is danger in using it, its liability for injuries, as in other cases, must be regarded as continuing; although it may not have been guilty of any other neglect, than that of permitting the way to be out of repair. Its general liability under the statute is not in such cases suspended. And it cannot reasonably claim, that it should be, unless there is a necessity for it; and then travellers should have notice of such necessity, that they may avoid the danger. If the way is not closed, and no notice is given, travellers may expect that it is practicable to pass it safely; and that they will have the usual protection, which the law affords.

The traveller cannot however, when he perceives that a way is under repair and much incumbered for that purpose, and that but a narrow and difficult passage is open for him, claim to drive with the same rapidity, and to exercise only the same attention, which would be allowable in a smooth and unincumbered way. He is bound to exercise that degree of watchfulness and caution which men of ordinary prudence would under such circumstances. If he does that, the town will be responsible, whether it has or not unnecessarily obstructed the way. If this be a correct exposition of the duties of the parties, the instruction requested should not have been given without qualification. That annexed required of the plaintiff ordinary care, and that the injury should have been occasioned without his fault.

It is insisted, that the jury might not and probably did not understand, that the care required was to be in proportion to the difficulties to be encountered. It is so apparent to the mind of every man of business, that different degrees of attention and care are expected in circumstances exhibiting very different degrees of risk and danger, that the presumption that the charge to the jury was

misunderstood, cannot reasonably arise. It cannot be supposed, that a jury would consider the plaintiff, as without fault, if he used no more care, than would be required on a way in good repair and not incumbered. If the counsel perceived, that there was doubt, whether the jury would correctly understand the charge, they should have made a request for such a charge as would have removed it.

The evidence is in some degree contradictory, as to the situation of the timber upon the narrow passage left. According to the statement of the witness, *Day*, the injury was occasioned by the carriage wheel striking against the end of a stick of timber, which projected further than the others into the passage way. His statement respecting the conduct of the plaintiff does not appear to be entirely consistent. It is, that he and the plaintiff were probably talking, that he was looking at the men digging a trench, and plaintiff was looking another way; and yet he says the plaintiff was using all the care any one could. It is now objected, that this is matter of opinion; and so it is, and so appears to have been his statement respecting their talking; and whether, when he was looking at the men digging in the road below, he could see what other way the plaintiff was looking, may admit of doubt. It all appears to have been received without objection; and when so received it affords no just cause for a new trial, that it was considered by the jury. The whole circumstances were peculiarly within the province of the jury. There are no facts so certainly proved and so important and decisive, that a court can with confidence decide, that the verdict is unauthorized by the testimony, and it is in such cases only, that it should be set aside.

Are the damages so excessive as to make it the duty of the court to set aside the verdict for that cause? This is a case where there is no certain measure of damages. The fractured limb is shortened. One joint is permanently injured. Whether it will ever be sound in other respects is by the surgeons regarded as doubtful. It is supposed in such a case, that a sum equal in value to the annuity paid by the government for the loss of a limb would have been a full compensation. And if the court had assessed the damages it is not improbable, that it would not have given a larger sum. But in cases of this description their verdict is not to be set

aside unless there is reason to believe, that the jury were actuated by passion, or by some undue influence, perverting the judgment. The Court cannot substitute its own sense of what would be proper for the verdict of the jury. There is no sufficient reason for concluding, that the jury were under any such influence as should destroy their verdict, and deprive the party of the right of having that verdict regarded as the measure of his compensation. It is said that the damages were probably made up partly by allowing for the loss of time, and for the expense of medical attendance and nursing, which losses are not alleged in the declaration. If so, the evidence was not objected to, and being in the cause it *might* be properly considered. As it is not unjust, that it should constitute an item of the amount of damages, it affords no reason for granting a new trial.

Judgment on the verdict.

Henry Scott *& al. vs.* Horatio P. Blood.

General reputation is not admissible in evidence, in aid of other testimony, to prove a partnership.

This was a writ of review. The original action was assumpsit by *Blood* against *Henry Scott*, *Jacob G. Remick* and *Daniel Remick*, as partners doing business in the name of *Scott & Remick*. A motion was made to dismiss the writ of review, and overruled by the Judge, at the trial, but was not noticed in the argument or decided by the Court. The original plaintiff introduced testimony for the purpose of showing, that the three defendants were partners, and with other evidence proved, without objection being made, the declarations of *Scott*, that the three were partners. The original plaintiff then "offered to prove the partnership, as alleged, by testimony of *general reputation*." Objection was made, and Shepley J. before whom the trial was, refused to admit it. *Blood* filed exceptions.

This case was argued at the *June Term*, 1837, but the opinion was not received by the Reporter until *May* 1, 1840.

F. H. Allen, for the original plaintiff, argued, that testimony of general reputation was admissible to prove a partnership on principle, from public policy, and on authority; and cited *Whitney* v. *Sterling*, 14 *Johns. R.* 215; and *Gowen* v. *Jackson*, 20 *Johns. R.* 176.

Kent, for the original defendants, controverted those positions, and contended, that the evidence offered was inadmissible. He cited 3 *Stark. R.* 53; 1 *M. & Selw.* 686; 1 *Stark. on Ev.* 61; 14 *East*, 323; 13 *East*, 321; 3 *T. R.* 723; *Whitney* v. *Ferris*, 10 *Johns. R.* 66.

The opinion of the Court was drawn up by

EMERY J.—By the exceptions, two questions might have been raised. First, whether the decision of the Judge was correct in overruling the defendant's motion to dismiss the writ of review. And second, whether the Judge was justified in refusing to admit the defendant in review, to prove the partnership as alleged by the testimony of general reputation. On the argument, no notice was taken of the first. And the subject was discussed as a simple question of the admissibility of general reputation to prove partnership. It was treated as a new question, not directly decided in courts of *Massachusetts* or *Maine*, and as one calculated to control the proof as to partnership, and it was insisted, that less evidence is necessary to settle proof of partnership between defendants, than between plaintiffs. For the articles of partnership between defendants, if they existed, would not usually be known to the plaintiffs, and all the defendant in review, the original plaintiff, could rely on, would be the acts and declarations of the parties, and the impression made on the public by their conduct. That if a party have produced the general impression on the community of the existence of a partnership, we are asked if it ought not to be admitted in evidence, not unsupported, to establish the fact, but that policy and safety of community require this, as ranking among the slight facts, which should go to a jury to prove a partnership.

Two cases decided in *New-York*, are cited to sustain the argument. The first is *Whitney* v. *Sterling*, 14 *Johns. R.* 215, the other *Gowen* v. *Jackson*, 20 *Johns. R.* 176. The main ground, separate from the influence of the two cases cited, upon which the counsel would sustain the exception, *is that of policy.* And it is true, that many contracts are considered void as against the policy of law. Such are those that bind to a total restraint of trade, or of marriage, or promising a reward to a person if by reason of his influence over one of the parties to the match sought to be accomplished, he can procure a marriage between the parties, contracts for the maintenance of suits which no way belong to one, wagers which have a tendency to create a breach of the peace, or affect the feelings of third persons, or an agreement conditioned to secure a person's interest for a candidate at an election, and some others, and among them, those void by the statute of frauds, whose policy has received the commendation of this Court in the case *Gillpatrick* v. *Sayward*, 5 *Greenl.* 465. And something like this policy has been introduced in the regulation of evidence.

Thus it was held, that if a *non compos* aliened by fine or recovery, that should not only bind him, but his heirs. And in *Butler's* note to *Coke on Litt.* 247, (a,) it is said, *Lord Hobart* observes, in the case of *Needler* v. *Bishop* of *Winchester*, that in those cases the law finds these persons not so disabled, nor admits the averment of such disablement, because it is certified by invincible and indisputable credit of the Judge, that they were perfect and able persons. *And so here is a law of policy* that doth not cancel the law of nature, but doth only bound it in point of form and circumstance, it being better to admit a mischief in particular, even against the law of nature, than an inconvenience in general; and it is not the law of nature to admit any improbable surmise against authentic record or evidence. *Hob.* 224. Neither this case nor the opinion of *Ld. Hobart*, is included in the edition published by the learned Judge *Williams.*

The simple note is "of advowson," &c. We do not mean to indicate any regret for this omission, having no particular prepossession in favor of the right of presentation to a church, independent of the approbation of a parish. Fine and recovery are not used with us as a mode of conveyance of estates. In the State of *Con-*

necticut, it has been held, that a man may show that he was *non compos mentis* in avoidance of his deed. 3 *Day's R.* 90, *Webster* v. *Woodford*. The Court saying, that the ancient common law was, that a man might do it, that it remained the law during a long period, never altered by legislative act, but the contrary doctrine depends upon decisions of courts, in direct opposition to the common law. That the court's business is to expound, not to make the law.

It is not an agreeable concession, that the rules of evidence should be based on mere shifting grounds of policy. Whose shall it be, the policy of the court, or of the executive, or of the legislature? Questions of sound policy would at first seem to rest with the latter. That the intention of the legislature, in making a constitutional law, should be carried into execution, is a fundamental rule of construction of statutes. But policy is a word susceptible of a good sense and a bad one. If it be understood as art, stratagem, it should never be a ground of judicial decision. If taken in the sense of the art of governing, or the management of affairs, it is rather inappropriate for courts of law to be dealing with it, otherwise than in the synoneme of prudence or wisdom in practical affairs, appertaining to the administration of justice; to suppress a mischief, rightly to expound the law, to guard against fraud, and advance the remedy for a mischief or inconvenience. Thus it is the legal policy of the *United States* for the judicial power, as matter of right and duty, to pronounce as void any act of the legislature, made in violation of the provisions of the constitution. And in this State, the Court has acted in conformity with this policy. *Comins* v. *Bradbury*, 1 *Fairf.* 447; *Trustees of New Gloucester School Fund* v. *Bradbury*, 2 *Fairf.* 118.

While we were a part of the Commonwealth of *Massachusetts*, evidence in the courts of justice was rejected on the grounds of public policy. *Churchill* v. *Suter*, 4 *Mass. R.* 156; *Manning Ex.* v. *Wheatland*, 10 *Mass. R.* 502. But as applied to the case under consideration, this conception of public policy, if acted upon, by admitting *reputation* in evidence, would lead to the unfortunate result of legalizing mere opinion unsanctioned by oath, and perhaps something destitute even of opinion for its foundation. With whom did it originate, and upon what ground was it called into existence? "However imposing from the real or supposed respectability of the

person first expressing it, thorough and patient inquiry, and examination might shew that it rested upon a precarious foundation, or upon none at all."

Every word, writing or act of the defendant, even his silence, if any thing implicating him as connected in the partnership was uttered in his presence and hearing, might justly be adduced in proof. But to introduce reputation in aid, it appears to us, that so far as sound policy should go, it would be decisively in favor of excluding it, because its admission trenches so strongly on well settled rules of evidence, and would be so likely to lead to improper conclusions.

There are general rules respecting the admissibility of evidence. The constant changes in the business relations of society may extend their number, and produce relaxations or qualifications of those which have now the stamp of authority. Admitting one of them to be, that all circumstances capable of affording a reasonable degree of presumption are evidence; it must be received in connexion with another, that hearsay is not evidence, because the party was not on oath, and because the party who is affected thereby, had not an opportunity of cross examining. A sort of distinction is allowed between hearsay and reputation. Yet reputation is nothing more than hearsay derived from those who had the means of knowing the fact, and may exist when those best acquainted with the fact are dead. Still it is a general rule, that reputation is evidence as to general character, as to the fact of legitimacy, relationship, pedigree, rights of common, rights of way, and all rights depending upon custom or prescription. But the admissibility of evidence of this last description, has been a vexed question for many years in *Westminster Hall.* See 14 *East's Rep.* 323, *Doe Lessee of Dedsbury* v. *Thomas & als.* in note.

In *Reed* v. *Jackson,* 1 *East,* 355, it was observed by *Lawrence* Justice, that reputation would be evidence as to right of way, and *Kenyon C. J.* agreed, that reputation was evidence with respect to public rights, claimed as in that case, but not with respect to private rights.

In the case of *Weeks* v. *Sparks,* 1 *Maule & Sel.* 686, part of *Lord Ellenborough's* view of the question was, supposing it to be a case of merely private right, whether according to the habit and

practice of the circuit in which it was tried, reputation can be received. And he confessed himself at a loss fully to understand upon what principle even in matters of public right, reputation was ever admissible evidence. But he admitted its existence. It was as it were a question between the plaintiff and a multitude of persons. Reputation he says, is in general weak evidence, and when admitted, it is the duty of the Judge to impress on the minds of the jury, how little conclusive it ought to be, lest it should have more weight with them, than it ought to have. The habit of admitting it could not make the law, but it showed what the prevailing opinion has been on this subject amongst a large class of persons interested in the due administration of the law. The opinion thus expressed, must be taken as applicable, particularly to the subject which called it forth, a claim of prescriptive right of tillage on a common, that evidence of reputation was admissible, a foundation having been laid first by evidence of enjoyment of the right. The concession seemed to be almost extorted from the Chief Justice. And the reason is, that he considered the admission of hearsay evidence upon all occasions, whether in matters of public or private right, as somewhat of an anomaly, and formed an exception to the general rules of evidence. And *Le Blanc J.* said, evidence is to be admitted from old persons, not any old persons, but persons conversant with the neighborhood where the waste lies, over which the particular right of common is claimed, of what they heard other persons of the same neighborhood, who are deceased, say respecting the right.

The case of the *King* v. *The Inhabitants of Eriswell*, 3 *T. R.* 707, in which *Buller & Ashurst*, Justices, were opposed in opinion to *Gross J.* and *Lord Kenyon*, Chief Justice, on a question of removal of a pauper, and his declarations before he became insane, and his examination relative to his settlement before two Justices, contains sufficient of judicial wisdom to admonish us to be cautious on the subject of increasing the exceptions to the general rules of evidence. *Ashurst J.* remarked, that if it were a new case, he should be strongly of opinion, that the evidence given, ought not to have been received, as being hearsay evidence. *Lord Kenyon* says, all questions upon the rules of evidence, are of vast importance to all orders and degrees of men; our lives, our lib-

erty and our property are all concerned in the support of those rules, which have been matured by the wisdom of ages, and are now revered from their antiquity, and the good sense in which they are founded, not rules depending on technical refinements, and the preservation of them is the first duty of judges. And for that cause, he asserted, that the evidence should be given under the sanction of an oath, legally administered and in a judicial proceeding, depending between the parties affected by it, or those who stand in privity of estate or interest with them. He was much afraid that they might endanger a rule of infinite importance to every individual, and by suffering exceptions to creep in, one after another, leave nothing like a rule. *Gross J.* says, no one ever conceived that an agreement could be proved by a witness swearing, that he heard another say, that such an agreement was made.

It has been contended, that where declarations have been made by those who were under no temptations to misrepresent the fact, they are no longer to be considered in the same light with the mere wanton unauthorized declarations of a stranger. Such declarations were once admitted in the case 1 *Mod.* 282, *Luttrell* v. *Raynell & al.* that *William Maynard*, one of the plaintiff's witnesses, was guilty by his own evidence, with the defendants, but was left out of the declaration that he might be a witness. Several witnesses were received and allowed to prove that *William Maynard* did at several times discourse and declare the same things and to the like purpose that he testified now. And the Lord Chief Baron said, though hearsay was not to be allowed as a direct evidence, yet it might be made use of to this purpose, viz. to prove that *William Maynard* was constant to himself, whereby his testimony was corroborated.

We think a more correct view of this subject was taken by this Court, in the case of *Ware* v. *Ware*, 8 *Greenl.* 42, in which this case was cited, and the Court considered the principle clearly established, that an impeached or contradicted witness *cannot be supported* by the party who called him, by proof of his declarations made at other times, and to other parties, coinciding with his testimony.

This decision contains the germ of the principle which should guide us on the subject under discussion. And deeply as we respect those who decided the two cases cited from *New-York*, by

the counsel for the original plaintiff, we are constrained to withhold our concurrence. They seem to us substantially at variance with former and subsequent decisions in that State, and with decisions in *Massachusetts.*

The case of *Whitney* v. *Ferris,* 10 *Johns.* 66, accords more with our views. There the objection was to evidence of the declarations and acts of *J. Ferris,* implicating *E. Ferris,* until the plaintiff first proved the fact of a partnership between the three persons charged. It was held by the Court, that the declarations and acts of *Jonathan Ferris* were evidence to show that he considered himself a partner with *Bostwick* and *E. Ferris,* but they were not evidence directly to implicate or charge *Elijah* with being a partner. They were admitted in too broad a latitude and the Court could not say what influence they might have had with the jury in charging *Elijah* directly as a partner.

In *Sweating & als.* v. *Turner, in error,* 10 *Johns.* 216, two were sued as partners. They pleaded, that the promises, if made, were made jointly with one *McNeil.* Issue was taken on the point whether the promises were by the defendants alone. They offered to prove by the declarations of the defendants, and of *Mc Neil,* when they were all present together, previous to the time the plaintiff's action accrued, and before the commencement of the suit, that they all declared and acknowledged themselves as partners, and held themselves out to the world as such. The court held, that if the defendants and *McNeil* were partners, they might have shown it by the production of the articles of copartnership, or by witnesses to the agreement. But for the defendants to offer their own declarations in support of their plea was against the rules of evidence. The declarations of a party are good evidence against him, but he never can testify for himself or use his own declarations in his own favor; *and the declarations of McNeil, he not being a party to the suit, were not evidence. He should have been produced and sworn.*

General reputation merely was considered inadmissible to prove who are officers of a corporation. 7 *Cowen,* 234. And in defence of an action on the case, for a fraudulent representation, the good character of the defendant for fairness and honesty in business

transactions was held to be inadmissible. 16 *Wend.* 646, *Gough* v. *St. John.*

In 5 *Pick.* 514, *Tuttle* v. *Cooper*, declarations and admissions of a person acting as a partner, were held inadmissible to prove a partnership so as to charge others as partners. Or that a note given by the person so declaring that it was given in the usual course of partnership business. 6 *Pick.* 464, *Robbins & al.* v. *Willard & al.* Yet precisely such declarations might have laid the only foundation for a reputation, that the party sought to be charged was a partner. Upon what just principle then could *reputation as to such a particular fact* be introduced as *prima facie* evidence? We apprehend, that we shall furnish the best security to society, and best support the established rules of evidence, by overruling the exceptions. And we do overrule them.

Augustus C. Smith & *al. vs.* Benjamin Richards.

Where a draft is drawn by one upon another in favor of a third person, without specifying therein the purpose to which it is to be applied, parol evidence is admissible to show in what manner *the parties* understood the money was to be appropriated.

But where the draft is accepted generally, the mere declarations of the acceptor at the time of the acceptance, when the other parties were not present, are not evidence of its appropriation to the declared object.

The conviction ought to be strong on the minds of the court that the jury have fallen into some error in regard to the nature and force of the evidence, before the court will interfere and grant a new trial.

Assumpsit, declaring on a writing of which a copy follows.

"*Bangor, July* 31, 1835.

"I hereby obligate myself to pay to *A. C. Smith* and *A. G. Currier* fifty cents per acre for a lot of land bonded to me by them, provided said land is sold by me, and fifteen dollars for the whole if it is not sold. "*Benj. Richards.*"

On the trial before Shepley J. the plaintiffs offered in evidence the deposition of one *Stiles*, which was objected to as proving the contents of a written instrument. To remove this objection the

plaintiffs read an affidavit of one of them to prove the loss of the bond from one *Jordan* to the plaintiffs mentioned in the deposition, and which the deponent testified, had once been given by the plaintiffs to the defendant, and by him returned to them. The Judge admitted so much of the deposition as proved the fact that such bond had been given and returned, but excluded so much as went to prove the contents of the bond. *Jordan* was called by the plaintiffs, who testified, that they were to give him fifty cents advance per acre by a written contract between them which was cancelled and destroyed when the plaintiffs gave him a draft on the defendant, and that the defendant had told him he had sold the land, and that he and another person had made $1600 on it; that he was present when the plaintiffs asked the defendant, if he was going to take the land, and he replied that he should; and that he received his pay of fifty cents an acre from the plaintiffs by their draft or order on the defendant, and by him accepted and paid. To the testimony of *Jordan*, the defendant objected, but it was admitted. The exceptions state, that the defendant read in evidence a bond from one *Hopkins* to the witness, *Jordan*, and a draft drawn by the plaintiffs on the defendant, and by the defendant accepted, but the contents thereof do not appear in the exceptions. It seemed to be admitted on the argument, that the draft amounted to exactly fifty cents an acre for the quantity of land bonded. The defendant's counsel then proposed to prove, that at the time of his accepting the order, he was advised that it would be a payment of the sum due to the plaintiffs on the contract declared on, and that he accepted it, declaring it to be for such purpose, neither of the plaintiffs being present. This testimony was rejected. The jury were instructed, that if they were satisfied from the testimony, that the order was drawn and accepted in discharge of the contract declared on, they should find a verdict for the defendant. If they were satisfied, that the order was drawn for the purpose of designating the proportion of the money to be paid by the defendant to *Jordan* from that proportion of it to be paid to *Hopkins*, and that the defendant so understood it, then the payment being made to discharge a different contract from the one declared on, they should find in favor of the plaintiffs; and that in examining the testimony they might call to mind the language of the paper declared on,

where it speaks of a "lot of land bonded to me by them." The verdict was for the plaintiffs. The defendant excepted to the admission of the testimony objected to, and to the rejection of the testimony offered, and to the instructions of the Judge to the jury. There was also a motion to set aside the verdict as against evidence.

Garnsey, for the defendants, contended: —

That all the contracts are to be construed together. *Davlin* v. *Hill*, 2 *Fairf.* 435. The paper declared on was cancelled, and ceased to be obligatory on the defendant on the surrender by the defendant to the plaintiffs of the bond of the same date. *Stackpole* v. *Arnold*, 11 *Mass. R.* 27; *Kimball* v. *Morrill*, 4 *Greenl.* 368; *Haven* v. *Brown*, 7 *Greenl.* 421; *Wilson* v. *Hanson*, 3 *Fairf.* 58. The evidence offered by the defendant and rejected, should have been received, on the ground of its being a payment. The defendant has a right to direct the appropriation. 2 *Strange*, 1194; 2 *Caines*, 99; 3 *Caines*, 14. It should have been received as a part of the *res gesta*. *Pool* v. *Bridges*, 4 *Pick.* 378; *Carter* v. *Gregory*, 8 *Pick.* 65; *Allen* v. *Duncan*, 11 *Pick.* 308; *Milford* v. *Bellingham*, 16 *Mass. R.* 108; *Kimball* v. *Morrill*, 4 *Greenl.* 368. He also argued, that the instructions given were erroneous, and that a new trial should be granted, because the verdict was against evidence.

Cutting, for the plaintiffs, said the case was merely this. *Hopkins*, owning the land, gave a bond of it to *Jordan* at $3 an acre, *Jordan* assigned this bond to the plaintiffs, at $3,50 an acre, and they sold and assigned the bond to the defendant, at $4, the acre. The defendant then sold and assigned the bond to a third person at an advance, and received of him all above $3 per acre, and the purchaser gave up the bond to *Hopkins*, and took a title directly from him. The defendant then has his own profit, and that of the plaintiffs, and of *Jordan*, and now seeks to make the sum due to *Jordan* pay both him and the plaintiffs. The course taken by the Judge is too clearly correct to require either argument or authority to support it.

Rogers replied for the defendant.

The opinion of the Court was drawn up by

EMERY J. — If the exceptions in this case can be sustained, the motion for the new trial will become unimportant.

The bond from *John Hopkins* to *J. R. Jordan*, dated *July* 15, 1835, to convey to him certain lots of land, in *Ellsworth*, containing 837½ acres, for $2512,50 assigned by *Jordan* on the 20th of *July*, 1835, to *A. C. Smith* and *A. G. Currier*. On the 31st of *July*, 1835, they transfer it to *Benjamin Richards*, the defendant. Before that time, to wit, the 21st of *July*, 1835, the next day after *Smith* and *Currier* took the assignment from *Jordan* of *Hopkin's* bond, it would seem that the defendant had taken a bond of the plaintiff of the land in *Ellsworth*, at $4 per acre, running twenty days, leaving the plaintiffs the privilege to sell at that price, or an advance of it, before the expiration of the bond, in which case the defendant agreed to take the land at the price offered or give up the bond.

The paper sued, is dated the 31st of *July*. Preparatory to the admission of the deposition of *Augustus C. Stiles*, it became important to show the loss of a paper or bond once given by the plaintiffs to the defendant, by whom it was returned. In strictness the affidavit of the other plaintiff should also have been introduced to show the search for and loss of the bond. It was satisfactory to the Judge, to whose discretion the preliminary proof is intrusted. Previous notice to the defendant was not necessary, the paper having been returned to the plaintiffs.

We cannot discover any legal objection to the admission of *Jordan's* testimony. The reason of the draft being made in his favor was fairly a subject of parol evidence.

The proof proposed by the defendant's counsel to be offered of the defendant's declaration of the purpose of accepting the draft, in the absence of the plaintiffs, was rightly rejected. The defendant produces the draft and his acceptance, but in that acceptance is no statement making any qualification of its generality, nor any condition that it was or should be accepted in fulfilment of the contract now in suit. It really became then a question for the jury to settle, whether the draft was by both parties intended as a payment of the plaintiff's present claim. The instruction of the Court was calculated to draw the minds of the jury to the just and proper dis-

crimination. And they have by their verdict determined, that the draft was made, and payment was understood by the defendant as being made to discharge a different contract from the one declared on. And certainly we cannot think the remark that they might call to mind the language, "a lot of land bonded to me by them," in the contract in suit was calculated to mislead. It would not be going too far to say, that it partook of so much latent ambiguity, that the testimony might properly be weighed by them, as helping them to a proper conclusion. And it must be recollected that the defendant introduced the *Hopkins* bond.

The exceptions must be overruled. On the motion for the new trial, we do not perceive that the language of the Court was calculated to make an erroneous impression on the minds of the jury. The conviction ought to be strong on the minds of the Court, that the jury have fallen into some error in regard to the nature and force of the evidence, before the Court will interfere to grant a new trial. It is said, that all the evidence is now before us. If so, we cannot say that the verdict is against law, nor against evidence, nor against the weight of evidence. We are therefore constrained to overrule the motion for a new trial.

AMASA STETSON *vs.* EBENEZER FRENCH *& al.*

The petitioner conveyed to the respondents, by deed of warranty, a parcel of land described, including within the limits that whereof he now prays partition, "reserving and providing for the keeping open and extending to *low water* Poplar Street, and *Washington Street*, said streets to be for the future disposition of the parties to this deed in such manner as may hereafter be mutually agreed on by them." An extension of those streets to low water mark would cover all the land described in the petition, of which one undivided half is claimed in fee. *It was held*, that the fee in the whole land passed by the deed, and that an easement only in this part of it was reserved to the grantor.

THE case came before the Court on a statement of facts. The petitioner claimed the fee of an undivided half of the land de-

scribed in the petition. The respondents contended, that the land was conveyed by the petitioner to them in fee, and that an easement only was reserved to himself. The material parts of the deed are given in the opinion of the Court. If *Poplar* and *Washington Streets* are continued to "low water," those streets will cover the whole of the land described in the petition.

E. Brown, for the petitioner, argued, that a mere easement in this land passed to the respondents, but that the fee remained in the petitioner; and cited *Mitchell* v. *Starbuck*, 10 *Mass. R.* 5.

Moody, for the respondents, contended, that the deed conveys the entire fee in the land covered by the description, and that the words of the grant were clear, definite, and unambiguous. The grantor reserves to himself a mere easement, in the land described in the petition. He cited 3 *Mass. R.* 352; 4 *Mass. R.* 205; 5 *Mass. R.* 411; 3 *Greenl.* 473; 11 *Mass. R.* 163; 1 *Pick.* 295; 11 *Pick.* 157; 4 *Dallas*, 347; 4 *Wheeler's Ab.* 254; 3 *T. R.* 370; 8 *T. R.* 394; 1 *Pick.* 478; 4 *Pick.* 54; 3 *Greenl.* 283; 1 *Shep.* 31; 13 *Mass. R.* 258.

The opinion of the Court was by

EMERY J. — According to the agreement of the parties, the right of the petitioner to partition depends on the legal construction of his deed, executed on the 12th of *July*, 1831, to *Ebenezer French*, *George S. French*, and *Frederick F. French*, "of all the petitioner's right, title and interest in and to one undivided half of a certain parcel of land in said *Bangor*, *viz.* the land on *Kenduskeag* point, which lies west of water lot, No. 27, and south of water lot, No. 26, *as laid down on a plan of said point made by Charles Bulfinch, reserving and providing for the keeping open and extending to low water Poplar Street and Washington Street as laid down on said plan; said streets to be for the future disposition of the parties to this deed in such manner as may hereafter be mutually agreed on by them*, also, one undivided half of two lots of land, situate on said point in said *Bangor*, being water lot, Nos. 27 and 28, as laid down on said plan."

The petitioner claims partition of a lot of land in *Bangor*, commencing at the southerly line of *Washington Street*, at the north-

westerly corner of water lot, No. 28, thence westerly, by and on the southerly line of said *Washington Street,* extended fifty feet, thence at right angles, southerly to *Penobscot River*, thence easterly by and on said *Penobscot River*, to the westerly line of said water lot No. 27, thence northerly, by and on the westerly line of said water lot, No. 27, to the place of beginning. In his petition, he alleges, that he is seized in fee simple of one undivided half of the premises.

In our judgment, the petitioner by his deed divested himself of the fee in one undivided half of the premises, *and by his warranty,* must be considered as reserving *and providing for the keeping open and extending to low water Poplar and Washington Streets as laid down on said plan,* and that he is not entitled to partition in the manner he has prayed, *unless he shows that it is agreeable to the parties to the deed, their heirs or assigns.* They have an interest in the property to be kept for the purpose designated in the deed, and the petitioner has only an easement according to his contract.

The petitioner can take nothing by his petition. As the parties have agreed, it must be dismissed, and the respondents recover their costs.

JOHN WILLIAMS *vs.* JOHN COLE, *and the* BANGOR INSURANCE COMPANY *as Trustees.*

Where a quantity of potatoes were insured against the perils of the sea, "and against all other losses and misfortunes which shall come to the damage of the said potatoes to which assurers are by the rules and customs of assurances in B, provided, that the said assurers shall not be liable for any partial loss on sugar, flax-seed, bread, tobacco and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, flax, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding;" and where the potatoes were lost by perils of the sea, but not by stranding; *it was held*, that the assurers were liable.

Potatoes come within the class of articles denominated *perishable in their nature.*

THE only question was, whether the company should be charged on their answers, from which it appeared, that the defendant had insured at the office of the defendants, a quantity of potatoes against the perils of the sea, "and all other losses and misfortunes which have or shall come to the damage of the said potatoes or any part thereof to which assurers are liable by the rules and customs of assurances in *Bangor*, provided, that the said assurers shall not be liable for any partial loss on sugar, flax-seed, bread, tobacco, and rice, unless the loss amount to seven per cent. on the whole aggregate value of such articles; nor for any partial loss on salt, grain, flax, fish, fruit, hides, skins, or other goods that are esteemed perishable in their own nature, unless it amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding." The vessel in which the potatoes were shipped sailed from *Frankfort* for *Baltimore*, her port of destination, and arrived there; and when the hatches were opened, it was discovered, that the potatoes were entirely rotten, and the Mayor of the City ordered the cargo to be carried below the fort, and the cargo thrown overboard. The company in the disclosure say, they do not admit the loss happened by the perils of the sea insured against in the policy, but annex an affidavit of the master of the vessel as part of their answer. The master therein states, "that he sailed from *Frankfort* in the State of *Maine*, on the third day of *November*,

in the present year, laden with potatoes and spars in the schooner *Tamerlane;* that in consequence of heavy winds, he was carried into the gulph stream; that the wind and weather continuing very boisterous, the schooner sprang a leak, which damaged the cargo; said schooner was bound to *Baltimore*, but in consequence of stress of weather, was compelled to put into *Hampton Roads.*"

The case was argued in writing.

Abbott, for the plaintiff, argued:—

1. The articles insured are not among the excepted or memorandum articles, and therefore the assured are entitled to recover. The words "other articles perishable in their own nature," are to be applied to articles of the *same genus*, as those mentioned as perishable in their own nature. 3 *Caines*, 110, *in note; Ellery* v. *New Eng. Ins. Co.* 8 *Pick.* 21; 1 *Phillips on Ins.* 492; *Tucker* v. *Clisby*, 12 *Pick.* 26.

2. The loss was total. 3 *B. & Pul.* 474; 5 *M. & Selw.* 447; 6 *Cowen*, 270; 9 *B. & Cr.* 411; 7 *T. R.* 222; 1 *Wheat.* 219; 2 *Phillips on Ins.* 338.

A. Gilman, for the trustees, contended, that goods perishable in their nature, of which character are potatoes, are not protected by this policy, "unless the loss amount to seven per cent. on the whole aggregate value of such articles, and happen by stranding. The loss then must happen *by stranding*, or the company are not liable. The answer does not show, that it so happened. The affidavit of the master, though made a part of the disclosure is not evidence of the facts. It is to have no more weight, than if offered on the trial of an action brought by *Cole* against the company. *Marshall on Ins.* 616; 7 *T. R.* 158.

The opinion of the Court was drawn up by

EMERY J.— Upon this disclosure, we think the defendants, sued in that character, must be adjudged trustees. We do not think it necessary that the loss should occur by stranding. Although potatoes like other vegetables are in their nature perishable, yet a loss by the perils of the sea, independently of stranding may well arise. If such losses were not within such policies, the indemnity against such risks would be practically of little importance.

In the memorandum clause, where the exception is broad enough to include other losses, besides those arising from the inherent decay of the articles specified, the insurer is entitled to exemption from every risk plainly and explicitly included within the terms of the exemption. In this policy potatoes were not, by name, included in that exemption.

The underwriter is not answerable for any partial loss on memorandum articles, except for general average, unless there is a total loss of the whole of a particular species, whether the particular article is shipped in bulk or in separate boxes or packages. 4 *Wend.* 33. *Here* the cargo was so damaged by the perils of the sea, as to exist only *in the shape of a nuisance.* In such a case, the loss is total, without abandonment. 3 *B. & P.* 474; 5 *M. & S.* 447; 3 *Bingham N. C.* 266, or 32 *Eng. Com. Law Rep.* 110, *Roux* v. *Salvador.*

JOHN RUSS *& al. vs.* ALLEN GILMAN *& al.*

The officer's return of an extent on land is fatally defective, and no title passes thereby, if it do not substantially state, that the appraisers were *disinterested* and *discreet* men, and freeholders *within the County.* And the mere return of "all of whom being *reputable* freeholders," is not a compliance with the requirements of the statute.

The Court, in the exercise of their discretionary power to grant leave to amend, declined to permit an amendment, to remedy the defects, after the lapse of twenty-six years.

WRIT of entry. The demandants are the heirs of *George Ulmer*, who died in *March*, 1826, and claimed title in *Ulmer*, by virtue of the levy of an execution in his favor against one *Henshaw*, *July* 14, 1813. *Henshaw's* title was under a levy on the same premises, made on the same 14th of *July*, 1813, by virtue of an execution in his favor against one *Holyoke.* The officer's return on the execution against *Holyoke*, after stating the names of the appraisers, and by whom chosen, says, "all of whom being *repu-*

table freeholders; I have delivered possession," &c. His return on the execution, *Ulmer* v. *Henshaw*, states, after the names and choice of the appraisers, "all of whom being disinterested and discreet freeholders; I have delivered," &c. No part of the proceedings on either execution shew the place of abode of the appraisers, or whether they lived within or without the county in which the land was situated. The defendants objected, that no estate passed by these returns. The demandants moved for leave for the officer to amend the returns on the executions, and offered to prove that the appraisers were disinterested and discreet freeholders within the county. No title of *Holyoke* was shown. The tenants claimed under a deed from the Commonwealth to *Stetson, Lapish* and *French*, dated *March* 2, 1802, by several mesne conveyances. It was agreed, that the Court should enter such judgment, as the legal rights of the parties authorized or required.

J. Williamson argued for the demandants, and cited 4 *Kent*, 429; 5 *Johns. R.* 489; 6 *Mass. R.* 418; 15 *Mass. R.* 549; 19 *Johns. R.* 55; 5 *Johns. R.* 489; 13 *Johns. R.* 289; 5 *Johns. R.* 327; 6 *Greenl.* 162; 13 *Maine R.* 111.

Gilman & F. Allen argued for the tenants, and cited 14 *Mass. R.* 20; 3 *Mass. R.* 523; 11 *Mass. R.* 163; 7 *Pick.* 169; 6 *Greenl.* 452; 1 *Fairf.* 471.

The opinion of the Court was by

EMERY J.—The true question in this case is, whether the plaintiffs or defendants have the better title to the premises defended.

Notwithstanding the levy of *Ulmer* on the portion of the dwellinghouse built by *Holyoke*, we do not discover in the report, that the building had, in *Holyoke's* hands, any character but that of personal property. The levy made by *Henshaw* against *Holyoke*, and the levy by *Ulmer* against *Henshaw*, both effected on the 14th day of *July*, 1813, might, if no objection could be introduced against them, have given a seizin to *Ulmer*, provided *Holyoke* and *Henshaw* had the legal title. *Ulmer* died about the 16th of *March*, 1826. From the time of his levy to near the time of his death, he collected one third of the rent of the house which was on a lot of land in *Bangor*, 50 feet on *Exchange Street*, and 100 feet back. By the disclaimer, thirty feet only of the premises are in

controversy. If the testimony of *William Rice* were admitted, it would only prove, that about 1809, a dwellinghouse was built upon the premises, two thirds by *William & Charles Rice*, and one third by *Holyoke*. And that before and at the time of the levy, *Abner Taylor* occupied the house, and continued to occupy as tenant for one to one and a half years after the levy, and paid his rent two thirds to *Rice*, and one third to *Holyoke*, and to *Ulmer's* agent. We do not perceive, that this evidence would materially change the case. But *Mr. Rice* appears to be a warrantor to one of the defendants against persons claiming under said *Rice*.

The defendant exhibited a title from the Commonwealth of *Massachusetts*, dated *March* 2, 1802, to *Stetson*, *French* and *Lapish*. A deed dated *February* 20, 1815, from *William & Charles Rice*, to *Nathaniel Freeman*, conveying two thirds of the 30 feet in controversy. On the 2d of *Sept.* 1816, *Stetson*, *French* and *Lapish* convey to *Call*, *Treat*, and *William & Charles Rice*. But *Call* had previously, on the 23d of *June*, 1815, conveyed all his interest in the land in question to *William Rice* and *Charles Rice*, "being, as the deed says, part of the lots I hold by bond from *Stetson*, *Lapish* and *French*, in common with the said *William & Charles*, and *Joseph Treat*, with all the buildings, privileges and appurtenances thereunto belonging." On the 11th of *July*, 1818, *Treat* conveyed his interest to *William & Charles Rice*. The *Rices* on the 26th of *Nov.* 1819, conveyed one third of the contested estate to the defendant, *Gilman*, and to him the executors of the will of *Freeman*, conveyed the remaining two thirds of the thirty feet on the 1st of *May*, 1828; which made *Gilman* the owner of the whole thirty feet, unless the plaintiffs can hold by such title as they bring before us. One third of the thirty feet has passed by mesne conveyances, from said *Gilman* to *Rice*, the other defendant. No disseizin has intervened to prevent the operation of these deeds.

The defendants insist, that to the validity of the return of the levy on the execution of *Henshaw* against *Holyoke*, there are fatal objections. The principal one is, that the return states, that the appraisers were reputable freeholders, but does not state, that they were disinterested and discreet freeholders of the then county of *Hancock*. And that in the return on the execution of *Ulmer*

against *Henshaw*, it is not stated, that the appraisers were freeholders of that county.

Unless this be alleged in the return, we must adjudge the levy void. Because it is a rule of law, that when a statute title is attempted to be gained to real estate, every requisite of the statute must be substantially shewn in the return. The cases cited by the defendants and their counsel, fully sustain their objections. And we must overrule the motion to amend the return, at the distance of nearly 26 years. According to the agreement of the parties, judgment must be rendered for the defendants.

PETER H. HESSELTINE *& al. vs.* ANSEL SEAVEY.

Since the statute of frauds the surrender of a lease can be proved only by deed or note in writing, or by act and operation of law.

But in an action on a lease of a house for the term of one year at a stipulated rent, to be paid quarterly, it is competent to prove by parol evidence, that, before the expiration of the first quarter, the lessee removed from the house and that the lessor accepted the key from the lessee, and put in another tenant, who entered and remained in the house to the end of the term. And such proof furnishes a good defence to a claim on the lease for rent for the three last quarters.

THE action was covenant broken, upon a duplicate lease under seal and executed by the parties, dated *August* 12, 1833. By the lease, the defendant was to occupy a house of the plaintiffs' in *Bangor*, for the term of one year from date, paying a certain rent therefor in quarterly payments. The substance of the pleadings are stated in the opinion of the Court. At the trial, the defendant called one *Grant*, as a witness, who testified, that about the middle of *November*, 1833, the defendant and one *Advardis Shaw* came into the store of the plaintiffs, where the witness then was, and that the defendant asked the plaintiffs, if they were going to take the lease back from him, and let *Shaw* have the house; that the plaintiffs replied, that they were, and said that they had not the lease there, but would get the lease and give it up in a few days;

that the defendant then gave the plaintiffs the key of the house, and that they took it and gave it to *Shaw;* and that the defendant had moved out of the house ten or twelve days before, and *Shaw* moved in three or four days after, and remained in eight or nine months. To the introduction of this testimony and its competency to prove the issue the plaintiffs objected. It appeared that the leases had not been given up, each retaining his own, without any appearance thereon of their having been cancelled. The payment of one quarter's rent was indorsed, as having been received *Nov.* 12, 1833. There was testimony introduced to disprove the statement of *Grant*, and to support it.

SHEPLEY J. presiding at the trial, hereupon instructed the jury, that if they were satisfied, that the testimony of *Grant* represented truly what took place between the parties, and that it took place before the close of the first quarter, it would be sufficient, to establish the truth of the defendant's brief statement, and they would find for the defendant; but that if not so satisfied, they would find for the plaintiffs.

The verdict was for the defendant, and the plaintiffs excepted.

M. L. Appleton, for the plaintiffs, contended, that the express covenants of the defendant could not be discharged, or the lease surrendered, by mere verbal declarations without writing, or giving up the lease, or cancelling it. Statute of frauds, *stat.* 1821, *c.* 53, *sec.* 2; *Co. Lit.* 333; 1 *Saund.* 235, *note* 9; 6 *East*, 86; 9 *B. & Cr.* 288; 11 *Wend.* 616; 8 *Cowen*, 71; 2 *Stark. Cas.* 379; 2 *Camp.* 103; 3 *Stark. Ev.* 996; *Roberts on Frauds*, 11; 5 *Greenl.* 381. The case before cited, from 9 *Barn. & Cr.* 288, defines what is a surrender by operation of law. This case is not of that character.

Rogers and *A. W. Paine*, remarked, that it would appear a little strange, if a landlord could have two independent tenants, not occupying jointly, of the same building at the same time, and compel each to pay the full rent of the whole building. The law is not subject to this reproach. A contract under seal may be waived and another substituted for it by parol. If one tenant goes out with the assent of the landlord, and another comes in with his assent and occupies, the first is discharged from the payment of rent.

And this may be proved by parol, although the lease be under seal. *Randall* v. *Rich*, 11 *Mass. R.* 494; *Munroe* v. *Perkins*, 9 *Pick.* 298; 1 *Har. & Gill*, 308; 4 *Dall.* 134; 2 *Wend.* 561; 1 *Rawle*, 435; 4 *Cowen*, 581; 7 *Cowen*, 48; 2 *Stark. Ev.* 591; 3 *Stark. Ev.* 1518.

The opinion of the Court was by

SHEPLEY J. — Since the statute of frauds there is no doubt, that a surrender of a lease can be legally proved, only by deed or note in writing, or by act and operation of law. In this case, there was no proof of any deed or note in writing or of any fact, that would shew a surrender by act or operation of law. And that part of the defendant's brief statement, which alleges a surrender of the lease, cannot be regarded as legally proved.

The brief statement proceeds further, and alleges, that the lessee quitted the premises, and "that thereupon, the said lessors leased the premises to one *Advardis Shaw*, who entered and continued to occupy the same during the whole term then to come." And the plaintiffs took issue upon this allegation of the defendant. The testimony was properly admitted to prove the facts thus put in issue by the parties. Whether if proved they would amount to a legal surrender, or what their effect might be would still be a question for the Court.

The instructions did not place the exemption of the defendant from the further payment of rent upon the ground of a surrender of the lease, but upon the defendant's proof of the truth of his brief statement so far as it stated facts. And the question is, whether the facts proved discharged the defendant from the further payment of rent.

The case of *Randall* v. *Rich*, 14 *Mass. R.* 494, so far as relates to the tenancy, was much like the present; and the Court stated several views, which might be taken of the transactions, by which the defendant would be discharged. One was, that the lessee might be regarded as ousted by the lessor. If the lessors as in this case, accept the key, and put in another tenant, who remains to the end of the term, they may well be regarded as having so conducted, that they cannot be permitted to deny, that they have ousted the lessee; and in such case, no rent is recoverable.

Exceptions overruled.

EBENEZER ADAMS *vs.* JOHN B. HILL *& als.*

A contract made by one of five members of a committee, chosen by a parish to build a church, in the name of the whole, is not binding on the corporation.

And as such contract cannot be enforced against the corporation, the other party is not bound by it.

A contract in writing made afterwards, and before the work was finished, with such other party by individual members of the corporation, wherein they agree to secure to him the payment of the amount of his contract, according to its terms, one half when he shall have completed the work, and the balance in sixty days thereafter, is not a collateral but an original promise.

The labor performed in completing the work, is a sufficient consideration to sustain the promise.

Where a contract has reference to another paper for its terms, the effect is the same, as if the words of the paper referred to, were inserted in the contract.

Although the work may not be performed strictly within the time and according to the terms of the contract, yet if it be done under the eye of one of those contracting to pay therefor, and be accepted by those for whose benefit it was done, and for whom they acted in making the contract, it is a waiver of strict performance, and payment must be made in conformity with the contract.

Any irregularity in the action is waived by a general submission thereof by rule of Court.

DURING the time that this action of assumpsit was pending in this Court, it was submitted to referees, who made a special report. On *June* 24, 1836, a contract in writing was made, purporting to be a contract between the building committee of *St. Johns Church* in *Bangor*, consisting of five persons, of whom the defendant, *Hayes*, was one, but it was signed by the plaintiff, and by *Hayes* only. By the contract, the plaintiff undertook to lath and plaster the inside of the church and vestry, in a particular manner mentioned, within thirty-three days of the date, for $1300, "one half to be paid when the work was completed, and the remainder in sixty days from that period." There was a stipulation in the agreement, that if the vestry should not be ready for plastering at the time, that payment should not be delayed for that cause for the work done, but only for the value of the work remaining. When this contract was thus executed, nearly one third of the work had been done by the plaintiff, and soon after, he objected to go on

with the work, unless he should have security given to him, that he should have his pay according to the contract. On the first day of *July*, following, the defendants executed and delivered to the plaintiff a writing in the following words. "We, the undersigned, do hereby agree to secure to *Ebenezer Adams*, the payment of the amount of his contract for plastering the inside of *St. Johns Church*, according to the terms of said contract, that is, one half of the amount, $650, when he shall have completed the work, and the balance, $650, in sixty days thereafter. *Bangor, July* 1, 1836. *J. B. Hill, Allen Haines, Charles Hayes.*" The plaintiff proceeded with the work, and completed it, with the exception of the vestry which was not ready, on *Sept.* 20, 1836. It would seem from the report, that some small portion of the stucco work was defectively done, but that one of the defendants, a member of the building committee, had seen the whole progress of the work without objection, and that the members of the church, and building committee, had proceeded and made use of the church without remonstrance or objection. On *Oct.* 10, 1836, the plaintiff notified the defendants, that he had not been paid, and requested them to fulfil their contract, which they declined to do, and the suit was commenced the next day. The parties were all members of the corporation of *St. Johns Church.* The referees in *Dec.* 1837, awarded, that the plaintiff should recover $1300,02, if by law he is entitled to recover for the labor, which was performed on the church previous to *July* 1, 1836, as well as what was done after the contract of the defendants was made. If the plaintiff is not entitled to recover for the labor done previous to *July* 1, 1836, and may for what was done after that time, then they award, that he should recover $868, with costs of reference and costs of Court in either case. But if the plaintiff is not entitled to recover, then the defendants are to recover costs.

Rogers and *M. L. Appleton*, for the plaintiff, argued, that the report of the referees was conclusive as to every thing not specially referred to the Court by them. All objections to the form of the action, and prior proceedings, are thereby waived. *Forseth* v. *Shaw*, 10 *Mass. R.* 253; *Bixby* v. *Whitney*, 5 *Greenl.* 192. The only question therefore, is, whether the defendants are liable to pay for the whole or part of the work done on the church.

The plaintiff was not obliged to go on under the first agreement, because the corporation was not bound, as but one of five members of the building committee had signed the contract. *Kupfer* v. *South Parish in Augusta*, 12 *Mass. R.* 185. The defendants are not guarantors or sureties, but original promisors for sufficient consideration. *Sumner* v. *Williams*, 8 *Mass. R.* 200; *Lent* v. *Padelford*, 10 *Mass. R.* 230; *Forster* v. *Fuller*, 6 *Mass. R.* 58; *Chitty on Con.* 7. But if the contract of the defendants were merely a guaranty, still as it was an absolute promise to pay a certain sum at a stipulated time, unless paid by others, no notice was necessary. 2 *Chitty's Rep.* 463; *Norton* v. *Eastman*, 4 *Greenl.* 526; *Read* v. *Cutts*, 7 *Greenl.* 186. The question whether the work was finished within the time, is not open to inquiry, but were it so, it was waived by the defendants, by one of the defendants who was of the building committee being present when the work was in performance, and by using the building without objection. *Nelson* v. *Milford*, 7 *Pick.* 18; *Hayden* v. *Madison*, 7 *Greenl.* 76. The defendants are liable for the whole amount. Their contract refers to the contract as signed by *Hayes*, and embraces its terms, and by that the plaintiff was to be paid for the whole work. The Court will look to the motive and object of the parties. 2 *Gill & Johns.* 382.

J. Appleton argued for the defendants. This is a promise to pay in case of the failure of the corporation, and was so understood and treated by the parties. *Theobald on Guar.* § 1; *Evans' Pothier*, 365; *Fell on Guar.* 1; 3 *C. & P.* 131. Similar language has been held to be a guaranty. 16 *Serg. & R.* 79; 6 *Bingh.* 94. Notice of non-payment should have been given, and demand made. 7 *Peters*, 120; 2 *Watts*, 128. And it should have been alleged and proved. 4 *M. & Selw.* 566; *Oxford Bank* v. *Haynes*, 8 *Pick.* 430; 9 *Serg. & R.* 202. A guaranty being a contract of suretyship, should be construed strictly. 1 *Stark. Rep.* 192; 5 *Bing.* 488; 2 *Stark. Ev.* 649; 9 *Wheat.* 680. The contract is not binding, because there is no consideration proved, or apparent on the paper. *Theobald on Guar. sec.* 7, 9, 10; 2 *Gill & Johns.* 64; 7 *Har. & Johns.* 409; 1 *Gill & J.* 427; 3 *Penns. Rep.* 282; 14 *Wend.* 246; 7 *Conn. Rep.* 57; 3

Pick. 207. If the principal contract, which is the subject of the guaranty, is invalid, the guaranty is void. *Theobald, sec.* 2; *Evans' Pothier*, 209. But if the contract was originally binding, the defendants are released, because the terms of the contract were not performed. 5 *B. & Cr.* 269; 2 *Vesey*, 540; *Theo.* 162, 172; 6 *T. R.* 200; 3 *Merivale*, 272. But if the plaintiff has any claim, it is not against the defendants under this contract, but only against the corporation on a *quantum meruit.* 7 *Greenl.* 77; 4 *Cowen*, 564; 3 *Com. L. Rep.* 236. The surety cannot be charged beyond the terms of his contract, and is not here liable on the *quantum meruit.* 4 *B. & P.* 34; 4 *Wash. C. C. Rep.* 27; 9 *Wheat.* 680; 6 *T. R.* 211; *Jurist, No.* 38, 438.

The opinion of the Court was afterwards prepared by

WESTON C. J. — The counsel for the defendants having waived all objection to the testimony, the facts of the case are settled by the report of the referees. By that it appears, that the instrument of *June* 24, 1836, was never an executed contract. It was manifestly left incomplete. For although it was signed by the plaintiff, it had the signature of only one of the building committee of *Saint Johns Church*, of whom there were five. The corporation therefore were not bound, even if the building committee had authority to enter into the contract. *Kupfer & al.* v. *The South Parish in Augusta*, 12 *Mass. R.* 185.

It would be unreasonable to hold the plaintiff bound by an instrument, executed only by one of the contracting parties, when it is apparent, that the plaintiff understood that both were to be bound. The consideration for the promise on the part of the plaintiff, was the promise of the corporation, by their committee. That not having been effectually made, there was a failure of consideration.

While the business was thus circumstanced, the plaintiff, as well he might, objected to going on with the work, unless he could be secure of his pay, according to the contract. Thereupon the defendants, on the first day of *July*, one week after the date of the first instrument, agree under their hands, to secure to the plaintiff, the amount of his contract, for plastering the inside of the church, $650, being one half, to be paid "when he shall have completed

the work," and $650, being the balance, in sixty days thereafter. The terms used, are a direct promise to pay, at the times stipulated; for such is the effect of an agreement to secure payments, which no other party was bound to make. It was not then a collateral, but an original promise. The consideration expressed in the promise, was the completion of the work then going on. And although a portion of it had been done, the labor subsequently performed was a sufficient legal consideration to sustain the promise, which is precise in its terms, both as to the amount to be paid, and the times of payment.

The promise of the defendants refers to the paper of *June* 24th, for the details of what the plaintiff was to do; the effect of which is the same, as if they had been inserted in the paper of *July*. If that reference embraces also the time, within which the plaintiff was to complete the work, as perhaps it ought upon a just construction, it is objected that there was a failure in point of time, and some slight defect in a part of the work. But it was all done under the eye of one of the defendants, and was accepted by those, for and with whom the defendants acted. And we are of opinion, that under the submission, the referees were well warranted in awarding to the plaintiff, whatever was in their judgment justly due to him for his entire services. As to any irregularity in the action, it was waived by the submission. *Forseth* v. *Shaw*, 10 *Mass. R.* 253. The report is accepted; and judgment is to be rendered thereon, for the larger sum awarded, and costs.

Israel Heald *vs.* John Hodgdon.

Under the resolve of *March* 17, 1835, in favor of certain officers and soldiers of the revolutionary war, the land granted is not to be considered as so "surveyed and laid out," as to entitle the holders of certificates to make their selection of lots, before the Surveyor General has made a return of his survey into the Land Office.

This was a special action on the case brought to recover damages against the Land Agent of the State, for not assigning and con-

veying to the plaintiff five lots of land, agreeably to a resolve in favor of certain revolutionary officers and soldiers, *March* 17, 1835. The parties agreed, that the townships specified in the resolve, were actually surveyed by the deputy surveyor, *Dec.* 3, 1835; the return of the plan and field notes was made by the deputy to the Surveyor General, *Dec.* 23, 1835; and by him examined and returned into the land office in *Augusta, Jan.* 1, 1836. The plaintiff had become the assignee of five certificates, granted by the Land Agent pursuant to that resolve, and on *Dec.* 12, 1835, gave the defendant written notice of the assignment of the certificates to him, and that he had selected certain lots described, and requested that a conveyance thereof might be made to him, and filed the notices in the land office at *Bangor.* At this time the plaintiff was informed by the Surveyor General, that no return of the survey of the township had been made to him. No selection of any lots had been previously made, nor had there been any assignment of the public lots. The defendant denied the right to make the selection at that time, and refused to make the conveyance. A nonsuit or default was to be entered by the agreement, as the opinion of the Court should be.

Mellen and *A. W. Paine*, for the plaintiff, cited the resolve of *March* 17, 1835, in favor of certain officers and soldiers of the revolutionary war; *stat.* 1828, *c.* 393; *stat.* 1824, *c.* 280; and contended, that the plaintiff had a right to make the selection of his lots on the 12th of *December*, 1835; and that the Land Agent was bound by law to make the conveyance of those lots to the plaintiff. The law provides, that the selection of the lots may be made when the lots are *surveyed and laid out.* This was done. It was not necessary, that the plan should first be made, and returned into the land office. The survey and plan are different things. *Ripley* v. *Berry*, 5 *Greenl.* 24.

F. Allen, for the defendant, and *Hodgdon, pro se*, contended, that the township could not be considered as surveyed and laid out, as the law requires, until all power of the Surveyor General over the survey was gone by a return into the land office. No selection of lots could legally be made until this was done, and until the public lots had been selected, as the law requires. These very lots might

have been selected as the public lots. The Agent would have violated his duty, to have suffered this attempt of the plaintiff, in fraud of the rights of others, to have been successful.

The opinion of the Court was drawn up by

SHEPLEY J. — By the act of the 20th of *February*, 1828, *c.* 393, all former acts providing for the sale and settlement of the public lands are repealed. That act provides for the appointment of a Land Agent and prescribes his duties. He is to keep correct plans of the surveys; may employ assistants, for whose conduct he is responsible; and is authorized to execute deeds in behalf of the State, when the grantees have complied with the conditions of their grants.

The act of the 18th of *March* 1830, *c.* 481, makes it his duty to select the lots reserved for public uses. The act of the 8th of *March*, 1832, *c.* 30, provides, that the Land Agent, instead of returning copies of the plans and field notes to the office of the Secretary of State, shall deposit them in a Land Office at *Bangor*, and the originals in the Land Office at *Augusta*. The resolve of the 17th of *March*, 1835, after making the grants under which the plaintiff claims, directs the Land Agent to cause the townships to be surveyed and laid out into lots; and authorizes him to issue certificates before the surveys shall be completed, which are to entitle the holders to a conveyance "whenever said land shall be surveyed and laid out." It is made the duty of the Agent "to keep correct plans of all surveys which shall be made as aforesaid, and to mark upon each lot the name of the person who shall first make choice of the same." The act of the 24th of the same *March*, *c.* 192, provides for the appointment of a Surveyor General, whose duty it is to survey, superintend, and direct the surveying of the public lands, and he is authorized to employ assistants, for whose conduct he is responsible. By this act the whole duty in relation to the surveys is taken from the Agent and transferred to the Surveyor and his assistants. The fifth section provides, that no land shall be sold until all the land in the township has been surveyed and lotted; and that the Surveyor General shall note upon his plans the growth, soil, streams, mill sites, and what roads may be neces-

sary, and make return thereof, together with the field notes, to the Land Agent in three months after he shall have performed the same.

Although the resolve requires the Land Agent to cause the surveys to be made, yet he must make them according to the laws of the State, and use such means to do it as the laws authorize. And after the appointment of a Surveyor General he must make them through him. The resolve speaks of a time when "the survey of said land shall be completed;" and until that time certificates might issue; and after that time the holders are entitled to make their choice. Other acts also refer to the time when the lands are surveyed and lotted, as a period from which rights and duties are to be reckoned. The act of the 18th of *March*, 1830, provides, that the owners in certain cases within three months after the lands shall have been surveyed and lotted, shall give notice to the Land Agent to appoint a person, who, with one appointed by themselves, is to designate and note the lots reserved for public uses. And in case of their neglect for such a period the Land Agent alone may appoint.

When was it intended, that the lands should be considered as surveyed and lotted, so that the time should be certain when these various rights accrued to the parties interested? The answer must be, whenever an official act has been performed, which makes the survey a matter of record, after which no change can be made by any public officer. This will be apparent, whether the language of the statutes, or the duties to be performed, are considered. The Surveyor General is made responsible for the acts of his assistants, and that implies the right to control and correct their proceedings. A plan is to be made and the information to be placed upon it is in some respects to depend upon his personal judgment. The power to alter and correct his opinions upon better information necessarily remains with him until his duties are finally completed, and his return is made according to law. If he should ascertain after his deputy has made a return to him, that no numbers were affixed to the lots in a whole range, could he be excused if he did not correct it, or vacate the whole survey? If the language of the resolve be examined the Land Agent is required to mark upon each lot, on the plan of course, the name of the person choosing it, and this he could not do until it was returned to him, and the Surveyor

is not obliged to return for three months after he has made the survey. Any attempt of the Land Agent to do it before, might have been entirely ineffectual, because the Surveyor General, for error detected, or other sufficient cause, might have changed the whole survey and allotment.

If the Surveyor General were charged with wilful neglect or misconduct in making an erroneous plan and survey, could it be sustained without proving, that he had given it his last and final official sanction by making his return as the law requires? It is all necessarily *in fieri* until that time. There must be a time before which alterations and correction of errors may be made, and after which none can be, by any officer whatever. And that time is necessarily fixed by the official act of return, when it becomes a record of the State.

The selection was in this case made by the plaintiff before the deputy surveyor had made his return to his principal, and before his proceedings had any confirmation or official sanction.

Plaintiff nonsuit.

PENOBSCOT BOOM CORPORATION *vs.* WILLIAM P. LAMSON *& al.*

A counsellor or attorney at law, regularly admitted to practice, is not under the necessity of producing any special power of attorney to act for individuals or corporations in Court; and his statement that he does represent a person or body corporate is sufficient.

Corporations originating according to the rules of the common law, must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred; and when one claims its origin from such a source, its rules must be regarded in deciding upon its legal existence.

But the legislature may create a corporation, not only without conforming to such rules, but in disregard of them; and when a corporation is thus created, its existence, powers, capacities, and the mode of exercising them, must depend upon the law creating it.

The legislature have power to permit one person, or his successor, to exercise all the corporate powers, and to make his acts, when acting upon the subject matter of the corporation and within its sphere of action and grant of powers, the acts of the corporation.

The grant of corporate powers to one person, *and his associates and successors*, does not require of such person, that he should take associates before the act can take effect, or corporate powers be exercised, but virtually confers on him alone the right to exercise all the corporate powers thereby granted.

The acceptance of the charter may be presumed from the exercise of the corporate powers therein conferred.

The dissolution of a corporation can take place only, either by an act of the legislature, where as in this State power is reserved for that purpose; or by a surrender of the charter which is accepted; or by a loss of all its members, or of an integral part, so that the exercise of corporate powers cannot be restored; or by forfeiture, which must be declared by judgment of court.

In an action by a corporation, the defendant cannot take advantage of any abuse or misuse of the corporate powers, not applicable to the question in controversy; or object that no mode of service, or of attachment, or means of redress or relief, is provided.

Pleading the general issue, admits the legal existence, and competency of the corporation to bring the suit.

Where the charter authorized the erection of a boom, parol evidence is admissible to show that the boom was erected by the corporation.

The act of incorporation provided, "that all logs rafted at said booms, or its branches, shall be measured, and their quantity ascertained by a person to be appointed by the surveyor general of *Bangor*, should such a surveyor be appointed, otherwise by a surveyor appointed by the selectmen of said

town." There was no act in existence, authorizing the appointment of a Surveyor General of *Bangor*, but one was soon after passed, authorizing the appointment of a Surveyor General for the county, to reside at *Bangor*, and an appointment was made under the act. *It was held*, that if the logs were measured by a person appointed by the Surveyor General of the county, although called a *scaler* of logs, instead of a *surveyor*, it was a sufficient compliance with this requirement of the act of incorporation.

If a book or document be called for by a notice to produce it, and it be produced, the mere notice does not make it evidence; but if the party giving the notice takes and inspects it, he takes it as testimony to be used by either party, if material to the issue.

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

Assumpsit for boomage of logs, asserted to belong to the defendants. The writ was dated, *December* 21, 1835, the action was entered at *January* term, 1836, and continued to *October* term following, when the defendants called for the right of the attorneys acting for the corporation to appear and act therefor. The Judge ruled, that it was unnecessary. The action came on for trial at *January* term, 1837, when the general issue was pleaded, and a brief statement was filed, denying the existence of the corporation then or at any time; alleging that the charter *by and under which the plaintiffs claimed a corporate existence* had been forfeited by *non user;* that there had been no organization under the same; that it was dissolved by a total loss of all its members; and that it had never complied with the provisions of the act of its incorporation by a total neglect to choose any officers under said act. To support the action, the act incorporating the *Penobscot Boom Corporation*, *February* 13, 1832, *Spec. Laws*, *c.* 236; a bill of sale from *Rufus Dwinal*, named in the act, to *Samuel Veazie*, dated *February* 17, 1832, conveying one half of the charter, booms, and property; and another bill of sale from *Dwinal* to *Veazie*, dated *April* 1, 1833, conveying the other half; were introduced. Also, a book called and offered as the records of the corporation, but not verified by the oath of any one; "to the sufficiency of which, to prove the organization, as well as to the introduction of all the testimony offered by plaintiff, the defendants' counsel objected. The objection was overruled, and a part of the book was read to the jury. The defendants' counsel having called for the records."

The charter and the bills of sale were copied into this book, and the following vote appeared therein. "*Bangor, April* 2, 1833. I, *Samuel Veazie*, being the only owner of the *Penobscot Boom Corporation*, have this day had a meeting of said corporation at my house, and appointed myself to the office of President of said corporation, and clerk of said meeting, with full powers to make all records, and to transact all business that may be necessary for carrying said corporation into full effect, and to receive and collect all tolls that may be due from time to time, and pay all bills against said corporation, and to continue until some person is chosen or appointed in my stead. A true record. Attest, *Samuel Veazie*, Clerk." The plaintiff then proved, that the logs were surveyed in the boom by *Davis* and *Young*, scalers, appointed by the Surveyor General of the county of *Penobscot*, under the statute of *March* 2, 1833, *Spec. Laws, c.* 373. *Young* also testified, that he took charge of the boom in the spring of 1833, and had retained it since; that a large amount had been expended on the boom by *Veazie;* and that the witness is the general agent of *Veazie* at *Oldtown*, and drew on him for money and paid him money received for boomage, and knew nothing of the corporation of his own knowledge. It was proved that the boom was erected in the spring of 1832, under the direction of *Dwinal*, and has been in operation ever since. The defendants requested the Court to order a nonsuit, but the Judge refused. The defendants then proved, that the boom, when full, prevented the free passage of rafts and logs. The counsel for the defendants, requested the Judge to instruct the jury, that there was no such corporation as alleged; that there was no vote or direction of the *Penobscot Boom Corporation*, at any regular meeting of the corporation, authorizing the erection of the boom; and that the action was not maintainable. The Judge did not thus instruct them, but directed them to inquire, if the evidence submitted to them proved the existence of such a corporation as is named in the writ; and if not, they would return a verdict for the defendants. But if such corporation had been proved, it not being denied, that the sum claimed in this action was due, if the contents of the logs had been legally ascertained, they would find for the plaintiff. They were also directed to inquire, if the boom had been erected and continued by authority of the *Pe-*

nobscot Boom Corporation. The jury returned a verdict for the plaintiff, and being inquired of at the request of the counsel for the defendants, stated that they found the boom to have been erected and continued by the authority of the *Penobscot Boom Corporation.* The defendants excepted.

Rogers and *J. Appleton,* for the defendants, argued in support of the grounds taken at the trial. They contended, that the defendants might show that the plaintiff had no corporate existence, either under the general issue, or by plea in abatement. But here the non-existence appears from the plaintiffs' own showing, and when that appears to the Court from its own evidence, it is a fatal defect at any time. They cited on this point, 19 *Johns. R.* 300; 2 *Cowen,* 378; 11 *Mass. R.* 25, 119; 5 *Pick.* 238; 14 *Mass. R.* 240; 1 *B. & P.* 43; 1 *Saund.* 340; 6 *N. H. Rep.* 199; 4 *Peters,* 480; *Angel & Ames on Corp.* 382; 6 *Wheat.* 260; 16 *Mass. R.* 245; 3 *Fairf.* 15; 1 *Dane,* 464, *sec.* 25; 7 *Conn. R.* 219; 3 *Mass. R.* 364; 8 *Pick.* 90; 4 *Burr.* 2200; 3 *T. R.* 240. This is neither a corporation sole nor aggregate. Not sole, because the charter was to *Dwinal* and his associates, mere private persons. And is not aggregate corporation, because it has not the powers of one and has not organized as such. 1 *Bac. Ab. Corp. A; Angel & Ames,* 19, 275; 10 *Mass. R.* 91; 5 *Mass. R.* 362; 10 *Mass. R.* 343; 14 *Mass. R.* 132. That the lumber should have been surveyed, in the manner pointed out by the statute, as a prerequisite to the plaintiff's right to recover. The persons who surveyed the logs, were not appointed by the "Surveyor General of *Bangor,*" as the charter prescribes, and they were scalers, and not surveyors. 7 *Greenl.* 480; 17 *Mass. R.* 258; *American Jurist, No.* 26, 379. The books were improperly admitted in evidence. 6 *Binney,* 416; 14 *Mass. R.* 180.

A. G. Jewett, for the plaintiffs. The party waives all right to call for power of the counsel to appear, unless the call is made the first term. *C. C. Pleas Rule,* 6. This is a mere discretionary act, and not the subject of exceptions. 3 *Greenl.* 216. And there is no difference in this respect, between corporations and individuals. 9 *Wheat.* 738. The legal existence of the plaintiffs, as a corporation, cannot be denied, but by plea in abatement. 3

Fairf. 382; 4 *Mason*, 436; 1 *Sumner*, 578; 1 *Peters*, 450; 10 *Mass. R.* 91, 361; 3 *Wend.* 291; 12 *Wheat.* 64; 7 *Pick.* 371. The defendants have treated the plaintiffs as a corporation in contracting a debt to them, and it is too late to deny it, when called on for payment. 8 *Greenl.* 365; 2 *Fairf.* 227. No advantage can be taken of any *non user* in a collateral action. It is a business solely between the corporation and the State. When the charter is taken away from them, all duties, as well as all powers cease. 2 *Kent*, 312; 5 *Johns. Ch. R.* 366; 6 *B. & Cr.* 703; 9 *Cranch*, 51; 8 *Wend.* 652; 4 *Paige*, 481; 5 *Mass. R.* 230; 4 *Gill & Johns.* 121; 6 *Cowen*, 23; 1 *Hall*, 198. A solemn vote of the corporation to that effect will not dissolve it. 14 *Pick.* 68. The survey was in the manner provided by law, and that is all the charter could have intended. The reference in it was to an act, not in existence, and which never did exist in name, though it did in substance. 7 *Greenl.* 474. If a party calls for books, he makes them evidence. 1 *Carr. & Payne*, 8; 5 *Esp. R.* 235; 4 *Esp. R.* 21.

The opinion of the Court was drawn up by

SHEPLEY J. — When one person professes to represent another, or a body corporate, he should exhibit his authority; and attorneys, according to the practice of many courts, appear by warrant of attorney; but in our practice, where the law recognizes certain persons as officers of the court, and entitled as such to represent others, as an official duty, no such warrants have been required; and the statement of the attorney, that he does represent a person, or body corporate, has been deemed sufficient. Should he abuse such power, he may be deprived of his privilege, and be subjected to an action for damages by the party injured. The sixth rule of the Court of Common Pleas requires no more than such a statement by the attorney, and it would seem, that by the rule, the court may give him leave to appear without requiring such statement. The objection having been overruled, the court must be regarded as having granted such leave, if it were necessary. No such rule exists in this court. The Supreme Court of the *United States* appears to entertain this opinion respecting the rights of attorneys to represent others, according to our practice. *Marshall*

Ch. J. says, "certain gentlemen, first licensed by government, are admitted, by order of court, to stand at the bar, with a general capacity to represent all the suitors in the court. The appearance of any one of these gentlemen in a cause, has always been received as evidence of his authority; and no additional evidence, so far as we are informed, has ever been required. This practice, we believe, has existed from the first establishment of our courts, and no departure from it has been made in those of any State, or of the Union. This universal and familiar practice, then, of permitting gentlemen of the profession to appear, without producing a warrant of attorney, forms a rule, which is as applicable in reason to their appearance for a corporation as for a natural person." *Osborn* v. *United States Bank*, 9 *Wheat.* 738.

The existence of such a corporate body is denied, and it is said that it does not come within the legal description of a corporation, either sole or aggregate, as defined by any code of laws. Corporations originating according to the rules of the common law, must be governed by it in their mode of organization, in the manner of exercising their powers, and in the use of the capacities conferred. And when one claims its origin from such a source, its rules must be regarded in deciding upon its legal existence. The legislature may however create a corporation, not only without conforming to such rules, but in disregard of them; and when a corporation is thus created, its existence, powers, capacities, and the mode of exercising them, must depend upon the law of its creation. It was the pleasure of the legislature in this case to create a corporate body, without requiring a conformity to the usual mode of organization known to the law. The grant is to one person, who was at liberty to associate others, or to have a succession without it. No provision is made for a division of the property allowed to be held into shares, or for the call of any meeting, or the choice of a clerk, or any other officer, or the keeping of any records, or any mode of organization. And yet many important powers and privileges are granted with an evident design to permit their exercise. The grant being to one person and without any such provisions, the inference necessarily is, that it was the intention of the legislature to permit that one person or his successor to exercise all the corporate powers, and to make his acts, when acting upon the subject matter of the

corporation and within its sphere of action and grant of power, the acts of the corporation. There does not appear to be any other mode of carrying into effect the intention of the legislature. And if there are doubts, whether the person controlling the corporation has acted in behalf of the corporation, they are necessarily to be solved by proof. And if any evils have arisen or shall arise from any proceedings under the act, the legislature may provide a remedy. The answer to the arguments against its existence arising from a want of organization and choice of officers is, that the act requires them. In the case of *Day* v. *Stetson*, 8 *Greenl.* 365, where a charter was granted to one, and provision was made for taking associates and calling a meeting of them, it was decided, that it was a condition subsequent, and that the neglect would not prevent the act taking effect, or the exercise of the powers granted by it. The case finds, that "it was proved that the boom was erected under the direction of *R. Dwinal*, and went into operation in the spring of 1832, and continued so ever since;" and this sufficiently proves the acceptance of the act of incorporation, for it could not be lawfully done but by virtue of the act, and the presumption of law is, that one acts lawfully when he may do so by a special grant of authority for that purpose. There is not the same finding in all the other cases, but there is sufficient testimony to prove that the boom was erected, and that it has been maintained by the one professing to own the franchise and to act under it. And the acceptance may be presumed from the exercise of the corporate powers. *Bank of the United States* v. *Dandridge*, 12 *Wheat.* 71; *Trott* v. *Warren*, 2 *Fairf.* 227. And the act of incorporation, with proof of the exercise of the corporate powers since 1832, was sufficient evidence of the existence of the corporation. *Utica Ins. Co.* v. *Caldwell*, 3 *Wend.* 296; *Day* v. *Stetson*, 8 *Greenl.* 365. There being no provision for the call of any meeting, or for the choice of any officers, when a sale of part of the franchise to *Veazie* required some evidence of the assent of two minds to perform a corporate act, there might be more difficulty in proving the acts of the corporation, but it is not perceived, that the mode of proof would be changed.

It is contended also, that if the corporation has existed, it has been dissolved. In what manner corporations may be dissolved,

and what will not operate as a dissolution, has been determined in many decided cases. A corporation will not be dissolved by a sale of the franchise; or of all the corporate property and a settlement of all its concerns and a division of the surplus; or by a cessation of all corporate acts; or by any neglect of corporate duty; or any abuse of corporate powers; or by doing acts which cause a forfeiture of the charter, without a judgment declaring such forfeiture. Such dissolution can take place only, 1. by an act of the legislature, where, as in this State, power is reserved for that purpose; 2. by a surrender, which is accepted, of the charter; 3. by a loss of all its members, or of an integral part, so that the exercise of corporate functions cannot be restored; 4. by forfeiture, which must be declared by judgment of court. *Shee* v. *Bloom*, 5 *Johns. Ch. R.* 367; *Trustees of Vernon Society* v. *Hills*, 6 *Cowen*, 23; *Bank of Niagara* v. *Johnson*, 8 *Wend.* 645; *Wilde* v. *Jenkins*, 4 *Paige*, 481; *Canal Company* v. *Rail Road Company*, 4 *Gill & Johns.* 121; *Russell* v. *McLellan*, 14 *Pick.* 63; *Revere* v. *Boston Copper Company*, 15 *Pick.* 351; *Porter* v. *Kendall*, 6 *B. & C.* 703; 2 *Kent*, 312.

Nor can a defendant take advantage of any abuse or misuse of the corporate powers, or object, that no mode of service, or of attachment, or means of redress or relief is provided. This would prove an oversight in the legislation, which ought to require immediate attention; but it does not excuse a defendant from a performance of his duty, that the legislature has not provided for his obtaining redress for an injury, which he has suffered. As it appears to be important to have a decision upon the rights of this corporation these objections have been considered, although this defendant, according to our practice, is not in a position to call for proof of the existence of the corporation, not having pleaded it in abatement. *Trustees in Dutton* v. *Kendrick*, 3 *Fairf.* 384.

It will be perceived, that in speaking of the acceptance of the act of incorporation the objection that the boom is not owned by the corporation, has in substance been answered. The legal inference is, that the money which was expended by the owner of the charter was expended under it, and that the boom thereby became corporate property. The evidence confirms this presumption. The person who expended the money, could not be permitted to

say, that he had not acted legally by virtue of the authority granted, but had placed a nuisance in the river. The jury were authorized to find, that it was erected by the corporation, and parol proof might for this purpose, be admitted. 12 *Wheat.* 70. The corporation may not have acquired the title, and probably has not to any real estate; but this is not required by the act; the right of use is all that is necessary, although the act allows the title to be acquired.

Another objection is, that the logs were not surveyed as the act of incorporation requires. The ninth section of the act provides, "that all logs rafted at said booms, or its branches, shall be measured, and their quantity ascertained by a person to be appointed by the Surveyor General of *Bangor*, should such a surveyor be appointed, otherwise by a surveyor appointed by the selectmen of said town." The act of *March* 2, 1833, provides for the appointment of a Surveyor General for the county, "who shall make his residence in *Bangor*;" and no other Surveyor General of lumber has been provided for or appointed. The act of incorporation had reference to a future Surveyor General as an officer to be created, and it designated him as the Surveyor General of *Bangor*, and when in the following year provision was made for such an officer, whose powers extended over the whole county, it is said that he is not the officer designated. It would scarcely be expected that the legislature, looking to the creation of a new office by a future legislature, should be able to refer to it by the exact definition, which might be adopted. The intention of the legislature is rather to be regarded, than any slight difference in the name of the officer. That intention must have been to obtain the advantage of the superior knowledge and skill to be expected from a Surveyor General in the appointment, and the uniformity of survey, which would result from it. This object would be equally secured whether he should be called Surveyor General of the county, or of *Bangor*; and any advantages of local knowledge to be expected from a residence in *Bangor* were also secured. The act of incorporation, and the act providing for the office, both in substance apply to the same officer, and the difference is rather in the description of the same Surveyor General, than as denoting a difference of title. The intention of the legislature will be fully answered by considering the description as comprehending such Surveyor General, as should

reside and perform his duties in *Bangor*. To the objection, that "scalers, and not surveyors were appointed," the answer is, that the act of incorporation does not require the appointment of surveyors, but only that the "logs shall be measured by a *person* to be appointed by the Surveyor General of *Bangor*;" and it is immaterial by what name he may be called.

The introduction of what was called the "book of records," was objected to, and the case finds, that the records were called for by defendants' counsel, but it does not find, that the counsel received or inspected any such book, until after his objection to its introduction had been overruled, and the book admitted. The rule is, that if a book or document be called for by a notice to produce it, and it be produced, the mere notice does not make it evidence; but if the party giving the notice, takes and inspects it, he takes it as testimony, and it may be used, if material to the issue. *Sayer* v. *Kitchen*, 1 *Esp. R.* 210; *Johnson* v. *Gilson*, 4 *Esp. R.* 21; *Wharam* v. *Routledge*, 5 *Esp. R.* 235; *Wilson* v. *Bowie*, 1 *C. & P.* 8. Upon the view which has been taken of this case, the book was wholly immaterial.

Exceptions overruled.

Penobscot Boom Corporation *vs.* Cushing Baker.

In an action for boomage of logs, on an account annexed to the writ, if an amendment be allowed at the Court of Common Pleas, permitting the filing of a count for money had and received, it will be presumed to be for the same cause of action, unless the exceptions show to the contrary.

Where a statute gives a corporation a certain sum per thousand feet on all logs "boomed, rafted and secured," and gives a lien on the logs therefor, an action can be maintained for the boomage against any one making an express promise to pay for the same before the logs are delivered, or by whose order the logs were delivered to and received from the boom.

When the logs are rafted and well secured the right to receive boomage accrues, and is not taken away, if some of them be lost without any neglect or carelessness of the corporation.

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

The same questions were raised in this case, as in the preceding action. In this case, which was assumpsit on an account annexed for boomage of logs, in addition to the facts in that case, the plaintiff moved for leave to file a count for money had and received. This was opposed by the defendant, but permitted by the Court. The second objection made by the defendant, the facts in relation to it, and the instructions given, appear in the opinion of the Court. The same remark will apply to the third objection. The verdict was for the corporation, and the defendant excepted.

Rogers and *J. Appleton*, for defendant.

A. G. Jewett, for plaintiff.

The opinion of the Court was by

SHEPLEY J. — The most important questions presented in this bill of exceptions, have been decided in the case between the same corporation and *Lamson*, *ante p.* 224. The others are, first, the amendment, by permitting a count for money had and received to be filed. The eighth rule of that court allows amendments for the same cause of action in the discretion of the Court, and it having been allowed and nothing appearing to the contrary, it is presumed to be for the same cause of action.

The second objection taken is, that the defendant was not liable to pay the toll, he being mortgagee of the logs and not in possession. The whole evidence tending to prove his title and the character of it, and tending to prove an express promise to pay was submitted to the jury with instructions, "that if they found the logs to have been the property of the defendant, and that they had been delivered to, and received from the boom by him or his order without first paying toll or boomage, he would be liable for the same in this action; that if they found, that the defendant promised to pay boomage and the logs had been delivered in pursuance of the promise, the defendant would be liable." Whether the first clause of these instructions might not be liable to just complaint, coming from the other party need not now be considered; but the defendant surely has no right to complain of them. Under such instructions, it was not material, when the toll accrued, for the plaintiff could not recover without proving an express promise, or that the logs

were both delivered to and received from the boom by the defendant's order.

A third objection is, that the defendant was not liable for the toll upon the logs which were lost. The only testimony to prove a loss is that of a witness, who states, that the defendant "was shewn one raft, that within a week or fortnight after, his brother called on him and said he could not find the logs, that they were taken away by some one, and he could not find them, and that it would be hard for him to pay the boomage." Upon the logs being rafted they are to be secured below the boom, and the corporation is liable for losses happening by its neglect or carelessness. But when rafted and well secured, the logs may be taken away, or lost without such fault, and in such case the owner is equally liable for the toll, as for that on other logs. There is no evidence that the logs were lost through any neglect or carelessness of the corporation, and the judge was therefore correct in declining to comply with the eighth request.

Exceptions overruled.

Penobscot Boom Corporation *vs.* Ira Wadleigh *& al.*

Same *vs.* Same.

In an action for the recovery of boomage on a quantity of logs, evidence that the defendant had lost other logs which had come into the boom in the same season, but in a different lot or parcel, through the neglect of the plaintiffs, is inadmissible.

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

The distinction between this case and that of same plaintiffs v. *Lamson, ante p.* 224, will be sufficiently understood from the opinion of the Court.

Rogers argued for the defendants, and cited *Taft* v. *Montague*, 14 *Mass. R.* 282.

A. G. Jewett, for the plaintiffs, said, that the demand sued for, and that for which a set-off is claimed, are entirely distinct, and relate to different descriptions of logs, coming to the boom, at a different time. The claim set up is to recover damages for an injury done, and is not the subject of set-off. The case has been decided in principle, in *Prop. Side Booms* v. *Weld,* 6 *Greenl.* 105.

The opinion of the Court was by

SHEPLEY J. — The principal questions arising in these cases have been decided in the case of the *same corporation* v. *Lamson.* The only remaining point insisted upon at the argument relates to the exclusion of the testimony offered to prove, that through the neglect of the corporation the defendants had suffered by the loss of other "logs which had come into the boom during the same season." This evidence was rejected, because it did not apply to the same lot or parcel of logs for the toll of which the suit was brought.

The general rule, without noticing the limitations, is, that when one is called upon to pay for services performed, he may defend himself by shewing that through the fault of the other party he has derived no benefit from them. But it does not embrace a case where the service has been faithfully performed upon the matter in suit, and the defendant has suffered loss through the neglect or misconduct of the plaintiff in relation to other matters not in suit. The plaintiff could never be expected to come prepared to try questions not arising out of the matter then in controversy. To permit such a defence would not only operate as a surprise upon the plaintiff, but would bring into that controversy matters having no connexion with it. Such a claim for uncertain damages could not have been filed in set-off. *Austin* v. *Foster,* 7 *Pick.* 345; *Adams* v. *Manning,* 17 *Mass. R.* 178.

The other questions, having been decided in other cases, are not noticed here.

Exceptions overruled.

Penobscot Boom Corporation *vs.* Barzillai Brown.

Where a witness is not present, and the other evidence in the case makes it appear that he might have been a material witness, testimony to show that such witness was absent from the State, and could not be obtained, is admissible.

In an action by a corporation to recover payment for the boomage of logs, evidence that individual members of the corporation had brought an action in their own names against a third person, under a liability similar to that of the defendants, is irrelative and inadmissible.

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

The main questions in this case were similar to those between the same plaintiff and *Lamson*, *ante p.* 224. The facts bearing upon the objection to the admission of testimony, are stated in the opinion of the Court. The exceptions make this statement in regard to the writ. The defendant offered in evidence a writ, *Dwinal* and *Veazie* v. *Charles Fiske*, dated *Sept.* 22, 1834, returnable to the next term of the Court of Common Pleas, claiming of *Fiske* $107,66 for boomage of logs for the year 1832. This was objected to by the plaintiffs' counsel, and it not appearing to the Court, that *Veazie* ever consented to, or authorized, or knew of the suit, it was not received in evidence.

Rogers, for the defendant.

A. G. Jewett, for the plaintiff.

The opinion of the Court was by

Shepley J. — The exceptions taken in this case, which have not been decided in the case against *Lamson*, relate to the admission of the testimony of *Greely*, to portions of that of *Young*, and to the exclusion of the copy of the writ, *Dwinal* and *Veazie* v. *Charles Fiske*. The testimony of *Greely* appears to have been introduced to prove, that *Hunnewell*, who measured the logs, was absent from the State, for the purpose of enabling the plaintiff to introduce his survey book, or some other secondary evidence; but when the book was offered, it was not admitted, nor any other testimony, which could not have been legally admitted without it. It

could have had no other influence than to account for the absence of such testimony as might otherwise have been expected.

The testimony of *Young* upon the same subject was confined to facts within his own knowledge and so far as it might tend to prove the quantity of logs and amount of toll was not liable to any objection. The testimony does not appear to have been of a character to be very satisfactory, but any defect might have been supplied by other testimony not reported; and the question here is not upon the effect of the testimony, but whether it was legally admitted.

The writ against *Fiske* does not appear to relate to the matter in contest between these parties, and it could have had no influence upon the question respecting the existence of the corporation, or upon any other question reserved, and it was therefore properly excluded.

Exceptions overruled.

James P. Stone *vs.* Calvin Osgood.

The temporary residence of a citizen, liable to do militia duty, in a town wherein he is not domiciled, merely for the purpose of attending school, does not subject him to enrolment in that town, or to the performance of militia duty therein.

This was a writ of error brought to reverse a judgment of the Municipal Court of the city of *Bangor*. The original action was brought by *Osgood* as clerk of a company of militia, to recover a fine for non-appearance at a company training. The question was whether *Stone* at the time, *May* 3, 1836, was or was not liable to militia duty in *Bangor*. From the facts proved at the trial, it appeared, that *Stone* was a native of *Salem, Massachusetts*, where his father still resides; that he came to *Bangor* in *June*, 1835, and attended to academical studies at the classical school there; that he became twenty-one years of age in *March*, 1836, and was enrolled as a private in the company on *April* 26, 1836, was warned the next day to attend the training, and that he did not attend. On the day

following the warning, the vacation at the school commenced, and *Stone* returned to *Salem*, and there spent the vacation, as was his usual custom, and at the commencement of the next term, returned to *Bangor*, and attended the school. His return was after the training, but before the expiration of twenty days after it, and no excuse was offered. There are two vacations in the classical school, of five and six weeks, one commencing in *April*, and the other in *August*. *Stone* had always resided with his father at *Salem* prior to his coming to *Bangor*, and came there by his father's direction, and was supported by his father at *Bangor*, spending the term time there, and the vacations at *Salem*. *Stone* offered his father as a witness, and proposed to prove by him, that he sent the son to *Bangor* to attend academical pursuits, and still considered his son's residence at *Salem*, and that the son was sent to *Bangor* for a temporary purpose only, to attend school, and that he still supports the son, and considers him under his care. This testimony was rejected, and judgment was rendered in favor of the Clerk.

The errors assigned, were, 1. Because the Judge rejected the testimony. 2. Because on the whole facts proved, judgment was rendered for the then plaintiff, when it should have been for the defendant.

The writ of error was argued in writing, by *Abbott & Wakefield*, for the plaintiff in error, and by *D. T. Jewett*, for the original plaintiff.

The counsel for *Stone* argued in support of these propositions.

1. The plaintiff in error had no legal residence within the bounds of the company of which the plaintiff was clerk, at the time he was enrolled therein. *U. S. Militia Act*, *May* 8, 1792, *sec.* 1; *Story's Conflict of Laws*, 42, *sec.* 44; 1 *Binney*, 351, *note*; *Cutts* v. *Haskins*, 9 *Mass. R.* 43; *Granby* v. *Amherst*, 7 *Mass. R.* 1; *Turner* v. *Buckfield*, 3 *Greenl.* 229; *Knox* v. *Waldoborough*, 3 *Greenl.* 455; *Parsonsfield* v. *Kennebunkport*, 4 *Greenl.* 47; *Harvard College* v. *Gore*, 5 *Pick.* 370; *Commonwealth* v. *Walker*, 4 *Mass. R.* 556.

2. If the position is established, that the plaintiff in error had only a temporary residence in *Bangor*, he was not liable to be enrolled and to do military duty there. *Commonwealth* v. *Walker*, 4 *Mass. R.* 556; *Commonwealth* v. *Swan*, 1 *Pick.* 194; *Shattuck*

v. *Maynard*, 3 *N. H. Rep.* 123; *Commonwealth* v. *Douglass*, 17 *Mass. R.* 49.

3. There is no evidence of any enrolment of the plaintiff in error at any time or place, until the day previous to the warning; and no person is liable to perform militia duty until after he shall have been enrolled six months.

D. T. Jewett, for *Osgood*, contended that the *United States* militia law does not require a citizen to have a *legal residence*, a *settlement* in a place before he can be required to perform militia duty. Its words are "every citizen who shall reside," &c. "who shall come to reside," and hence it has always been held, that a laborer who comes to work but a few months in a place is liable to militia duty in the town where he so resides. The cases cited for the plaintiff in error are principally pauper cases, and have here no application, and the others are predicated upon a state of facts entirely different from this. This is the case of a man twenty-one years of age, coming to reside in *Bangor*, and the nature of his occupation, be it that of a student, or a laborer, can make no difference. And this was the understanding of our legislature. The militia acts of 1834, § 5, and of 1836, § 7, and of 1837, § 6, show the construction put on the *United States* law by the legislature of the State. The last act is merely declaratory of what was the fair construction of the other acts.

The fact, that after the warning *Stone* went to visit his friends, and was absent at the training, is mere matter of excuse, and that should have been made before the expiration of the twenty days. *Tribou* v. *Reynolds*, 1 *Greenl.* 408. The age of *Stone*, in the absence of all other testimony, is sufficient to authorize the conclusion, that he had once been enrolled six months previously, and that is all to which he was entitled. *Haynes* v. *Jenks*, 2 *Pick.* 172.

The opinion of the Court was by

Weston C. J. — By the constitution of the *United States*, Congress has power to provide for organizing, arming and disciplining the militia. This power was exercised in *May*, 1792, and the act of Congress then passed, has been inserted in the general revision of the laws, in relation to the militia. In the first section,

Congress has determined, who shall be liable to do military duty, how and where they shall be enrolled, and with what arms and equipments, they shall be provided. And it makes provision further for the enrolment of every such citizen, who may, from time to time, come to reside within the bounds of any company, by the commanding officer thereof. This part of the statute has received, in *Massachusetts*, a judicial construction, both before and since our separation. And it has there been held, that the temporary absence of a citizen, liable to do military duty, from the place of his domicil, not only left his enrolment there in full force, but that he was not liable to enrolment in the place of his temporary residence. *Commonwealth* v. *Walker*, 4 *Mass. R.* 556; *Commonwealth* v. *Swan*, 1 *Pick.* 194. We refer to those cases, as giving, in our judgment, a just exposition of the law.

And we are of opinion, from the facts stated, that at the time of the delinquency charged, the domicil of the plaintiff in error was at *Salem;* and that his residence at *Bangor* was temporary only, at the time of his enrolment there. It results, that he is not liable to the fine sought to be recovered in this action.

Judgment reversed.

The State *vs.* Stephen Walker.

Acting as the servant of a person licensed as a retailer, under the *stat.* 1834, *c.* 141, will not excuse such servant for knowingly violating the provisions of the statute.

One license under that statute, will not authorize the person or persons licensed to conduct the business in more than one place.

If one without license sell wine, brandy, &c. in small quantities to such as he may victual, and to others calling therefor, to be drank in his house or cellar, he is guilty of the offence prohibited in the first section of the statute.

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

The indictment, the license, and the instructions of the Judge to the jury appear in the opinion of this Court. *Atkins & Walker*

to whom license was granted, kept a store in one street attended by themselves, and also kept another store in another street attended by the respondent, *Stephen Walker*. The counsel for *Stephen Walker* requested the Judge to instruct the jury:—1. That if they believed the defendant to be the mere servant, or bar-keeper, under *Atkins & Walker*, the indictment could not be sustained. 2. That *Atkins & Walker*, having a general license to retail within the city, have a right to retail in both their stores or places of business. 3. That selling in such a manner only as he lawfully might under a license as a common victualler, to such as he victualled, to be drank in his cellar, and to others who might call (excepting they had already taken too much) spirituous liquors in small quantities, to be drank by those who called for such, would not constitute him a common seller of wine, brandy, &c., but that he should have been prosecuted for the individual offences, or indicted as a common victualler.

Blake, for the respondent, contended, that the instructions requested ought to have been given, and that those given were erroneous; and cited and commented upon the *stat.* 1834, *c.* 141, and the case, *State* v. *Burr*, 1 *Fairf.* 438.

Goodenow, Attorney General, for the State.

As to the first request, he should believe the Judge to be right, rather than the counsel, until some case could be referred to, showing that a man had been excused for a criminal offence, knowing at the same time that he was violating the law, merely because he acted as the servant of another.

To have given the second instruction requested, would have defeated the object of the law, as well as its spirit and effect. If two stores may be kept under one license, any number may be, and they may be scattered over a whole city. The law is wholly inconsistent with this claim. The licensing board are to fix the number to be licensed; and whether the applicants "are persons of sober life and conversation, and of good moral character, and suitably qualified for the employment;" and but one bond is to be given under one license. These provisions would be useless on the construction contended for.

The case cited, *State* v. *Burr*, is decisive against the third request.

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

EMERY J. — At the Court of Common Pleas, *May Term*, 1837, the defendant was indicted, for that on the 1st day of *Feb.* 1837, and on divers days and times from that day to the day of taking that inquisition at *Bangor*, he did presume to be and was a common seller of rum, gin, brandy and other strong liquors by retail, and in less quantities than twenty-eight gallons at a time, without being duly licensed according to law, or without any authority so to do, against the peace and contrary to the form of the statute, &c. That statute was passed the 13th of *March*, 1834. The defendant among other evidence, introduced a license to "*Atkins & Walker.*" It was dated, "City of *Bangor*, *Sept.* 5, 1836. Pursuant to an act of the State of *Maine*, passed *March* 13, 1834, *Atkins & Walker* is hereby licensed by the board of Aldermen and City Clerk of said city to retail within the said city, for a term of one year from the date hereof."

The exception against the direction of the Judge, that "being a servant or bar-keeper of *Atkins & Walker* would not justify the defendant, if he knew the selling to have been in violation of the statute," cannot prevail. The instruction is altogether as favorable to the defendant as the law will sanction.

In some civil concerns, the servant acting within the scope of his employment, if lawful, and such as may reasonably be presumed, conformable to his master's orders, is protected. The servant is not liable for the mere negligence of the master.

But when, as in this case, yielding credit, as we must, to the verdict, the servant has been engaged *knowingly in an unlawful act*, even supposing it *in his master's service*, the servant becomes amenable to the penalties of the law. For the wrongful act of the servant, the authority of the master will not be implied. If the servant, by the command of his master, violates the law knowingly, both are liable.

The second instruction, "that the license of *Atkins & Walker*, would not apply to and authorize them to sell under it in more than one distinct place," was founded upon a just construction of the statute.

In considering the object and design of the law from its title, we must perceive an intention to produce something like regulation of retailers. On looking into the sections of the statute, we discover that the persons to be licensed, are to be of sober life and conversation, of good moral character, and suitably qualified for the employment, and it is imposed as a duty, that this qualification and the number deemed necessary be ascertained by the judgment of the selectmen, treasurer and clerk in towns, of assessors, treasurer and clerk in plantations, of aldermen and city clerk in cities. Each person who is so approved, before being licensed, is to give bond with sufficient surety or sureties in the penal sum of $300, on the condition prescribed in the statute. The alleged servants here who are selling in another street at an establishment, different from the store in *Wall Street*, give no bond. Upon the principles insisted on by the defendant, we cannot perceive, why it should be requisite to license more than one person in a town or city, for he might set up as many stores and establishments as he pleased, and nominally, or really, hire his servants in every house, or store, or establishment in the town or place, within which he is licensed. Such a construction would be mischievous, and defeat the intention of the law. We believe that the intention of the legislature was to secure the full execution of the law; because by an additional act, *c.* 725, passed on the 24th of *March*, 1835, "in addition to the mode of recovery of any fine, forfeiture, or penalty provided in the former act of *March*, 13, 1834, which was by an action of debt, provision was made, that a recovery may be had by complaint or indictment. And no prosecuting officer shall discontinue any legal process commenced or to be commenced under this or the former act, except by the direction of the Court."

The 5th section of the statute of 1834, provides, that "no innholder, victualler or retailer shall suffer any disorderly conduct in his house, shop or dependencies thereof, nor suffer any person to drink to drunkenness or excess in his or her house or shop, or suffer any minor, or servant to sit drinking there," indicating in our judgment, but *one house*, and *one shop*, as the place to be protected by one license to one firm.

Upon such facts as are stated in the exceptions, we are of opinion, that the third requested instruction was rightly declined to

be given. It appears, that matters alleged in defence were denied and contested by the prosecution, and the cause went to the jury on the whole evidence given on the trial. Upon the grounds claimed in defence, as stated in the exceptions, that requested instruction could not properly be required.

The exceptions must be overruled, and the cause remitted to the District Court for further proceedings.

THEOPHILUS NICKERSON *& al. vs.* JAMES CRAWFORD.

The general rule is, that lands bounded upon rivers or streams of water extend to the thread of the stream, unless the description be such as to show a different intention.

And if land be described in the grant as extending from a road northerly "*to the margin of the cove, thence westerly along the margin of the cove about eleven rods,*" and thence southerly to the road; the land granted extends but to the edge of the water and the flats are not included.

THIS was a petition for partition. The material words of the grant are found in the opinion of the Court. If the land conveyed extended so as to include the banks and flats of the cove, the respondents were to prevail; and if not partition was to be ordered.

The case was submitted without argument.

J. & J. E. Godfrey, for the petitioners.

Abbott, for the respondents.

The opinion of the Court was drawn up by

SHEPLEY J. — The land described, lies upon the southerly side of a body of water called the cove, is bounded upon one end by the road, and the line is described as extending "to the margin of the cove, then westerly along the margin of the cove about eleven rods," and it then returns to the road. The question is, whether by this description the flats adjoining were conveyed. The general rule is, that lands bounded upon rivers or streams of water extend to the thread of the stream, unless the description be such as clearly to show a different intention.

By the case of *Storer* v. *Freeman*, 6 *Mass. R.* 435, it was decided, that a deed extending the line of boundary to the shore and thence by the shore would not convey the flats, not being described as extending to the water.

In *Hatch* v. *Dwight*, 17 *Mass. R.* 289, it was held, that land bounded by the bank of the river did not extend to the thread of it.

In the case of *Dunlap* v. *Stetson*, 4 *Mason*, 349, and in *Lapish* v. *Bangor Bank*, 8 *Greenl.* 85, the description commenced the line of boundary at a stake on the bank, and returned it to a stake and stones on the bank, and connected the points by a line running on the bank to high water mark at the first bound, and it was decided, that the flats were not conveyed.

In this case, the land conveyed is not by any term used extended to the water, but is bounded by a line without the edge of the water, and the flats are not included.

Prayer of petition granted.

Enoch W. Clark & *al. vs.* Joseph J. Bigelow.

If a bill be drawn in this State on drawees in another State, the notarial protest is admissible in evidence.

Due diligence to give notice of the non-payment of a bill, is a sufficient excuse for not giving it.

Where a witness speaks of his impressions, if it be understood, that the fact is impressed upon his memory, but that his recollection does not rise to positive assurance, it would be admissible evidence for the consideration of the jury; but if the impression be not derived from recollection of the fact, and be so slight, that it may have been derived from the information of others, or some unwarrantable deduction of the mind, it cannot be received.

The plaintiffs brought the action as indorsees of a bill of exchange, drawn and dated at *Bangor, July* 2, 1835, payable in six months after date, by *Reed & Edwards* on *Tyler Reed & Co.* of *Boston*, in favor of *Daniel S. Jones* and *Joseph J. Bigelow*, and by them indorsed. The material facts in the case appear in the opinion of the Court. There was also a motion for a new trial, because the verdict was against evidence.

Rogers and *A. W. Paine* argued for the defendant, and in the course of their argument, cited *Chitty on Bills*, 213; *Bayley on Bills*, 283; 3 *Campb.* 262; 2 *Stark. on Ev.* 270; *Hill* v. *Varrell*, 3 *Greenl.* 233; 13 *Johns. R.* 432; *Whittier* v. *Graffam*, 3 *Greenl.* 82; 8 *Pick.* 251; 16 *Pick.* 392; 1 *Wend.* 376; 6 *Wend.* 436; 8 *B. & Cr.* 387; 4 *Car. & P.* 522; *Doug.* 679; 7 *East*, 231; 3 *Barn. & Ald.* 619; 3 *Car. & P.* 522; *Chitty on Bills, (8th Am. Ed.)* 592; 7 *Halst.* 268; 3 *Gill & Johns.* 474; 1 *Stark. R.* 314; *Groton* v. *Dallheim*, 6 *Greenl.* 476; 4 *Leigh*, 37; 4 *M. & S.* 49; 12 *East*, 433.

A. G. and *D. T. Jewett* argued for the plaintiffs, and cited 10 *Mass. R.* 1; *Bayley on Bills, (Ph. & S. Ed.)* 280, 284, 516; 12 *Pick.* 484; *Atwood* v. *Clark*, 2 *Greenl.* 249; 1 *Pick.* 401, 413; 1 *N. H. Rep.* 240; 2 *Stark. Ev.* 255, and cases there cited; 2 *Johns. R.* 273; 3 *Kent*, 107; 2 *Caines*, 121; 1 *Johns. R.* 294; 2 *Peters*, 96.

The opinion of the Court was drawn up by

Weston C. J. — The first count in the declaration avers a regular demand upon the drawees for payment, and due notice thereupon of the dishonor of the bill to the defendant, the indorser. The second count, instead of setting forth due notice to the defendant avers, that the plaintiffs used due diligence to give him notice. Under the general issue, which has been pleaded in this case, we are of opinion, that upon the point of notice, the plaintiffs are entitled to recover, if they have proved due notice given, or due diligence to give it.

The bill, having been drawn in *Maine* on drawees in *Massachusetts*, is a foreign bill, as has been decided in the Supreme Court of the *United States*, in *Massachusetts* and in this State. *Buckner* v. *Finley*, 2 *Peters*, 586; *Phœnix Bank* v. *Hussey & al.*, 12 *Pick.* 483; *Green* v. *Jackson*, 15 *Maine R.* 136. The notarial protest was therefore properly received in evidence.

A part of the deposition of *Thomas A. Dexter*, the notary, is objected to, where he speaks of his strong impression, that he sent a duplicate notice to the defendant at *Bangor*, about which however he will not swear positively. If we are to understand from this language, that the fact is impressed with some strength upon

his memory, but that it does not rise to positive assurance, it would, we doubt not, be evidence properly admissible, for the consideration of the jury. In that case, it would not be conjecture or belief merely, but recollection, not quite strong enough in the apprehension of the witness, to exclude all possibility of mistake. If no other recollection, than that of the most positive character, is to be received in a court of justice, the difficulty of verifying facts, resting in memory, would be greatly increased. It would shut out the testimony of those, in whom that faculty is not strong, or has been little cultivated. It is well known, that some over scrupulous persons will not speak positively, after the lapse of some time, as to what they may have seen, heard or done. If they give their recollection, precisely as it rests upon their minds, whether more or less strong, the jury will give it such weight, in connexion with other testimony, as it justly deserves. But impression, although it may convey the idea of a certain degree of recollection, is an equivocal term. It may have been derived from the information of others, or from some unwarrantable deduction of the mind, from premises not well established. And upon the whole, unless it can be made to appear, that it is derived from recollection, it cannot, in our judgment, be safely or legally received. But as the jury have found the residence of the defendant to have been in *Boston*, that part of the deposition has become immaterial.

The notarial protest states, that notice was left at the place of abode of the defendant in *Boston*. If this fact may be controverted, the evidence is strong, and the jury have found that the place where the notice was left, was not the place of abode of the defendant at the time. The notary deposes, that the plaintiff, *Clark*, sought with more than usual attention, to ascertain the residence of the parties. *Tarbell*, who bought the defendant's stock of jewelry about the first of *December*, deposes, that he understood he went immediately to *Bangor*, but that he returned to *Boston*, and was there a day or two in the winter. *Thayer*, the son of the lady with whom the defendant had boarded several months, and an inmate of the family, deposed, that the defendant had gone from his mother's from two to four weeks, when the notice was left, but he did not know where he had gone, or where he was to be found. The jury have found, that his residence was on the fifth of *Janua-*

ry in *Boston*, and that due diligence was used to find it. Upon the latter point, the presiding Judge gave it as his opinion, that it had been sufficiently proved; and this is warranted by the testimony of the notary, who expressly deposes, that upon the point of diligence, the plaintiff bestowed an unusual degree of attention. The defendant has adduced no evidence, showing where he was on the fifth of *January*, or in what part of the city of *Boston* or elsewhere, he could have been found on that day. There is not a little reason to believe, that the object of the defendant was to elude a notice, by which his liability might be fixed. It is a well settled principle, that due diligence excuses notice. *Williams* v. *The Bank of the United States*, 2 *Peters*, 96; *Bateman* v. *Joseph*, 12 *East*, 433.

Judgment on the verdict.

William Arnold *vs.* Charles H. Pond.

Where a creditor obtained judgment against his debtor, and had part satisfaction of his execution, returned by an officer, by sale of a personal chattel of a third person, who brought an action against the officer and recovered the value thereof; and the creditor, during the pendency of that suit, recovered a new judgment for the balance of his execution, left unsatisfied, in action of debt, and obtained satisfaction of that judgment; and after the recovery against the officer, brought *scire facias* on the first judgment to have execution for the amount thus returned satisfied on the first execution; *it was held*, that the *scire facias* could not be sustained.

This was a *scire facias*, originally commenced in the Court of Common Pleas, where the facts were agreed by the parties, on a judgment of that Court, *January Term*, 1832, for $13,66, damages, and $8,53, costs. Execution issued *January* 28, 1832, and was given to one *Trafton*, a deputy sheriff, who seized thereon "one tool chest," and having legally advertized the same, sold it on the execution as the property of *Pond*, and returned the execution satisfied thereby, for the sum of $9,50. Subsequently one *Stevens*, whose property the chest was, brought an action of trespass

against *Trafton* for taking it, and finally recovered the value thereof. During the pendency of the last suit, *Arnold* commenced an action of debt before a Justice on his judgment against *Pond*, and recovered judgment for the balance remaining, after the proceeds of the sale of the chest had been indorsed; and an execution issued thereon, and was fully satisfied. This *scire facias* was instituted after the recovery against *Trafton*.

J. Appleton, for the plaintiff, argued, that this was but the case of the satisfaction of an execution against one man by the sale of the personal property of another, where it is no satisfaction of the judgment, and the creditor is entitled to a *scire facias* for a new execution. *Flagg* v. *Dryden*, 7 *Mass. R.* 52; *Steward* v. *Allen*, 5 *Greenl.* 103. The judgment before the Justice is no more than a satisfaction of so much of the execution. This is the only remedy the creditor has.

P. Chandler, for the defendant, argued, that a judgment recovered is indivisible, and that two suits, debt and *scire facias*, cannot be maintained upon it. The first judgment was merged in the second before the Justice, and that is satisfied. The second judgment, even without satisfaction, is a sufficient bar to another suit on the first judgment. 15 *Johns. R.* 229, 432; 6 *Dane*, 223; 3 *East*, 346; *Adams* v. *Rowe*, 2 *Fairf.* 95.

By the Court. — Whatever remedy, if any, may remain to the plaintiff, we are of opinion it is not to be obtained upon the process to which he has resorted. No subsisting unsatisfied judgment is in force against the defendant.

Judgment for defendant.

JONATHAN G. BEAN *vs.* WILLIAM ARNOLD.

Where W. A., the payee of a negotiable note then payable, indorsed it thus, "W. A. *Holden, Aug.* 11, 1836," he was held liable without demand or notice.

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

The declaration contained but one count, for money had and received. The plaintiff introduced a note from a third person to the defendant, or order, dated *March* 31, 1836, payable in sixty days from date, with the following indorsement on the back thereof in the handwriting of the defendant. "*William Arnold, Holden August* 11, 1836."

The Judge instructed the jury, that if they should find the indorsement was genuine, it was their duty to inquire and find whether the word "Holden," used as above by the defendant, was a waiver of demand and notice, and if so, they would return a verdict for the plaintiff. There was no evidence offered of demand and notice. The jury found for the defendant, and the plaintiff filed exceptions.

McDonald, for the plaintiff, argued, that it was erroneous in the Judge to leave the legal effect of the words to be decided by the jury; and that they decided the question wrongly. The note being due when the indorsement was made, the defendant waived the useless form of making a demand and giving notice. *Hunt* v. *Adams*, 6 *Mass. R.* 519; *Cobb* v. *Little*, 2 *Greenl.* 261; *Bayley on Bills*, 291; 3 *T. R.* 80; 1 *Yeates*, 360; 6 *Har. & Johns.* 256.

G. G. Cushman, for the defendant, said, that if the verdict was right upon the facts, it was immaterial whether the Court or jury decided the law. But it was rightly left to the jury to determine what meaning was usually given to the word, when used in that manner. The defendant was to be holden only on a compliance by the plaintiff of what the law requires of him, making a seasonable demand, and giving due notice. 9 *Johns. R.* 121; *Copeland* v. *Wadleigh*, 7 *Greenl.* 141; *Springer* v. *Bowdoinham*, 7 *Greenl.* 442.

The opinion of the Court was drawn up by

Weston C. J. — The effect of the indorsement by the defendant on the note, adduced by the plaintiff, was a question of law, for the decision of the Court. The word, holden, must be understood to mean the assumption of a liability, without the condition of demand and notice, which is necessary to charge a common indorser. No other sensible construction can be given to the term, which must have been intended to have some meaning. The defendant now resists payment, insisting that he is not holden. By the indorsement however, he undertook to be holden, without imposing any conditions. He cannot be permitted therefore to interpose as a defence, the want of demand and notice.

Exceptions sustained.

Asa Legro *vs.* Joseph Staples & Trustees.

An order negotiable in its form, but drawn for no specific amount, and payable upon a contingency, cannot be regarded as negotiable.

But such order, being drawn for the whole of a particular fund, and accepted by the drawee to be paid when in funds, is an assignment of the amount to be received, and is sufficient to prevent any attachment of it by a trustee process as the property of the assignor, if the assignment be valid.

If the drawee be summoned as the trustee of the drawer of the order, and disclose facts showing an assignment to another, and the creditor object that the assignment is invalid and ineffectual to defeat his attachment, the assignee should be summoned in and made a party to the suit, under the provisions of the *stat.* 1821, *c.* 61.

And when the assignee is thus summoned in, if the assignment should be shown to be invalid, and the trustee should be adjudged to pay to the creditor of the assignor, such judgment would be a sufficient protection to the trustee to the amount thereof in a suit against him by the assignee.

On the disclosure of trustees. *Messrs Chandler & Paine*, being summoned as trustees of *Joseph Staples*, disclosed that before the service of the writ they had collected for him of *Jedediah Varney* a sum of money, which they had not paid over; but that before

the service they had accepted an order drawn on them by the defendant in the words following. "*Bangor, March* 15, 1837. Pay to the order of *Jeremiah Staples* whatever sum you may collect for me of *Jedediah Varney*, on demands left with you for collection. *Joseph Staples.* To *Messrs Chandler & Paine, Bangor, Me.*" On the face of the order it was accepted in these words. "Accepted to pay when collected, after deducting our bill against *Staples. Chandler & Paine.*" The order was presented to them for acceptance by the defendant, *Jeremiah Staples* not being present, and was presented to them for payment after this action was commenced by a person unknown to them. On the facts presented by the disclosure, the counsel for the plaintiff contended, that the acceptance of the order was not an acceptance of negotiable paper, which *ipso facto* would discharge the supposed trustees, but that the drawing and accepting of the order, and the other facts stated, constituted a *prima facie* assignment of the balance of money in their hands to *Jeremiah Staples.* They denied the validity of this assignment, and moved the Court to allow them to contest the same according to the provisions of *stat.* 1821, *c.* 67, *sec.* 7. The Court was holden by EMERY J., and the exceptions state, that "the Judge decided otherwise, adjudged that this was not an assignment within the purview of the statute, and that said *Chandler & Paine* were not trustees, and overruled the plaintiff's motion to be allowed to contest said assignment." The plaintiff filed exceptions.

The case was argued in writing, by *Moody & Le Breton,* for the plaintiff, and by *A. W. Paine,* for the trustees.

For the plaintiff, it was contended, that the order was not a negotiable security. 1. Because it was not for the payment of money absolutely and at all events. *Bayley on Bills,* 1, 8; *Coolidge* v. *Ruggles,* 15 *Mass. R.* 387. An order to be paid out of money when collected is not negotiable. *Bayley,* 10; *Black. R.* 782; 3 *Wils.* 207; 6 *Cowen,* 108. 2. Because it was payable out of a particular fund. 2 *Bos. & P.* 413. 3. Because it was not drawn for the payment of a specific sum. *Bayley,* 7; 2 *Stark. Rep.* 375; *Adams* v. *Robinson,* 1 *Pick.* 461. This then not being a negotiable security, it could only operate as a *prima facie*

assignment of the demand, and we were entitled by the statute to try its validity.

A. W. Paine, for the trustees, argued, that if the order was not negotiable, the trustees must still be discharged. The acceptance of the order is making a new contract, independent of the former one, with a third person, which contract the trustees are bound to perform. Fraud or wrong between others does not affect their rights. 4 *Mass. R.* 258. The order itself, without the acceptance, operates as an assignment, and such as the statute contemplates. The acceptance extinguishes the old implied contract, and substitutes the new express one with another person. The trustees have a right to claim of the Court such an adjudication as will save them harmless in every possible emergency. The adjudication in this case, if against the trustees, could not be given in evidence in a suit by the assignee against them, and they might be compelled to pay the amount twice. The plaintiff ought not therefore to be permitted to summon in the payee of the order, as in no emergency can he derive any benefit from the result of his inquiry.

The opinion of the Court was drawn up by

Shepley J. — The order named in the exceptions cannot be regarded as negotiable, because it was not drawn for any specific amount and it was payable only upon a contingency. It did however operate as an assignment of the amount which might be received. *Cutts* v. *Perkins*, 12 *Mass. R.* 206; *Robbins* v. *Bacon*, 3 *Greenl.* 346. And that would be sufficient to prevent any attachment of it as the property of the defendant, if there were not a suggestion, that it was invalid, and so ineffectual to transfer the property. Such an allegation having been made, the statute provides that the assignee may be summoned and become a party to the suit, and that the validity of the assignment may be tried and decided. *Stat.* 1821, *c.* 61, § 7. The language of the statute must be regarded as embracing all written transfers or assignments, whatever may be their form. The law must decide what is an assignment, and if decided to partake of that character it will be included in the class of instruments contemplated by the statute. This is indicated both by the language and design of it.

The acceptors of the order, who are summoned as trustees of the assignor, contend, that they ought not to be holden as his trustees because their contract with him has been discharged, and a new one made with the assignee. And that they would not be protected against a suit brought upon the order by the assignee. But the very question contemplated by the statute to be tried and determined is, whether there is any valid contract upon which the assignee can claim, and he is to become a party to the suit in which that question is to be determined. And if his title is adjudged not to be good, they will be released from any promise to him. And should they be adjudged to pay to the creditor of the assignor, they will be fully protected by that judgment, because they may offer it in evidence against the assignee, it being between the same parties. The case presents in principle only that of an assignment *inter partes*, where the creditor, debtor, and assignee of the creditor mutually stipulate for a payment by the debtor to the assignee.

Exceptions sustained.

The Case of Waldo T. Pierce.

Two Justices of the Peace and of the quorum have no power to *imprison* a person for refusing to give his deposition *in perpetuam*.

Pierce was brought into Court on a *writ of habeas corpus*. It appeared that *Pierce* had been summoned to appear before two Justices of the Peace and of the quorum for this county, to give his *deposition in perpetuam*, at the request of one *Fiske*, who had an interest in the subject matter of his testimony, which was a question proper for judicial investigation in a civil process, but in relation to which no suit was pending. *Pierce* refused to appear at the time and place appointed, and a capias was issued, and he was brought before the Justices. He there wholly refused to make answers to the questions put to him, or to testify in relation to the case. Thereupon a mittimus was made out, ordering him to be committed for that cause; and on his being carried into the prison,

the writ of *habeas corpus* was immediately sued out, as had been previously arranged.

J. Appleton and *Hill*, for *Pierce*, cited the statutes of 1821, *c.* 85, prescribing the mode of taking depositions, of 1833, *c.* 85, in addition thereto, and of 1834, *c.* 126, § 2, and contended, that the legislature had not conferred, and had not intended to confer, on two Justices of the Peace the power to force a man, by imprisonment, to give a deposition *in perpetuam*, where no suit was pending; a power so subject to be abused, and converted into the means of inquiring into the private affairs of individuals; and that the law, in this case, had left the remedy to a civil suit, as before the statute of 1833. But if the question is left in doubt, he should be discharged. Nothing is to be presumed in favor of the jurisdiction and power of inferior magistrates. *Bridge* v. *Ford*, 4 *Mass. R.* 641; *Dodge* v. *Kellock*, 13 *Maine R.* 136; *Commonwealth* v. *Leach*, 1 *Mass. R.* 59.

Mellen and *T. M'Gaw*, for *Fiske*, argued, that the spirit and intention of the statute of 1833, *c.* 85, and the fair construction of it, authorized and required the magistrates to commit *Pierce* for his contumacy in refusing to submit to the requirements of the law.

By the Court. — The question is by no means free of doubt and difficulty. The language of the statute of 1833, *c.* 85, seems to have reference to the acts of only one Justice of the Peace and of the quorum; "that whenever *any Justice* of the Peace and of the quorum, in any county, shall have issued his citation to any person, notifying such person to appear *before him*;" "whenever any such deponent shall be brought before *said Justice* upon any capias," "the *said Justice* is hereby vested with the same power," &c. No *single Justice* of the Peace and of the quorum is authorized by law to take a *deposition in perpetuam*, and any Justice of the Peace, *not of the quorum*, has authority to take a deposition where a *civil action is pending*. Some words in the statute appear comprehensive enough to include a case of this description; — "to give his deposition *in any affair in which depositions are by law authorized to be taken*;" and yet there are others seeming to limit the power to depositions taken where actions are pending; "such questions as may be propounded to him *by either party*."

Where the liberty of the citizen is involved, the statute should be construed strictly, and should not be made to embrace any doubtful case, as this must be considered. The Court are of opinion, that the imprisonment is not authorized by law, and that *Pierce* should be discharged therefrom.

BARZILLIA BROWN *vs.* JOHN FOSS.

Where a nonsuit was ordered, but to be taken off if the defendant should come in on the first day of the succeeding term and be ready for trial, and where it was eventually taken off and the action tried; *it was held*, that the action was so pending, after the nonsuit was thus ordered and before it was taken off, that a deposition might be taken in the action during the time.

Objections that questions are leading, should be taken at the time the deposition is taken, or they will be considered as waived, and cannot be made at the trial.

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

The action, which was assumpsit for a quantity of clapboards, was entered at the *Oct. Term*, C. C. Pleas, 1835. To make out his case the plaintiff introduced the deposition of one *Leighton*, taken *June* 20, 1837. The defendant was notified, but not present. To the admission of this deposition the defendant objected, because at the time of the caption the action was not pending in court; and in support of his objection produced the Clerk's minutes in the case, as follows. "*January Term*, 1837. *Brown* v. *Foss.* 47th day, plaintiff nonsuit, to be taken off, if plaintiff comes in 1st day next term ready for trial. No costs for plaintiff. *May Term*, 1837. *Brown* v. *Foss. January Term*, 1837, plaintiff nonsuit, (no costs for two last terms,) to be taken off if plaintiff comes 1st day of present term, ready for trial. 42d day, continued on affidavit as before, no costs for plaintiff." The nonsuit was at a subsequent term taken off, and the action tried at *January Term*, 1838. The Judge overruled the objection, and the depo-

sition was read. On reading the deposition of one *Maloon*, the defendant objected to a question and answer, because the interrogatory was leading. The defendant had notice of the taking, but did not attend. The objection was overruled, and the question and answer were read in evidence. The verdict was for the plaintiff, and the defendant excepted.

Cutting, for the defendant, contended, that as the nonsuit had been ordered before the deposition was taken, and was not taken off until afterwards, and after the time when liberty was reserved to take it off, the action was not then pending. By a nonsuit the plaintiff is out of court. 5 *Dane, c.* 175, *art.* 12, § 1, and authorities there cited. On the second objection, he referred to his argument in *Rowe* v. *Godfrey, ante, p.* 128, and 4 *Wend.* 231, and 6 *Binney*, 490, in addition.

J. Appleton, for plaintiff, argued, that an action once entered is pending in court until some judgment is rendered upon it. *Howe's Pr. Nonsuit;* 2 *N. H. Rep.* 324. And that the objection to the form of a question must be made at the taking of the deposition, or it comes too late. 1 *Stark. Rep.* 82; *Woodman* v. *Coolbroth*, 7 *Greenl.* 181; *Allen* v. *Babcock*, 15 *Pick.* 56; *Potter* v. *Leeds*, 1 *Pick.* 313; *Talbot* v. *Clark*, 8 *Pick.* 55.

The opinion of the Court was by

Weston C. J. — A nonsuit had been entered in this case, but it was conditional. The action was not finally disposed of; and the very terms of the condition, upon which the nonsuit was entered, implied, that the plaintiff might have a trial, if he could be prepared. Ultimately the nonsuit was taken off, and the action tried. The suit must be regarded as pending, from its first institution, until its final termination. The deposition was therefore legally taken, to be used in an action actually pending.

As to the leading questions, they should have been objected to at the time the deposition was taken, that the questions might be put in a mode not exceptionable. The objection is now too late, as was decided in *Rowe* v. *Godfrey, ante, p.* 128, to which we refer.

Exceptions overruled.

HENRY WARREN *vs.* HENRY WARREN.

If a bill be drawn, accepted and indorsed by persons residing in this State, but made payable at a place within another State of the Union, the protest is competent evidence to prove the presentment of the bill and its non-payment.

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

The action was on a bill drawn by *Sabin Pond & Co.* on *Charles Ramsdell,* which was accepted by him, and indorsed by the defendant for the accommodation of *Ramsdell,* dated *January* 25, 1836, and made payable at the *Suffolk Bank* in *Boston,* in ninety days from date. It was said in the argument, that the parties to the bill lived in *Bangor,* but the exceptions did not show where their place of residence was. The facts sufficiently appear in the opinion of the Court. The defendant objected to the admission of all the testimony offered by the plaintiff. PERHAM J. admitted the evidence, and instructed the jury, that the books of the witness, *Rice,* were not evidence in the case, that he might refer to them to refresh his recollection, but that he must testify on his own responsibility. The verdict being for the plaintiff, the defendant excepted.

F. Allen, for the defendant, contended, that this must be considered an inland bill of exchange, and that the protest therefore was improperly admitted to show a demand. However the law may be where the parties live in another State, when they all live here, the bill must be considered as inland. *Stat.* 1821, *c.* 88, *sec.* 1; 2 *Wheat.* 688, *and note; Chitty on Bills,* 12; 5 *Johns. R.* 375; 3 *Marshall,* 488; 2 *Peters,* 170. The evidence, legally admissible, was wholly insufficient to prove due notice to the indorser. 5 *Wend.* 301; 11 *Wend.* 477; 1 *Stark. Ev.* 133; 5 *Wheat.* 572; 8 *Wheat.* 324; 2 *Black. Com. Tucker's Ed.* 467, *note.*

Rogers and *A. G. Jewett* argued for the plaintiff, and cited *Bayley on Bills,* 15; *Chitty on Bills,* 8*th Ed.* 490; 2 *Peters,* 170; *ib.* 586; 4 *Leigh,* 37; *Phœnix Bank* v. *Hussey,* 12 *Pick.* 483; 5 *Mass. R.* 1; *ib.* 101; 6 *Mass. R.* 350; *Brunswick* v. *McKean,* 4 *Greenl.* 508.

The opinion of the Court was drawn up by

EMERY J. — This suit against an indorser, for the accommodation of one *Ramsdell*, is resisted, first, on the ground that the demand is upon an inland bill of exchange, and secondly, that the evidence to charge the indorser is insufficient. We have already decided, that a draft of such description as that now in controversy is to be treated as a foreign bill of exchange. For though the parties are said to live *here*, by making the instrument payable at the *Suffolk Bank*, *Boston*, out of the jurisdiction of this State, they have elected to consider it foreign. It must draw with it the consequences of being subjected to the contingencies of that character, in relation to the species of evidence, the notarial protest *there*, in order to fix the liability of the indorser. That protest is produced. The demand of payment and notice prepared and sent to the indorsers is proved by it. The testimony of *Mr. Mills*, the cashier of the *Eastern Bank*, who was an indorser, subsequent to the defendant, goes on to disclose the progress of those notices. He received the draft and protest and notice to the defendant from the *Suffolk Bank* in due course of mail, and he delivered the notice for the defendant to *William Rice*, runner and notary public, the day it was received by him and soon after. *Rice's* testimony discloses, that he was in the habit of delivering notices for the *Eastern Bank*, and though he did not remember any thing about delivering notice to the defendant in this case, yet he kept a memorandum book of notices delivered, and had no doubt he delivered a notice to the defendant on the 30th of *April;* that he remembered delivering notices to the defendant more than once, but he could not say whether they were notices of drafts coming due, or of protests, but he kept no minutes of notices of paper coming due. That all the notices from the *Suffolk Bank* are in the same form. The implication would be strong, that the notice reached the defendant. It is strengthened from the fact that he finds in his memorandum, that he notified on the same day the other parties to the bill, *Ramsdell & E. G. Moor & Co.* The defendant's witness, *Ramsdell*, testifies, that the defendant told him he had been notified, that the draft was protested.

We do not perceive, that the testimony was improperly admitted, or that any just complaint exists against the rulings of the Judge.

The testimony of *Rice*, *Ramsdell* and *Mills*, with the protest, will warrant the conclusion to which the jury came, and we see no reason for disturbing the verdict.

Exceptions overruled.

Simon Bryer *vs.* Gershom B. Weston *& als.*

To show that several persons carry on business as partners, it is sufficient to prove that they have severally admitted the fact, or have held themselves out as such; and this may be proved by parol evidence, although it appear on the trial, that there was a written agreement, and no notice to produce it was proved.

Where parol evidence had been introduced to prove an agency by the acts of the principals and agent, and the party adducing it then offered a copy of a written authority, which was objected to by the other party, and it was withdrawn and not given in evidence; this furnishes no sufficient cause for excluding the parol evidence.

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

Assumpsit against *Weston*, *Hobart*, *Mayo*, *Bolles* and *Smyth*, described as trustees of "*The Bangor & Lower Stillwater Mill Company*," on an instrument alleged to have been signed by them by *S. Peabody*, their agent, in the following terms.

"*Orono, March* 11, 1836. *Mr. S. Peabody*, Agent of the *Bangor & L. Stillwater Mill Co.* Sir, Please to pay the bearer *Simon Bryer*, ninety-two dollars and thirty-five cents, and charge the same to us, it being for value rec'd. $92,35. *Durgin & Bryer.*"

On the back thereof was written, "*Orono, March* 11, 1836. Accepted to be paid, *April* 1, 1836. *S. Peabody, Agent.*"

The facts in the case, found in the exceptions, which were made by the defendants, appear in the opinion of the Court.

The arguments were in writing, by *Washburn*, for the defendants, and by *Wilson*, for the plaintiff.

For the defendants, it was argued, that parol testimony was inadmissible to prove the liability of the defendants, without showing

notice to them to produce the original articles by which they were, if at all, constituted trustees of the company for whose debt they were sued. *Thayer* v. *Middlesex M. F. Ins. Co.*, 10 *Pick.* 326. The parol testimony admitted to prove the agency of *Peabody*, when the plaintiff had shown his authority, if any, to be in writing, was improperly admitted. 10 *Pick.* 326, before cited; *Thornton* v. *Moody*, 2 *Fairf.* 255; *Sug. Vend.* 262; 2 *Stark. Ev.* 55.

For the plaintiff, it was contended, that the description of the defendants as trustees was mere surplusage and immaterial, and that the defendants were proceeded against as partners. *Clapp* v. *Day*, 2 *Greenl.* 305. The evidence was properly admitted.

The opinion of the Court was by

WESTON C. J. — It does not appear, that the *Bangor & Lower Stillwater Mill Company*, is a corporation established by law. It must be taken then to be a voluntary association, transacting business under that name. The order upon which the action is brought, is addressed to *S. Peabody*, Agent of the company. It is objected, that parol testimony, that each of the defendants admitted himself to be a trustee of the company, is inadmissible, upon the ground that a deed exists, by which they were so constituted. To show however that persons carry on business as partners, or as jointly associated, it is sufficient to prove, that they have admitted the fact, or have held themselves out as such. Even where they are plaintiffs, parol proof is sufficient, that they have actually carried on business in partnership, and it is not necessary to produce any deed, or other agreement, by which such partnership may have been constituted. 3 *Stark.* 1067. And where they are sued as partners, less evidence is usually sufficient to charge them. The partnership may be proved by their habit and course of dealing, by their conduct and declarations. *Ibid.* 1070. In *Alderson* v. *Clay*, 1 *Stark. Cases*, 405, this was held sufficient, although the partnership there was proved to have been created by deed, and it did not appear that any notice had been given to produce it. And we are satisfied, that the evidence received in this case, upon this point, was legally admissible.

As to the agency of *Peabody*, it was not necessary that it should be proved by deed. It appears, that after he had introduced parol

evidence of such agency, the counsel for the plaintiff offered to produce a copy from the registry, by which it would appear, that *Peabody* was appointed their agent in writing. This testimony being objected to by the defendants, was waived by the plaintiff. This being the posture of the case, there is no evidence whatever of the mode of appointment. It appeared, that *Peabody* had acted for some time, both before and after the acceptance, as the agent of the company, and that orders drawn by him as such, had been accepted and paid by their treasurer. The general agency of *Peabody* was well known and acknowledged. The objection is not one of a character to be favored; and if the defendants would insist upon the strict proof, for which they contend, it should have been made to appear, by affirmative evidence *in the case*, that their agent was appointed in writing.

Exceptions overruled.

WINGATE S. ORDWAY *vs.* BENJAMIN F. WILBUR.

Cloth purchased for a coat, carried to a tailor to be made into one, and cut out, is exempted from attachment.

The Court of Common Pleas has power to grant an amendment, permitting a writ of original summons, directing the attachment of property, to be changed into a regular writ of attachment.

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

The action was trespass for taking and carrying away *two yards of broadcloth.* When the action was commenced, the writ was in form an original summons, and property was attached thereon. The defendant pleaded in abatement, "that the plaintiff's writ at the time it was served on the defendant, did not command the officer to whom the same was delivered for service, to take the body of the defendant, if the same could be found in his precinct, in want of his goods and estate, but that it was in form a summons and attachment only." The plaintiff moved for leave to amend so as to make the process in form a writ of attachment. The Judge decid-

ed, "that the plea was not a good cause of abatement, and ordered the defendant to answer further, allowing the plaintiff to amend his writ," as requested.

The defendant then pleaded the general issue, and filed a brief statement, justifying the attachment of the cloth as a constable of the town of *Orono*. The plaintiff proved, that he had procured the cloth, being two yards of superfine broadcloth, for the purpose of being made into a coat for himself, and had left it with a tailor who had taken his measure and cut out the cloth, but before it was made up, it was attached by the defendant, and taken from the shop, the tailor stating to him the facts. There was evidence tending to prove, that the plaintiff was poor and in need of a coat.

The plaintiff's counsel contended, that the cloth, in the situation in which it was when attached, was exempted from attachment by the statute, as "necessary wearing apparel." The defendant's counsel contended, that it was not so exempted, but liable to attachment. The Judge thereupon instructed the jury, that if they found by the evidence, that the cloth had been procured by the plaintiff and left with the tailor to be made into a coat, and the same was necessary for the plaintiff, and the operation had actually commenced by being cut out for the garment before it was taken, they might consider the same as coming within the exemption of the statute. The verdict was for the plaintiff, and the defendant excepted.

The case was argued in writing by *Washburn & Prentiss*, for the defendant, and by *Wilson*, for the plaintiff.

The counsel for the defendant cited in their argument, to show that the amendment should not have been permitted, and that the writ should have been abated, *stat.* 1821, *c.* 63, § 1; *Cooke* v. *Gibbs*, 3 *Mass. R.* 193; *Howe's Pr.* 59, 361; 3 *Black. Com.* 51; *Co. Lit.* 348; 9 *Pick.* 446; 13 *Johns. R.* 127. To show that the cloth was not exempted from attachment, they cited *stat.* 1821, *c.* 95; 13 *Mass. R.* 84; 6 *Bac. Abr. st.* 16; 15 *Mass. R.* 163.

Wilson, for the plaintiff, contended, that the amendment was properly permitted, and that the cloth was not liable to attachment. He cited in relation to the amendment, 3 *Greenl.* 183; *ib.* 216; 6 *Greenl.* 307; 1 *Shepl.* 307; 1 *Pick.* 156. And to show that

the cloth was exempted from attachment, 13 *Mass. R.* 86; 15 *Mass. R.* 205; 2 *Pick.* 80; 10 *Pick.* 423.

The opinion of the Court was drawn up by

SHEPLEY J. — This Court has decided that an amendment in matter of substance, similar to the one allowed in this case, might be made on terms, by virtue of the fifteenth rule of this Court. *Matthews* v. *Blossom*, 15 *Maine R.* 400. This amendment might be made by virtue of the eighth rule of the Court of Common Pleas, and this Court must suppose, that the Judge exercised his discretion as to the terms.

The intention of the legislature in exempting certain goods from attachment should be carried into effect. A construction of the statute so liberal as to allow it to be perverted to fraudulent purposes, should be avoided, while one so strict as to defeat the object designed ought not to prevail. Apparel, it is said, means dress, clothing, vestments, garments; and hence it is inferred, that nothing is comprehended in the term, but such as are in a fit state to be worn or used as such. A construction so strict would not exempt a garment wholly or partially in pieces for repair or alteration. When cloth has assumed the form and shape to fit it to the body of a particular person, may it not be regarded as his vestment, although not in a condition at that time to be worn? If the tailor had made a charge of his services would he not have charged for "cutting a coat?" When handing it to his journeyman to be sewed, would he not speak of it as a "coat to be made?" And if so must it not, in the popular language used by the trade, be regarded as a coat and part of the plaintiff's apparel?

The principal object of the exemption probably was to secure to the debtor all the comforts of clothing; it may also have been considered, that garments once formed to the person of an individual would lose much of their value by being taken and exposed to a public sale. And if so, to allow it in this instance would be to permit one of the mischiefs intended to be prevented.

Exceptions overruled.

THOMAS AMES *vs.* GERSHOM B. WESTON *& al.*

Where a writ was dated *November* 25, 1836, and was made returnable to the Court of Common Pleas next to be holden at B, within and for the county of P, which court was by a general law to be holden on the first *Tuesday* of *January* in each year; and where the defendant appeared at the first term, and did not object for that cause until the third term; *it was held*, that the court had power to permit an amendment of the writ by inserting on which *Tuesday* of the month and in what month of the year the court was holden.

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

The plaintiff's writ was dated *November* 25, 1836, served the same day, and entered at the term of the Court of Common Pleas holden on the first *Tuesday* of *January*, 1837. As the writ then was it read thus. "Before our Justices of our Court of Common Pleas next to be holden at *Bangor*, within and for our said county of *Penobscot*, on the ——— *Tuesday* of ——— next; then and there," &c. Counsel appeared for the defendants at the first and second terms, and the action was continued generally, and at the third term the defendants moved to quash the writ for the omission to fill the blanks. The plaintiff moved for leave to amend his writ by filling the first blank with the word "first," and the second blank with the word "*January*." Leave thus to amend was granted, and the motion was overruled. The exceptions state, "whereupon the defendants became defaulted," and "to which ruling and order of the court the defendant excepted."

The argument was made in writing.

Washburn, for the defendants, contended, that the objection raised in the court below was a fatal one, and that the defect pointed out could not be amended. The statute requires that all writs in the Supreme Judicial Court and Court of Common Pleas shall be made returnable at the next succeeding term of the court, allowing sufficient time for the service. And the form in the statute which is prescribed, and which has the force of law, requires also that the day of the month and the month of the year should be set forth in the writ. Now in this case when the writ was served, and until the third term, neither day, week, month, nor year appeared in the writ. It was not made returnable to any term of the court. This

was a material and substantial defect, one which made the writ void and incurable, and which was not merely a formal error. The writ was not amendable. He cited *Hall* v. *Jones*, 9 *Pick.* 446; *Bailey J.* v. *Smith*, 3 *Fairf.* 196; *Ball* v. *Austin*, 13 *Pick.* 90; *Wood* v. *Hill*, 5 *N. H. Rep.* 229; 2 *Johns. R.* 190; 4 *Johns. R.* 309; 9 *Johns. R.* 386; 2 *Fairf.* 178; 3 *Black. Com.* 287; 6 *N. H. Rep.* 44; *Tidd's Pr. (8th ed.)* 160; 3 *Mass. R.* 193; 5 *Mass. R.* 362; 10 *Mass. R.* 176.

Wilson, for the plaintiff, contended, that if the writ was originally defective it was cured by the appearance of the defendants generally, for two terms, without objection. But if there was originally a defect in the writ, it was amendable under the *stat.* 1821, *c.* 59, § 16. *Livermore* v. *Boswell*, 4 *Mass. R.* 437; *Green* v. *Lowell*, 3 *Greenl.* 373; *Wyman* v. *Dorr*, 3 *Greenl.* 183; *McLellan* v. *Crofton*, 6 *Greenl.* 307; *Sawyer* v. *Baker*, 3 *Greenl.* 29; *Buck* v. *Hardy*, 6 *Greenl.* 162. But the granting of this amendment was an act of discretion of the Judge for which exceptions do not lie. *Clapp* v. *Balch*, 3 *Greenl.* 216.

The opinion of the Court was drawn up by

Weston C. J. — The writ in question, as it stood before it was amended, was dated the twenty-fifth day of *November*, 1836, and was made returnable to the Court of Common Pleas, next to be holden at *Bangor*, within and for the county of *Penobscot*. As that court was, by a general law of the State, to be holden on the first *Tuesday* of *January*, the return day must have been understood by the officer who served the writ, and by the defendants. This is sufficiently indicated by the appearance of the latter, and the regular return of the writ.

In most of the cases, cited for the defendants, the writ was made returnable on a wrong day. As in *Wood* v. *Hill*, 5 *N. H. Rep.* 229, on the first *Tuesday* of *August*, instead of the third. In *Bunn* v. *Thomas, & al.* 2 *Johns.* 190, a writ, dated *May* twelfth, was made returnable on the seventeenth of *May* next, passing by one or two intermediate terms. So in *Burk* v. *Barnard*, 4 *Johns. R.* 308, the writ being dated 1808, instead of 1809, the return day was apparently passed, when it was served. In *Bell* v. *Austin*, 13 *Pick.* 90, the writ was made returnable the first *Tuesday*

of *April*, whereas the court was holden on the fifth *Tuesday* of *March*. In all these cases, the writs were held not amendable. But they differed essentially from the one before us, which was made returnable on the right day, but not with so much particularity, as the statute form must be understood to require. *Hall* v. *Jones*, 9 *Pick.* 446, *Bailey* v. *Smith & al.* 3 *Fairf.* 196, and *Dearborn & al.* v. *Twist*, 6 *N. H. Rep.* 44, turned upon the distinction necessary to be observed, between the seal and process of one court and another.

In this case, the parties, the cause and the court were so plainly indicated, that they could not be misunderstood; and it appears to us to fall very clearly within the power of amendment, expressly given to the court by statute.

Exceptions overruled.

Gilman Conner & al. vs. William Lewis & al.

The *stat.* 1837, *c.* 273, "to secure to mechanics and others payment for their labor and materials expended in erecting and repairing houses and other buildings," does not impair rights previously acquired under the *stat.* 1821, *c.* 159, on the same subject.

One of the contracting parties must be a proprietor of the land on which the building is to be erected to create a lien upon the land under the *stat.* 1821, *c.* 159; and a mere contract for the conveyance of land to one of the parties, on payment of the price by a fixed time, does not bring the case within the statute so that a lien may attach against the owner of the land.

Where a contract to erect buildings, made on one part in the name of three, was signed by but one who did not assume to act for the others, and was thus recorded, parol evidence is inadmissible to show that this contract was also the contract of the other two named, and thereby create a lien upon their land.

Where one contracts for the conveyance of land to him on his paying certain sums at specified times, a resulting trust is not created by his paying a part of the purchase money.

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

This was a petition filed under the provisions of the *stat.* 1821, *c.* 159, " securing to mechanics and others, payment for their labor and materials expended in erecting and repairing houses and other buildings with their appurtenances," setting forth a contract made by the respondents, *Lewis*, *Bigelow & Wadleigh*, on one part, and the petitioners on the other part, for the erection of certain mills. The petition was dated *Dec.* 29, 1836, was entered at *Jan. Term*, 1837, continued until *Oct. Term*, 1837, and a motion was then made to dismiss the petition, because the act had been repealed. The motion was denied. The petitioners then read a contract, not under seal, purporting to be made between the petitioners and respondents, but signed by the petitioners and *Lewis* only, dated *March* 8, 1836, and recorded *August* 23, 1836. The respondents objected to the admission of this contract in evidence, but the objection was overruled. The petitioners then offered parol evidence to show that this was the contract of the other two respondents, to which objection was made. The objection was overruled, and the evidence was received. The exceptions then give a list of seven different instruments with their dates, but they were not made a part of the exceptions, and are no part of the case in this Court. In the list one was named as an assignment by *Lewis* of a mortgage to him by *Dexter E. Wadleigh*, another respondent, of two thirds of the premises to *Isaac Hatch*, which was to be made a part of the case, but no copy appears. The respondents were in the exclusive possession of the premises when the contract was made, and until the time of trial. *Hatch* appeared and filed an answer in which he alleged a right under the mortgage prior to the contract, and objected to a sale under this petition. The petitioners objected to the right of *Hatch* to appear, but the objection was overruled. There was evidence offered by the petitioners, which they contended proved, that the land was held under such circumstances, that *Hatch* was not entitled to a priority. The substance of this testimony appears in the opinion of the Court. Immediately preceding the instructions of the Judge, there is found stated, that " the respondents objected to the introduction of any evidence to prove a trust by parol." *Hatch* and *Wise* knew of the erection of the mills, and there was no evidence that they made any objection to such erection.

The Judge instructed the jury, that if they found that the contract was made in writing and recorded, though not signed by all the respondents, and that they all went on, ratified, confirmed and adopted it, and that they accepted the mills and received the benefit of the contract, and were equally interested in it, they cannot now object, that it was not signed by all; that if the respondents, or either of them, were proprietors of the land at the time the contract was made, the petitioner's lien would attach to the land; that if they did not have the entire interest, then the lien would attach only to the extent of this interest, but if they had no interest in the land, and *Hatch* had shown a good title to it, the petition could not be maintained; that if they found, that the conveyances to *Hatch* were made in bad faith to defeat this lien, and were fraudulent, his claim could not be interposed to defeat this petition. The respondents then requested the Judge to instruct the jury, that *Hatch's* knowledge of the pendency of this petition could not affect his title; that neither of the respondents having any legal title in the premises at the time the contract was made, or at the time this petition was filed, the petition cannot be sustained; that if they found there was a contract between *Wise* and *Lewis* for the conveyance of the land and that said contract was forfeited, or that the conveyances to and from *Hatch* were not in pursuance of said contract, they would find for the respondents. The Judge did not give these instructions, but left the jury to inquire into the character of the conveyance under which *Hatch* claimed, as appeared from the whole evidence, and to return specially, whether it was in good faith, or colorable and fraudulent. The jury returned a verdict for the petitioners, and answered, that "*Hatch's* title was not made in good faith." The respondents filed exceptions.

The case was argued in writing, by *A. W. Paine*, for the respondents, and by *Washburn*, for the petitioners.

For the respondents, it was contended:—

1. That the petition in this case, being founded on the *stat.* 1821, *c.* 159, which was afterwards repealed, by *stat.* 1837, *c.* 273, on the same subject, without any saving clause, the petition cannot be any longer sustained. Therefore the motion to dismiss the petition was improperly overruled. The principle seems to be fully sustained by authorities, that any right which depends for its

existence upon the provisions of any statute, can exist no longer than the statute giving the right. *Thayer* v. *Seavy*, 2 *Fairf.* 284; 4 *Yeates*, 392; *Springfield* v. *Hampden Co.* 6 *Pick.* 501; 5 *Cranch*, 281; 6 *Cranch*, 203; 1 *Wash. Cir. C. Rep.* 84; 1 *Black. Rep.* 451. The act is constitutional. It is not an *ex post facto law*. 3 *Dallas*, 386; 1 *Kent's Com.* 408. Nor is it a law impairing the obligation of contracts. *McCullock* v. *Maryland*, 4 *Wheat.* 316; 2 *Fairf.* 290; 12 *Wheat.* 213; 6 *Pick.* 501; 2 *Peters*, 413.

2. The contract was admissible, as also was the evidence to prove it the contract of all the respondents. It will not be denied as a general principle, that parol evidence is inadmissible to control, vary, or explain a written contract. An exception to this rule is, where there is a dormant partner who shares in the profits of a contract made by the active partner, there the law will construe the signature of the active partner to be that of the firm, and will hold both to the performance of the contract. But this case does not come within that exception. In support of the proposition, and to show how far the principle should extend, he cited 11 *Mass. R.* 27; 2 *Munf.* 330; 3 *Wash. C. C. Rep.* 508; 13 *Wend.* 85.

3. The statute makes it necessary, that the contractors should be owners of the land, *having the whole title*. Here the whole title was indisputably in *Wise*, who is not alleged to be a contractor. *Thaxter* v. *Williams*, 14 *Pick.* 49; 12 *Mass. R.* 325. That the rights of parties must be judged of as they existed at the time of bringing the action, is too plain a principle of law to need the citation of authorities.

4. The instruction was incorrect, that *Hatch's* claim could not be interposed to defeat this petition, if made in bad faith. The fraud, if any, was practised after the action was brought, and had no effect to take the property out of the way of creditors. The transaction was wholly between *Wise* and *Hatch*, and neither of them was creditor or debtor of either petitioners or respondents.

5. The parol evidence introduced was improperly admitted. It went to prove a trust by parol. *Smith* v. *Lane*, 3 *Pick.* 205.

6. The third instruction requested, ought to have been given. The only title which either of the respondents had to the land was a contract to convey on certain conditions, which had been forfeited

by them. They certainly had no interest in the land, and had nothing which could be attached.

7. The first requested instruction should have been given. The title being in fact in *Wise*, *Hatch* was not bound to take notice of any incumbrance from any other person who had not the title.

For the petitioners, it was contended: —

1. That the act of 1837, *c.* 273, did not repeal the statute on which this proceeding is founded. The *stat.* of 1837, does not in terms repeal the former statute, but only such parts as are inconsistent with its provisions, and the remedies are merely cumulative, and more beneficial to mechanics than the former statute. Where two statutes may stand together, the former is not repealed. The repugnancy must be manifest or there is no repeal. *Procter* v. *Newhall*, 17 *Mass. R.* 92; *Wales* v. *Stetson*, 2 *Mass. R.* 146; 14 *Mass. R.* 92; 1 *Pick.* 254; 3 *Mass. R.* 221; *ib.* 539. The *statute* of 1837, cannot act on liens which had attached at the time of its passage, under the earlier statute, especially if process was then pending to enforce the lien. No principle of law is better established, than the principle that vested rights cannot be impaired or disturbed, however much remedies may be changed or modified. If the statute operates as an absolute, entire and unqualified repeal of the former statute, it is unconstitutional and void. Not only it cannot thus operate, but the act of 1837 was not intended by the legislature, and does not purport to repeal the former act, so far as it respects liens then created. He commented upon the authorities cited for the respondents, and insisted that they did not conflict with this view.

2. The contract was made in the name of all, and was signed by one for all the respondents, and under the finding of the jury is binding on all. It is not necessary that the signing should be such as would satisfy the statute of frauds. But here there was enough to satisfy even that. The one who signed was authorized to sign for all, and his acts too were subsequently ratified. And neither the previous authority or subsequent ratification need be in writing. *Cleaves* v. *Foss*, 4 *Greenl.* 1; *Alna* v. *Plummer*, *ib.* 258; *Vin. Abr. Tit. Con. and Agree't, (H)* 45; 3 *Woodeson's Lec.* 427; *Rob. on Frauds*, 113, *and notes*; *Shaw* v. *Nudd*, 8 *Pick.* 9; 12

Johns. R. 112; 1 *Sch. & Lef.* 22; 2 *T. R.* 188. The evidence was rightly admitted for the purposes for which it was introduced.

3. The respondents were proprietors of the land in such manner, that the lien of the petitioners attached to it. 4 *Kent*, 305; *Barrel* v. *Joy*, 16 *Mass. R.* 221; *Northampton Bank* v. *Whiting*, 12 *Mass. R.* 112; *Jenney* v. *Alden*, *ib.* 375; 15 *Mass. R.* 218; 16 *Mass. R.* 221; 1 *Johns. R.* 45; 1 *Johns. Ch. R.* 153; 3 *Johns. R.* 216; 11 *Johns. R.* 91; 13 *Johns. R.* 463; 13 *Maine R.* (1 *Shepl.*) 352; 2 *Bl. Com.* 337; 4 *Kent*, 302; 3 *Burr.* 1898; 4 *Mason*, 349; 14 *Pick.* 54; 3 *Mass. R.* 253; 9 *Mass. R.* 34; 11 *Mass. R.* 153; 7 *Greenl.* 96; 4 *Mass. R.* 566; 1 *Coke*, 576, *notes*; *Perk.* 372; *Cro. Eliz.* 503; *Prest. Est.* 546.

4. The objection that the respondents were not owners, cannot be taken by them, or by *Hatch*. 1 *Fairf.* 383; 6 *Greenl.* 243; 2 *Greenl.* 226; 4 *Kent*, 38; 1 *Caines*, 185; 2 *Johns. R.* 119.

5. There was no error in the instructions given, or in refusing to give those requested. But at all events justice has been done, and the verdict will not be set aside. 13 *Maine R.* 59; 1 *Mass. R.* 237; 7 *Greenl.* 442; *ib.* 141; 4 *T. R.* 468.

6. The facts in the case, cited from 14 *Pick.* 49, are so different from the facts of this, that it is no authority for the respondents. Here there is nothing to give validity to the fraudulent acts of *Wise* and *Hatch*, and like others of the same character, they are void.

The opinion of the Court was drawn up by

Weston C. J. — It does not appear to us that the rights of the petitioners, under the *stat.* of 1821, if they had any, have been impaired by the *stat.* of 1837. It is true the latter repealed all acts and parts of acts, inconsistent with its provisions; but as it was to operate only upon contracts, thereafter to be made, contracts previously made might, with perfect consistency, be governed by the former statute.

The *stat.* of 1821, was a re-enactment in this State of a statute which existed in *Massachusetts*, at the time of our separation. It has received there a judicial construction, in the case of *Thaxter* v. *Williams & al.* 14 *Pick.* 49. It was there held, that the statute was intended to apply to the owner of the land. The contracting party, for whom the buildings are erected, is so denomi-

nated in the fourth section. In the first section, he is called the proprietor of the land; and the lien is made to attach to the land, or to the right of redeeming it, if it had been previously under mortgage. A right arising from a contract to purchase real estate, was not made a tangible attachable interest, until a later period. In the case cited, the true owner of the land interposed his objection, which was sustained for his protection; but it is very manifest that one of the contracting parties must be a proprietor of the land, to bring the case within the statute.

The contract for erecting or repairing any building, between the mechanic and the proprietor or proprietors of the land, upon which it may be placed, in order to create a lien thereon, is required by the statute to be recorded. This was designed to apprise purchasers of the extent and validity of the lien. The contract under consideration had, in the body of the instrument, the names of *Lewis*, *Bigelow* and *Wadleigh*, as proprietors, but was signed only by *Lewis*, who did not assume to act for them. It could not be deduced from that paper, as recorded, that a lien attached to the estate of *Bigelow* and *Wadleigh;* and if it might be established by any subsequent testimony, the object of the registry would be defeated, and a purchaser might be entrapped. We are of opinion, therefore, that the presiding Judge erred in admitting parol testimony, to show their assent and privity, and in instructing the jury, that this might be equivalent to the execution of the instrument by them.

At the time of the contract, the title was in *James Wise*. It is contended, that he held it in trust for the respondents, and they being in possession, as between them and the petitioners, the respondents must be regarded as the owners of the estate. If it had been purchased with their money at the time, a resulting trust would thereby have been created. *Buck* v. *Pike*, 2 *Fairf.* 9. But such a trust does not arise upon subsequent payments, under a contract to purchase. In that case, the trust, if any exists, is express; and depends upon the terms of the contract. Here neither of the respondents paid at the time any part of the consideration to *Kinsman*, the original owner. That was all secured by the notes of *Wise*, the grantee. At a subsequent period, $3000 were paid to *Wise* by *Lewis*, or others associated with him; and *Lewis*

had a writing from *Wise*, to convey the premises to him, upon certain conditions. It is insisted, that this amounts to a declaration of trust. It may, or may not be so. The contents of that writing, except that it was an undertaking to convey, do not appear. Upon evidence so vague, we are not at liberty to decide affirmatively, that it contained a declaration of trust. There may be reason to suspect, that *Wise* held for the benefit of *Lewis* and his associates, and that there may have been management, to prevent the lien of the petitioners from attaching, or to defeat it, but if the petitioners would predicate rights upon the existence of a trust, it is incumbent upon them to make it out upon competent proof.

It appears however, that in *July*, after the contract, which was made in *March*, *Lewis* deeded two thirds of the land to *Wadleigh*, taking back from him a mortgage, which he assigned to *Hatch*, so that they held two thirds under *Lewis*, subject to the prior mortgage to *Kinsman*. As *Lewis* was in possession, under a contract with *Wise*, and the contract by him with the petitioners was recorded, on a further trial, it may deserve consideration, whether *Lewis*, *Wadleigh* or *Hatch* can object to the lien, as to two thirds of the land. No claim is interposed in behalf of *Kinsman*, or his assignees; and it is not intended to make any intimations, affecting the interests of attaching creditors.

Exceptions sustained.

Silas Barnard *vs. Inhabitants of* Argyle.

The money paid by non-residents on account of taxes assessed for the highways is a substitute for labor and materials, to be appropriated to repair them; and an order drawn by the assessors of a plantation for money thus paid in favor of one, who had performed labor on the highways at the request of the assessors, is binding on the plantation, at least to the extent of the fund.

In an action against a town for services in making a road within its limits, the admission of evidence of the advice and opinions of individual inhabitants to charge their town is a sufficient cause for setting aside a verdict.

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

Assumpsit on an order, of which this is a copy. "*Argyle*, *October* 14, 1835. To *Nathaniel Danforth*, Treasurer of the plantation of *Argyle*. Please to pay to *Silas Barnard*, or order, the sum of two hundred and sixteen dollars sixty-nine cents, in twenty days from date, with interest, it being due the said *Barnard* for making a road in the plantation of *Argyle*, in the year 1834.

"*Warren Burr*, } Assessors of
Gideon Oakes. } *Argyle*."

There were counts for labor done and money had and received. *Barnard* had been appointed an agent of the State, with authority to expend a certain amount of money of the State on a road through *Argyle*, if the plantation would expend thereon a certain other amount. The plantation on the 17th of *March*, 1834, "voted, that $1000 shall be expended on the new road, so called, under the direction of the State Agent, agreeably to a resolve of the legislature," and on the 16th of *March*, 1835, "voted, to raise the sum of $1000, to be expended on the highway the ensuing year." Several witnesses testified, whose testimony tended to prove, that the assessors had employed the plaintiff to do work upon the road, to be paid from the non-resident taxes, which had been paid into the treasury in money, and that the assessors settled with him, and found due to him the amount for which the order was drawn; and that most of the inhabitants of the plantation were present and advising to this course. To all this testimony the defendants objected, but it was admitted.

The counsel for the defendants, requested the Judge to instruct the jury, that the assessors had no right to contract with the plaintiff for making the road, and that such contract could not be binding on the plantation; and that the assessors had no legal right to draw the order in question. The Judge did not so instruct them, but did instruct them, that the assessors had not authority, unless it be out of funds appropriated for an object for which the plantation is liable. The verdict was for the plaintiff, and the defendants filed exceptions.

J. Appleton, for the defendants, contended, that the selectmen of a town or assessors of a plantation must strictly pursue the authority given them by statute, or their acts will not bind the town or plantation. The assessors have no right to draw a cash order, unless they have a right to assess a tax in cash to meet it. They cannot assess a highway tax in money; nor can they bind the plantation, except to the amount of money raised. 7 *Greenl.* 133; 13 *Pick.* 348; 4 *Pick.* 149; 14 *Mass. R.* 448; 1 *Shepl.* 293. The testimony was improperly admitted. The plantation cannot be bound by the statements or admissions of its inhabitants. 3 *Day*, 493; 3 *Cowen*, 623; 1 *Cowp.* 22; 4 *Serg. & R.* 317; 2 *Fairf.* 185; 1 *Shepl.* 321; 16 *Pick.* 567.

A. G. Jewett, for the plaintiff, said, that the labor was performed at the request of the assessors, for the use of the plantation, of which they had received the benefit, and are on this ground alone bound to pay for it. But here the plantation raised money to avail themselves of the bounty of the State, and this was a general fund to pay for this labor. They had money from non-residents in the treasury, and the order might rightly be drawn on that fund. The objectionable testimony was wholly immaterial, and could have had no possible influence in the decision of the case, and the court for such cause will not set aside a verdict. 13 *Maine R.* 439; 7 *Greenl.* 76; 3 *Fairf.* 293.

The opinion of the Court was prepared by

Weston C. J. — The money paid by non-residents, on account of taxes assessed for the highways, is a substitute for labor and materials, to be appropriated to open and repair them. In our judg-

ment, an order drawn by the assessors of a plantation, for money thus paid, in favor of a party, having claims for services performed in relation to the highways, is binding upon the plantation. It makes the money available for the purpose, for which it was paid. In furtherance of this object, the assessors have a right to draw orders, at least to the extent of the fund.

By the *stat.* of 1821, *c.* 118, *sec.* 22, it is provided, that assessors of plantations shall be held to perform all the duties required of the selectmen of towns, relating to highways; and they are invested with the same powers.

It appears, that the non-resident money, which had been paid or liquidated, was equal to the amount drawn in favor of the plaintiff. The assessors, who have the management of the prudentials of the plantation in regard to highways, which are placed under their supervision, as they are under the selectmen of towns, have allowed the claims of the plaintiff. There being an available fund for this purpose, the course pursued had no tendency to impose any additional burthen upon the plantation, unless they bring it upon themselves, by resisting a legal demand, adjusted and allowed by those, whom they have chosen to represent them in such concerns, as fall within their cognizance. There may be sufficient ground therefore, upon which to sustain the action, not legally exceptionable; but as testimony was received of the advice and opinions of individuals, which was not by law admissible, we sustain the exceptions, set aside the verdict, and grant a new trial.

SAMUEL J. GARDNER *vs.* SALMON NILES *& al.*

In an action on a bond with a penalty, judgment is rendered for the amount of the penalty, and execution issues for all damages sustained *at the time of the rendition of judgment.*

Where the defendant conveyed to the plaintiff by deed of warranty certain land, then incumbered by a mortgage and by an attachment of the equity, and at the same time gave a bond with a surety, that he would "within ninety days cause said mortgage deed to be cancelled, and all other incumbrances to be removed from said land, as by his deed he had covenanted;" and where the *incumbrances had not been removed* by either party at the time *judgment was rendered* for the penalty, in an action on the bond commenced after the ninety days had expired, but the mortgagee had entered into the actual possession of the premises under a judgment on the mortgage, and the equity of redemption had been sold for a large sum; *it was held,* that execution should issue for the amount of the conditional judgment on the mortgage and the amount for which the equity sold, and interest on those two sums.

THIS action of debt was commenced *Dec.* 21, 1835, on a bond from defendants to the plaintiff, dated *Dec.* 20, 1834, in the penal sum of $3000, with this condition, "that said *Niles* had on that day conveyed by deed of warranty to said *Gardner,* a certain lot of land, and that the same was incumbered by an outstanding mortgage from said *Niles* to *James Crosby,* and if the said *Niles* shall within ninety days cause said mortgage deed to be cancelled, and all other incumbrances to be removed from said land, so that the same shall be free from all incumbrances, as by his said deed to said *Gardner* he has covenanted, then this obligation shall be void, otherwise in full force." The facts were agreed by the parties, from which it appears, that since the commencement of this suit, an action had been commenced on the mortgage, a conditional judgment rendered thereon, *June* 23, 1836, for $1310,83, and that there was another note secured by the mortgage not then due; that on *Sept.* 10, 1836, the mortgagee entered into the actual possession of the premises under his judgment, and has continued in possession ever since. When the deed and bond were made, *Niles'* right to redeem the land had been attached, and was duly sold on an execution against him, during the pendency of this suit, on *June* 24, 1837, for the amount of the judgment and expense of sale, $825,66. Neither plaintiff, nor defendant, has ever paid the sums

secured by the mortgage, or the amount for which the equity sold, or any part thereof. The plaintiff contended, that he was entitled to have judgment made up, and execution issue for the amount secured by the mortgage, and the amount for which the equity of redemption was sold, and interest thereon; and the defendants contended that the plaintiff was entitled to nominal damages only; and they submitted the case for the decision of these questions.

C. Gilman argued for the plaintiff, in support of his proposition, and cited *Waldo* v. *Fobes*, 1 *Mass. R.* 10.

Blake and *Garnsey*, for the defendants, argued, that the plaintiff was entitled to but nominal damages, and cited *Prescott* v. *Trueman*, 4 *Mass. R.* 627; *Wyman* v. *Ballard*, 12 *Mass. R.* 304; *Hunt* v. *Livermore*, 5 *Pick.* 395; *Davlin* v. *Hill*, 2 *Fairf.* 434; *Boynton* v. *Dalrymple*, 16 *Pick.* 147; 7 *Johns.* 358; 4 *Kent*, 476.

The opinion of the Court was prepared by

Weston C. J. — The defendants have failed to comply with the condition of the bond, within the time limited, and they have not at any time removed the incumbrances therein embraced. The plaintiff then had a cause of action, at the time when the suit was commenced, and was at that time entitled to judgment for the penalty. It is insisted, that he can have execution only for the damages, which had then accrued. The practice of the courts has been otherwise. By the statute giving remedies in equity, statute of 1821, *c.* 50, § 3, the court, in suits upon such bonds, is to enter up judgment for the penalty, and to award execution for so much of the debt or damage, as is due or sustained at that time. Under a similar statute in *Massachusetts*, that time was held to refer to the time of the rendition of judgment, and not to the commencement of the action. The statute of 1830, *c.* 463, provides only upon this point, that when the issue is to be tried by a jury, upon breaches assigned, the damages are to be ascertained by their verdict.

It is further contended, that the plaintiff, not having removed the incumbrances, has sustained, and is entitled to only nominal damages. The condition contains a positive and affirmative engagement, on the part of the defendants, to remove the incum-

brances, within a stipulated period. This differs from the covenant, usually found in deeds of conveyance, that the premises are free from all incumbrances. Cases therefore under such covenants, are not strictly analogous. In *Prescott* v. *Trueman*, 4 *Mass. R.* 627, which is a leading case, the incumbrance then under consideration, and others put by the court by way of example or illustration, were such as had neither been extinguished nor enforced; for if the grantee had been actually evicted by a mortgagee, or by a party entitled to dower, it could not be said, that he had sustained only nominal damages.

In *Boynton* v. *Dalrymple*, 16 *Pick.* 147, the condition substantially was, that the grantee should not be disturbed in the enjoyment of certain lands, which had been conveyed to him, and it was held, that there was no breach, so long as he was not disturbed. In 4 *Kent*, 476, (2d ed.) upon covenants against incumbrances, he lays down the law to be, that if the purchaser has not removed the incumbrance, *and there has been no eviction under it*, he shall recover only nominal damages, inasmuch as it is uncertain whether he would ever be disturbed. Here the plaintiff has been evicted, and the incumbrance arising from the attachment, has become fixed. As he might have extinguished the mortgage, by paying the amount liquidated in the conditional judgment, and also the incumbrance created by the attachment, by exercising his right of redeeming the equity, by paying the amount for which it sold, those two sums, with interest thereon, constitute the measure of his damages; and he is to have execution accordingly.

Judgment for the plaintiff.

JESSE FOGG *& al. vs.* BENJAMIN GREENE *& al.*

If a party fail to prove one item of his account, the Judge has power during the trial to permit an amendment by striking that item from his account.

While the action is on trial on the general issue, the Judge may authorize an amendment of the christian name of a defendant.

Where notes purporting to be signed by the defendants as partners have been put in suit, and judgment rendered by default, a copy of that judgment is competent evidence in a suit against them in favor of a different plaintiff, to show that they had held themselves out as partners.

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

Assumpsit against *Benjamin Greene*, *Lawrence Greene*, and *Augustine G. Greene*, on an account annexed to the writ containing a large number of items. The delivery of all the articles, charged to *Lawrence Greene*, was proved on the trial, excepting one item of $22. On motion of the plaintiffs, they were permitted to strke this from their account, the defendants objecting thereto.

The plaintiffs introduced evidence to prove the existence of a copartnership between the defendants, and as part of it, the record of a judgment, *Fiske & als.* v. the same defendants, founded on two notes alleged to be signed by them as copartners. They did not appear, and the action was defaulted. This was objected to by the defendants, but admitted by the Judge.

One of the defendants was originally named in the writ *Augustus*, and during the trial, the plaintiffs moved for leave to amend by substituting *Augustine* for *Augustus*, which was objected to by the defendants, and permitted by the Court. The verdict was for the plaintiffs, and the defendants filed exceptions.

The case was submitted without argument, by *Garnsey*, for the plaintiffs, and by *G. G. Cushman*, for defendants.

The opinion of the Court was drawn up by

WESTON C. J. — The presiding Judge had a right, at his discretion, to permit the item, which the plaintiffs had failed to prove, to be stricken from their account. It appeared, that notes had been given to *Fiske & als.*, purporting to be signed by the defendants, as copartners. By their default, when these notes were put in

suit, the defendants admitted their liability upon them. It was competent evidence, to show that they had held themselves out as partners, and therefore tended to prove a partnership, although in transactions between other persons.

The misnomer in the christian name of one of the defendants, not having been taken advantage of in abatement, was legally amendable.

Exceptions overruled.

EDWARD TEBBETTS *vs.* ROBERT R. HASKINS *& al.*

In an action for the materials found in building a house, and the labor done in erecting it, the testimony of master builders, who had examined the house and made an estimate of the expense of erecting it, is admissible, to ascertain the amount of damages.

Where a contract in writing had been made between two persons, wherein one agreed to build a house and the other to pay a certain sum therefor, and which had afterwards been abandoned by them, and a house had been built by one party to the written contract for the other party and two others; *it was held*, that it was not necessary to prove an express contract, but that one might be implied; and that the price for building the house was not to be ascertained from that fixed in the written contract.

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

The action was for labor done in building a house, and materials furnished therefor. There were three defendants, *R. R.* and *Romulus Haskins*, and *Jotham Parsons*. The declaration originally was on an account annexed to the writ, and after the trial had commenced, the plaintiff, by leave of Court, the defendants objecting thereto, amended his writ by adding a *quantum meruit* for the same items. The defence set up was, that the work was done by the plaintiff for *Parsons* alone, under a written agreement, and that the *Haskins* were not interested in it. The plaintiff, with a great variety of other evidence on the trial, introduced the testimony of certain master builders, who had examined the house and made an estimate of the expense of erecting such a house as that

was. To this evidence the defendants objected, but the Court admitted it. It was shown on the trial, that the defendants were partners in trade, and that *Parsons* occupied one part of the house and the *Haskins* the other. Evidence tending to show the abandonment of the written contract by the parties; that the materials were to be charged, and the work to be charged by the day; and that the *Haskins* were jointly interested in the house, and contracted with the plaintiff jointly with *Parsons;* and also evidence to the contrary, was introduced, and all submitted to the jury.

The counsel for the defendants requested the Judge to instruct the jury, that if the contract between *Tebbetts* and *Parsons* was thrown aside, the *Haskins* are not liable, unless after such dissolution of the contract they expressly agreed and contracted to do it by the day; that no implied contract could arise in this case as to the *Haskins;* and that the measure of damage is the contract price of the building with the real value of the alterations. The Judge instructed the jury, that if the *Messrs. Haskins* were not interested jointly with *Parsons* in the building of the house, they would not be liable unless they expressly made themselves so; but if they were jointly interested in the house with *Parsons*, and had the benefit of it, they would be jointly liable, unless the work was done under special contract; that if the contract was abandoned by the parties, it would furnish no regulation for the price of the work done subsequently; that if they found for the plaintiff, the amount of damages must be settled by the evidence, of which the jury were the judges; and that if they should find that the contract between *Tebbetts* and *Parsons* had been abandoned by them, and that the two *Haskins* were interested in the building, they would find for the plaintiff, but if both or either of the *Haskins* were not so interested, then they would find for the defendants, as the action could not be sustained against the defendants, unless they were all jointly liable.

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

J. Appleton, for the defendants, argued in support of the several grounds taken at the trial, and contended, that the instructions given did not cover the requests, and were erroneous. To show that the testimony of the master builders was improperly admitted, he cited

7 *Verm. Rep.* 158; 6 *N. H. Rep.* 462; 16 *Wend.* 587; 1 *Stark. Ev.* 389. That the plaintiff cannot say now, that this part of his evidence is wholly immaterial, and so may be rejected. 16 *Pick.* 567; 14 *Pick.* 520; 2 *Hall*, 40. That the contract price was the true measure of damage, making a proportionable allowance, where the contract had been departed from. 16 *Wend.* 589; 13 *Wend.* 276; 3 *Stark. Ev.* 1761.

A. G. Jewett, for the plaintiff, said, that the jury have found that the contract had been given up by consent of parties, and in this case, is to be considered as if it had never been made. The evidence of the value of the work from those who had seen it, and were most competent to judge of its value, is not only proper evidence, but the best the nature of the case admits. The work was done for all the defendants, and they must pay for it.

The opinion of the Court was drawn up by

Emery J. — The first inquiry is, whether among a variety of other evidence introduced, evidence of certain master builders, who had examined the house, and made an estimate of the expenses as to the probable expense of erecting the house, as erected by the plaintiff, was legally admissible. The action is assumpsit on account annexed for work and labor done, and materials furnished, and a *quantum meruit*.

The usual way in which proof is made upon accounts for moneys paid to the amount of six dollars and sixty-six cents, for services rendered, goods, wares, merchandize sold, or materials supplied, is by producing the original entries of the charges made, accompanied by the supplementary oath of the party making them, to such articles as are not of such bulk and value as to require other proof. If the entries were made by a clerk, and he be living, and within the process of the Court, his testimony is to be exhibited. *Dunn* v. *Whitney*, 1 *Fairf.* 9. But this is not the only means by which a demand of this character may be established. Receipts, signed by the party to be charged, may be introduced. However prudent and judicious it may be to keep day books, in which transactions of sale may be entered, no man is compelled to keep accounts in writing. With many, who are ignorant, it may be impracticable. If inability do not exist to keep the requisite memo-

randa, and yet such accounts are not shown, still the best evidence in his power to give, may be introduced. It would be under many disadvantages, if it were shewn that regular accounts of the work had in truth been kept, but were not exhibited. The fact that a building was erected by the plaintiff for the defendants, was susceptible of proof by witnesses. The just expense might not be easily demonstrated. The objection is in fact to the measure of proof. We have not here, as in *Maryland*, a statute in relation to the probate of accounts, that the party bringing suit shall make oath before some Judge or Justice of that State, or before some Court, Judge, Justice or officer of the State or county, where such money, goods, &c. shall have been delivered, that he believes the money, goods, &c. charged in the account, to which such oath, &c. shall be annexed, were, *bona fide*, delivered as charged, and that he hath not to his knowledge or belief received any payment, or satisfaction for the articles charged, more than credit is duly given for in, and appearing on the account, to which such oath, &c. shall be annexed, nor hath he received any security for the same; and that the balance charged and claimed is justly due, according to the best of his knowledge and belief. *Dyson* v. *West's Ex'r*, 1 *Har. & Johns. Maryland Rep.* 567.

Our statute for the relief of poor debtors, when one is to be arrested on *mesne process*, who is about to depart and establish his residence beyond the limits of the State, with property or means exceeding the amount required for his own immediate support, requires the oath or affirmation of the creditor, his agent or attorney, before a justice of the peace, of reasons to believe and actual belief of the fact, and that the demand in the writ is, or the principal part thereof due him. This measure does not avail to establish the justice of the claim on trial, but is only a security against the abuse of the process of the Court for the purpose of arrest. Whether further legislation be desirable must be left with the appropriate power to decide. In this case, no illegal course was adopted before the jury in attempting to prove the plaintiff's claim in the absence of the book account. It is objected, that it was totally improper to receive evidence of the probable expense of building the house, of opinions which were merely rough guesses, miserable hearsay.

Though witnesses can, in general, speak only as to facts, yet in compilations of the law of evidence, there is a regular citation of certain cases on the subject of the opinion of witnesses. In 1 *Phil.* 226, 227, that in questions of science or trade, or others of the same kind, persons of skill may speak not only as to the facts, but are allowed also to give their opinions in evidence. Evidence of character is founded on opinion. Opinions of a medical man as to the state of his patient is evidence; so of ship builders as to seaworthiness of a ship, from examining a survey taken by others, at which the witness was not present; so of an engineer from his own experiments in a particular harbor, that the removal of a certain bank in another similarly situated on the same coast, would not restore the harbor, and as to forged seals, engravers are admitted to show difference between genuine impression, and one supposed to be false; so as to handwriting, and of an artist in painting as to genuineness of a picture. 3 *Stark. Ev.* 1736; *Norris' Peake's Ev.* 278, 279.

It was decided in *Hathorn & al.* v. *King, Ex'r,* 8 *Mass. R.* 371, on *Mrs. Norris'* will, that physicians may be inquired of whether from the circumstances of the patient, and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and if so, whether they from thence conclude that her mind was sound or unsound, and in either case, they must state the circumstances or symptoms, from which they draw their conclusions. So the subscribing witnesses to a will are permitted to testify their opinions respecting the sanity of the testator. *Ware* v. *Ware,* 7 *Greenl.* 42.

In *Dickenson* v. *Barber,* 9 *Mass. R.* 225, it was held, that although the opinions of professional gentlemen on facts submitted to them, have justly great weight attached to them; yet they are not to be received as evidence, unless predicated upon facts, testified either by them or by others.

In *Davis* v. *Mason,* 4 *Pick.* 156, a practical surveyor with long experience, was permitted to be asked his opinion, whether certain heaps of stones put up, and certain trees were anciently marked, for the purpose of making them monuments of boundaries, because he would have acquired a skill in determining, whether they were so intended.

In 1825, on an information against one for a violation of a statute concerning the students of *Yale College*, for giving credit to one *Van Zandt*, a student and minor, witnesses were permitted to state, being well acquainted with *Van Zandt*, that they should think, from his appearance, that he was a minor between the age of fourteen and the age of seventeen years. On error brought, the testimony was held to be inadmissible. It was opinion entirely abstracted from fact. Had the witness testified to the facts, indicative of *Van Zandt's* age, and accompanied them with their belief or opinion, the Chief Justice said he should consider the testimony competent. *Morse* v. *State of Connecticut*, 1 *Conn. Rep.* (*2d Series,*) 9.

In a suit for breach of promise of marriage, a witness was permitted to be asked, whether, living with the plaintiff, and from an observance of her deportment, he was of opinion, that the plaintiff was sincerely attached to the defendant, because there are a thousand nameless things, indicating the existence and degree of the tender passion, which language cannot specify. The opinion of witnesses on this subject, must be derived from a series of instances, passing under their observation, which yet they could never detail to a jury. *McKee* v. *Nelson*, 4 *Cowen*, 355.

Whether particular facts, if disclosed to an underwriter, would in the opinion of a witness, conversant with the subject of insurance, as a matter of judgment, make a difference as to the amount of premium, was held to be admissible evidence. 2 *Stark. Rep.* 229.

In a question of settlement of a pauper, between the towns of *Rochester* and *Chester*, in 3 *New-Hamp. Rep.* 349, where a witness was called to testify to the value of a small lot of land, and a hut upon it, it was held, that the opinion of witnesses as to the value of property owned by the pauper was not admissible, although they were well acquainted with it, and had examined for the purpose of ascertaining its value, and with a view to purchase; on the ground, that the jury must be supposed competent to ascertain this without the aid of such assistance. The like decision was made upon a similar question, between the town of *Peterborough* and the town of *Jaffrey*, 6 *New-Hamp. Rep.* 462. Against this it is laid down by the late *Judge Swift*, in his digest of the *Law of Evidence*, 111, that "in questions with respect to the value of any

article of property, the witness must often testify an opinion or judgment."

In particular branches of trade or manufacture, we hold that the opinions of persons skilled in these respective matters should be received, as well as to the value, as the fidelity and excellence of the work. They are all open to cross examination, and the reasons of their opinion may be required. If opposing testimony be introduced, it is the office of the jury at last to judge which of them is entitled to most weight. We consider that there was no error in the Judge in admitting the testimony of the master builders as to their opinion and estimate of the probable expense of erecting the house as erected by the plaintiff. For it all resulted in helping the jury to determine how much he deserved to receive. And the amendment offered, after the trial had progressed, was within the discretion of the Court to permit.

The instructions given by the Judge, were, that if the *Messrs. Haskins* were not interested jointly with *Parsons* in the building of the house, they would not be liable, unless they expressly made themselves so, but if they were jointly interested in the house with *Parsons*, and had the benefit of it, they would be jointly liable, unless the work was done under a special contract. They were likewise directed, that if the contract was abandoned by the parties, it would furnish no regulation for the price of the work done subsequently. That if they found for the plaintiff, the amount of damages must be settled by the evidence, of which the jury were the judges. And that if they should find that the contract between *Tebbetts* and *Parsons*, had been abandoned by them, and that the two *Haskins* were interested in the building they would find for the plaintiff; but if both or either of the *Haskins* were not so interested, then they would find for the defendants, as the action could not be sustained, against the defendants, unless they were all jointly liable. This course of instruction we think altogether superseded the necessity of complying with the requested instructions sought for by the defendants. It was as favorable to the defendants as by law it ought to be.

Gibbs C. J. in *Robson* v. *Godfrey & al.* 1 *Stark. Rep.* 220, says, "I have always understood the rule to be, that you may recover for work executed as for work and labor generally, if the

terms contained in the written agreement are not of such a nature as to preclude a recovery otherwise than on the contract itself. It is every days experience that a party may recover on the general counts for work done under a special contract."

In the present case, it appears that the contract was abandoned. It is therefore to have no effect whatever in the estimate of the jury, for there is no pretence that any terms, contained in it, were to be binding on the parties. It must be considered as abandoned entirely. *Chitty on Contracts*, 169; *Keyes* v. *Stone*, 5 *Mass. R.* 391; *Tuttle* v. *Mayo*, 7 *Johns. R.* 132; *Lenningdale* v. *Livingston*, 10 *Johns. R.* 36.

It would seem that the defendant might give the special agreement in evidence, with a view to lessen the damages, and for that purpose it was used. The whole evidence was submitted to the jury, and by them determined.

The exceptions are therefore overruled, and there must be judgment on the verdict.

Alvah Huntress *& al. vs.* Isaac Wheeler *& al.*

If a debtor be arrested, since the *stat.* of 1835, *c.* 195, for the relief of poor debtors went into operation, on an execution issued on a judgment in an action commenced before that time, founded on a contract made before the *stat.* 1831, *c.* 520, for the abolition of imprisonment of honest debtors for debt, the bond to obtain release from imprisonment, should be made pursuant to the provisions of the *stat.* 1822, *c.* 209; and if it be taken in accordance with the provisions of the *stat.* 1835, it is not good as a statute bond, but only at common law; and the plaintiff can recover only the original debt, costs and interest.

This action, debt on a bond dated *July* 13, 1836, was submitted on an agreed statement of facts. The defendants, with the general issue, filed a brief statement, stating that *Wheeler* being under arrest on the execution, was unlawfully required to give the bond declared on, and that to procure his release, the bond was given. The facts sufficiently appear in the opinion of the Court.

Cutting, for the plaintiffs, gave a history of legislation on this subject, since the separation of this State from *Massachusetts* up to the statute of 1835, and adverted to the extreme difficulty in ascertaining what was the proper bond to be given by a debtor to obtain his release from imprisonment. He commented on the various provisions of the poor debtor act of 1835, *c.* 195; urged that the present bond was properly taken under the 8th section of the last act; contended, that by this section it was the design of the legislature, which was fully accomplished, to destroy all distinctions between the various classes of executions, and making uniform the method of proceeding with, and executing, all executions issued on judgments *in any civil suit;* that all the provisions of the act, unless section 6, and every act to be done under each section, are sufficiently broad to comprehend the past, the present, and the future; that the 6th applied only to such suits as should be afterwards commenced; and that there were no provisions in the last section, contradictory of the general provisions of the 8th section, and that this bond was rightly taken under the act of 1835. The legislature may act upon the remedy, and still leave the right unaffected. *Thayer* v. *Seavey*, 2 *Fairf.* 288; 4 *Wheat.* 122, 209. *Wheeler* was legally arrested and imprisoned, and it was his duty to furnish a bond to obtain his release, and for that purpose offered this and no other. He cannot therefore say, that it is illegal, even if it was taken under the wrong act.

Hobbs, for the defendants, remarked, that this suit was prosecuted merely to recover the penal interest under the 8th section of the *stat.* 1835, *c.* 195, and contended, that the act of 1835, had no application to this case. The officer should have proceeded under the *stat.* 1822, *c.* 209. The original contract was made before the act of 1831 took effect, and was excepted from the operation of that act. This suit was commenced prior to the time the act of 1835 took effect, and was therefore excepted from its operation by the last section. The bond, not being taken in accordance with the requirements of the *stat.* 1822, is not good as a statute bond. The bond is admitted to be good at common law, but being a bond with a penalty, it is subject to chancery. The plaintiffs can recover only the principal and simple interest. *Winthrop* v. *Dock-*

endorf, 3 *Greenl.* 156; *Kavanagh* v. *Saunders*, 8 *Greenl.* 422. As the offer was duly made in writing to be defaulted for that sum, the defendants are entitled to recover their costs.

The opinion of the Court was prepared by

SHEPLEY J. — The plaintiffs commenced their original suit against the defendant, *Wheeler*, on the 16th of *April*, 1833, upon a contract dated on the second of *May*, 1831, and recovered judgment at the *June Term* of this Court, 1836. On the 13th of *July* following, *Wheeler* was arrested upon the execution, which had issued, and was committed to prison; and with the other defendant executed the bond now in suit to procure his discharge. The bond was taken according to the provisions of the eighth section of the act of 1835, *c.* 195. The defendants, at the *January Term* of the Court of Common Pleas, offered to be defaulted, according to the provisions of the act of 1835, *c.* 165, for the balance due upon the bond with interest. The plaintiffs claim the interest at the rate of twenty-five per cent. as allowed by the act of 1835. And the question submitted is, whether the bond should have been taken according to the provisions of the act of 1835, or according to those of the act of 1822.

The language of the eighth section of the act of 1835 is general, embracing all cases. The proviso in the seventeenth section is, "that this act shall not be so construed as to affect any suit or suits already commenced, or rights vested under any of said acts." The suit, upon which the judgment was recovered and execution issued, had been commenced before that time, and was not affected by its provisions. The question, whether the final process and proceedings were intended to be included in the term suit, was considered, and decided to be included, in the cases of *Gooch* v. *Stephenson*, 15 *Maine R.* 129; and *Hastings* v. *Lane*, *ib.* 134.

This bond cannot therefore be regarded as a good statute bond, and the plaintiffs can recover only the original debt, costs, and interest; for which judgment is to be rendered; and for defendants for costs.

THE STATE *vs.* HENRY R. SOPER *& als.*

In an indictment against several, they are not of right entitled to be tried separately, but are to be tried in that manner only, when the court from sufficient cause shall so order it.

In the trial of an indictment for larceny, a witness from whom the property is charged to have been stolen, is not bound to disclose the names of persons in his employment, who gave the information which induced him to take measures for the detection of the persons indicted.

Where several persons are proved to have been associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object and forming a part of the *res gesta*, may be given in evidence against the others.

A demurrer to evidence is considered an antiquated, unusual and inconvenient practice, and is allowed or denied by the Court, where the indictment or cause is tried, in the exercise of a sound discretion, under all the circumstances of the case.

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

This was an indictment against *Soper*, *Staples*, *Locke* and *Twitchell*, for larceny at *Orono*, in stealing thirty pine logs, the property of *J. Cushing* and others. After they had been arraigned, and had pleaded not guilty, *Soper* moved for a separate trial. The Judge refused to grant the motion, unless it should be necessary to his defence. It was not shown to be necessary to the satisfaction of the Judge, and he refused to grant the separate trial; to which *Soper* excepted. A witness testified to certain conversations with *Staples*, tending to show him to be guilty of the offence, and on cross examination stated, that in a subsequent conversation, *Staples* said he was willing to do what was right, and proposed to pay fifty dollars rather than have a difficulty, but would not settle unless a receipt were given to *Soper* and himself. The counsel for the accused objected, that this evidence should be excluded, because the statements were made under an offer to compromise. The objection was overruled. The witness testified, to similar statements of *Locke*; that the witness told *Locke*, that he should make no promises, and gave no assurances, but said "it would be full as well and better for him to state the facts, as the whole would come out, but the confessions were voluntarily made."

The counsel for the accused objected to the consideration of this evidence by the jury, because it was obtained by inducements held out to him. The County Attorney said he was willing to have all the statements made after the witness had used the words, "full as well," &c. excluded, and the witness replied, that he had not related any conversation after that time. The testimony was not ruled out by the Judge. On the cross examination, the witness was asked by the counsel for the accused, if he had received any information, by letter or otherwise, which induced him to go to *Oldtown* on this business, and if so, from whom? The witness replied, that the men in their employment were afraid of being mobbed, if it were known they gave the information, and that if the names of those who gave it were made known, the owners would be unable to get men to assist them, and declined to give the names of the men in their employment, from whom the information was obtained, unless the Court should so order. The defendants' counsel requested the Judge to give such order, which he declined, and the question was not answered. The other facts sufficiently appear in the opinion of the Court. The counsel for the accused, after the evidence was closed, offered a demurrer to the evidence. The County Attorney refused to join the demurrer, and the Judge declined to order it to be done, and did not receive the demurrer. They then requested the Judge to charge the jury, that the evidence did not support the indictment; but the Judge declined so to do. The verdict was guilty, and exceptions were filed by the accused.

J. Appleton argued in support of the grounds taken in defence at the trial; and cited *Archb. Cr. Pl. & Ev.* 60; *Roscoe on Cr. Ev.* 29; 6 *Car. & P.* 146.

Goodenow, Attorney General, for the State, argued, that the accused had *no right* in law, or by usage, to demur to the evidence in a criminal prosecution. *Young* v. *Black*, 7 *Cranch*, 565. The Court may always in their discretion, refuse the request to demur, and the case shows sufficient cause for the refusal in this instance. The question, whether there was or was not a joint offence was properly submitted to the jury and settled by them. No argument is necessary to justify the other rulings of the Judge.

The opinion of the Court was prepared by

EMERY J. — The defendants, excepting *Twitchel*, who was not arraigned, pleaded not guilty. *Soper* moved for a separate trial. It did not appear necessary for his defence, and was refused. Even in capital trials, it is not a matter of right, but within the discretion of the Court. *United States* v. *Merchant*, 12 *Wheat.* 480.

Exception was taken to the evidence of *Thomas A. White*, because the statements were made, as it was asserted, in behalf of the defendants, under an offer of compromise. The witness said it was voluntary.

We are not aware that the rule of excluding offers of compromise from being heard in evidence applies to criminal cases. They are not to be compounded. It is not under a searching investigation of acts of larceny, that it is intended a man may buy his peace. 2 *Stark. Ev.* 38.

The Court declined ordering the witness to disclose whether previous to the 16th of *August*, he had received information by letter, or otherwise, and if so, from whom. The witness was unwilling, from motives of policy, to give the names of men in his employ, and from whom he had received information, unless ordered by the Court, though the Court was requested by the prisoners' counsel to order it. The witness said the men in their employ were afraid of being mobbed, if it were known that they gave the information, and if exposed, the owners would be unable to get men to assist them.

In the *United States* v. *Reuben Moses*, 4 *Washington C. C. R.* 726, it was held, that the officer, who apprehended the prisoner, is not bound to disclose the name of the person from whom he received the information which led to the detection and apprehension of the prisoner. It was remarked by the Court, that such a disclosure can be of no importance to the defence, and may be highly prejudicial to the public in the administration of justice, by deterring persons from making similar disclosures of crimes, which they know to have been committed. And we think the situation of the witness, in the employment of the owners of the logs, alleged to have been stolen, would well warrant the Court from holding him to disclose the names of those from whom he received the information, as much as in the case of the officer before spoken of.

After the evidence of the government was out, the defendants, by their counsel, offered to demur to the evidence, which the county attorney refused to join, and the Court declined ordering him to join the demurrer and receiving the same, though offered by the prisoners' counsel. As stated by *Justice Story*, "no joinder ought to have been required or permitted," even in a civil case, "while there was any matter of fact in controversy between the parties. It is no part of the object of a demurrer to evidence to bring before the Court an investigation of the facts in dispute, or to weigh the force of the testimony, or the presumptions arising from the evidence. That is the proper province of the jury. If there is parol evidence in the case which is loose and indeterminate and may be applied, with more or less effect to the jury, or evidence of circumstances, which is meant to operate beyond the proof of the existence of these circumstances, and to conduce to the proof of other facts, the party demurring must admit the facts, of which the evidence is so loose and indeterminate and circumstantial, before the Court can compel the other side to join therein. A case made for demurrer to evidence is to state facts, and not merely testimony, which may conduce to prove them. It is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form a ground of presumption." *Fowle* v. *Common Council of Alexandria*, 11 *Wheat.* 320.

A striking and masterly discussion of the law relative to demurrers to evidence is found in *Gibson & Johnson* v. *Hunter*, 2 *H. Black. R.* 187, in the opinion delivered by *Chief Justice Eyre*, wherein too, he says, the whole proceeding upon a demurrer to evidence, he takes to be under the control of the Judge before whom the trial is had.

The like construction is adopted by the Supreme Court of the *United States.* A demurrer to evidence is considered an unusual and antiquated practice, which that Court discourages as inconvenient, and calculated to suppress the truth and justice of a case, and is allowed or denied by the Court, where the cause is tried, in the exercise of sound discretion under all the circumstances of the case. *Young* v. *Black*, 7 *Cranch*, 565; *United States* v. *Swett*, 11 *Wheat.* 171, *note to p.* 183, *and cases there cited.*

We apprehend that in criminal cases more especially depending on parol and oftentimes circumstantial evidence, the practice of offering to demur to evidence, and calling on the Court to compel a joinder in the demurrer will not hereafter be adopted. From the best consideration we have given to the evidence *the whole of which is not stated but the substance only*, we cannot perceive that the Judge erred in declining to order a joinder, or to receive the demurrer to the evidence. By our State constitution, in all criminal prosecutions, the accused has secured to him a right to trial by jury. When he pleads not guilty, he puts himself for all purposes upon his trial by jury. He has then made his election. The State's right is to hold him to that election. *Maine Const. Art.* 1, *sec.* 6; *U. S.* v. *Gibert & al.*, 2 *Sumner*, 19.

It is however insisted on the argument, that the evidence shews no joint offence, and therefore the defendants could not be indicted jointly.

To us it appears, that the jury were justified in the conclusion to which they came, if they believed the testimony. It detailed contrivance and concert of the defendants to effect the common object of secretly getting the logs loose, and forwarding them to the mill for the purpose of converting them to their own use, without the consent of the owners. The saws were adjoining, one of which hauled the logs for both saws. Boats, axes, cant hooks, and pick-poles were kept for getting logs to the mills. There was no separation till they arrived at the mills. It could be but of little consequence in characterizing the offence, how the defendants divided the spoils. They called the boards from such logs, *Kibbe* lumber. A sort of flash language was thus adopted, and the phrase of going up the river to see about a horse, was understood, he was going up after logs; and these White logs were seen coming down the river the *Thursday* night after one of the defendants told that another of them was going up the river. And *Soper, Locke* and others said, if any one gave information, he would be tarred and feathered, sluiced, or have oil poured upon him. Where several persons are associated together for the same illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gesta*, may be given in evidence

against the others. *American Fur Company* v. *United States*, 2 *Peters*, 359.

He who commands or procures a crime to be done, if it is done, is guilty of the crime, and the act is his act. *United States* v. *Gooding*, 12 *Wheat.* 469. The proof of the command or procurement may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury. Persons can rarely be jointly indicted, except where they have mixed themselves up with the criminal transaction in a manner which in the sober judgment of the grand jury implicates them in the common guilt. *U. States* v. *Gibert & al.*, 2 *Sumner*, 19. And with such proof as is reported here, the indictment seems to be supported.

It is further contended, that the evidence of the confessions of *Locke* were improperly received, because they were obtained by the inducement held out to him by the witness that it would be better for him. A confession forced from the mind by the flattery of hope, or the torture of fear, it is said, comes in so questionable shape, when it is to be considered the evidence of guilt, that no credit ought to be given to it, and therefore it is rejected. 1 *Leach*, 263, *Warubshall's Case*. The witness declared to *Locke*, that he should make no promises, and gave no assurances, but said it would be full as well, and better for him to state it, for the whole would come out. The witness then asked *Locke*, as the matter is first stated in the exceptions, if he had seen any of those logs sawed, and he replied, he had. It is urged, that this is like *Mills' Case*, 6 *Car. & Payne*, 146, where a constable said to a person charged with larceny, it is of no use for you to deny it, for there are the man and boy, who will say they saw you do it, in which case, a confession, made after this, was rejected by *Baron Gurney*. So where the words were, it would have been better if you had told at first. The principle upon which this class of cases is founded, is, that by an inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully dealt with if he confesses, and that he may thereupon be induced to confess himself guilty of an offence he never committed. The witness in the present prosecution, however, declared that he had not stated any thing *Locke* told him after he had said to him it would be better for him to tell the whole. And he wished it to be understood, that

he had not made him any promises, or held out to him any inducement. Nevertheless it is possible, that the course pursued by the witness, might have some influence on *Locke's* mind, though it seems to me under all the circumstances, that it is very improbable.

If a threat or promise be made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence on the mind of the party, the confession is to be received. Thus in *Richard's Case*, 5 *Car. & Payne*, 318, a girl charged with poisoning, who was told by her mistress, that if she did not tell all about it that night, the constable should be sent for next morning to take her to S, meaning before the magistrate there, upon which the prisoner made a statement. The next morning a constable was sent for who took the prisoner into custody, and on the way to the magistrate, without any inducement from the constable, she confessed to him. *Bosanquet* Justice, " thought that statement receivable. The inducement was, that if she confessed that night, the constable would not be sent for, and she would not be taken before the magistrate. Now she must have known when she made this statement, that the constable was taking her to the magistrate. The inducement therefore was at an end."

When the promise or threat proceeds from a person who has no power to enforce it, and who possesses no control over the prisoner, a confession made under such circumstances is admissible, if the advice to confess be not given or sanctioned by any person that had any concern in the business. *Row's Case, Russ. & Ry.* 153, cited *Rosc. on Cr. Ev.* 32.

So where a witness stated that he had held out no threat or promise to induce the prisoner to confess, but that a woman, who was present, said she had told the prisoner, that she had better tell all, upon which the prisoner made certain confessions to the witness; *Park & Hullock* ruled, that as no inducement had been held out by the witness to whom the confession was made, and as the only inducement had been held out by a person having no sort of authority, it must be presumed, that the confession to the witness was free and voluntary. Yet the constable interposed no check, and might seem from his silence to approve what the woman said. So where it appeared, that the prisoner was told by a man, that anoth-

er prisoner had told all, and that he had better do the same to save his neck; upon which he confessed to the constable, *Hullock*, *Baron*, held, that as the promise, if any, was by a person wholly without authority, the subsequent confession to the constable, who had held out no inducement, must be considered as voluntary, and was therefore evidence. *Rosc. Cr. Ev.* 33.

It is said, that whether a person has been told by one person, that it will be well for him to confess, will exclude a confession subsequently made to another person, is very often a nice question, but will always exclude a statement made to the same person. These positions, *Roscoe* says, in page 33, "do not appear to be supported by prior authorities. If after the promises have been made such circumstances should take place as to whom a presumption that a subsequent confession has not been made under the influence of that promise, there appears to be no reason for rejecting the confession, because the person to whom it is made, is the same to whom the former confession was made."

A person being brought up for examination, the magistrate told him that his wife had already confessed the whole, and that there was enough against him to send a bill before the grand jury, upon which the prisoner immediately made a confession. The confession was objected to, as having been made upon a threat. The objection was overruled by *Park* Justice, who understood it as a caution. *Wright's Case*, *Rosc. Cr. Ev.* 34.

As the witness in his remarks to *Locke* observed, that he should make no promise, and gave no assurances, and held out no inducements, would it be unreasonable to consider all that he said as a caution? It does not appear that the witness had authority, other than being in the employment of the owners, nor that he is the prosecutor. But still more strongly in the subsequent description as to this witness it is stated, that he communicated nothing in evidence after he told *Locke* it would be better for him. Taking the whole together, it must be understood, that no evidence was given of what was said after the advice, even if it could be deemed to have had any influence.

Under all these circumstances, we are constrained to overrule the exceptions, and remit the cause to the Court of Common Pleas for further proceedings.

NATHANIEL JORDAN *vs.* SAMUEL ELDRIDGE.

The location of a town or private way by the Selectmen, or their order, must precede the issuing of the warrant to call the town meeting for its acceptance.

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

Trespass *quare clausum* for taking down and carrying away the plaintiff's fence. The defendant justified, that the fences were upon a town way and a private way, and that as surveyor of highways he removed them. The bill of exceptions states the evidence, and divers requests for instructions, but does not show, whether any ruling was made, or instructions given or withheld, or whether any verdict was rendered. The exceptions were filed by the plaintiff, and allowed by the Judge. The case sufficiently appears from the opinion of the Court.

J. Appleton, for the plaintiff, with other grounds, argued, that the proceedings in laying out the roads were void, because the alleged location of the highway did not take place, until after the warrant for calling the town meeting at which it is said to have been accepted, had been issued. *Howard* v. *Hutchinson*, 1 *Fairf.* 335; *Keen* v. *Stetson*, 4 *Pick.* 492.

Rogers, for the defendant, contended, that it was sufficient if the order to lay out the road was given before the warrant for calling the town meeting was issued. In such case it is legal, if the return be made before or at the town meeting.

The opinion of the Court was drawn up by

SHEPLEY J. — The exceptions in this case are not presented with so much accuracy as would be desirable. There is no statement that the Judge refused to give the instructions requested, or that any instructions were given, or any verdict found. It may be inferred, that the verdict was against the plaintiff, because he takes the exceptions, and that the instructions requested were refused for the same reason, and also because the Judge has allowed the exceptions.

The justification of the defendant will depend upon the legality of the proceedings of the selectmen of *Dexter* in laying out a town way in 1830, and a private way for the use of himself and *Libbey* in 1836.

On the 19th of *March*, 1830, the selectmen directed the surveyor to lay out the town way, and upon the same day issued their warrant calling a town meeting for its approval and allowance. The surveyor made his return, under date of the 27th, to the selectmen in the town meeting held on the 29th of the same *March*.

The private way was by the selectmen, by their order to the surveyor, dated on the 4th of *September*, 1836, directed to be laid out; and on the same day they issued their warrant calling a town meeting for its approval and allowance. The return of the surveyor, without date, appears to have been made to the town meeting held on the 14th day of the same month.

In the case of *Howard* v. *Hutchinson*, 1 *Fairf.* 335, it was decided, that the laying out of a town or private way must precede the issuing of the warrant calling the meeting for its approval. The reasons for this construction of the statute are there given. They were in brief, that it was necessary to enable the party to have that hearing before the selectmen, and also before the town, to which he was entitled.

The result of such a decision is, that the town way and the private way named in this case were both illegally laid out, and that they can afford no justification to the defendant.

Exceptions sustained.

County of Hancock *vs.* Eastern River Lock & Sluice Company.

No action can be maintained for the penalty for neglecting after due notice to make and keep open a sufficient and convenient passage way through a dam across a river or stream for the free passage of fish, under the provisions of the *stat.* 1835, *c.* 194, for the preservation of the salmon, shad and alewive fisheries in *Penobscot* Bay and River, and their tributary waters, unless due notice be given by the fish warden of "the time in which the same shall be done."

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

The kind of action and the facts in relation to the point on which the decision was founded, appear in the opinion of the Court. The notices are thus stated in the exceptions. "The evidence of *James Stubbs*, that on the 17th of *May*, 1836, he gave notice to *Joseph R. Folsom*, who said he was agent of the company, that there was no sufficient fish way by or through the dam, and that the company must make one, that he said he would make one, that the witness told him what kind of one was wanted, and he said he would not make such an one." This evidence was objected to, as there was no evidence, that he was one of the corporators, or an officer of theirs. The exceptions do not show, that there was any ruling of the Court on this objection. The plaintiffs then proved, that the following written notice was delivered to the Clerk of the company by *Stubbs*, a fish warden. "*Mr. Bliss Blodget*, Clerk of the Lock and Sluice Company in *Orland*. On the 17th of *May*, instant, I examined the mills and dam at the lower falls on *Eastern River*, obstructed by said dam, and I then notified *Mr. Folsom*, the agent of said corporation, to make a fish way by taking away about fifteen feet of the eastern end of said dam to the bed of the stream. I find that this is not done, and that no fish way is made where fish can pass up, and I now notify you, as Clerk of the company, that a fish way through said dam must be made immediately. *Bucksport, May* 30, 1836. *James Stubbs*, Fish Warden, &c."

The counsel for the defendants objected, that this notice was not sufficient, within the meaning of the statutes, but the Judge overruled the objection.

There were other objections made, but they are immaterial here, as no decision was made upon them.

Abbott and *Wakefield*, for the defendants, contended, that the notice was wholly insufficient, because no time was fixed in which it should be done, as the statute expressly requires; and because it did not direct them in what way it should be done. Merely telling what he had directed others to do is not sufficient. The penalty cannot be recovered, unless all the requisites of the statute have been complied with. *Ex parte Baring*, 8 *Greenl.* 137.

F. H. Allen, for the plaintiffs, contended, that the notice to commence immediately was a sufficient compliance with the requirement of the statute as to time, and the reference to the first notice was sufficient as to the manner. But the dam was a nuisance, and no time was necessary to be fixed for its removal.

The opinion of the Court was drawn up by

Shepley J. — The action is debt, to recover penalties of the defendants, for neglecting after due notice to make and keep open a sufficient and convenient passage way through their dam across the *Eastern River*, for the free passage of fish. The act of the 24th of *March*, 1835, provides, that if in the opinion of the warden the passage shall not be sufficient, or if there be no passage, "said fish warden or wardens, shall forthwith give notice to the owner or occupant of such dam of such insufficiency; and of what is required to make such passage or sluice way sufficient and convenient, or to make such new passage or sluice way; and of the time in which the same shall be done, giving a reasonable time therefor." And it provides, in case of neglect, that the fish warden may make it, and recover the expense of the owner or occupant. By an additional act of *March* 30, 1836, a daily penalty is imposed of not less than five, nor more than thirty dollars for neglecting or refusing to open and maintain such passage way, "after being duly notified by any one or more of the county fish wardens." The act of 1836 does not prescribe any notice, and there can be no doubt, that the notice alluded to was that prescribed by the act of 1835. Before a penalty can be recovered there must be a strict compliance with all the duties enjoined upon them

by those claiming it. Neither in the notice given to the agent of the defendants, nor in the written notice to the clerk, is there any "time in which the same shall be done" stated; and yet this is expressly required by the statute. In the second notice what was required to be done was made known only by way of recital of what he had in the former notice directed. Whether a penalty could be recovered when the only evidence of what was required of the party was to be derived by inference from a recital, that it had before been required, might deserve consideration. But it is not necessary to decide upon such defect, for the one first noticed is clearly sufficient to prevent a recovery of the penalty.

It is contended, that the obstruction was illegal, and that notice might therefore be dispensed with. But to recover the penalties provided by the statutes, the conditions must be performed upon which only the statutes give them.

Exceptions sustained.

JAMES R. HALEY *& als. vs.* SAMUEL GODFREY *& al.*

If the oath be duly administered, but there is a want of accuracy and formality in the return of the magistrate, living in another State, and taking the deposition there under a *dedimus*, issued from the Court of Common Pleas, under the *stat.* 1821, *c.* 85, *sec.* 7, that Court has power to admit the deposition in evidence or to reject it.

And the exercise of that power is of that discretionary character which is not subject to revision in this Court.

In an action of assumpsit by several plaintiffs, where they call a witness who is objected to as interested in the event of the suit, a release under seal, although executed by but part of them, discharges the joint interest, and renders the witness competent.

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

The action was assumpsit. The plaintiffs offered the deposition of *James Godfrey*, to the admission of which the defendants objected, as improperly taken, which appears from the caption. The

objection was overruled. The deponent lived without the State, and the deposition was taken by *dedimus*. The caption was thus, "*Bristol, ss. December* 25, 1837. Then the within named *James Godfrey*, personally appeared and made oath that the within answers and declarations by him subscribed were just and true. Before me, *George Clapp*, Justice of the Peace." The plaintiffs also introduced the deposition of *W. R. Leach*, to which objection was made, that he was interested, and that the release which was under seal, and signed by four of the nine plaintiffs, did not discharge the interest. The deposition was admitted. The verdict was for the plaintiffs, and the defendants excepted.

J. Appleton and *W. T. Hilliard* argued for the defendants, and in support of the first objection, cited *Davis* v. *Allen*, 14 *Pick.* 313. And in support of the second, *Hewitt* v. *Lovering*, 3 *Fairf.* 201; *Winslow* v. *Kelley*, *ib.* 513; 9 *Conn. R.* 23.

Fuller argued for the plaintiffs, and cited *stat.* 1821, *c.* 85, *sec.* 7; *Goodwin* v. *Mussey*, 4 *Greenl.* 88; 1 *Peters' C. C. R.* 85; 4 *Serg. & R.* 298; *Barnes* v. *Ball*, 1 *Mass. R.* 73; *Bryant* v. *Com. Ins. Co.* 9 *Pick.* 487; 4 *Johns. R.* 130; *Vail* v. *Nickerson*, 6 *Mass. R.* 262; *Blake's Ch. Pr.* 130; 13 *Serg. & R.* 334; 3 *Fairf.* 201, and 513, cited for defendants.

The opinion of the Court was drawn up by

SHEPLEY J. — The first exception taken, relates to the admission of the deposition of *James Godfrey*. The Courts are authorised by *stat. c.* 85, *sec.* 7, to issue a *dedimus* to take depositions within or without the State, on such terms as they may prescribe. And the nineteenth rule of the Court of Common Pleas, prescribes the terms upon which a commission may issue from that Court. The sixth section of the statute provides, that depositions taken out of the State by any person legally empowered, may be admitted or rejected at the discretion of the Court. The deposition of *Godfrey* appears to have been taken out of the State by a *dedimus*, and upon interrogatories filed and annexed, which were answered by the witness, and the answers were annexed, and the whole returned by the person authorized, stating that the witness personally appeared and made oath to the truth of the answers. The objections are, that it does appear, that he did not follow the instructions

of the commission, and that the proper form of the oath was not administered; and that it does not appear that the answers were reduced to writing in the presence of the magistrate. There was an informality and want of accuracy in the return of the magistrate, which should be avoided. When nothing appears to the contrary, it may be presumed, that when the witness subscribes and makes oath to the truth of the answers before the magistrate, that they were reduced to writing in his presence. No particular form of oath is prescribed in such cases, and it appearing, that the testimony was under the sanction of an oath, the great object in that respect was accomplished.

This deposition was within that class over which the judge had by law a discretionary power, and having exercised it, not in violation of any law or rule of Court, his judgment in such case is not to be revised by this Court.

The sufficiency of the release given to the witness, *Leach*, is objected to, because it does not appear, that those signing had authority to act for the plaintiffs, who were associated under the name of the *Stillwater Iron Foundery Company*, and because only four out of the nine plaintiffs executed it.

If it did not bind the whole of the plaintiffs for want of authority, it bound those of the plaintiffs who signed it; and if part of several joint promisees release the promise, it will be a good discharge.

Exceptions overruled.

SAMUEL SMITH *& al. Appellants vs.* MARCIA DUTTON, *Administratrix.*

The Judge of Probate in proper cases may open an administration account, once settled, for the purpose of correcting mistakes or errors; but when public notice has been duly given prior to the decree allowing the account, and where the settlement of the account has come to the actual knowledge of the applicant in season to appeal from the decree, and where it has not been made manifestly to appear, that justice requires it, the Court will decline to open the account for re-examination.

The statute has fixed no direct limitation within which license may be granted to an administrator to sell real estate; but in consequence of the limitation of suits against administrators to four years from the time of accepting the trust, if notice be given in manner provided by law, the Courts generally, but not under all circumstances, refuse to grant license, unless application be made within a reasonable time after the termination of the four years.

The purchaser of real estate of the heirs at law of an intestate before the expiration of four years from the time of taking out administration, will be regarded as equitably taking the place of the heirs.

APPEAL from a decree of the Judge of Probate. On *June* 30, 1837, *S. & E. Smith*, the appellants, presented their petition to the Judge of Probate, representing that *Marcia Dutton*, the Administratrix of *Samuel E. Dutton*, deceased, in her account of administration, allowed by the Judge of Probate in *April* of the same year, had charged, and was allowed, several items, which the petitioners averred had not been paid by said *Marcia*, and ought not to be allowed in her said account, nor is the estate legally chargeable with it. A copy of the items objected to follows.

"1834, *Nov.* 26,	Paid *Jonathan Avery*, per *Geo. Starret*, for balance due on mortgage of farm, by hand of *S. P. D.*	747,86
1837, *March* 28,	Due *William Coggswell*, allowed by Comm'rs *Oct.* 31, 1832, judg't,	164,11
	Sum total of interest on sums previously paid from the time of payment respectively to *March* 31, 1837,	332,21
	2½ per ct. on moneys paid out, $1996,58,	49,91
	⅔ making fences and clearing land in *Levant*, in 1833,	40,00

Improvements laid out on ⅔ of farm, 1833, 100,00
" " " 1834, 200,00
" " " 1835, 203,32

"The improvements consist of a house and large barn, fences and clearing land on farm."

They also alleged, that the administratrix in that account had credited only the sum of $573,32 for two thirds of the rent of farms, houses and lands belonging to the estate, when she should have credited a much larger amount. On this petition the Judge of Probate issued a notice to the administratrix to show cause why the prayer of the petition should not be granted. On *Dec.* 27, 1837, the petitioners and the administratrix were finally heard before the Judge of Probate, who thereupon decreed, "that the complainants have no legal right to disturb the said *Marcia's* account of administration, touching any charges made prior to *Nov.* 27, 1835, the date of said complainants' deed, and that inasmuch as the income of the real estate under administration subsequent to that time exceeds the interest charged since the same date, and no error in said account having been proved, the Court further decree, that said complaint be dismissed." From this decree the complainants appealed. The reasons were, 1. Because the Judge has not nor ever had jurisdiction respecting said *S. E. Dutton's* estate, nor any authority by law to make any order or decree thereon, or to appoint any administratrix thereon. No reason why, is given. 2. Because the Judge of Probate allowed the following improper and unfounded charges, being the same items named in the petition. 3. Because the Judge of Probate allowed the whole of the account of the administratrix, when divers large sums contained therein should not have been allowed.

On *Dec.* 27, 1837, the Judge of Probate granted a license to the administratrix to sell so much of the real estate of the intestate as would pay the sum of $2360. From this decree *S. & E. Smith* appealed. The three first reasons of appeal were substantially the same as the reasons of appeal from the decree refusing to require the administratrix to correct the former account. 4. Because said Judge granted license to sell said estate after more than four years had elapsed between the time of granting letters of administration, and the time of presenting the account for allowance,

and because all right for said administratrix to sell said estate, or to have license, had expired by lapse of time before the granting of said license by the Judge.

Several of the papers laid before the Court were original papers, and were returned. The Reporter has no means of ascertaining the other facts, but believes they sufficiently appear in the opinion of the Court.

The arguments were in writing, by *T. McGaw*, for the appellants, and by *J. Godfrey*, for the administratrix.

For the *appellants*, it was contended: —

1. The first reason of appeal is grounded on the fact, that the Judge of Probate was a creditor of the estate of *S. E. Dutton. Stat.* 1821, *c.* 51, *sec.* 2; *Cottle, Appellant*, 5 *Pick.* 483.

2. The counsel went into an extended argument, to show that the decision of the Judge of Probate was erroneous for the cause set forth in the second reason for the appeal; and to show that an account settled before a Judge of Probate may be opened for the purpose of correcting errors, cited *Stetson* v. *Bass*, 9 *Pick.* 27. To show that an administrator may not charge interest. *Storer* v. *Storer*, 9 *Mass. R.* 37. Real estate is not liable to be sold to pay expenses of administration after four years has elapsed. *Nowell* v. *Nowell*, 8 *Greenl.* 226. The *stat.* 1821, *c.* 52, gives authority to sell only so much of the real estate as may be necessary to pay the "just debts of the deceased with charges incidental to the sale and charges of administration." These improvements were never debts of the deceased, and do not fall under either of the other two clauses. *Dean* v. *Dean*, 3 *Mass. R.* 258. The administratrix is not authorized to pay mortgages after four years have elapsed, unless judgment has been recovered against the estate. *Scott* v. *Hancock*, 13 *Mass. R.* 167; *Gibson* v. *Crehore*, 5 *Pick.* 146; *Ex parte Allen*, 15 *Mass. R.* 62.

3. To show that the third reason was well founded he cited *Drinkwater* v. *Drinkwater*, 4 *Mass. R.* 354.

4. And to show that the fourth reason contained sufficient cause to sustain the appeal, *Ex parte Allen*, 15 *Mass. R.* 62; *Scott* v. *Hancock*, 13 *Mass. R.* 162; *Thompson* v. *Brown*, 16 *Mass. R.* 172; *Richmond, pet.* 2 *Pick.* 567; *Heath* v. *Wells*, 5 *Pick.* 143;

Nowell v. *Nowell*, 8 *Greenl.* 220; *Hartwell* v. *Root*, 19 *Johns. R.* 345.

For the *Administratrix* it was contended:—

The appellants had no such interest in the estate as would enable them to appeal. *Swan* v. *Piquet*, 3 *Pick.* 443; *Penniman* v. *French*, 2 *Mass. R.* 140. The counsel examined the argument for the appellants and the authorities cited, and argued that the appeal could not be sustained for either of the reasons assigned; and cited *Hudson* v. *Hulbert*, 15 *Pick.* 426; *Nowell* v. *Nowell*, 8 *Greenl.* 225; *Heath* v. *Wells*, 5 *Pick.* 143; *Saxton* v. *Chamberlain*, 6 *Pick.* 222; *Richmond, pet.* 2 *Pick.* 567; *Jennison* v. *Hapgood*, 10 *Pick.* 79.

The opinion of the Court was prepared by

WESTON C. J. — The first reason of appeal is expressly removed by *stat.* of 1822, *c.* 198, the interest of the Judge as creditor, being less than one hundred dollars.

The petition, marked B, was an application, in *June*, 1837, to the discretion of the Court, to open the account of the administratrix on the estate of *Samuel E. Dutton*, deceased, which had been settled the preceding *April*. That account was presented in *Jan.* 1837, and notice to all concerned, was given in a newspaper at *Bangor*, appointing the last *Tuesday* of *April* following, for the examination of the same, at which time it was examined and allowed. The Judge upon the petition of the appellants, not being satisfied that any error existed, declined to open the account. We have no doubt the Judge might have done so, for the purpose of correcting a manifest mistake. *Stetson* v. *Bass*, 9 *Pick.* 27. But upon an examination of the case, we perceive no sufficient reason for reversing his decree, upon this point. The estate of the deceased was rendered more valuable, by the extinguishment of the mortgage, with which it was charged. As the estate was solvent, the creditors were entitled to be paid, principle and interest, and the administratrix would equitably stand, by substitution, in their place. So with regard to the improvements on the estate, they added to its permanent value; and as this expenditure exceeded very little, if at all, the rents and profits, we are not prepared to determine, that there is such a manifest error in its allowance,

or in the commission allowed in the payments and disbursements, as requires that the accounts should be opened. But the reason decisive with us, for declining to reverse the decree is, that ample and public notice was given, prior to the allowance of the account; and it has not been made to appear to the Court below, or to this Court, that justice requires, that it should be again opened. *Samuel Smith*, one of the appellants, states in his affidavit, that the first notice he had, that his interest was liable to be affected, was upon publication of notice of the petition of the administratrix to sell the real estate of the deceased. As this notice was given in a public newspaper, as ordered, between the last *Tuesday* of *April*, and the last *Tuesday* of *May*, the allowance of the account in *April*, upon which that petition was based, must have come to his knowledge before the expiration of thirty days, and in season for him to have claimed an appeal, if by law he was entitled to interpose; and this is another reason, why that allowance should not now be disturbed.

Regarding the allowance of the account as settled by the decree of *April*, 1837, the principal remaining objection is, to the license, granted to the administratrix to sell a portion of the real estate of her intestate, upon the ground, that, at that period it was not liable to be sold; especially after a large portion of it had been alienated by the heirs. The statute has fixed no direct limitation, within which such license must be granted. But it has provided, that no executor or administrator shall be held to answer to any suit, that shall be commenced against him in that capacity, for more than four years after his acceptance of the trust; provided he shall give public notice of his appointment, in the manner provided by law. *Statute of* 1821, *c.* 52, § 26. In consequence of this limitation, the Courts have in their discretion, with certain exceptions depending on peculiar circumstances, refused to grant such license, unless application for it is made, within a reasonable time after the termination of the four years. *Nowell* v. *Nowell*, 8 *Greenl.* 220; *Nowell* v. *Bragdon*, 14 *Maine R.* 320, *and the cases there cited.*

It appears, that the administratrix was appointed on the twenty-eighth of *June*, 1831. When she accepted the trust, or when, if ever, she gave public notice of her appointment, does not distinctly appear. *James B. Fiske* deposes, that prior to his appointment of

commissioner on the same estate, which was on the twentieth of *June*, 1832, he saw posted in a public place, a notice in the usual form, having the signature of *Marcia Dutton*, as administratrix. Assuming that this is competent and sufficient evidence, that she gave notice of her appointment, in the mode prescribed by law, it cannot be referred with certainty to a period earlier, than at or about the time stated by the deponent. If so, the four years expired in *June*, 1836. It must be borne in mind, that our statute, unlike that of *Massachusetts*, subjects the real estate to be sold, if necessary, to defray the charges of administration. In *January*, 1837, seven months after the expiration of the four years, the administratrix presented her final account for examination. An application to sell the real estate followed, immediately upon the allowance of the account, which was passed upon, as soon as due notice could be given to all concerned.

The license was opposed by the appellants; but was finally granted in *December*, 1837. It does not appear, that the administratrix had been hastened in her movements by the Judge, or by any person or persons, interested in the settlement of the estate. A portion of it at least was under her charge and management, from which she received rents and profits, which were principally applied to improvements. The Judge of Probate, who may be presumed to have become well acquainted with the nature and condition of the estate, in taking cognizance of the discharge of the duties of a trust emanating from himself, was satisfied, that the application for a license was made within a reasonable time. And this Court perceives nothing in the case, which ought to lead them to a different conclusion. When the appellants purchased of some of the heirs a large portion of the estate, in *November*, 1835, if well advised, they must have been aware, that it was liable to be sold, upon the final settlement of the estate, unless that settlement was unreasonably delayed. It cannot be pretended, that upon the principles, which have governed the Courts, the lien upon the estate had then been dissolved. Purchasing at that early period, they may well be regarded, as equitably taking the place of the heirs.

The decree of the Court below is, in both cases affirmed.

Isaac Hodsdon *vs.* Calvin Copeland.

The dissolution of a corporation can take place only, either by an act of the legislature where power is reserved for that purpose; or by a surrender of the charter which is accepted; or by the loss of all its members or of an integral part, so that the exercise of corporate powers cannot be restored; or by forfeiture, which must be declared by judgment of Court.

Where an individual stockholder therein, has money of a corporation in his hands, accruing from a sale of corporate property, another share holder cannot recover his proportion of it in an action for money had and received.

But if the corporation assent to a sale of its property by one of its members, and to a distribution of the proceeds of such sale among the holders of the shares, each may recover his proportion thereof in an action against the holder of the money.

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

The action was assumpsit, and the declaration contained two counts. 1. On an account annexed to the writ, charging the defendant with two shares in the *Bangor & Dexter Stage Company.* 2. Money had and received. From the voluminous exceptions and papers referred to as part thereof, it seems that on the first day of *February*, 1834, the plaintiff, defendant, and others were incorporated into a company by the name of the "*Bangor & Dexter Stage Company;*" that the company had duly organized under their charter; had chosen officers; that the subscribers of whom were the plaintiff and defendant, had paid the assessments on the shares subscribed by them; that records had been kept, but no certificates of stock had been issued; that the corporation had purchased horses, carriages and other property, and had for a time conducted the business of running a stage; that the defendant had been chosen one of the agents of the company, and had acted as such; that the company met *March* 21, 1835, and chose the plaintiff one of the committee, and the defendant agent, and voted to make settlement of all claims and settle all accounts. No records of any proceedings after that time were produced by either party. The clerk of the company, who had sold out his interest, was called as a witness by the plaintiff, and among other things testified, "that at the meeting of 21st of *March*, 1835, the defendant and himself, looked over the books of the defendant, and from the representa-

tions of the defendant and his examination of the books, he made out a memorandum," which was read in evidence, and which was a statement of amounts received and paid out by the defendant, as agent of the company, leaving some balance in his hands. The same witness further testified, " that at this meeting, the subject of selling out all the property of the corporation and closing its concerns, was discussed between the defendant and the witness; that witness agreed, that if defendant should find a good opportunity to sell, he might do so, and account to witness for what his interest was worth, and that he supposed that the plaintiff had the same conversation with the defendant; that plaintiff was present at the meeting; that the defendant was then the owner of twenty-five shares; that in *July*, 1835, defendant informed the witness that he had sold out the stage property to the *Messrs. Curtis*, and at this time bought of the witness, his two and an half shares, and gave him his notes for $150, and an obligation to save him harmless from all liabilities by reason of his having been a member of the corporation; that the defendant informed the witness since that time, that he claimed twenty-nine shares out of the thirty-two existing; that there has never been any meeting of the company since *March* 21, 1835; and that all the property of the company, except books, notes and papers, was sold to the *Messrs. Curtis.*" To all this testimony the defendant objected, but the objection was overruled and the testimony admitted. It appears from a contract referred to, that the defendant, as agent of the company, sold out the property to *E. & H. Curtis*, *June* 22, 1835, reserving a lien thereon for the price agreed on; that they became insolvent, and that the defendant, acting in the name of the company, took the property, and sold some of it to others.

The counsel for the defendant requested the Court to instruct the jury, that the plaintiff's action was not maintainable; that if the defendant in the sale of the property, acted as the authorized agent of the company, his acts were binding on the company, and for that act he would not be responsible to the plaintiff for the proceeds of the property thus sold; that if he acted without authority, and was not authorized by the company to make that contract, yet that any proceeds of the property thus sold which came into his hands subsequently from such sale would be the property, not of

the plaintiff as a stockholder, but of the incorporated company called the *Bangor & Dexter Stage Company*, and that this action could not be maintained by reason of such acts; and that if the plaintiff was the holder of two shares in the company, and the defendant with or without authority undertook to sell, and did sell the property of the company, this action could not be maintained. The Judge declined to give such instructions, and did thereupon instruct them, "that if they found by the evidence the corporation to be in existence and in operation, the defendant its authorized agent, and what he did in relation to the property was done as such, he was not liable to the plaintiff in this action; but if the corporation had ceased and not being in operation, the defendant took the property of the company and converted the same to his own use, such wrongful intermeddling would render him liable to the plaintiff; and if so, he may waive the tort, and bring assumpsit for the value of his share of the property thus tortiously converted. In such case the real value of the plaintiff's share of the property at the time would be the true measure of damages."

The counsel for the defendant also requested the Judge to instruct the jury, that the evidence was not sufficient to authorize them to find a dissolution of the corporation; that neither the sale to *E. & H. Curtis*, nor the non-user of the corporation, nor the conversations of *Hill*, the clerk of the company, with the sale of his shares to the defendant, were evidence of a dissolution. The Judge "declined instructing the jury, that they had not sufficient evidence of the dissolution of the corporation, but stated to them, that the acts of the defendant, as agent or as a stranger were not sufficient without the assent or acquiescence of the corporation, but he left them to inquire from the whole evidence, if the action was sustained, upon the principles before stated." The verdict was for the plaintiff, and the defendant excepted.

Rogers, for the defendant, argued, that the Judge of the Common Pleas erred in admitting the evidence objected to, in refusing to give the instructions requested, and in giving such as were given, and insisted on the grounds of objection taken at the trial, and that if the corporation was dissolved, its property did not vest in the stockholders, but in the State. He cited 4 *Wheat.* 636; 2 *Bl.*

Com. 37; *Kyd on Cor.* 1, 15; *Angel & A. on Cor.* 7, 105, 513; 2 *Kent, (2d Ed.)* 267, 305; *Russell* v. *McLellan,* 14 *Pick.* 63; 3 *T. R.* 241; *Co. Lit.* 13 *b.*

J. Appleton, for the plaintiff, said that the right to recover resulted from either of two propositions, each of which he should attempt to support. 1. That the shares of the plaintiff were sold to the defendant. 2. That the corporation was dissolved, and that the property did not revert to the State, but that on the dissolution it is restored to the original owners, and each corporator has the right to call his share of the funds out of the hands of the defendant. He cited in his argument, *Kyd on Cor.* 467; *Slee* v. *Bloom,* 19 *Johns. R.* 456; *Ayliffe,* 204, 205; *Smith* v. *Smith,* 3 *Desau.* 557; *Penniman* v. *Briggs, Hopkins,* 300; *Cases Temp. Wm.* 3, 19; 4 *Gill. & Johns.* 1.

The opinion of the Court was drawn up by

SHEPLEY J. — This Court has recently decided in the case of *Penobscot Boom Corporation* v. *Lamson, ante, p.* 224, in what manner a corporation may be dissolved; and according to the principles there adopted, the corporation referred to in this case does not appear from the evidence reported to have been dissolved. Nor does the doctrine of the case of *Slee* v. *Bloom,* 19 *Johns. R.* 456, apply to this case. That was the case of a creditor, claiming to recover from the private property of the stockholders payment of debts due from the corporation; and no one of them in his answer alleging the existence of it, the decision was, that the corporation might be considered as dissolved for the sake of affording the plaintiff a remedy upon their statute. The plaintiff in this case, is not a creditor of the corporation, but a share holder, claiming to recover of another share holder, who has taken and sold the corporate property, the value of his shares, or the value of his proportion of the corporate property sold. As the corporation was not dissolved, the property continued to belong to it, and not to the share holders; and no one of them could recover against the defendant, upon the ground that as a corporator he was interested in the property of the corporation. Whether the defendant had authority, or had not, to make sale of the corporate property, he was liable to account to the corporation, and not to each corporator as

an individual interested. The instructions of the Judge were incorrect, as they imply, that if the corporation had ceased or omitted all corporate action, the property belonging to it would thereby become the private property of the share holders. It may indeed be true, that if the corporation had assented to a sale of its property by the defendant, and to a distribution of the proceeds of such sale among the share holders, the defendant might be regarded as holding it in trust for those entitled. So it may be undeniable, that if the defendant agreed to purchase the plaintiff's interest in the corporation, he must pay according to agreement. But the case was not put to the jury upon either of these grounds, and they are the only ones upon which the plaintiff can be entitled to recover, unless the evidence should be materially different. *Mr. Hill*, the witness, after stating a conversation between himself and the defendant in the presence of the plaintiff, was permitted to say "that he supposed, that the plaintiff had the same conversation with the defendant." This was not legal testimony. If the plaintiff can by legal testimony obtain a verdict upon the principles stated, he will have an opportunity.

Exceptions sustained.

NATHAN WINSLOW *vs.* SAMUEL N. BAILEY *& al.*

Where a paper is offered in evidence to prove a contract to be fraudulent, its admissibility is to be determined by the Court, and not left to the jury for their decision. But when sufficient evidence has been introduced, in the opinion of the Court, to warrant the jury in inferring, that the paper was used as an inducement to enter into the contract alleged to be fraudulent, it may properly be admitted in evidence, with instructions to the jury to disregard it, unless the proof was satisfactory to them, that it was used for such purpose.

In an action on a note given as the consideration of an assignment of the bond of a third person for the conveyance of a tract of land, on payment of a certain sum within a certain time, the defendant may give evidence that the contract was fraudulent without returning the bond, if the time had expired before he had knowledge of the fraud.

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

Assumpsit on a note payable to the plaintiff or order in 60 days, dated *May* 28, 1835. The defence set up was, that the note was obtained by fraudulent and false representations. It was proved, that the note was given in part payment of the consideration for the assignment of a bond from one *David Haynes* and others to the plaintiff, conditioned to convey a tract of land within ninety days, on payment of a certain sum. The defendants offered in evidence a certificate of one *Jameson*, stating the quantity of timber there was upon the land, and alleged that it was false, and known to the plaintiff at the time to be false, and that it was used by the plaintiff to defraud the defendants. To its admission the plaintiff objected. The Judge did not then admit it, but after the introduction of certain evidence, stated in the opinion of the Court, he did admit the paper, and directed the jury, that if they were not satisfied, that it had been used to induce the defendants to make the purchase, from the proof, together with the circumstances of the paper having been in the possession of the plaintiff a short time before the sale of the bond, and in a few days after in the hands of the defendants, it would not be evidence in the case. The plaintiff's counsel requested the Judge to instruct the jury, that if the note was obtained by false pretences, it was the duty of the defendants to return and restore the bond assigned, before its

expiration. The Judge did not give such instructions but did instruct them, that the defendants were not bound so to do, unless they had ascertained, that the statements were false and fraudulent before the expiration of the bond. The verdict being for the defendants, the plaintiff filed exceptions.

Cutting, for the plaintiff.

The Court ought not to have permitted the certificate to go to the jury, until the defendants had shown, that it had been used to induce them to purchase the bond. And this question was to be decided by the Court, and not left to the jury. 5 *Amer. Com. L.* 183, *and cases there cited.* Improper testimony ought not to be suffered to go to the jury, and it is not sufficient, afterwards, to direct the jury not to regard it. *Penfield* v. *Carpenter*, 13 *Johns. R.* 350; *Irvine* v. *Cook*, 15 *Johns. R.* 239. To suffer improper evidence to go to the jury, with instructions to disregard it unless certain other facts are proved, is transferring the duties and responsibilities of the Court to the jury, and depriving the other party of all remedy, if the jury decide wrong. The best evidence to show the inducement should have been produced, for fraud is not to be presumed. Here was no evidence whatever, and the paper was improperly before the jury. 4 *Mass. R.* 646; 5 *Mass. R.* 305; 1 *Peters*, 596; 19 *Johns. R.* 345. The Judge should have instructed as requested, that if the defendants would rescind the contract, they should have returned, or offered to return the bond. 4 *Mass. R.* 502; 15 *Mass. R.* 319.

McGaw and *Poor*, for the defendants, insisted, that the argument for the plaintiff was mainly founded on an erroneous view of the facts. The paper was not permitted to be read to the jury, until sufficient evidence had been introduced to warrant the jury in inferring that it had been used in the fraud. If the testimony had a reasonable tendency to prove the issue it is sufficient. 2 *H. Bl.* 296; 3 *Johns. R.* 235; 2 *Day*, 205. The jury have found, that the fraud had not been discovered by the defendants, until after the time limited in the bond had expired. It was then mere waste paper, of no value to any one, and it could not be necessary to go through the useless form of returning it.

The opinion of the Court was by

EMERY J. — The suit is on a note of the 28th of *May*, 1835, given in payment for a bond assigned by the plaintiff to the defendant.

The defendant resisted payment, because he alleged, that the note was obtained by false representations of the quantity of timber on lands reserved for public use in the town of *Chester*, in the county of *Penobscot*, containing 1000 acres more or less, for which the bond was given to *Winslow*. There was a certificate of *Jeremiah Jameson*, dated *May* 14, 1835, that he had explored the tract, and that it contained 10,000 feet of the best quality of pine timber to the acre in his opinion.

It was also proved, that the plaintiff between the 10th and 20th of *May*, 1835, had been on to the land, and that there was very little timber on the tract. And it was proved, that this paper was in the plaintiff's possession at and about the time it was made, and that he used it to induce others to purchase the land, and was in his possession a short time before the sale of the bond, and a few days after in the hands of one of the defendants. After these facts and circumstances were proved, the defendants offered the *Jameson* certificate which they alleged was false.

To the admission of this paper in evidence, to show that it was used by the plaintiff in the sale of the bond to induce the defendants to purchase, the plaintiff objected, until proof was introduced to shew that it was so used. And it is insisted, that the proof of this fact should have been addressed to the Court, that it was a fact to be decided by the Court, and exclusively within their province. We conceive with the plaintiff's counsel, that the authorities cited by him do establish, that it is the exclusive right of the Court to decide on the legality and competency of all testimony, which is to be read or given to the jury.

That the certificate was made by *Jameson*, was not contested. That the plaintiff had it in his possession at and about the time it was made being proved, as well as the fact that the plaintiff had it in his possession a short time before the sale, and had used it to induce others to purchase the bond, would not alone, be evidence that it was used to induce the defendants to purchase. It was therefore necessary to exhibit some other proof, by which the Court

should be persuaded to the conviction, that it ought to go to the jury as tending to maintain the ground of defence. *That proof was given of the subsequent possession of this very paper by one of the defendants.* We think this well justified the Court in permitting it to be read. The subsequent remarks of the Court were full of good sense, and were of the most favorable character towards the plaintiff's case; that if the jury were not satisfied that it had been used to induce the defendants, it would not be evidence in the case. Though fraud is not to be presumed, it is usually proved by circumstances. *It is most natural to suppose* from the circumstance that the plaintiff obtained the certificate on the 14th of *May*, 1835, of the quantity of pine timber of the best quality to the acre on the tract, and had used it before the sale to induce others to purchase, *that it was a principal consideration of himself and others, with whom he should deal, to take the land thus loaded with a most valuable commodity.* This may properly be presumed. It is not pretended that there were any gold or silver mines on it, or slate or granite quarries to work upon the imagination of purchasers. The defendants having in their possession this paper, did come before the jury with strong moral evidence, that they received it from the plaintiff, in a rightful manner. *He never complained*, that it had been *wrongfully withdrawn.* It was most natural to suppose it would be delivered over by him to the purchasers, *with the design that it should be accredited.* But if it was not so done, he had the liberty to call upon *Wilson*, the witness, or introduce any testimony to render it doubtful to the jury, whether it had been so employed.

The instruction of the Judge, that the defendant was not bound to restore the bond assigned before its expiration, unless he had ascertained that the statements were false and fraudulent before the expiration of the bond, was entirely right.

It would be utterly absurd to suppose the defendants were at liberty to rescind the contract, until they had ascertained the worthlessness of the purchase, and the false and fraudulent representations of the plaintiff. Yet, *had these facts been ascertained before the expiration of the term limited by the bond, it ought to have been restored.* For though when one has been practicing a fraud to effect the sale of a bond to one person, he who so practices, has

but slight claim on the one attempted to be made a victim, and it might at first appear proper, that the instrument of deception should be impounded, yet it is to be remembered, that *on the return of the papers, the plaintiff might possibly have effected a sale fairly without any misrepresentation to some subsequent purchaser. But when the defendants discovered what ought to relieve them, the bond had lost vitality, by lapse of time, but without any fault on the part of the defendants.*

The exceptions are overruled.

Stephen Jennings *vs.* Samuel Estes *& als.*

Where a partnership is alleged to exist between two persons, the acts and declarations of either bind him, but do not affect the other, and it often becomes necessary to prove the acts and declarations of one at a time; and therefore such testimony may properly be admitted, and the legal effect of it be postponed until the Judge instructs the jury upon the law of the whole case, whose duty it would then be to inform them, that the acts and declarations of a party, before the partnership is proved, bind himself only.

In an action against two persons for services performed for them *in lumbering* at a certain time and place, if a witness offered by them state "that he was connected with them *in lumbering*," and the *defendants* do not call upon him to state more fully the nature of the connexion, that its limitations, if any, may appear; the witness must be considered as interested and inadmissible.

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

Assumpsit against *Estes, Rollins, Webster, & Heald* on an instrument of which the following is a copy. "$83,44. *Orono, April* 10, 1836. For value received, we promise to pay to *Stephen Jennings*, or order, the sum of eighty-three dollars and forty-four cents, to be paid in the month of *July* next, and interest.

"*Rollins, Estes, Webster & Heald,*

"*By Jefferson Heald.*"

Heald and *Webster* were defaulted. The signature was in the handwriting of *Heald*, one of the defendants, and *Rollins* and

Estes denied, that he was in any way authorized to sign for them, and also denied their being partners with him. The note was given for the plaintiff's work in cutting and hauling lumber in the woods; and it was proved by the plaintiff's own witnesses, that "the plaintiff hired with *Heald & Webster*, worked in their crew, boarded in their camp, separate and distinct from the camps of *Rollins & Estes*, that *Heald & Webster* settled with the plaintiff for his services, and gave the note signed as aforesaid by *Jefferson Heald*." It was admitted that *Heald & Webster* were partners, and that *Estes & Rollins* were also partners, and the question was whether *Estes & Rollins* were partners with *Heald & Webster*, or had held themselves out as such; in relation to which there was much evidence. The exceptions state, that "to prove the copartnership of *Estes & Rollins* with *Heald & Webster*, the plaintiff offered the declarations and acts of *Heald & Webster*, which were admitted by the Court, on the condition that the plaintiff should connect them with said *Estes & Rollins*, and show they assented to the same, to which ruling the counsel for the defendants objected, unless said acts and declarations were made in the presence or with the knowledge of *Estes* or *Rollins*." There was evidence tending to show an express promise by *Estes* to pay the plaintiff, and that he had in his hands the whole of the lumber cut by all. The defendants offered one *Spaulding*, as a witness, to whose admission the counsel for the plaintiff objected, and inquired of him, whether if the plaintiff obtained his pay out of the common stock of logs, the witness would not lose by it; to which the witness made answer, "if the logs he hauled were liable as partnership property to pay the plaintiff's demand, he supposed he should lose by it, and if he was a partner with *Heald & Webster* and others, he should be liable, but he did not know of any partnership, nor did he know but there was such; and that he was connected with *Estes & Rollins* in lumbering." Nothing further in relation to the interest of this witness, is found in the exceptions, except that, "upon the above statement, the Court rejected said witness." No other ruling of the Judge, and no instructions to the jury are found in the exceptions. The verdict was for the plaintiff, and the defendants excepted.

The arguments were in writing.

Wilson, for the defendants, urged, that the testimony objected to by him at the trial was inadmissible. *Sherwood* v. *Marwick*, 5 *Greenl.* 295; 3 *Stark. Ev.* 1072, 1075. And that the witness rejected should have been admitted.

J. Appleton, for the plaintiff, argued, that the testimony was rightfully admitted, and cited 3 *Watts*, 101; 17 *Serg. & R.* 453; 3 *Stark. Ev.* 1071. And that *Spaulding* was directly interested in the event of the suit, and clearly inadmissible. *Collyer on Part.* 460, and cases cited; *Hewitt* v. *Lovering*, 3 *Fairf.* 201.

The opinion of the Court was by

SHEPLEY J.— The acts and declarations of a person, tending to prove that he is a partner with another, bind him, but do not affect the other. When a partnership is to be proved by the acts and declarations of those who are alleged to be partners, it often becomes necessary to prove those of one person at a time. And if it were illegal to do so, it would preclude the proof of a partnership by proving the acts and declarations of each party to the contract. And yet such testimony might clearly prove a partnership by the acts and declarations of each member of it, while each is bound only by his own acts and declarations.

The legal effect of the testimony when admitted must necessarily be postponed until the Judge instructs the jury upon the law of the whole case as presented for their decision. It would then be his duty to inform them that the acts and declarations of a party, before the partnership is proved, bind himself only. No exceptions are taken to the charge, and this Court must of course infer, that the proper instructions were given.

The other exception relates to the exclusion of *Seth Spaulding* as a witness for the defendants. Being examined on the *voire dire* he said "he was connected with *Estes & Rollins* in lumbering." There is no limitation of this connexion stated by the witness, or apparent in the case; and it must be regarded as a connexion coextensive with their lumbering business. If it were not of that general character that would make him liable to contribute to pay all their debts arising out of that business, the defendants should have called upon him to explain more fully the nature of his connexion, that its limitations, if any there were, might have been

known. Without any explanation he appears to have been interested in the payment of all debts arising out of that business, where *Estes & Rollins* were liable. And if so, he had a direct interest to prevent a recovery against them, because he would be liable to pay a share of the sum recovered.

Exceptions overruled.

HENRY SCOTT *vs.* JOHN HALE.

In an action to recover damages for the loss of a building by fire, occasioned by the negligence of the defendant, the testimony of witnesses offered on his part "that he was very careful with fire, that they never discovered any carelessness in him about taking care of his fires during the time they were at his house, which was immediately before the fire," is inadmissible.

THE substance of the declaration, and the whole of the bill of exceptions relative to the admission of the testimony objected to, and for the admission of which alone the new trial was granted, are found in the opinion of the Court. Other questions were raised at the trial before SHEPLEY J., stated in the exceptions, and argued, but need not be given here, as the decision was not founded upon the consideration of them.

J. Appleton, for the plaintiff, contended that the testimony objected to was inadmissible. It was evidence of the general character of the defendant as to his carefulness in regard to fires, which should not have been permitted. In no case is general character admissible to prove the performance of a duty, or to enable the party to escape from the consequences of his negligence or misconduct. 2 *Stark. Ev.* 366; 7 *Conn. R.* 116; 5 *Sergt. & R.* 322; 6 *Munroe*, 136; 16 *Wend.* 646; *Jurist, No.* 35, 165; 2 *Dana*, 418; *Com.* v. *Worcester*, 3 *Pick.* 462. The testimony was inadmissible, because the witness should testify to facts, and not to his conclusions from facts. Different persons may draw different conclusions from the same facts, and it is the province of the jurors, and not of the witnesses. In giving opinion, and not facts, there

is no way of disproving the statements. 3 *Dane*, 281; 1 *Ayliffe*, 113.

Rogers, for the defendant, contended, that the testimony was rightly admitted. The jury may infer negligence by general habits, and it may be repelled by the same kind of proof. It may not be possible to prove negligence at the precise time the fire happened, and the jury may properly infer it at the time from his being generally negligent. So too, the defendant may not be able to prove his careful conduct at the moment, and can only prove his general habits of carefulness. The question whether there was negligence or not, is a question of fact for the determination of the jury; and whether the defendant was negligent or careful generally, is one fact proper for their consideration.

The opinion of the Court was drawn up by

EMERY J. — The plaintiff in a declaration containing two counts, in one represents himself as seized, and possessed of a certain tract of land in *Foxcroft*, on which was a dwellinghouse and a store, on the 1st of *Oct.* 1832, which dwellinghouse he then at the defendant's request, suffered and permitted him to occupy as tenant at will, that on the 1st of *June*, 1833, *Hale* of his own motion, and for his own convenience, erected on the plaintiff's land, a building additional to and adjoining to the plaintiff's said dwellinghouse, and in the building so erected by the defendant, he built a chimney and oven badly, and of bad materials, that they were and became unsafe and dangerous, and for that reason, all the buildings in great danger of being burned and destroyed, of which *Hale* had notice, but he continued to occupy the dwellinghouse as tenant at will of the plaintiff till the 7th of *Jan.* 1836, when the plaintiff terminated it on his part, and gave *Hale* due notice in writing to quit and surrender up the premises to the plaintiff, which *Hale* refused, and continued to occupy the dwellinghouse afterward, against the plaintiff's will, till the 19th of *March*, 1836, the chimney and oven not having been rebuilt or repaired, carelessly and negligently put and kindled a fire by himself and his servants, which fire, by reason of the defective, dangerous and unsafe state of said chimney and oven, escaped from said chimney and oven, communicated to the building erected by said *Hale*, which was burnt and consumed,

and communicated from that to the dwellinghouse and store of the plaintiff, and consumed them.

The other count alleges the occupation as tenant at will, and the promise of *Hale* to use reasonable diligence to keep and preserve the dwellinghouse from all losses by fire, and that intending to injure and defraud the plaintiff, the defendant being in possession, carelessly and negligently put and kindled a fire in the chimney and oven, knowing it unsafe and dangerous, and the dwellinghouse and store of the plaintiff was burnt and consumed by reason of the said *Hale's* carelessly, negligently and fraudulently kindling the fire, knowing the chimney and oven to be dangerous and unsafe. In the second count, nothing is said of notice to quit, but *Hale* is described as the plaintiff's tenant at will, till the 19th day of *March* aforesaid.

The jury have found that the defendant did exercise by himself and those under his control in all his conduct, *that degree of carefulness which a discreet and prudent and careful man would do in the possession of his own premises,* and that the buildings were not consumed in any mode stated in the declaration, by reason of neglect or failure of the defendant and his servants to exercise that degree of care. This conclusion is irresistible from the verdict. The jury were instructed, "*that if from the testimony they believed that the defendant and his servants failed to exercise that degree of care,* and the fire happened and the buildings were consumed in any mode stated in the declaration, by reason of such neglect, then the defendant would be liable to pay such loss, and they would find for the plaintiff, the amount of the injury he had suffered."

We think this was a most liberal instruction in favor of the plaintiff. But we forbear now to go more minutely into the discussion of questions argued, not because they have not occupied our attention, for they have. Yet we find ourselves reluctantly obliged to sustain the exceptions on one point, and to set aside the verdict and grant a new trial.

The exceptions say, "that the defendant proved by witnesses that said *Hale* was very careful with fire, that they never discovered any carelessness in him about taking care of his fires during the time they were at his house, which was immediately before the fire,

to all which evidence and all evidence of a similar nature, the plaintiff's counsel objected, but his objections were overruled."

From the manner in which these exceptions come, it would seem that nothing, in effect, more than the opinion of witnesses was presented by them to the jury, instead of facts. And it does not appear that the witnesses came within the description of *experts*, whose opinions are admitted frequently in evidence. 1 *Norris' Peake's Evidence*, 278; 10 *Bing.* 57, *Chapman et al.* v. *Walton*; *Roscoe's Criminal Evidence*, 136, 137, *and notes.*

The plaintiff must judge whether he can probably alter the result of the present verdict.

Exceptions sustained, verdict set aside, and new trial granted.

Isaac Wheeler *vs.* Thomas A. Hill.

To exclude the communications of client to counsel from being given in evidence, it is not necessary that they should have been given under any injunction of secresy.

But the mere fact of the employment of counsel in a cause is admissible.

In an action by the lessee against the lessor on the covenants of a lease, a process of forcible entry and detainer, which had been sued out by the lessor but on which no judgment had been rendered, cannot be given in evidence by the defendant to show an entry by him for a forfeiture.

If one party introduce in evidence a judgment against the other in favor of a third person, he who introduces it cannot afterwards object to its introduction or legal effect.

Where the lessee conveys to a third person a part of the premises leased for a portion of his term, such third person is not an assignee of the term, but an undertenant, and improvements made by him are to be considered as made by the tenant.

The action was covenant broken on a lease, and the defendant, with the general issue, pleaded by brief statement performance generally. It does not appear that there was any replication. The lease was dated *Sept.* 10, 1830, wherein the defendant leased to the plaintiff, and his heirs, executors, administrators and assigns,

a building at the west end of the bridge in the village of *Bangor*, with the lot of land belonging to the same and the wharf thereon, for the term of five years, commencing *Nov.* 1, 1830. One of the covenants on the part of *Wheeler* was, that the building should not be used for purposes usually denominated extra hazardous as to fire by insurance companies. At the close of the lease was this provision. "And the parties aforesaid for themselves respectively, each with the other and their respective heirs, executors and administrators do further covenant and agree as follows, viz. that the said *Wheeler* may at his own expense, repair, alter and improve said building in such manner as shall be most for his interest, but that all fixtures he may make to the premises during said term shall remain and become the property of said *Hill*, at the end of said term, without any charge for the same — that if said *Hill* shall make an actual and *bona fide* sale of the premises during said term, this lease shall expire after two years from this date, but in such case, said *Hill* shall pay said *Wheeler* for all betterments which he shall have made on the premises." The plaintiff introduced evidence tending to prove, that after the execution of the lease he made alterations and improvements in the building; that *May* 2, 1831, he leased a part of the premises, including the cellar, to *Hasty & Huntress*, *for one or five years*, from *Nov.* 1, 1830, the parties mutually agreeing that *Hasty & Huntress* might at their own expense, repair, alter and improve the premises for their interest and benefit, to become the property of *Wheeler* without any charge for the same, but that *if Wheeler did not hold the premises for the whole five years, the lease should expire after two years*, and in such case *Wheeler* should pay them for all betterments they should make on the premises; that *Hasty & Huntress* made expensive improvements, which were fixtures, and which greatly increased the rents of the same. The plaintiff read in evidence a deed of the premises from the defendant to *Samuel Smith*, dated *Dec.* 22, 1832, and an obligation from *Smith* to *Hill* of the same date, stipulating that *Smith* should have all after rents and indemnify *Hill* against all claims in consequence of the lease. The defendant then introduced evidence tending to show, that the expenditures thus made on the building were calculated to produce an increase of rent, and that were the building to remain for a

series of years in the state in which it was put by the expenditures, the property would be increased in value equal to the value of the expenditures, but that the alterations made, did not increase the value of the property in the market. In the spring of 1833, the building was removed by *Smith*, against the wishes of the tenants. There was evidence introduced by defendant tending to prove, that certain mechanics, and among them a plane maker, had occupied parts of the premises during a portion of the time, and that those employments were "usually denominated extra hazardous as to fire by insurance companies." There was some testimony, that at some time an entry had been made for breach of covenants for non-payment of rent. The defendant offered to read a process of forcible entry and detainer, dated *Dec.* 13, 1832, instituted by him against one *Burr*, the occupant of the cellar under *Hasty & Huntress*, to which *Burr* had appeared and pleaded the general issue, but no judgment had been rendered therein; and offered to prove by the counsel for *Burr*, that he was instructed by *Burr* to defend the suit, and that the process was instituted, and possession claimed for an alleged forfeiture of *Wheeler's* lease by the appropriation of a part of the premises to uses denominated extra hazardous in contravention of the covenants in the lease from *Hill* to *Wheeler*. The counsel for the plaintiff objected to the admission of the process and the testimony of *Burr's* statements to his counsel, and they were excluded by the Judge. The *defendant* then read in evidence, the proceedings in a suit *Hasty & Huntress* v. *Wheeler*, and the judgment in their favor, for $478.

The trial was before EMERY J. and the report concludes in the following manner. For the purpose of reserving certain questions of law for the consideration of the full Court, by agreement of the parties, the jury were requested to answer the following inquiries. What was the value of the betterments of the premises made by *Isaac Wheeler*? They answer $101,60. What was the value of those made by *Huntress & Hasty*? The jury answered $487,68. Were the premises used by *Wheeler* or his assigns for purposes usually denominated extra hazardous as to fire by insurance companies? They answered, we could not find any. To the question, was there any entry made by *Hill* or *Smith* for the breach of the covenants for the non-payment of rent? the jury

answered, we have no proof of it. To the question, to what time the interest was calculated? the jury answered, we unanimously agreed to calculate it for four years and an half back of this time. There was much evidence introduced to the jury as to the nature, character, extent and value of the improvements. And the Court instructed the jury, that if from the evidence they were satisfied, that the expenditures by *Wheeler* and *Hasty & Huntress*, were such as men of prudence and good judgment would have made on the premises in contemplation of the use of the property as authorized by the lease, and that they did in fact add such an amount to the value of the building, supposing it should remain there, they might consider the damages recovered in that judgment *Hasty & Huntress* against the plaintiff as *prima facie* evidence of the amount of the betterments made by *Hasty & Huntress*. The verdict is taken however subject to the opinion of the whole Court, who may amend or set aside said verdict, or render judgment thereon as they may see fit.

Rogers and *M. L. Appleton*, for the defendant, argued, that the provisions in the lease extending to assigns related merely to the use of the building, as it was, and the rent to be paid for it, but the agreements in relation to the betterments were between the parties themselves, and did not extend to assigns; and the defendant therefore is not compellable to pay for improvements made by assigns. He has not so agreed, and on the agreement only can he recover. The alterations made by *Hasty & Huntress* were such as the plaintiff himself was not authorized to make. If the improvements were recoverable, the judgment was not *prima facie* the amount of betterments. 1 *Phil. Ev.* 248; 1 *Stark. Ev.* 186. Because it was between other parties, was the finding of another jury on other proof, and on evidence not given to the jury in this case. *Hasty* v. *Wheeler*, 3 *Fairf.* 434. There has been a forfeiture of the estate, and therefore the plaintiff cannot maintain his suit; because the building was used for purposes usually denominated extra hazardous as to fire in contravention of the agreement, and because the acts of *Hasty & Huntress* amounted to waste. *Jacob's Law Dic. Waste.* Where the landlord is entitled to enter for a forfeiture, it is not necessary to prove an actual entry. 1 *Saund.* 287, *note* 16.

A. W. Paine argued for the plaintiff, and contended: —

1. That the mere process of forcible entry and detainer, without a judgment rendered thereon, was not admissible in evidence. 1 *Stark. Ev.* 245, 280; 2 *Johns. R.* 46, 181; 7 *Johns. R.* 32.

2. The declarations of *Burr* were inadmissible, because mere hearsay; and because confidential communications of a client to his counsel; and because irrelative.

3. Judgment was rightly rendered for damages found for *Hasty & Huntress'* improvements. The lease is to assigns, but the letting of a part of them by *Wheeler*, was not an assignment, but a mere underletting. 6 *Cowen*, 302; 8 *Wend.* 175; *Swett* v. *Patrick*, 3 *Fairf.* 9.

4. The instructions were correct. They were substantially the same as was decided in *Hasty* v. *Wheeler*, 3 *Fairf.* 434. The defendant introduced the judgment in that case, and he has no right to complain that it was used for the only purpose it could be. But it was to be considered by the instruction, only *prima facie* evidence in case they found the value of the betterments to be equal to the amount recovered in that suit. That those improvements did not amount to waste, was decided in the case cited, *Hasty* v. *Wheeler*. The jury have found, that the building was not used for purposes considered extra hazardous as to fire, and that objection is not founded in fact.

The opinion of the Court was drawn up by

Emery J. — We consider that the proposed declarations of *Burr* were rightly rejected. They could have been shown only by the *counsel* retained in his defence. And the law does not regard it as necessary for the protection of the client, that his communications should be made to his attorney under any particular circumstances or injunctions of secresy. It is sufficient that the relation of client and attorney subsisted between them to throw around the proceeding an impenetrable veil of secresy, excepting only if it should become necessary, *it might be communicated that Burr employed him.* Not a syllable more which he said on his case can lawfully be divulged. There would exist another objection against the admission of the evidence, that it would be hearsay. It would be entirely useless to introduce the process of forcible entry and detainer,

the justice of which was denied by pleading the general issue. No judgment had been rendered thereon. Many groundless prosecutions are commenced. Whether this was of that description we cannot undertake to say. Only we are satisfied it ought not to have been admitted in this trial.

All the evidence in relation to the inquiry whether the building had been used for purposes usually denominated extra hazardous as to fire by insurance companies, was fully submitted to the jury, and they could find no such use. We do not perceive that they have drawn an incorrect conclusion. They have also negatived the fact that *Hill* or *Smith* entered for the breach of the covenants for non-payment of rent.

The defendant having offered the proceedings in the suit, *Hasty & Huntress* against said *Wheeler* upon the lease between them, must not be permitted to avail himself of objections against their admissibility. If any truly existed, he must be deemed to have waived them all. It would be absolutely indecorous to allow a party to practice upon such a principle in a court of justice. He must be bound by his own election to introduce the evidence.

This action is founded on the covenants of a lease by indenture, made between the defendant and the plaintiff on the 10th of *Sept.* 1830, by which the defendant demised to the plaintiff, his heirs and assigns, a building, lot of land, and wharf, in *Bangor*, to hold for five years from the 1st of *Nov.* then next. And *Wheeler* covenanted for himself, his heirs, executors and administrators to pay rent, &c. And in like language the said parties covenanted to each other. The word "assigns," is not again used. If *Hill* sold the premises during the term, the lease was to expire after two years from the date, "but in such case said *Hill* shall pay said *Wheeler* for all betterments, which he shall have made on the premises."

Whenever a lessee conveys to a third person the whole or any part of the land for a portion only of his term, such third person is not an assignee of the term, but an under tenant. Even when there have been covenants not to assign, transfer, set over, or otherwise do or put away the lease or premises, courts have always held a strict hand over these conditions for defeating leases. The lessor, if he pleased, might certainly have provided against the

change of occupancy, as well as against assignment. *Crusoe ex dem Blencowe* v. *Bugbee*, 2 *Black. R.* 766; 3 *Wills.* 234. But he did not, and the parties by the lease having contemplated an assignable interest, we must regard the expenditures of the under tenant as though they had been made by *Wheeler* himself.

We are satisfied that the instruction to the jury was correct. And they having found that the expenditures by *Wheeler, Hasty & Huntress* were such as men of prudence and good judgment would have made on the premises, in contemplation of the use of the property as authorized by the lease, and that they did in fact add such an amount to the value of the building, supposing it should remain there, it would be quite inequitable, as well as unlawful, to allow the defendant to escape from responsibility to that extent. He has taken his indemnity in his contract with *Mr. Smith* of the 22d of *December*, 1832.

We consider that the sums of $101,60, and of $478, should constitute the principal. But on the authority of *Holliday* v. *Marshall*, 7 *Johns. R.* 211, we must deny interest, because the matter was all open at the trial to settle as unliquidated damages. Interest should not be calculated from the 26th day of *May*, 1833, to the time when the verdict was rendered. The verdict must therefore be amended, assuming $464 as a principal, and judgment must be on the verdict amended, with the addition of interest, as by law it should be.

Franklin Rollins *vs.* Nathaniel Mudgett, Jr.

Where a Colonel of a regiment of militia signs a sergeant's warrant, leaving a blank for the insertion of the name of the sergeant, and authorizes the captain of the company to insert the name of such person as he shall think proper, and the captain inserts the name of a private, and on the back of the warrant appoints him clerk, and this is afterwards made known by the clerk to the Colonel, who expresses no dissatisfaction; although the proceeding is irregular, the person thus appointed clerk, may legally act under the appointment.

In an action for a fine for absence from a company training, it is competent to prove by parol evidence, no record in relation thereto being made by the clerk, that the company did meet at the time and place appointed, and that the defendant was absent.

If the clerk of a company verbally resigns, and delivers over the company records, and the resignation is accepted by the captain, another clerk may be appointed in his stead.

The neglect to record the appointment of sergeant and clerk on the company books, does not render the appointment invalid.

This was a writ of error, to reverse a judgment of a Justice of the Peace, in an action brought by *Mudgett*, as clerk of a company of militia, against *Rollins*, to recover a fine for neglecting to appear at a company training. The errors assigned, and the evidence apparent on the record of the Justice, will be found stated in the opinion of the Court.

J. Appleton argued for the plaintiff in error, and cited Militia Law of 1834, *c.* 121, § 8; *Burt* v. *Dimmock*, 11 *Pick.* 355; *Commonwealth* v. *Kellogg*, 9 *Pick.* 557; 2 *Brock.* 64; 1 *Yerger*, 149; 2 *Yerger*, 337; *Commonwealth* v. *Pierce*, 15 *Pick.* 170; *Cobb* v. *Lucas*, 15 *Pick.* 9; *Tripp* v. *Garey*, 7 *Greenl.* 266; *Abbott* v. *Crawford*, 6 *Greenl.* 214.

H. Hamlin argued for the defendant in error, and cited *Bullen* v. *Baker*, 8 *Greenl.* 390; *Fullerton* v. *Harris*, *ib.* 393; *Lovett*, *pet.* 16 *Pick.* 84; *Haskell* v. *Haven*, 3 *Pick.* 404; *Field*, *pet.* 9 *Pick.* 41; *Stat.* 1837, *additional to Militia Act of* 1834, *c.* 276, § 8; *Buck* v. *Hardy*, 6 *Greenl.* 162; *Welles* v. *Battelle*, 11 *Mass. R.* 477; *Avery* v. *Butters*, 9 *Greenl.* 16.

The opinion of the Court was drawn up by

EMERY J. — In the original case wherein judgment was rendered in favor of the present defendant in error, we perceive that on the trial before the Justice, the records and roll, the sergeant's warrant of plaintiff, and the commission of the captain were before the magistrate, all other facts of notice, enrolment, and liability to do duty, &c. were admitted. The plaintiff in error, assigns five errors for which he claims a reversal of the judgment. If any of the evidence objected to by the counsel of the original plaintiff, but admitted, ought not to have been received, though it may be apparent on the record, that circumstance alone would not be a reason for reversing the judgment at the suit of the present plaintiff in error.

The first error assigned is, because it appears that *John Emery*, the captain of the B company in *Dixmont*, never appointed said *Mudgett* sergeant of said company, and that the said commanding officer of the company never made any return of any appointment of the said defendant in error, sergeant, as by law he should.

The evidence of the captain is decisive, that he did appoint the plaintiff as sergeant by filling up with the name of the plaintiff one of the blank sergeant's warrants, signed by the Colonel of the Regiment, which were sent by him to the captain, and which the Colonel told him to fill with the names of such persons as he should appoint; and that on the back of said warrant, he appointed the plaintiff clerk. No objection is taken to the subsequent qualification of the clerk.

The second error assigned, is, that it appeared by the record of said Justice, that the commanding officer of the Regiment, never granted a warrant to any individual as sergeant, nor did he appoint said *Mudgett* as sergeant, or know of his appointment.

And in behalf of the plaintiff in error, his counsel insists, that the law requires two several appointments, one of sergeant, and one of clerk, that they are distinct acts, to be done by different persons, that though the captain appoints in the first instance, yet he must make a return thereof in writing to the commanding officer on the company or regimental roll. That in this case, the Colonel has never acted, has not received the appointment made by the

captain, nor issued a warrant, and that a blank signature is no warrant. That it is a judicial discretion, and the Colonel must know whom he appoints, and he may disapprove the captain's judgment, and reliance is placed on *Burt* v. *Dimmock*, 11 *Pick.* 355, to sustain these positions.

The *stat. c.* 121, *sec.* 8, declares that the non-commissioned officers of companies, shall be appointed by the captains of their respective companies, who shall forthwith make return thereof to the commanding officer of their respective regiments or battalions, and they shall grant them warrants accordingly. We consider that the delivery of the warrant by the captain, and the retaining of it by the sergeant, and in this case clerk, of the appointment to these officers, without any evidence of his having resigned his office, or being discharged or doing duty in the ranks as a private afterward, is evidence of his being duly appointed. It is the document regularly proving his authority.

In *Fullerton* v. *Harris*, 8 *Greenl.* 393, on an approval of a jail bond by Justices after it was signed, but it was a blank as to the names of the parties, the penal sum, the description of the execution, and the written parts over the signatures, seals, and attestation of the witnesses, and was filled up by the jailer, or by some other person by his direction under verbal authority, communicated by the bearer of the bond, the jury having found, that the blanks were all filled up by the consent and authority of the principal and sureties prior to the delivery of the bond to *Harris*, it was held, to be as binding an instrument as if it had been executed in the usual manner, and made perfect in all respects before the signature. *Zouch* v. *Clay*, 1 *Ventr.* 185. The late Chief Justice *Mellen* in delivering the opinion of the Court, speaks of this approval by the Justices, "that the jailer might be considered as acting under the natural conclusion, that they had acted understandingly in the discharge of the duty by law assigned them, and in making the certificate of their judgment in the premises," and remarks, "no doubt the above course was a very careless and improper one, but the jail keeper is not answerable for the looseness of proceedings on the part of the approving Justices in signing their approbation, without ascertaining the sum due on the execution, and the Justices would not be allowed to contradict or explain

away their own certificate, disprove the facts certified, and thus expose an innocent officer to a severe penalty, because he reposed confidence in their official sanction."

The mode in which this business was managed, was adopted probably because found conformable to the practical convenience of officers in the militia. The word grant, it is said, seems to import the exercise of discretion, and we may say, the words, *shall grant the warrant accordingly* seems to make it the imperative duty of the commanding officer of the Regiment to do it, after being informed by the captain of the appointment. If the officer relies on the discretion of the captain in making the appointment, as he doubtless must, as being best acquainted with the merits of the individuals under his command, and their qualifications to become non-commissioned officers, we are not aware that any injury can arise from his delivering warrants signed by the Colonel to the captain, to be filled up in the manner this was. We are induced more readily to come to this conclusion, because in the same section it is provided, that in case there shall be but one company of cavalry or artillery in any brigade, then the warrant shall be granted by the captain of such company.

In the case cited by the counsel for the plaintiff in error, *Burt* v. *Dimmock*, 11 *Pick.* 355, the warrant was not signed by the Colonel himself, or by his specific direction, but the Colonel's name had been affixed to it by the Adjutant of the Regiment in pursuance of a general authority from the Colonel. In the case, *Coffin* v. *Wilbour*, 7 *Pick.* 149, as to an approval of a sentence of a court martial, the Court were inclined to the opinion that it ought to have been revised by the Major General, and his approbation certified under his own signature. The difference of the call for judicial discretion in this last case, and the issuing of a blank warrant for the sergeant of a militia company is very striking. The clerk ought not to be reduced to the mortification of being considered an usurper of office, by accepting from his captain the sergeant's warrant duly signed by the Colonel's own hand, which the captain was authorized by the Colonel to fill up, and on which the captain has indorsed the appointment made by himself of the same individual as clerk. In the fall of 1837, it was proved he signed the roll as clerk, and at muster informed the Colonel, that he had been

appointed sergeant and clerk. No disapprobation of this appointment on the part of the Colonel appears, and the silence after this intelligence, may well be deemed a ratification. If the higher officers have been indiscreet in the order of proceeding the clerk is blameless. In the case of *Charles W. Lovett, pet.* 16 *Pick.* 84, going almost the whole length of the present, it was held, that as to the supposed irregularity of the appointment in other respects, that depends upon parol evidence, which is inadmissible to contradict or control the written evidence of the appointment. That being in common form we can take no notice of the parol evidence. In our judgment the first and second errors are not well assigned.

The third error assigned is, that it did not appear by any records of the company that there was any meeting of said company, or that the plaintiff in error was absent, which the Justice ruled was unnecessary. And we discover in the Justice's proceedings, that there was no record of any meeting of the company at the days and places alleged in the plaintiff's suit, and no record of absence (except the mark of absence on the roll) both of which facts the Justice permitted to be proved by parol. Here was indeed a careless omission on the part of the clerk. But the record would be subsequent to the delinquency, which is a fact, and the question is, whether competent evidence of it was exhibited. In *Commonwealth* v. *Peirce,* 15 *Pick.* 170, there were pencil marks against names of some of the members of the company; and it was held, that the clerk's testimony in explanation of the mark was inadmissible, and reference is made to *Commonwealth* v. *Paul,* 4 *Pick.* 254. This last decision was made on the peculiarity of the *Mass. stat.* of 1809, *c.* 108, *sec.* 18, which permits the clerk to testify as to notice, but not as to other facts. Our *stat. c.* 279, passed *March,* 28, 1837, *sec.* 8, makes all commanding officers, subaltern officers, and clerks of companies, competent witnesses in law, to testify to all or any facts, within their knowledge in any suit commenced by said clerk or commanding officer, for the collection of any fine or forfeiture under the militia acts. The notice, enrolment, and liability to do duty, &c. were admitted. We must understand, that this was notice to meet as required, and should have been obeyed. The orders do not become unavailing by the omission of the clerk to record them. In *Cobb* v. *Lucas,* 15 *Pick.* 7, it was held, that

the authority of the orders of the commanding officer do not depend upon their being recorded. And we are not prepared to hold under our statute, that the parol proof was wrongly introduced to prove the fact of the meeting of the company, and the absence of the original defendant. There was on the roll the mark of absence. The clerk was competent to prove all facts within his knowledge. The testimony too was open to impeachment, if it could be contradicted.

The judgment cannot be reversed for the third assigned error.

The fourth error assigned, is, "that it appeared, that *Joseph Gilman* was appointed, sworn, and qualified as clerk of the company, and that there was no discharge of him on the records of the company, until after the institution of the suit, and that the now defendant was appointed as clerk long before said supposed discharge of said *Gilman.*" It was proved on the trial, that the Colonel of the Regiment was present when *Gilman*, after refusing to obey an order to parade the company, then resigned the office of clerk in 1834, when the company was called out for *May* inspection, gave the roll and books to *Henry Mudgett*, the then commander of the company, and said he would have nothing more to do with it, and that he, *Mudgett*, must appoint a new clerk. No written discharge was ever made by *Mudgett* to *Gilman*. It appeared, that *Gilman* was present in the ranks and did duty, in no way claiming any authority as clerk or sergeant. The record of his resignation was made by a clerk, named *Craig*, after the commencement of the suit. *Craig* resigned his office of sergeant and clerk in *May*, 1836. In 9 *Pick.* 41, *Jabez Field, petitioner*, it was held, that the captain had a right to appoint the clerk, and of course to accept his resignation. The clerk in that case surrendered his sergeant's warrant. In the present it does not appear that there was any application by *Gilman* for a written discharge. He dispensed with its being given. As the captain of the company appointed a new clerk on *Mr. Gilman's* resignation and request, he must be considered as accepting it. And *Mr. Gilman* appears perfectly willing to do the duty of a private. We do not perceive the propriety of the present plaintiff in error attempting to impugn what was so mutually satisfactory. It was a perfect practical dis-

charge from office. For this error assigned we cannot reverse the judgment.

The fifth assigned error is, that the Justice rendered judgment that the plaintiff should recover, when by law, he should have rendered judgment that the plaintiff should not maintain his suit.

From the view which we have taken of the other assigned errors, we cannot consider that the fifth error is well assigned. On the contrary we believe that the Justice drew the right conclusion from the evidence legally admissible, and therefore consider that his judgment be affirmed, and that the defendant in error recover his costs of the present suit against the plaintiff in error.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF WASHINGTON, JULY TERM, 1839.

Proprietors of MACHIAS *vs.* JOHN WHITNEY.

Where no monuments are named in a grant, and none are intended to be afterwards designated as evidence of the extent of it, the distance stated therein must govern.

But where the legislature make a grant, and require by the terms of it, that an actual survey should be made, so that the land granted might be designated upon the earth and separated from the ungranted land, and that the survey and plan should be returned and accepted by the grantors before the title should pass to the grantee, and the survey is made, and the plan is returned and accepted; the extent of the grant is to be determined by the actual location upon the earth.

Where there is an excess of measure in an ancient survey and location of a grant, amounting to one seventeenth part, although it is the province of the jury to decide what circumstances occasioned the excess, and what was the intention of the party making it, and to determine whether there was fraud or not; yet the mere fact of the existence of such excess would not warrant the jury in drawing the inference that there was fraud.

Where a tract of land was granted by the Commonwealth in 1770, to be surveyed and located by the grantees, and a plan thereof was to be returned and accepted by the legislature; and where the surveyor and chainmen were sworn by one of the grantees, as appeared on the face of the plan so returned and accepted; the grantees cannot afterwards object, because the oath was thus administered.

THIS was a writ of entry. All the facts which the papers in the case furnish are found in the opinion of the Court. When the

demandants introduced the original warrant, dated in 1771, and their records, to show their organization as proprietors, the tenant objected that there was no evidence, that the proprietors were notified as required by the warrant. WESTON C. J. presiding at the trial, ruled, that after such a lapse of time such notice was to be presumed. It appeared that *Jonathan Longfellow,* who administered the oath to the surveyor and chainmen, was one of the proprietors of the township, and it was contended, by the counsel for the tenant, that the survey and plan were thereby vitiated; but the Court ruled, that as it was returned on the plan that the oath was administered to the surveyor and chainmen by *Longfellow,* and as it was known to the legislature that he was a proprietor, that any objection on this account was waived by the legislature on their acceptance of the survey and plan. It appeared, that the land demanded was within the grant to the demandants, according to the actual survey and location, but there was evidence tending to show, that the width of the township, instead of being eight miles, the distance specified in the grant, was by accurate admeasurement eight miles and an half, and that there was an equal excess in the side lines of the township, and it was thereupon contended, that the demandants ought to be restricted to the exact courses and distances set forth in their grant, and that the excess in the survey and location was evidence of fraud on the part of the demandants. The Court ruled, that the actual survey and location made and marked by the surveyor on the earth and on the plan, would determine the extent of the township, and being in accordance with the large and liberal measure of that early day, was no evidence of fraud. The verdict was for the demandants, and was to be set aside, if the ruling upon either of the points taken was erroneous.

The case was argued in writing, by *Clifford,* for the tenant, and by *Mellen* and *R. K. Porter,* for the demandants.

For the tenant, it was contended, that the demandants should be restricted to the limits of their grant, which was a tract ten miles by eight, and which would not include the premises demanded. The grant commences at a definite and fixed point, and runs by course and distance only, ten miles one way and eight the other. No monuments whatever, but the starting point, are mentioned or

referred to in the legislative grant. No location by the proprietors could give to themselves a larger tract of territory, or vary their limits. As there were no monuments referred to in the grant, none could be erected in conformity to the grant. The act of confirmation is in the words of the original grant, and it cannot be wise to extend by construction the act of confirmation to cover territory never within the intention of the legislature. 5 *Serg. & R.* 234; *Linscott* v. *Fernald*, 5 *Greenl.* 503; 4 *Munf. R.* 475; 17 *Mass. R.* 210; 6 *Mass. R.* 133. A grant made by the public, is not to be extended by implication. 10 *Coke*, 112; 2 *Black. Com.* 347; 12 *Mass. R.* 252; *Bac. Ab. Prerogative, F* 2; 3 *T. R.* 288; 7 *Pick.* 461. The demandants had no rights whatever until the act of confirmation, which did not pass until 1784, and then only to the extent of the original grant. *Hill* v. *Dyer*, 3 *Greenl.* 441. The counsel took an extended view of the law in relation to frauds, and contended, that although there might not be an uniformity of decision, still the great weight of authority was, that fraud was a question of fact and not of law, and that the jury should have been left to have decided, whether there was or was not fraud in the survey and location by the demandants; and urged, that whether the decision was to be made by the jury or by the Court, the facts showed fraud. He cited *Sherwood* v. *Marwick*, 5 *Greenl.* 295; 10 *Coke*, 56; 7 *Cowen*, 301; 8 *Cowen*, 448; 4 *Wend.* 301; 7 *Wend.* 436; 12 *Mass. R.* 378; 4 *Conn. R.* 450; 5 *Greenl.* 96; 3 *Greenl.* 425; 1 *Pick.* 389; *ib.* 288; 15 *Mass. R.* 246; 8 *Johns. R.* 446; 5 *Johns. R.* 258; 19 *Johns. R.* 218; 1 *M. & Selw.* 251; *Wilcox*, 662; 9 *Johns. R.* 337; 2 *Cowen*, 431; 3 *Cowen*, 166; 1 *Bay*, 173; 2 *Bay*, 546; 1 *Hawks*, 341; 2 *Bibb*, 416; 3 *Marshall*, 239; 2 *N. H. Rep.* 13; *ib.* 222; 3 *N. H. Rep.* 170. It was also contended, that the legislature did not waive any objection to the oath to the surveyor and chainmen, and that in fact they had never accepted that survey.

For the demandants, it was contended:—

1. After the lapse of sixty-five years, the Court will presume that notice was duly given of the proprietors' meeting. 2 *N. H. Rep.* 310; 14 *Mass. R.* 145; 14 *Mass. R.* 177; 10 *Mass. R.* 105; 6 *Greenl.* 145; 3 *ib.* 290; 4 *ib.* 508; 6 *ib.* 9; 4 *Pick.* 258; 8 *Greenl.* 343.

2. The administering of the oath by *Longfellow* was good. It was a mere ministerial act. And if objectionable, the legislature must have seen it, and waived the objection. *Barnard* v. *Fisher*, 7 *Mass. R.* 71.

3. The demandants are entitled to hold to the extent of the survey and location. *Brown* v. *Gay*, 3 *Greenl.* 126; *Pike* v. *Dyke*, *ib.* 213; *Ripley* v. *Berry*, 5 *Greenl.* 24; *Esmond* v. *Tarbox*, 7 *Greenl.* 61; *Loring* v. *Norton*, 8 *Greenl.* 61; *Pernam* v. *Wead*, 6 *Mass. R.* 131; *Howe* v. *Bass*, 2 *Mass. R.* 380.

4. The surplus in the measure is nothing uncommon, but well known to be usual in those times. It cannot therefore be evidence of fraud. Now, although fraud is a question for the jury generally, yet what is legal evidence of fraud is a question of law, and in many cases what constitutes fraud. *Laidlaw* v. *Organ*, 2 *Wheat.* 178; 3 *Stark. Ev.* 1626, 1627, 1628.

The opinion of the Court was drawn up by

Shepley J. — From the report and documents referred to, it appears that a tract of land was granted by the General Court of the Province of *Massachusetts Bay*, to *Jones* and others, in 1770, described as commencing at a certain rock and extending by courses and distances from it, so as to be ten miles in length by eight miles in breadth. The grantees made a survey and returned a plan as required. By a certificate upon the plan it appeared, that the oath was administered to the surveyor and his chainmen by one of the grantees. The survey was also noted upon it, stating the courses and distances according to the grant and naming certain trees as the corner bounds, which were marked as monuments of the tract of land, thus bounded and separated from the ungranted land.

The close demanded is within the limits of this tract, as designated by the monuments and location upon the earth, but not within the limits of the grant, if the grantees are to be restrained to the exact measure. The plan was returned with these monuments noted upon it, and was accepted by the Provincial legislature in 1771.

The objection taken at the trial to the want of evidence of notice to the proprietors, of the time and place of their first meeting, has not been insisted upon in the argument. The acceptance of

the plan, with a full knowledge of the manner in which the survey was made, was binding upon the grantors, and they could not afterward object, that the oath was administered by one of the grantees.

The principal question is, whether the grantees acquired a title according to the actual location, or are to be restrained to the exact distances stated in the grant.

The argument for the defendant is, that the grantees are to be limited by the distances named: — 1. Because no monuments are named in the grant; — 2. The grant and location passed no title, and the act of confirmation was in the language of the original grant, not confirming the actual location; — 3. The ruling of the presiding Judge respecting the alleged fraudulent survey and location was erroneous.

When no monuments are named in a grant, and none are intended to be afterward designated as evidence of the extent of it, the distances stated must govern. But when the legislature grants and requires by the terms of the grant an actual survey to be made, so that the land granted may be designated upon the earth and separated from the ungranted land; and that the survey and plan should be exhibited before the title passes to the grantee, there is a clear indication of an intention, that the extent of the grant should be determined by the actual location. And this would be necessary to enable the legislature with safety to itself or to its grantees to make grants and locations of the adjoining lands. The location of such a grant and the designation of monuments, fairly made according to the practice of the times, and accepted by the grantors, must be regarded as binding upon the parties. And the like rules as between individuals would apply to any difference between the plan and the lines and monuments designated upon the earth. The grantees would hold according to the bounds of the actual location. *Esmond* v. *Tarbox*, 7 *Greenl.* 61.

It is true, that without the act of confirmation the grantees would not have acquired a title. There is a recital in that act as follows; "a plan of which tract, setting forth the extent and *boundaries* thereof, was in *July*, 1771, presented to, received, and accepted by the said court;" then follows the confirmation of the grant as originally made without requiring any new survey or location.

There can be no reasonable doubt of the intention of the legislature, that the proprietors should hold according to the plan and boundaries thus recited, unless some unknown fraud had been practiced in making them.

The only evidence reported as indicative of fraud in the survey is, that the distances from monument to monument exceed the distances named in the grant by about half a mile. Where the presiding Judge speaks of the admeasurement "being in accordance with the large and liberal measure of that early day," it is reasonable to conclude, that he does so having reference to the evidence in the cause, although it is not reported. But if he is to be regarded as alluding to it as a matter of experience and history in our judicial tribunals and as well known to the jury, bringing it to their consideration as explanatory of the differences in distance, there is little reason to believe, that it was the occasion of injustice to any one. If the remark of the Judge, that under such circumstances, the excess in the distances "was no evidence of fraud," is to be regarded as withdrawing the question of fraud from the consideration of the jury, it was erroneous; it being their province to decide under what circumstances and with what intention the survey was made occasioning such differences.

But the experience of the Courts has shown, that excess of admeasurement is so uniformly indicated in surveys of that early period, that the Court is not prepared to say, that the excess, which was proved in this case, was evidence, which would warrant the jury in drawing an inference of fraud.

It does not appear in this case that the defendant was not an entire stranger to the title and without any right to impeach it. But supposing him to stand in such relation, as is alleged in the argument, does he appear to have any just cause of complaint that injustice has been done? The grantors have acquiesced in the location for more than fifty years without complaining of any fraud. Nor is there now any evidence of any such allegation on their part. With this, taking into consideration the terms of the act of confirmation, and the known customs of that period in making surveys, and the verdict cannot be regarded as unjust or improper. The merits, so far as they have been exhibited, appear to have been rightly decided. If the defendant has just cause of complaint that he

has not had a full hearing upon the facts, there is a proper channel for redress open to him.

Judgment on the verdict.

State of Maine *vs.* Alvan Cutler.

Where a township of land within the State of *Maine*, was granted by the Commonwealth of *Massachusetts*, before the separation, with a reservation therein of certain lots for the support of education and of public worship in such township forever; the State of *Maine* is entitled to the custody and possession of the lots until those shall come into existence for whose benefit the reservation was made, and may maintain trespass against strangers to the title for stripping the land of its timber and trees.

Trespass *quare clausum*, for an alleged trespass in cutting trees on lots numbered 53, 54, and 55, in township No. 18, granted to the proprietors of certain land prizes, drawn in virtue of the act of *Massachusetts*, passed *Nov.* 9, 1786, establishing a land lottery, and another act in addition thereto, passed *June* 20, 1788, which township has not yet been incorporated as a town or plantation. In each of these grants, there was a reservation of four lots of 320 acres each, for public uses; "one for the use of a public grammar school forever; one for the use of the ministry; one for the first settled minister; and one for the benefit of public education in general, as the General Court shall hereafter direct." On a plan of the land granted, made by the proprietors and accepted by the State, the names of the respective proprietors to whom the lots were drawn, were entered on the lots, and on the lots 53 and 54 was written the word, "Minister." The facts were agreed by the parties, and they agreed, that if in the opinion of the Court, the action can be maintained on proof of the cutting of trees on these lots, and on the plea of not guilty, the action can be maintained, it was to stand for trial. If not, it was to be dismissed.

The case was argued in writing, by *J. A. Lowell*, for the State, and by *Mellen*, for the defendant.

For the State, it was said, that the question presented for the decision of the Court, was this; that as the land reserved had not vested in those for whose use it was intended, because not yet *in esse*, in whom was the title vested during the period between the time of the grant, and the coming into existence of the person or corporation for whose benefit the reservation was made? It was argued, that by the separation act, *Maine* became entitled to all the rights and powers before existing in *Massachusetts;* that the State held the reserved land, either as part of the public domain, or was invested with it in trust for those for whom the benefit thereof was intended, by virtue of her sovereignty; that such was the view of the legislature in passing the *stat.* 1831, *c.* 510, *sec.* 9, for the sale and settlement of public lands, directing the land agent to take care of the lots reserved for public uses, and preserve them from trespassers; and that this act was constitutional. But that if the fee was in the proprietors, or in *Massachusetts*, *Maine* was in possession of the reserved lots, and could maintain trespass against strangers to the title; and that the defendant, being a mere trespasser, without right or title, cannot take advantage of a want of title in the State. *Shapleigh* v. *Pillsbury*, 1 *Greenl.* 289; *Little* v. *Palister*, 3 *Greenl.* 6; *Taylor* v. *Townsend*, 8 *Mass. R.* 411; *Cutts* v. *Spring*, 15 *Mass. R.* 135; *Read* v. *Davis*, 4 *Pick.* 216; *Davis* v. *Mason*, *ib.* 156; *Campbell* v. *Arnold*, 1 *Johns. R.* 511; *Jackson* v. *Haven*, 2 *Johns. R.* 22; *Stuyvesant* v. *Thompson*, 9 *Johns. R.* 61; *Wickham* v. *Freeman*, 12 *Johns. R.* 182.

For the defendant, it was contended, that unless the State had title, the action could not be maintained, for these were mere wild lands; that the act of 1831, applied only to lands never granted by the State, and had no relevancy to this case; that *Maine* had no power over lands granted by *Massachusetts* before the separation; that the title to the whole township, including these lots, vested by the grant in the proprietors, where it still remains, or if not, in *Massachusetts* and not in *Maine*. The action therefore cannot be maintained. *Rice* v. *Osgood*, 9 *Mass. R.* 38; *Inhabitants of Porter* v. *Griswold*, 6 *Mass. R.* 430; 3 *Dane*, *c.* 76, *art.* 10, *sec.* 20; *Humphrey* v. *Whiting*, 3 *Pick.* 158.

The opinion of the Court was drawn up by

EMERY J. — One of the first objects of forming our State Government, was for providing security and order throughout the territory comprising the State. We were a part of the Commonwealth till the act of separation, which has become a part of our constitution. By that we may be aided in coming to a conclusion as to the merits of the present action.

By the act of separation, and the adoption of the constitution, we have succeeded to all the sovereignty of the Commonwealth of *Massachusetts*, for the regulation of the great subjects of State Rights. Our title to our portion of the public lands is the same as hers. Our jurisdiction over the territory is complete. Redress for injuries to those lands is to be sought in our Courts. But the principles of law as to individual and corporate rights are to govern our decision. Where the State has no right or title against individuals or corporations, but a mere despotic interference, it is not to be favored. But when it employs its power for the preservation of property, to take which, there is no person in existence, though it is not considered as passing by escheat to the government, it may well enough be considered as entitled to the possession against mere strangers and trespassers. It is not by this construction, intended, that the State becomes proprietor absolutely, and so authorized to defeat the terms of the grant made by *Massachusetts;* but to maintain them, for the security of those, who may be entitled to the benefit. When the first minister shall be settled on the territory, he would have a right to enter on the lot reserved to him, and as pastor of the first parish in the town, would become possessed of the lot reserved for the ministry, but for the *stat. c.* 254, of *Feb.* 12, 1824, which vests it in the inhabitants of the town, and not in a particular parish, and the town will be entitled to the management of the school land, in whom the fee is vested by that statute, for the use and support of school funds therein forever.

For certain purposes, proprietors who have granted land, as in the case *Proprietors of Shapleigh* v. *Pillsbury*, were held entitled to maintain an action against a trespasser while the fee was in abeyance.

In cases where reservations are made for charitable uses, and the beneficiaries are not in existence, we hold it within the legitimate

exercise of sovereignty, for the State to take possession, and preserve the property for the benefit of its citizens, for those charitable purposes intended.

At the end of the first section of the act of 9th *Nov.* 1786, granting the lottery for the sale of fifty townships, of which No. 18 is a part, it is provided, that there be reserved out of each township four lots of 320 acres each, for public uses; to wit, one for the use of a public grammar school forever, one for the use of the ministry, one for the first settled minister, and one for the benefit of public education in general, as the General Court shall hereafter direct. The additional act of *June 20th*, 1788, was passed for the accommodation of some of the proprietors of the prize lots drawn in that lottery, who had drawn or were entitled to prize lots, equal to the contents of a township. By that act those persons were entitled to receive a deed of the same within and upon the borders of the tract appropriated to the lottery, *reserving however the lots appropriated to public uses in such township.*

The lot reserved for the benefit of public education in general, as the General Court shall hereafter direct, necessarily falls within the direct power of the State. And the other reservations are so intimately connected with the subject of education, for the most enlarged charity, that we apprehend the *stat.* of *March* 28, 1831, *c.* 510, *s.* 7, 9, indicate the just resolution of the State to preserve the property for the charity to be promoted.

We are satisfied, therefore, that upon the plea of not guilty and proof of any trespass committed, the action can rightfully be maintained *by the State, inasmuch as the township has not been incorporated as a town or plantation.*

Asa Grimes *vs.* Seth Turner *& al.*

Where a sum of money was paid by the debtor to the judgment creditor, while the execution was in the hands of an officer, and directed to be allowed thereon but was not indorsed; and the debtor was afterwards arrested on the execution, and gave bond in double the amount of the whole execution and officer's fees; in ascertaining the amount due in a suit upon the bond, the sum thus paid, is to be regarded as a payment made at the time it was received.

The attorney in the original suit, having a lien for his costs which were included in the amount for which the bond was given, may receive payment of the debtor after the giving of the bond, and give a valid discharge for the amount.

Where there has been a payment and acceptance of the full amount equitably due on the bond, before a suit was commenced thereon for the penalty, the action cannot be maintained.

The case was submitted upon a statement of facts agreed by the parties, from which it appears, that the action was debt on a bond in the usual form of those given upon arrest on execution, to procure release therefrom, dated *December* 15, 1835, in the penal sum of $341,20. An officer, having in his hands an execution in favor of the plaintiff against *Seth Turner*, dated *Sept.* 15, 1835, issued on a judgment recovered at the *Sept. Term*, of the Court of Common Pleas, 1834, arrested the defendant thereon *December* 15, 1835, and released him on his giving the bond in suit. This was the third execution, stating on its face that execution was to be done for $162,44, and the officer charged dollarage on that sum, and made his fees amount to $7,74. The penalty of the bond was said to be for double the two last sums. The statement of facts shows, that "it is admitted, that prior to the arrest of *Turner*, the plaintiff admitted to the officer having the execution, that he had received fifty dollars of *Turner* upon the execution, which he ordered the officer to allow thereon, and it is agreed to be the same fifty dollars referred to by the parties in their agreement, dated *Sept.* 13, 1834." At the close of that agreement are these words, "if it hereafter appears, that said *Turner* has paid *Moses Rines* fifty dollars for said *Grimes*, this shall not be a discharge of said *Turner's* claims on said *Grimes* for said fifty dollars." It was also admitted, that *Turner* paid *G. M. Chase*, the Attorney for

the plaintiff in the former suit, thirty-five dollars, *Feb.* 21, 1837. The costs of that suit, were $35,94. *May* 15, 1836, the plaintiff assigned the demand to *B. F. Waite*, and *Sept.* 26, 1836, *Turner* paid *Waite* $100, and *Dec.* 26, 1836, the further sum of $10. The time when this suit was commenced does not appear. The plaintiff claims that the fifty dollars paid by said *Turner* prior to the execution of the bond shall not be allowed on the execution and the bond, as against *Waite*, the assignee. If that sum is to be allowed, judgment is to be rendered for the defendants, unless in the opinion of the Court, the plaintiff shall be entitled to judgment against the principal for that sum. If the fifty dollars are not to be allowed, then judgment is to be for the plaintiff for that amount, interest and costs.

Chase, for the plaintiff, argued:—

1. The confession of the plaintiff that he had received the fifty dollars, taken in connexion with the other facts in the case, is only to be considered as his opinion of the legal effect of the contract, and will not control it. *Boston Hat Manufactory* v. *Messinger*, 2 *Pick.* 223.

2. Were this an action on the judgment, the defendant could not prevail. He could only plead it as accord and satisfaction. Here was accord, but no satisfaction. 2 *Stark. Ev.* 25; *Saund. Pl. & Ev.* 28.

3. This action is founded on an entirely different cause of action from the one sought to be affected by the agreement. The only question here is, whether the covenants have been kept.

4. The defendants are estopped to deny the consideration of the deed or bond. There has been no failure of consideration, and the circumstances have not altered, and no mistake is shown in giving the bond.

5. The true issue between the parties is, have the defendants kept and performed the conditions of the writing obligatory declared on? They cannot introduce parol evidence to vary or contradict the bond.

6. *Waite*, the assignee and party in interest, was ignorant of any agreement about the fifty dollars at the time of the assignment, and therefore is entitled to all legal objections to the agreement as affecting the bond.

Bradbury, for the defendants, argued, that the admissions of *Grimes*, made long before the assignment, were as strong evidence of payment, as if he had continued the owner of the demand. He could assign to *Waite* only the sum equitably due. If this then was a payment on the execution, it is a payment on the bond. The bond was not taken under the statute, being for more than double the amount due on the execution. Judgment can be rendered only for the amount equitably due, and that can be ascertained but by finding the amount due, if any, on the execution. The agreement to allow this on the execution is clear. The fact is sufficient, whatever his opinion of the law may be. *Clapp* v. *Cofran*, 7 *Mass. R.* 98.

The opinion of the Court was by

WESTON C. J. — The arrest, commitment and bond were the means, afforded by law, to enable the creditor to coerce the payment of his debt. The execution sets forth the duty of the officer and the liability of the debtor. The officer is to cause the amount to be paid and satisfied to the creditor. The latter had an undoubted right to receive it, at the hands of the debtor; and if he had done so, and had notified the officer accordingly, his precept would not have justified him in arresting the body of the debtor, for the amount originally due on the execution, whatever rights he might have had for his own fees; for he is to take the body, for the want of goods to satisfy the creditor. And if the creditor has received a partial payment, execution remains to be done only for the balance, with the officer's fees.

The case finds, that while the execution was in the hands of the officer, and before the arrest of the debtor, the execution creditor admitted, that he had received of the debtor fifty dollars on the execution, and ordered the officer to allow the same thereon. This was prior to the assignment to *Waite*, and while *Grimes* was the real party in interest. The admission was then full evidence of the fact; and the officer was bound to take the direction given him. *Hatch* v. *Dennis*, 1 *Fairf.* 244.

It can make no difference how this sum was paid. There is reason to believe that *Grimes* allowed it, on account of a previous payment of the same amount by *Turner*. The former agreement,

touching that payment, was for the purpose of showing, that the fifty dollars were not adjusted and allowed in lessening the judgment, as doubtless would have been done, if *Grimes* had been satisfied, that such a payment had been made. The allowance on the execution was not in pursuance of that agreement, but in consequence of the subsequent positive acceptance by *Grimes*, of that payment, when assured that it had been made, as so much paid on the execution. Most extraordinary would it be, if that arrangement, dictated by the most obvious principles of justice, is to be defeated by the subsequent proceedings of the officer. He should have arrested the debtor for the balance, and the bond should have been taken accordingly. That is the derivative, based upon the amount, for which the debtor is imprisoned, and the sureties are answerable only for the debt due, cost and interest. In our judgment then, the payment of the fifty dollars, made to the creditor, should be allowed.

As to the question, whether the plaintiff may not have judgment against the principal, it appears to us, that there had been an acceptance of all, that was equitably due, prior to the suit.

In the assignment to *Waite*, provision is made to secure the cost, which belonged to the attorney, *Mr. Chase*. Thirty-five dollars, being its amount, within a fraction, were paid by *Turner*, to the acceptance of *Chase*, although more than nine months from the date of the bond. It was competent for him to adjust this part of the claim; and of this *Waite* had no right to complain. The sum, for which execution was to be done, was $170,60, including the fees of the officer. Deducting therefrom the fifty dollars paid to *Grimes*, and the thirty-five dollars paid to *Chase*, there would remain due to *Waite*, $85,60, which with interest thereon, he was entitled to receive. Within eight days after the time, when by the condition of the bond the principal should have surrendered himself, *Waite* received from him a larger sum, than the balance and interest; and three months afterwards, an additional sum of ten dollars.

The bond, having been given for more than double the amount, for which the debtor was lawfully imprisoned, can be good, if at all, only as a bond at common law, and as such is subject to chancery, and the plaintiff in interest had, prior to the suit, accepted all

that he would be entitled to in equity and good conscience. It was in the nature of a payment and acceptance, *post diem*, of all which the plaintiff had any equitable right to claim, and must therefore in our judgment be taken to have been received in satisfaction.

Judgment for defendants.

JOSHUA A. LOWELL *vs.* WILLIAM ROBINSON *& al.*

If the line of land conveyed be described as commencing at a stake by the side of a mill pond, which pond is caused by a dam across a fresh water river overflowing its banks in the spring but admitting all the water within the channel of the river in the summer, and from thence running from the pond and returning to another stake "by the side of the river or mill pond," and running "by the said pond to the first mentioned bounds;" the grant extends to the thread of the river.

And if the description be "running by the side of the mill pond," the land overflowed in the spring passes by the grant.

Parol evidence is inadmissible in either case to show that the parties intended to limit the grant to the margin of the water as it overflowed the land in the spring.

TRESPASS *quare clausum*, for cutting and taking away the plaintiff's grass. The facts in relation to the title of the respective parties by deed appear in the opinion of the Court. *Jones* entered into possession within twenty years under his mortgage, by judgment of Court, and foreclosed the same, and the defendant had the title of *Jones*. *Nathan Hanscomb*, under whom both parties claimed, was released by the plaintiff, and testified, that he never claimed the meadow lot under *Scott*, his grantor of certain lands, and, as the defendant contended, of the meadow, but by possession only, and that he had been in possession by cutting the grass annually for thirty-nine years prior to his deed to the plaintiff, and had fenced this and other land of his from the road. The case states, that it was proved by the plaintiff, and not objected to by the defendants, that when the lot described in the deed from *George*

Scott to said *Nathan Hanscomb*, was laid out in 1797 by the committee of lot layers appointed by the proprietors of the township, they were requested by said *Hanscomb* to include the meadow with the upland, and that the committee then refused to include the meadow, and made their bounds at the monuments by the side of the mill pond, as described in his deed from *George Scott;* and it was also proved by certified copies from the proprietors' records of 1770, that the first division rights were to be laid out exclusive of marsh, and that the fresh meadows in the township were laid out in separate and distinct lots by themselves in 1800.

At the trial, before SHEPLEY J. the plaintiff requested the Judge to instruct the jury, that the plaintiff and those under whom he claimed, having been in quiet possession of the meadow for forty years, claiming it as their own and mowing it annually, may maintain trespass against any person, even the former rightful owner of the soil; and that the farm occupied by the defendants, being bounded in front by fixed and durable monuments, to wit, the stake by the side of the mill pond near the bridge on the meadow brook, and an ash tree by the side of the mill pond, and running from one of those monuments by the side of the mill pond to the other, they cannot hold beyond the monuments and the side of the mill pond as it is during the usual spring freshets. The Judge instructed the jury, that the plaintiff had no title to the meadow, because it had been previously conveyed to *Jones*, and could not recover for the grass cut thereon; but if there had been a cutting proved on the land purchased of *Ellesmere*, he might recover therefor. The jury returned a verdict for the plaintiff, assessing the damages at four dollars.

If the instructions were correct, judgment was to be rendered on the verdict; and if not, a new trial was to be granted.

The case was argued in writing.

Lowell, pro se, admitted that by the common law, the grantee of land, bounded by or fronting on fresh water rivers, holds to the thread of the river. *Dav. Rep.* 149; 4 *Burr.* 2162; *Kent's Com.* 411 to 430; *Angell on Water Courses*, 3 to 10. The same principle is decided or recognized as the law of this country in *King* v. *King*, 7 *Mass. R.* 496; *Lunt* v. *Holland*, 14 *Mass. R.* 149; *Hatch* v. *Dwight*, 17 *Mass. R.* 289; *Ingraham* v. *Wil-*

kinson, 4 *Pick.* 268; *Morrison* v. *Keen*, 3 *Greenl.* 474; *Tyler* v. *Wilkinson*, 4 *Mason*, 397; *Purinton* v. *Sedgley*, 4 *Greenl.* 283; *Claremont* v. *Carlton*, 2 *N. H. Rep.* 371; 5 *Cowen*, 216; 6 *Cowen*, 518, and note on 536; 5 *Wend.* 423. The limitation of the principle is equally clear, that where the land granted is described as bounded by fixed and permanent monuments, without the edge or margin of the river, intended to bound the length of the lot as extending to or from the river, and not the width of the lot on the river, the grantee cannot hold beyond the monuments. This limitation or exception to the general rule, is found in most of the cases cited. He commented on these cases, and cited in addition, *Hargrave's Law Tracts*, 5, 8, 9; and *Waterman* v. *Johnson*, 13 *Pick.* 261. He contended, that this case fell within the limitation of the rule; and that this construction was aided by the deed of *Scott* to *Hanscomb*. And he urged, that if it did not, there was such latent ambiguity in the language, that under the case of *Waterman* v. *Johnson*, already cited, it might be explained by parol; and that thereby it appeared, that the meadow was not included in the description in the deeds. He also contended, that he was entitled to hold by an adverse possession of more than twenty years.

Mellen, for the defendants, argued, that the ruling of the Judge was correct. As the mortgage deed was prior to any title of the plaintiff, if the meadow was conveyed thereby, it is now the property of the defendants. As the course in the deed is "by the said pond to the first mentioned bound," the words "at a stake by the side of the mill pond," or *to* such stake, are wholly immaterial, unless to determine the extent upon the pond. The language used in the mortgage deed passes the land to the thread of the river, and of course includes the meadow. The cases cited by the plaintiff fully establish this principle. The land conveyed by the deed to *Jones* is bounded on the pond; and a mill pond, as this was, is a river or stream stopped or raised by a mill dam. The overflowing in the spring neither extends the rights of the owner on one side, nor restricts those of the owner on the other. The *claim* set up by *Hanscomb* can give him no title, nor can it alter the legal construction of the deed. Being the mortgagor, he can gain no title by possession against the mortgagee before foreclosure, and

twenty years have not elapsed since the entry. The cutting of the grass, however, on uninclosed land cannot give a right thereby. The deed from *Scott* to *Hanscomb* is described in some degree differently from the mortgage, but whether the same land is conveyed by both or not, is wholly immaterial. The meadow is included in the mortgage, and the plaintiff has no title, but by a subsequent conveyance of the same land.

The opinion of the Court was drawn up by

SHEPLEY J. — It is too well settled to admit of doubt, that when land is bounded upon a river or stream, the grantee will hold to the thread of the stream. Nor is there any doubt that land may be so bounded upon the bank, or by monuments standing near but without the edge of the stream, as to exclude the stream from the conveyance. When the monument is stated to stand by the river or by the edge of the river, the same idea is communicated as if it had stated, that the line of boundary commenced by the river or by the edge of the river, instead of at the monument thus standing, unless from other parts of the conveyance it should clearly appear, that such was not the intention.

The case finds, that the premises in controversy are meadow lands flowed during the spring of the year by a mill dam across the river below, but not so flowed during the summer season.

Both parties derive their title from *Nathan Hanscomb*, the defendants having the elder title; and the question is, whether the premises had been conveyed by him before he conveyed them to the plaintiff. And that is to be determined by the construction put upon the deeds, unless the language is so ambiguous as to authorize the aid of parol testimony. The deed from *Hanscomb* to *Jones*, under whom the defendants claim, begins the line of boundary at meadow brook, "at a stake *by the side* of the mill pond," the other lines being described, it returns "to a stake *by the side* of the river or mill pond, thence *by the said pond* to the first mentioned bounds."

It will be perceived, that the line in effect commences by the side of the mill pond, returns to the side of it, and runs by it from one point to the other. It is said, that this deed may be explained by the deed from *Scott* to *Hanscomb* of the same lands. The line

as described in that deed begins at meadow brook, "at a stake *by the side* of the pond, and the other parts being described, it returns "to an ash tree *by the side* of the mill pond, then *by the side* of the mill pond to the first mentioned bounds." The only difference perceived where the line is adjoining the pond is, that one deed describes it as running *by the pond* and the other *by the side* of the pond; and the difference in the words, does not communicate any difference of intention. In neither is the line disjoined or separated from the pond; and such language when used with reference to a river or stream, not flowed into a pond, would not admit of doubt.

In the case of *Hathorne* v. *Stinson*, 3 *Fairf.* 183, it was decided by this Court, that a lot of land bounded upon a pond artificially raised by the flowing of a stream by a mill dam, was not limited to the margin of the pond, but included the land thus flowed. The same opinion is expressed in the case of *Waterman* v. *Johnson*, 13 *Pick.* 261, with a possible qualification, that the pond may have acquired by becoming permanent another well defined boundary. The pond named in these deeds cannot be regarded as having acquired a permanent boundary, for the case finds, that it yearly ceases to exist, the water being confined within the banks of the river.

As the land is clearly bounded by the mill pond, a well established rule of construction carries it to the centre of the stream thus flowed; and parol testimony cannot be admitted for any other purpose, than to make known the kind of pond described as a mill pond. For this purpose it may be admitted, for if it had been a natural pond not artificially raised by the flowing of a stream, the title would have been limited by the margin of the water, as decided in the case of *Bradley* v. *Rice*, 13 *Maine R.* 198.

The facts do not show such a disseizin of this close committed and continued against the owner as to authorize an action of trespass to be maintained against him.

Judgment on the verdict.

PETER BEEDY *vs.* EBENEZER REDING.

In an action of trover for a quantity of wood, where it was proved, that the minor sons of the defendant, being members of his family, at three several times hauled away the plaintiff's wood, and the jury found the defendant guilty; *it was held*, that the jury were justified in inferring that it was done with the defendant's knowledge, if it had not his approbation, and that there was no cause for setting aside the verdict.

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

The whole bill of exceptions follows. "This action is trover and conversion of twelve cords of wood, tried on the general issue. The plaintiff, to prove the issue on his part, introduced several depositions, tending to show he purchased a lot of wood; and that the defendant's boys were seen with his team hauling some of it away. The defendant's counsel contended, there was no evidence that he directed the boys to get the wood, or knew of it, or had any benefit therefrom, and that he was not liable in law for the torts and trespasses of his minor children, unless they acted under his direction, or with his knowledge and approbation, or that he had the benefit thereof. But the Judge did not rule the law to be so, nor so instruct the jury; they returned a verdict for the plaintiff. The writ, depositions, and all the papers in the case *may be referred to by either party* the same as *if made a part* of this bill of exceptions. To the Judge's not ruling the law as defendant's counsel stated it to be, and in not so instructing the jury, the defendant excepts, and requests the same may be allowed and signed."

As the depositions and other papers were not made a part of the bill of exceptions, they were not copied, and are unknown to the Reporter, and could not come with propriety before the Court, as facts influencing the decision.

Chase & Fuller, for the defendant, argued, 1. Minor children that transact business for a man, are in this respect his servants. 1 *Bl. Com.* 430. 2. If the defendant is liable for the torts of his minors, it is by force of the relation of master and servant, and his liability must be determined upon the common principles growing out of the relation of master and servant. 3. If the trespass is not done in the course of his master's business, the master is not liable. 1

East, 106; *Foster* v. *Essex Bank*, 17 *Mass. R.* 479; 1 *Swift's Dig.* 68; 2 *Kent's Com.* 209; 1 *Bl. Com.* 429. No master is chargeable with the acts of his servant, except when he acts in execution of the authority given by his master. 1 *Salk. R.* 282.

N. Abbott, for the plaintiff, contended, that the father was liable for all acts of his children, tortious or otherwise, done while in his employment and under his direction. *Reeves' Dom. Rel.* 72; *Kent's Com.* 189; 3 *Mass. R.* 364; 17 *Mass. R.* 579; 1 *Campb.* 127; 1 *Pick.* 66; 1 *Strange*, 653; *Paley on Agency*, 229, 231. The principles contended for by the defendant's counsel, were inapplicable to the facts of the case, and ought not to have been given to the jury as the law of this case. The minors were seen with the defendant's team repeatedly hauling away the plaintiff's wood, and the jury had good reason to infer, that it was done with the assent, and even direction of their father. The principles contended for were too broad, and would have taken from the jury the right to judge from the acts of parent and children, and the Judge might well think they were irrelevant, and neglect to notice this part of the argument in his charge.

The opinion of the Court was drawn up by

Weston C. J. — The case does not state the instructions actually given by the presiding Judge to the jury. It does not appear, that he was requested by the counsel for the defendant, to instruct them according to his views of the law. All that does appear is, that the counsel took certain legal positions, in relation to which the Judge was silent; for it is not stated that he overruled them. But aside from the manner in which the case is presented, upon examining the evidence, we are not satisfied that the verdict ought to be disturbed. For any thing which appears, the jury negatived the assumptions, upon which the defence was based. The minor sons of the defendant, being at the time members of his family, with the defendant's team, at three several times, hauled away the plaintiff's wood. This could hardly have been done, without the defendant's knowledge, if it had not his approbation. It was his duty to have restrained them from trespassing on his neighbor's property. *Qui non prohibet, cum prohibere possit, jubet.* And this maxim may be applied, with great propriety to minor children,

residing with, and under the control of their father. If he had caused them to carry the wood back, when the fact came to his knowledge, if he did not know it at the time, he would have done his duty to his children and to his neighbor. Considering the relation in which he stood, and the repeated use of his team in getting the wood, it would not be easy otherwise for him to escape legal liability, upon a just view of the facts.

Exceptions overruled.

NATHANIEL LAMB *vs.* JOHN BARNARD.

Where an order in writing was given to furnish men in the wilderness with provisions, and where at the time the order was delivered, the men had no means of cooking provisions, and board was furnished for the men instead of provisions; *it was held*, that although the order was to deliver the materials for boarding the men and not to board them, still it was admissible in evidence with other testimony, to show that the defendant had waived a strict compliance with the order, and had accepted board instead of provisions.

So too it was held, that a paper, on which was the claim for the board, and also certain figures and writing of the defendant's clerk and of the defendant himself, was admissible with other evidence to prove the defendant's liability to pay for the board.

The acts of an authorized agent in the transaction of business, are the acts of his principal, and may be proved in the same manner.

ASSUMPSIT on an account annexed to the writ. One item in the account was for "boarding men twelve weeks and three days, $37,50 — Keeping six oxen one night, $1,50 — Keeping horse four nights, $1,25." The defendant filed an account in set-off one item of which was "pair oxen pr agreement, $100;" another, "use of oxen, $40." The plaintiff with much other evidence, offered a writing signed by the defendant, and marked B, of which the following is a copy. "*Mr. Nathaniel Lamb. Calais, 4 Dec.* 1826. Sir — If *Mr. Marhar* should want any provisions until they can get up supplies, you will please oblige him. I give him his supplies which are ready, and I will see you have them or may del. the bearer. *John Barnard.*"

This was objected to as inadmissible, but admitted. One of *Marhar's* men, *Levi Small*, testified, that while he was at work, he received that order from *Barnard*, to get supplies for him of *Lamb* for *Marhar's* men, until the teams should come up. They were then at *Grand Lake Stream*, thirty or forty miles from *Calais*. *Marhar* was then "carrying on a team for *John Barnard*." Witness carried the order to *Lamb*, who boarded him and the other men employed by *Marhar* in lumbering; that they had then no "cooking tools or provisions;" and *Lamb* boarded them on the strength of the order from *Barnard*. The plaintiff also offered another writing of which a copy follows.

"1826, *Dec.* *John Barnard* to *Nathaniel Lamb*, *Dr.*

	To boarding men twelve weeks and three days, at 18*s* pr week, - - - -	$37,50
	Six oxen one night, - - -	1,50
	To keeping horse four nights, - - -	1,25
		$40,25

13,85	1385 ft. clear boards,	*a* 11,	$15,23	
15,85	112 " ref. clear,	6½	0,56	
15,23	260 " mer.	8	2,08	
			$17,87	

Levi Small pr Marhar."

It was proved, that "the figures purporting to be minutes of lumber," were those of a clerk of defendant's, and that the words, "*Levi Small pr Marhar*," were in the handwriting of the defendant. This was objected to by the defendant, but admitted. The other testimony will be understood from the opinion of the Court. SHEPLEY J. presiding at the trial, instructed the jury, that although the true legal construction of the order, marked B, would not authorize the supply of any thing more than uncooked materials, from which the men might obtain a subsistence when considered by itself, yet they were at liberty to examine the testimony in the case, and consider the circumstances under which it was given in connection with the order, and the condition of the men in the wilderness without cooking utensils, and that if they believed it was the intention of the defendant to give effectual support to *Marhar's* men until their supplies were sent in to them, and that the only

mode in which it could be afforded, was by boarding them and their cattle, or if they should come to the conclusion, that the defendant made the memorandum on the paper with a knowledge of the circumstances, and with a design to admit that the boarding was under the authority given to *Small*, that would amount to a waiver of all objection to the mode of supply; and that they might find that the defendant was chargeable with those items, and if they did not so find, they should disallow them. That if they were satisfied that the paper marked A had been in the hands of the clerk of the defendant, and that the memorandums on it respecting the boards were made by him, they might consider whether they were so made with a design to admit them as proper charges against the defendant, and might also consider, whether the defendant after such entry by his clerk made the memorandum in his own handwriting, knowing the purpose of the entry by the clerk; or whether such entries were made by defendant's clerk and himself, only as taking a note of the plaintiff's claim, and not with a design to allow them; and that if they found the entries for the purpose first stated, they would allow those items if charged, and if only for the latter purpose, they would disallow them. If the rulings or the instructions were erroneous, the verdict found for the plaintiff was to be set aside and a new trial granted. There was also a motion to set aside the verdict as against evidence.

J. Granger, for the defendant, contended:—

1. The paper marked B was not admissible in evidence, as it had no tendency to prove the facts in issue. The paper offered and admitted tends to prove only, that the defendant made a proposition to pay in kind such provisions as the plaintiff might lend to *Marhar.* Provisions mean the raw materials and not board. *Walker* v. *Leighton*, 11 *Mass. R.* 140; *Robbins* v. *Otis*, 1 *Pick.* 368.

2. The paper marked A was improperly admitted. It cannot be upon the principle of the admission of an authorized agent, for there is no evidence of the circumstances necessary to make the declarations of an agent evidence. 2 *Stark. Ev.* 60; *Leeds* v. *Mar. Ins. Co.* 2 *Wheat.* 380; *Haven* v. *Brown*, 7 *Greenl.* 421; 2 *Harri. Dig.* 1039, 1114; 1 *Stark. Ev.* 46; 4 *Taunt.* 565. The declarations of an agent, oral or written, are not received as

admissions, but as part of the *res gesta*, 2 *Wheat.* 380 ; 9 *Peters*, 682 ; *Haven* v. *Brown*, 7 *Greenl.* 421.

3. The instructions to the jury were erroneous. The paper B is a guaranty or collateral undertaking, and if the plaintiff accepted it, he should have given seasonable notice thereof to the defendant, and of the amount furnished. *Copeland* v. *Wadleigh*, 7 *Greenl.* 141 ; *Norton* v. *Eastman*, 4 *Greenl.* 521 ; 3 *Conn. R.* 484 ; 2 *Stark. Ev.* 649. And there should have been a specific request to pay. *Babcock* v. *Bryant*, 12 *Pick.* 133 ; *Greenwood* v. *Curtis*, 6 *Mass. R.* 358. The paper is unambiguous in its terms, and the intention of the signer should be gathered from the instrument alone. 3 *Stark. Ev.* 1008 ; *Goddard* v. *Cutts*, 2 *Fairf.* 440 ; *Haven* v. *Brown*, 7 *Greenl.* 423.

Fuller, for the plaintiff, remarked, that the objection seemed rather to be, that the jury were permitted to draw inferences from the facts proved, than that the evidence was in itself inadmissible. The construction given by the Court to the order is admitted to be correct, but it is said it should not go to the jury because it did not prove the issue. But there were other important facts to go with it to the jury, and to show that it never could have been the intention of *Barnard*, that the men should be turned back without support, and also to show *Barnard's* ratification and assent afterwards.

The paper A was properly admitted. 2 *Saund. Pl. & Ev.* 246 ; 2 *Stark. Ev.* 54 ; *Union Bank* v. *Knapp*, 3 *Pick.* 96. The jury were fully warranted in finding as they did on the single ground, that the defendant waived a strict compliance with the order, and accepted what was more beneficial to him, board for the men instead of raw provisions which they could not cook.

The opinion of the Court was by

SHEPLEY J. — To prove his accouut the plaintiff was allowed to introduce an order addressed to him and signed by the defendant, requesting him to oblige one *Marhar* by furnishing him with provisions, if he should be in want. The objection to it is, that it was irrelevant, having no tendency to prove the plaintiff's claim. If it could properly have any influence, it was legal testimony ; and that it could be legally used for certain purposes will more fully appear, when the instructions to the jury are under consideration.

Another objection is to the admission of an account, containing a claim for boarding the men of *Marhar*, to whom by the order he was authorized to furnish provisions, and also a claim for a small quantity of lumber, and having upon its margin figures relating to the lumber, made by one who had been the defendant's clerk, and in the handwriting of the defendant the words "*Levi Small* per *Marhar*." The ground upon which it was admitted was, that the design and object of making these memorandums in the margin of the account was proper for the consideration of the jury. They proved, that the paper had been in the possession of the defendant and the subject of consideration. *Small* was proved to have been the person, who received the order from the defendant, who by marking his and *Marhar's* names upon the paper containing the charge for boarding, authorized an inquiry before the jury as to the purpose for which it was done and what connexion might be inferred from it between the order and the manner of executing it, by boarding the men instead of a more literal execution by furnishing the provisions for their subsistence. And even this would seem to be sufficient reason for precluding the Court from withholding either of the papers from the consideration of the jury.

It is insisted, that the memorandum of the clerk was not evidence, because the declarations or admissions of an agent do not bind his principal. But this memorandum was not of that character, and if operative at all, it was as an act of an authorized agent in the transaction of the business entrusted to him, and such acts are the acts of the principal and may be proved in like manner. And by the instructions the jury were not authorized to find the items of account, to which the clerk's memorandum applied, for the plaintiff, unless they found it to have been made while he was acting as defendant's clerk, and with a design to admit them as proper charges, and that it was known to the defendant to have been so made, when he made the memorandum on the same paper.

The legal construction of the order was undoubtedly to be determined by the Court, and the construction, which was given to it, is not questioned; but complaint is made, that while the jury were informed, that it did not in terms authorize the plaintiff to board the men, they might consider the circumstances under which it was given; the condition of the men in the wilderness, without cooking utensils, and that if they believed that it was the intention

of the defendant to give effectual support to *Marhar's* men, and that the only mode in which it could be afforded was by boarding them, or that the defendant, knowing these circumstances, made the memorandum on the paper with a design to admit, that the boarding was under the authority of the order given to *Small*, they might find for the plaintiff those items of the account.

That it was competent for the jury to find, that the memorandum was made by the defendant with a full knowledge of all the facts and with a design to waive all objection, or to admit the boarding to be an execution of the order, can admit of little doubt; and that would fully authorize the admission of the order and account, and the instructions, so far as they related to the waiver by the defendant of a strict compliance with the terms of the order. If the first clause of these instructions had authorized the jury to consider the directions given by the order as changed, or varied by the parol testimony, they would have been erroneous, and would have contradicted the instructions already given as to the meaning of the order. The instructions did not authorize by connecting the parol testimony a different conclusion to be drawn as to the meaning of the order, but in reference to the execution or performance of the request, they did authorize the inquiry whether a literal performance, or one accommodated to the necessities of the case was to be expected.

What shall be regarded as performance of a written contract or request, is of necessity a matter of fact under proper instructions, and there is no departure from the rule, which does not authorize parol testimony to vary or contradict a written contract, when applied to the fact of its having or not having been executed. It is not in human foresight to provide against all possible contingencies, which prevent the exact and literal fulfilment of every written direction, when it is clearly given; and the force of circumstances must be allowed in some degree to enter into the inquiry, when the question is, not what the legal construction of a written paper is, but whether there has been such a performance as entitles a party to claim compensation, for what he has done under it.

There does not appear to be sufficient reason to authorize the verdict to be set aside under the motion for a new trial.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF HANCOCK, JULY TERM, 1839.

Mem. WESTON C. J. having been detained in the trial of jury causes in the county of *Washington*, was not present at the arguments in this county.

BUSHROD W. HINCKLEY *vs.* BLUEHILL GRANITE COMPANY.

The service of a writ upon *a manufacturing corporation*, by leaving an attested copy thereof and of the return thereon, with the *clerk of such manufacturing corporation*, thirty days before the day of the sitting of the Court, to which the same writ shall be returnable, is a good service.

THE defendants pleaded in abatement, that the service of the writ is insufficient in law, it being made, as appears by the return thereof, upon the clerk of said company, and not upon the president or other head officer thereof. To this the plaintiff demurred generally.

The case was argued in writing.

W. Abbott, for the plaintiff, said that it must be admitted, that the *Mass. stat. c.* 75, *sec.* 8, has not been re-enacted so as to embrace corporations generally, the terms, " or other body corporate," having been omitted in our *stat.* 1821, *c.* 114, *sec.* 7. The service of writs is and always has been regulated by statute in this State and in *Massachusetts*, and the legislatures of both States intended to provide for and regulate that subject by positive enact-

ment, and there is no evidence of any common law in this State, regulating the service of writs. The general practice has been to serve writs on corporations by summoning the clerk. If there be no common law existing on the subject, then if the doctrine contended for by the defendants be correct, there are a multitude of corporations who may set at defiance the laws; and the consequences may be, that all judgments rendered against corporations since 1820, where they have not appeared, are liable to be reversed by writ of error. The Court will hesitate before they come to a result so full of danger, and if it be necessary, will apply the maxim, *communis error facit jus. Kent* v. *Kent*, 3 *Mass. R.* 357. But it is contended, that the service is good under the general provisions of the *stat.* 1821, *c.* 59. The terms, "any persons," are broad enough to include such corporations as are not embraced in any of the statutes. A notice of fourteen days will be sufficient. *Bullard* v. *Nantucket Bank*, 5 *Mass. R.* 100. It may fairly be inferred from the statute of *March* 29, 1837, *c.* 289, that a service on the clerk is good. The principal object of the legislature in passing that act, was to have the proper officer on whom service might be made reside within the State.

Hobbs, for the defendants, argued: —

1. That the officer having served the writ by leaving an attested copy of it with his return thereon, with the clerk of the defendants, may be supposed to have intended to follow the direction of *stat.* 1821, *c.* 60, *sec.* 2. But this is not enough. It is only upon corporations authorized by law to receive tolls that such service and return is to be made. The defendants are a manufacturing corporation, and have no attachable franchise, or any other attachable right, privilege or immunity, as is contemplated by that section. At the time of the separation, the service of writs like the present, was regulated by *stat. c.* 75, *sec.* 8. That law was expressly repealed by the repealing act, *stat.* 1821, *c.* 180, and the eighth section was not re-enacted by our legislature in any of the acts upon the same subject matter. The service is not good therefore as a statute service.

2. It is not good at common law. By the common law, service on corporations must be on the president or principal officer of the institution. 1 *Tidd's Pr.* 116; 16 *Johns. R.* 6; *Angell & A.*

on Cor. 228, 232, 383. The common law remained in force in *Massachusetts* until the *stat. c.* 75, before referred to, passed in 1786, before which time a service, fourteen days before the return day, upon the president or other principal officer was the usual mode. The common law is now in force in this State. The service in this case does not conform to it, and is therefore insufficient and void.

The opinion of the Court was drawn up by

SHEPLEY J. — The defendants were incorporated by the act of 29th of *February*, 1836, for "working, manufacturing, vending, dealing in, and exporting granite," and with the like powers, duties, and liabilities of other similar corporations. The intention therefore must have been to class this corporate body among manufacturing corporations, and the service of process upon it must be such as is provided for on them.

The statute of *Massachusetts*, *c.* 75, § 8, provided, that "when any suit shall be commenced against any town or other body corporate a copy of the writ" "shall be left with the clerk of such town or with one or more principal inhabitants thereof, or with the clerk or some principal member of the body corporate." That act upon the revision of the statutes in this State was repealed. *c.* 180, 2 *Maine Laws*, 781. The revised statute, *c.* 59, § 6, provides for a service upon towns, parishes, and proprietors of common or undivided lands or other estate, but the words, "or other bodies corporate," were omitted. By the revised statutes, *c.* 60, § 1, provision is made for the attachment of the shares or interest of any person "in any turnpike, bridge, canal, *or other company*," and service is to be made by leaving an attested copy of the writ "with the clerk, treasurer, or cashier." And in the second section it is provided, that the franchise of "any turnpike, bridge, canal, or other company incorporated by law, with power *to receive toll*," "as well as all other corporate property, either real or personal, shall be liable to attachment on mesne process; and when such attachment shall be made, or other service of mesne process shall be made on any of the corporations *aforesaid*, the officer serving the same shall leave an attested copy of said process and his return

thereon with the clerk, treasurer, or some one of the directors of said corporation."

According to the grammatical and legal rules of construction, the word *aforesaid* would be regarded as referring to the class of corporations named in the section in which the word is found, and not to all those named in the first as well as second sections; and such should be the construction adopted by the Court, unless forced by the examination of other acts of legislation in *pari materia* to the conclusion, that a different construction was intended by the legislature, and must therefore be admitted.

Provision is made in *c.* 59, § 1, 2, for a service of writs upon *persons* or *defendants* in the suit, and it would be a somewhat forced construction, that would include bodies corporate under those words. And yet the legislature must have intended to provide in one of these modes for a service upon manufacturing corporations, or to make no provision for a service upon these and other classes of corporations.

Where *persons* have been prohibited from doing certain acts, the prohibition has been decided to include bodies corporate. *The People* v. *Utica Ins. Company*, 15 *Johns.* 358. Corporate bodies are said, by *Lord Coke*, to be included in the word *inhabitants*, in his exposition of the statute 22 *Hen.* 8, 2 *Inst.* 703. The like construction prevailed in *Rex* v. *Gardner*, *Cowp.* 83, where the words *inhabitants* and *occupiers* were held to include bodies corporate.

The enactments in *c.* 60, § 31, contemplate, that actions may be commenced against manufacturing corporations, and provide that an officer having a writ or execution may demand of the president, treasurer, or clerk of such corporation to "show the same officer sufficient personal estate to satisfy any judgment that may be rendered upon such writ, or to satisfy and pay the creditor the sums due upon such execution." The agent or other officer of such a corporation, having charge of its property, is required on request of an officer having a writ or execution against the same to deliver the names of the directors and clerk. *c.* 385, § 4.

The additional act respecting foreign attachments subjects bodies corporate, excepting counties, towns, and parishes, to be called upon by that process to account for goods of a debtor in their pos-

session; and provides for service being made upon them "as is or may be provided by law for the service of writs and processes in civil actions on such corporations." *c.* 442. The act of 29th of *March* 1837, *c.* 289, requires all corporations to keep the office of their clerk within the State, and that the clerk shall file a certificate of his being such in the office of the register of deeds in the county, where the corporation is established or where it operates. These enactments clearly indicate the sense of the legislature, that a mode of service had been provided by statute; and intimate that the mode of service was that provided in the first or second sections of *c.* 59. To give effect to the sense of the legislature thus expressed, that some mode of service had been provided, it may be necessary to admit one of the constructions before alluded to; and the former would seem to be more clearly indicated than the latter. It is believed, that a practical construction has prevailed since the revision of the statutes, that a service upon the clerk was good. And it was decided in *Rogers* v. *Goodwin*, 2 *Mass. R.* 475, that a practical construction, which had prevailed for a long number of years, "although if it were *res integra* difficult to maintain," was not to be shaken. Such a mode of service may also be regarded as legal by implication arising out of the provisions of the later statutes, which presuppose its existence. The service must be adjudged to be good.

JOHN EVELETH *& al. vs.* HENRY LITTLE *& als.*

A court of equity will not permit the use of a legal fiction to create a forfeiture; and therefore will not allow a forfeiture to be created by the date of the extent of an execution on land not according to the truth, and especially in favor of one at whose suggestion the erroneous date was made.

An officer may be permitted to amend his return of an extent of an execution on land, where no third party is adversely interested, during the pendency of a suit in which the title to the land is brought in question.

THIS was a bill in equity, brought against the judgment creditors who extended their execution against one *Blaisdell* on his land,

and against the officer who made the extent, by the purchasers of *Blaisdell's* right to redeem the land. All the important facts in the case, are abstracted by the Judge who drew up the opinion, and appear in it.

F. Allen & Hathaway in their argument for the plaintiffs — to show that the officer might amend his return according to the truth, where there has been no change of rights, cited *Buck* v. *Hardy*, 6 *Greenl.* 162; *Howard* v. *Turner*, *ib.* 106; *Means* v. *Osgood*, 7 *Greenl.* 146. And to show that if the amendment was not allowed, that there was not enough done on the eleventh to make such commencement of the extent as to have the after proceedings relate back to that day; and that even if there was, that all lien was lost by a delay of eighteen days; they cited *Allen* v. *Portland Stage Company*, 8 *Greenl.* 207; *Tate* v. *Anderson*, 9 *Mass. R.* 92; *Bott* v. *Burnell*, *ib.* 96; *Same parties*, 11 *Mass. R.* 163; *Waterhouse* v. *Waite*, 11 *Mass. R.* 207.

W. Abbott, in his argument for the defendants, contended, that enough was done on the eleventh to constitute a good commencement of an extent of the execution on the land; that the officer had power to adjourn; that the seizure was not lost by unreasonable delay; and that the whole proceedings relate back to the commencement. *Prescott* v. *Wright*, 6 *Mass. R.* 20; *Heywood* v. *Hildreth*, 9 *Mass. R.* 395; *Brown* v. *Maine Bank*, 11 *Mass. R.* 158; *Allen* v. *Portland Stage Company*, 8 *Greenl.* 207. The mistake in law by the plaintiffs, in supposing they had a year from the perfection of the extent in which to redeem instead of the commencement, is no good cause for the interference of a court of equity. 1 *Story's Eq.* 121, 123; 1 *Fonb. Eq. Book*, 1, *c.* 2, *sec.* 7, *note B.*

The opinion of the Court was drawn up by

Shepley J. — It appears from the bill, answer, and proofs, that one *Paul Blaisdell* on the eleventh day of *April*, 1834, was seized of a tract of land containing about thirty-five acres, on the western end of which was a granite quarry.

The respondents having an execution against him, placed it in the hands of an officer, who on that day caused appraisers to be selected and sworn to satisfy the execution by a levy upon the land;

and they with the officer entered upon and viewed some grass land upon the easterly end of said tract, and distant from the quarry, as the testimony states, from sixty to one hundred rods; and they then made up their minds as to the value per acre of the grass land viewed. For the purpose either of allowing the debtor to make payment, or the respondent to be present and select the land to be levied upon, there being a difference in the testimony as to the cause, an adjournment took place to the twenty-ninth of the same month, when the officer, appraisers, and one of the creditors went on to the same tract, the creditor taking them on to the granite quarry on the western end of the tract, which was then appraised and taken to satisfy the execution; the return was then made and signed, bearing date on the eleventh of *April*, and seizin was delivered to the creditor.

One of the plaintiffs was present and knew the proceedings on the twenty-ninth, and on that day took a conveyance of *Blaisdell's* right to redeem the quarry; and on the twenty-seventh day of *April*, 1835, tendered the amount of the debt with interest, to redeem the levy, which the creditors refused to receive, alleging, that the right of redemption had been forfeited by lapse of time. The bill is brought to redeem, and to have the respondents' title by the levy released.

Since the hearing, on petition of the officer to the Court of Common Pleas, he has been allowed to amend his return, and the amendment has been made, stating the appraisement to have been made, the extent completed, and seizin given on the adjournment to the twenty-ninth of *April*.

A motion having been submitted for leave to amend, the right to permit an amendment was argued at the hearing. There being no third party interested, the amendment is justified by the case of *Howard* v. *Turner*, 6 *Greenl.* 106. The amendment was refused in the case of *Freeman* v. *Paul*, 3 *Greenl.* 260, not because the return was not amendable, but the Court declined the exercise of an admitted power to enable a party to create a forfeiture. In this case, so far as it may be effectual, it is to prevent a forfeiture.

The *stat. c.* 60, *sec.* 30, allows the debtor or his assignee to redeem the levy, "within the space of one year next following the extending execution thereon;" and the question arises, when the

execution is to be regarded as extended upon the quarry. In the case of *Heywood* v. *Hildreth*, 9 *Mass. R.* 393, it was decided, that the whole proceedings after the seizure, have relation to the day of the seizure. And in *Brown* v. *Maine Bank*, 11 *Mass. R.* 153, it is said, that a title by execution, takes effect by relation to the time when the proceedings commence. In the case of *Waterhouse* v. *Waite*, 11 *Mass. R.* 207, it is said, that if the land is seized within the thirty days after judgment, the attachment is saved, yet the extent is not complete without delivery of seizin to the creditor. In the case of *Allen* v. *Portland Stage Company*, 8 *Greenl.* 207, it was decided, that a levy was not commenced until the appraisers had been sworn; and it was said, that "it might not be going too far to hold that the first step in extending an execution upon any particular real estate is when it is shewn to the appraisers, for there is no designation of the land to be appraised in the oath administered." And it may be added, that there is no designation of any tract of land to be levied upon until it is shewn for that purpose. Although it may be the policy of the law, and very proper for the purpose of preserving the lien by attachment, to regard all the proceedings as having relation to the commencement of them, yet to make use of such a fiction, contrary to the truth, for the purpose of creating a forfeiture, which the law does not favor, would be alike unjust, and contrary to the rules, by which Courts are governed in the use of legal fictions.

One of the respondents was present and knew that the quarry was first selected, and that it was appraised and seizin delivered on the twenty-ninth of *April*; and although the appraisers' return bears date on the 11th of *April*, one of them testifies, that he objected to the date at that time, and was informed by the creditor, that it would make no difference, and that he wished it to bear that date to save an attachment. No attachment of the land appears to have been made. There is therefore no occasion for a fiction to preserve an attachment, and the proof, from the amended return and other testimony, may be received, that the extent upon the quarry did not take place until the twenty-ninth of *April*.

It would be inequitable to allow a forfeiture to be created by a date not according to the truth, and especially in favor of one at whose suggestion the erroneous date appears to have been made.

It is ordered, adjudged and decreed, that the land described in the bill, is held by respondents subject to the plaintiffs' right to redeem; and that upon payment by the plaintiffs of the debt and interest, the respondents convey to the plaintiffs by deed in due form all title acquired by the levy, and pay the costs of this suit.

Inhabitants of the County of PENOBSCOT *vs.* JOHN TREAT *& al.*

SAME *vs.* JAMES SAUNDERS JR. *& al.*

In an action to recover the penalty for obstructing the passage of salmon, &c. in *Penobscot Bay* and *River*, contrary to the provisions of *stat.* 1835, *c.* 194, § 5, the declaration is bad, if it do not allege, that the fish warden gave notice of "what is required to make such passage or sluice way sufficient and convenient," and of "the time in which the same shall be done."

THESE were actions brought by the County of *Penobscot* to recover the penalty for obstructing the free passage of salmon, shad and alewives in the *Penobscot Bay* and *River*, and the streams emptying into the same, contrary to the provisions of the statute of 1835, *c.* 194. The defendants demurred to the declaration in each case, and the plaintiffs joined in demurrer. The defects for which the declaration was held bad will be seen in the opinion of the Court.

The arguments were in writing.

W. Abbott, for the defendants, argued in support of the demurrer, and cited 1 *Chitty's Pl.* 404; 1 *Saund.* 135, *note* 3; *Bigelow* v. *Johnston*, 13 *Johns. R.* 428; *Com. Dig. Tit. Pl. C.* 22, 76; *ib. Action upon st. A.* 3; 25 *Com. L. Rep.* 318; *Bartlett* v. *Crozier*, 17 *Johns. R.* 456; *Wheeler* v. *Willard*, 14 *Pick.* 489.

Brinley argued for the plaintiffs, and cited 14 *Petersdorff*, 510, 514; *Commonwealth* v. *Ruggles*, 10 *Mass. R.* 391; 3 *Harrison's Dig.* 2052, citing 3 *Dow*, 13, and *Cowper*, 391; 2 *Y. & Jerv.*

196; *Oliver's Precedents*, 449, *in note*; *Terry* v. *Foster*, 1 *Mass. R.* 145; *Church* v. *Crocker*, 3 *Mass. R.* 21; *Holland* v. *Makepiece*, 8 *Mass. R.* 423; *Somerset* v. *Dighton*, 12 *Mass. R.* 385; *Holbrook* v. *Holbrook*, 1 *Pick.* 258; *Stoughton* v. *Baker*, 4 *Mass. R.* 522; *Commonwealth* v. *Chapin*, 5 *Pick.* 198; *Commonwealth* v. *Ruggles*, 10 *Mass. R.* 391; *Cottrill* v. *Myrick*, 3 *Fairf.* 222; 2 *East*, 496; 1 *Chitty's Pl.* 386; 1 *Black. Com.* 856; *Douglass*, 97; *Bac. Ab. Stat. L*; *Willes*, 210; 2 *Wils.* 376; 4 *B. & Ald.* 242; 1 *T. R.* 145; 1 *Stark. R.* 92; 1 *Ld. Raym.* 382; 6 *T. R.* 776; *Stephens on Pl.* 174; *Gould on Pl.* 461.

By the Court. — The declaration is bad, because it does not state that the fish warden gave notice of "what is required to make such passage or sluice way sufficient and convenient," and of "the time in which the same shall be done," as required by the act of 1835, *c.* 194, § 5, entitled "an act for the preservation of the salmon, shad and alewive fisheries in *Penobscot Bay* and *River*, and their tributary waters." As was decided in *County of Hancock* v. *Eastern River L. & S. Co. ante, p.* 303.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF WALDO, JULY TERM, 1839.

Mem. SHEPLEY J. did not sit in any of the cases at this term, or take part in the decisions, having been employed during the time in the trial of jury causes in the county of *Washington*.

SIMEON TYLER *vs.* WILLIAM CARLETON.

If a deed be placed in the hands of referees, in a reference entered into by rule of Court, to be delivered to the grantee, in pursuance of an agreement of the parties annexed to the rule, on his giving to the grantor his note for the amount found due by the referees, and if the note be given and received, and the deed be delivered, and the award be contested, but accepted by the Court; all preliminary arrangements by the parties must be understood to be irrevocable while the judgment remains in force, and are not to be examined over again in an action for the land thus conveyed, even if mistake or fraud in the referees can be shown.

IN a writ of entry, the demandant to prove his title, gave in evidence a judgment at the *July Term* of this Court, 1832, in which he recovered against the tenant the demanded premises. Subsequently the demandant brought an action in the Common Pleas, for the mesne profits of the land, which action with other matters was submitted to referees by rule of Court. By an agreement of the parties annexed to the rule, the referees were to decide, what

sum would be equitable and right for *Carleton* to pay to *Tyler* for the future support of himself and wife during life, and also the amount to be recovered in the action; and that *Tyler* should leave with the chairman of the referees, a quitclaim deed from himself, and one from *Ephraim Wood* and *Joseph Jones* to *Carleton* of the same land; and authorizing the chairman to deliver the deeds to *Carleton* on his giving his note to *Wood* and *Jones*, for the amount of the award, or leaving with the chairman for them, in full discharge and satisfaction of the award. By the agreement, the parties waived all legal objections to the award. The deeds were executed and delivered to the chairman of the referees. The referees heard the parties and awarded that *Carleton* should pay $851,57 in full satisfaction of all the matters submitted for their determination, including the support of *Tyler* and wife, and made their award known to the parties. *Carleton* at the same time made his note to *Wood* and *Jones* for the same amount, delivered it to the chairman, who delivered it to *Wood* and *Jones*, and they received it. The chairman then delivered the deeds to *Carleton*. The rule of Court with the award thereon was duly returned into Court. *Tyler* objected to the acceptance of the award, but after a hearing, it was accepted by the Court. Afterwards this suit was instituted, and at the trial before WESTON C. J. the counsel for the demandant offered to prove, that the referees had mistaken the subject matter submitted to them; that they had proceeded fraudulently; that the award was in the handwriting of the attorney of *Carleton*; and that *Tyler* had objected to the delivery of the deeds to *Carleton* before their delivery by the chairman. The Chief Justice was of opinion that the demandant was concluded by the acceptance of the award, and the testimony was rejected. The demandant then became nonsuited. If the opinion of the Court should be, that he was not concluded, and that the proof offered would be sufficient to defeat the title of the tenant, the nonsuit was to be set aside.

Thayer argued for the demandant, and cited *Worcester* v. *Eaton*, 13 *Mass. R.* 371; *Somes* v. *Skinner*, 16 *Mass. R.* 348; *Webster* v. *Lee*, 5 *Mass. R.* 334; *Hodges* v. *Hodges*, 9 *Mass. R.* 320; 1 *Bac. Ab.* 134; *Jones* v. *Boston Mill Cor.*, 4 *Pick.* 507; *Same case*, 6 *Pick.* 148; *Bean* v. *Farnham*, 6 *Pick.* 269.

C. R. Porter, for the tenant, in a written argument, contended, that when a report of referees has been duly accepted by the Court, it is equally binding on the parties as a judgment of the same Court between the same parties on the verdict of a jury.

The opinion of the Court was drawn up by

EMERY J. — It is urged, that without the deed of the demandant to the tenant, he could not hold the land by any award the referees could have made under the submission. And there may be truth in the assertion. Still there are certain things occurring in the course of judicial proceedings, which must assume a binding efficacy. If parties in our courts of record of common law jurisdiction, enter into special agreements with respect to their rights, and make them a rule of the court in submitting their controversies to referees, which are consummated by the award of referees, and accepted by the Court, *preliminary arrangements, if fairly made, must be understood to be irrevocable, and are not to be examined over again, in questions which could not have arisen, but for those antecedent steps, taken voluntarily by the parties, preparatory to the Court's lending its authority to accomplish their wishes. Then,* doubtless the expectation was confidently indulged, that the controversy would be rightly settled by the tribunal of their own choosing. Mere disappointment in the result is not a ground for revocation. On the same principle, in cases of usurious contracts, if a mortgage be given as collateral security for the payment of it, upon which a judgment has been recovered, the mortgagor cannot, in an action upon the mortgage, avoid his deed on the ground of usury. *Thacher & al.* v. *Gammon*, 12 *Mass. R.* 268.

And where a deed was deposited by the grantor with W, as an escrow, to be delivered to the grantee, on his producing a mortgage executed and recorded, and a certificate of the register of there being no other incumbrance on record, and W, on receiving the mortgage and certificate of registry, by the register, &c. delivered the deed to the grantee, and the mortgage to the grantor; it was held that the condition was performed, and the deed well delivered to the grantee, and that it related back, so as to give effect to an intermediate conveyance by the grantee to C, although the register made a mistake in the registry of the mortgage, as to the amount

of the debt, expressing it to be 300 instead of 3000 dollars. *Beekman* v. *Frost*, 18 *Johns. R.* 544.

The case of *Porter* v. *Cole*, 4 *Greenl.* 20, contains a construction of this Court on facts somewhat analogous to those now under consideration. There the deed from *Cole* was left with the referees, on the express condition only, that it should be delivered to *Porter*, if the report of the referees was accepted, and became a settlement of all demands between them. But on *Porter's* objection it was set aside. However, prior to its rejection, one of the referees delivered said deed to said *Porter*, in the presence of said *Cole*. And the Court say, " It was evident that the above condition was annexed for *Cole's* benefit, and therefore he might, at his pleasure, waive it, and assent to the delivery of the deed before performance of the condition. And upon such delivery, it would at once become the deed of *Cole*." In the present case, the award of the referees states that the conditions required by the terms of the rule of reference and the agreement thereto, preliminary to a hearing, having been fully complied with, they proceeded to award the sum to be paid by *Carleton*, made it known to the said *Carleton*, *Tyler*, *Wood*, and *Jones*. The note was given by *Carleton* as agreed, and the deed delivered to *Carleton*, by the chairman, and by *Carleton* received.

Whatever might be said of an award, simply, which is now viewed with great liberality, as the decision of judges of the parties' own choosing, it acquires additional solemnity and importance when it is returned to a Court of competent jurisdiction, and is there contested by the parties, and afterwards by the Court accepted. It then becomes *rem judicatam*, and has all the conclusive character of other judgments. It must be held conclusive upon the parties, and is only to be affected by a review or writ of error. In the collateral way proposed, it is not to be vacated. It would be substantially an attempt to try over again, collaterally, a subject which has already been decided. And this is a much stronger case than that in *Homes & al.* v. *Avery*, 12 *Mass. R.* 134, *where neither the submission or award were in writing*. That was an action for money had and received, to recover back the money paid upon an award. The Chief Justice, delivering the opinion of the Court, on the directions given at the trial, on the conclusive char-

acter of the award, " did observe, that if the plaintiff could prove, that evidence was fraudulently concealed, or that the arbitrators were imposed upon by any false statements of the defendant, the case might be different." But we view the present case as standing upon different ground. And if litigation is to be terminated, we ought to consider that the conclusion should come by the judgments of our Courts of law, when all the objections against the acceptance of the report were open to the present plaintiff, and by that court were deemed inadequate to defeat the award. That very inquiry involved the whole of the present proposition, *(see Gardner* v. *Buckbee*, 3 *Cowen*, 120,) for it would be absurd to ratify the award, and compel *Carleton* to pay his notes, without having the benefit of the conveyance, which was by the agreement of the parties made the condition of entering into the reference. We conceive that agreeably to decided cases, on questions of this description, the nonsuit should be confirmed.

Inhabitants of CAMDEN *vs. Inhabitants of* LINCOLNVILLE.

Where one town furnishes supplies to a pauper having a legal settlement in another town, the cause of action accrues at the time of the delivery of the notice that the expenses had been thus incurred, and the statute limitation of two years within which the action must be commenced begins at that time.

ASSUMPSIT for relief furnished to one *Samuel Calef*, alleged to have had at the time a settlement in *Lincolnville*. Notice was given by the plaintiffs to the defendants, *Nov.* 20, 1833. The relief was furnished from *Oct.* 19 to *Nov.* 30, 1833. And the suit was commenced *Nov.* 4, 1835. The general issue only was pleaded. The verdict was for the plaintiffs for the whole amount; and it was agreed, that if the Court should be of opinion that any part of the sum was legally barred by the limitation of two years, the verdict should be amended by deducting the amount so barred.

W. G. Crosby, for the defendants, contended, that the plaintiffs could not recover any thing where the cause of action had accrued more than two years before the bringing of the suit, and that the cause of action did accrue to the plaintiffs whenever and so often as supplies were furnished. Nothing can be recovered before *Nov.* 4, 1833, and the verdict should be amended accordingly. *Stat.* 1821, *c.* 122, *sec.* 11; *Sudbury* v. *East Sudbury*, 12 *Pick.* 1; *Readfield* v. *Dresden*, 12 *Mass. R.* 317; *Needham* v. *Newton*, *ib.* 452; *Harwich* v. *Hallowell*, 14 *Mass. R.* 184.

Thayer, for the plaintiffs, argued, that the mere furnishing of the supplies, gives no cause of action, unless notice is given within two months. That the cause of action accrues at the time the notice is delivered, and the limitation of two years then begins to run, was expressly decided in a much later case than the last, cited on the other side, and in some degree conflicting with it. *Uxbridge* v. *Seekonk*, 10 *Pick.* 150. The same principle has been decided at an earlier day in our own Court, in *Belmont* v. *Pittston*, 3 *Greenl.* 453, where it was determined that no action could be commenced until after two months from the time of giving the notice.

The opinion of the Court was prepared by

WESTON C. J. — In *Readfield* v. *Dresden*, 12 *Mass. R.* 317, and in *Harwich* v. *Hallowell*, 14 *Mass. R.* 184, it was the opinion of the Court, that one town could not recover of another, expenses for the support of a pauper, having his settlement in the defendant town, which had been incurred more than two years, next before the bringing of the action. The limitation in the statute, both of *Massachusetts* and *Maine*, is two years, after the cause of action has accrued. But in *Uxbridge* v. *Seekonk*, 10 *Pick.* 150, it was held, that the two years began to run from the delivery of the notice.

In this State however, it has been decided expressly, that no action can be maintained by one town against another, for the support of a pauper, until after the lapse of two months from notice given. *Belmont* v. *Pittston*, 3 *Greenl.* 453. Upon this construction, it may be contended, that the liability of a town to refund such an expenditure might be extended indefinitely, by delaying to

give the notice required by the statute. And such might be the result, but for another limitation in the same statute, which precludes a recovery for any expense incurred, more than three months before notice given. The statute clearly gives two years, within which to bring an action, from the time it accrues. This action was brought two months and an half before the expiration of the two years, commencing two months after notice, and as all the expense claimed, was incurred within three months next before notice, no part of it is in our judgment barred by the statute.

Judgment on the verdict.

JOHN WARE *vs.* CHRISTOPHER B. ASH *& al.*

The *stat.* 1835, *c.* 195, for the relief of poor debtors, provides that the debtor shall cite the creditor to appear before the Justices at the time he submits himself to examination and takes the oath, but points out no mode in which it shall be done.

Where the statute points out no mode by which the debtor shall notify the creditor of the time and place of his submitting himself to examination and taking the oath, and a citation is issued from a magistrate *on the application of the debtor only* and duly served on the creditor, and the notice is adjudged by the Justices who administered the oath to have been given *according to law*, such notice is sufficient.

AT the trial, before WESTON C. J. a nonsuit was entered by consent; and if the opinion of the Court should be, that the action could be maintained, the nonsuit was to be set aside, and the action stand for trial. The facts in the case appear in the opinion of the Court.

The case was submitted without argument, by *Hutchinson*, for the plaintiff, merely citing *Knight* v. *Norton*, 15 *Maine R.* 337; and by *Rogers*, for the defendants.

The opinion of the Court was by

WESTON C. J. — The bond in suit in this case, was given in virtue of the statute of 1835, *c.* 195, § 8. It does not therefore

fall within the principle of the case of *Knight* v. *Norton & al.* 15 *Maine R.* 337, which was based upon the subsequent statute of 1836, *c.* 245. The statute of 1835, § 8, pointed out no mode, by which the creditor was to be cited. It was one of the conditions of the bond, that the debtor was to cite the creditor. He did this, by availing himself of the sanction and authority of a Justice of the Peace. As the time and place, when and where the creditor was to appear, and the object of the citation, is stated with precision, we are of opinion, that in the absence of any prescribed statutory mode, it ought to be held sufficient; more especially as the Justices, who had jurisdiction of the subject matter, so regarded it. And this alone is decisive of the sufficiency of the notice. *Agry* v. *Betts*, 3 *Fairf.* 415.

In the citation, *Cornville*, the residence of the creditor, is erroneously stated to be in the county of *Penobscot*, instead of the county of *Somerset*; but it was served upon the creditor in person, by a deputy sheriff of *Somerset*. The Justices find and certify, that he was notified according to law. He was fully apprised of the time, place and purpose, set forth in the citation. It does not appear to us, that the error therein in regard to the county, can or ought to have the effect to vitiate the proceedings. From the certificate of the Justices, it appears that the poor debtors' oath was duly administered to the principal defendant.

Nonsuit confirmed.

Samuel Duncan *vs.* Gilmore Sylvester.

A tenant in common cannot enforce partition of a part of the common tenement by metes and bounds.

Thus if two tenants in common make a parol partition of the land held by them in common by metes and bounds, and each afterwards convey by deed of warranty to a third person, the land assigned to him by parol, and possession continues in accordance with the parol partition, but for a period less than twenty years, such parol partition may be avoided by one of the original co-tenants; but he cannot maintain a process to have partition only of the moiety assigned to his co-tenant by the parol partition, and must include in his petition the whole of the tract originally owned in common.

This was a petition for partition, wherein the petitioner claimed an undivided moiety of the land described in the petition, by virtue of a conveyance to him by *Abner Knight*, by deed dated *July* 19, 1819, conveying to him an undivided moiety of a tract of land of which the premises are part. The respondent denied the seizin of the petitioner.

At the trial, before Weston C. J. the respondent offered to prove, that one *George Knight* was tenant in common with the petitioner by virtue of a conveyance to him by the same *Abner Knight*, by a deed of warranty to him, dated *July* 18, 1817, of the other undivided half of the whole tract of land; that before *July* 18, 1823, *George Knight* and the petitioner made a division of the tract by metes and bounds, causing the land to be surveyed, but the division was merely by parol, no deeds being exchanged; that from the time of the division the petitioner and those claiming under him, and said *George Knight* and those claiming under him, have severally inclosed, occupied and improved the portion so set off to them respectively; that after the parol division, on *July* 18, 1823, the petitioner conveyed by deed of warranty to *Jones Shaw*, by metes and bounds, that portion of the land assigned to him by the survey and the parol partition as his half; that *George Knight* by his deed of warranty, *June* 20, 1833, conveyed to the respondent, by metes and bounds, that portion of the land which was so set off to him as his half, the last described tract being that of which partition is claimed in this process; and that since the conveyance by *George Knight* to the respondent, he had occupied the same openly, ex-

clusively, and adversely to the petitioner and all others. A default was entered by consent, which was to be taken off, if in the opinion of the Court, the evidence offered by the respondent would be sufficient to disprove the title of the petitioner, and the case stand for trial; otherwise judgment was to be rendered thereon.

Alden & W. G. Crosby, for the respondent, contended: —

1. A conveyance by one tenant in common of a part of the common property by metes and bounds, is void as to his co-tenants. *Varnum* v. *Abbott*, 12 *Mass. R.* 474; *Coggswell* v. *Reed*, 3 *Fairf.* 198. The conveyance therefore by the petitioner to *Shaw* was void as to the respondent. A tenant in common cannot enforce partition of a part of the common tenement by metes and bounds. *Miller* v. *Miller*, 13 *Pick.* 236; 1 *Co. Lit.* 250; 3 *Co. Lit. (H. & Butler's Ed.)* 250, *notes*, 23, 24. As between petitioner and his grantee, he would be estopped by his deed, but not as between him and other persons. *Bartlett* v. *Harlow*, 12 *Mass. R.* 348.

2. The deed to the respondent is also void as to the petitioner; and by filing this petition, he has elected so to consider it. If void, it conveyed nothing to the respondent, and of course he cannot be considered as tenant in common, and the process does not lie against him. *Com. Dig. Pleader*, 3 *F* 1.

3. The petitioner must adopt one of two courses. He must consider the conveyances valid, and thereby recognize the title of the respondent; or void, and thereby deny that the defendant is tenant in common with him. But if such division by parol is made, and is subsequently recognized and ratified by the parties by their several conveyances of the parcels set off to them in severalty, such division and conveyances do operate a severance.

4. A petition is in the nature of a real action, and like other real actions, the question in issue is one of legal title. *Blanchard* v. *Brooks*, 12 *Pick.* 47. A petition for partition lies only for one who is actually seized of the premises. 7 *Mass. R.* 475; 14 *Mass. R.* 434; 7 *Wheat.* 120; 1 *Mass. R.* 323; 10 *Mass. R.* 464; 15 *Mass. R.* 439; 8 *Pick.* 376; 13 *Pick.* 145; 1 *Pick.* 114; 1 *Cowper*, 217; 1 *Greenl.* 89; 5 *Mass. R.* 344; *Angel on Lim.* 96; 13 *Johns. R.* 406.

Thayer, for the petitioner. Since the statute of frauds, partition by parol is void. 5 *Mass. R.* 233; 13 *Mass. R.* 418; 7 *Mass. R.* 475; 14 *Mass. R.* 435. The petitioner has never been disseized. The parol division was merely a license to the other party to hold in severalty. That is revoked by filing this petition. 14 *Mass. R.* 403; 13 *Mass. R.* 418; *ib.* 435. Partition may be had by tenant for years against one in possession who holds in fee. 15 *Mass. R.* 155; 17 *Mass. R.* 282. A tenant in common in possession, holds according to his title. 8 *Pick.* 377. Although the grantee of a part of the common tract, cannot enforce a partition, still the original co-tenant may elect to consider the grantee of a part as tenant of the freehold. 13 *Mass. R.* 57; 12 *Mass. R.* 474. The conveyance by one tenant in common of his share in a specific portion of the land is not absolutely void, but only as against a co-tenant. 12 *Mass. R.* 474. The only objection is from the injury he might do his co-tenant. 17 *Mass. R.* 282; 13 *Mass. R.* 57; 8 *Wheat.* 1. The petitioner therefore may well have partition made of this tract.

The opinion of the Court was drawn up by

Weston C. J. — Assuming, for the purpose of determining its legal bearing, that the testimony offered by the respondent had been received, it appears that in *July*, 1819, one *George Knight* and the petitioner were tenants in common of a tract of land, of which the part described in the petition was understood to constitute one half. In *July*, 1823, *Knight* and the petitioner caused the whole to be surveyed, and thereupon made a parol partition of the same by metes and bounds, in pursuance of which the parties and those claiming under them, have since occupied in severalty. In the same month of *July*, the petitioner conveyed, by a deed of warranty, the part assigned to him, to *Jones Shaw*, by metes and bounds. And in *June*, 1833, *Knight* also conveyed, by deed of warranty, the part assigned to him, by metes and bounds, to the respondent.

Neither the parol division, nor the subsequent corresponding occupation, nor the conveyance by each of the purparty assigned to him, operated as an effectual legal partition. *Knight* and the petitioner were seized *per mi et per tout*, and neither could invest the

other with a separate title to a portion of the tract, without the formality of a deed. Each therefore may avoid the conveyance of the other, so that it may not interpose an obstacle to a just and equal partition. The tenancy in common, embracing the whole tract, neither can, by his own act, exclude the other from any part of it. The petitioner has elected to avoid these proceedings, as far as he can do so, and he now claims partition of that, which he had assigned by parol to his co-tenant.

The statute authorizes partition to be made between those who are interested in the estate, and requires that all persons so interested should be notified. *Knight* has the same interest in the part, which the petitioner conveyed to *Shaw*, as the petitioner has in the part conveyed by *Knight* to the respondent; and both *Shaw* and the respondent are interested in that part of the estate, which may finally enure to them, by force of the estoppel, arising from the deeds to them respectively. *Varnum* v. *Abbott & als.* 12 *Mass. R.* 474. The respondent therefore having an interest in the land, and being privy in estate with *Knight*, has the same right to require that in the partition, the conveyance made by the petitioner should be disregarded, as the petitioner has to insist, that the conveyance made by *Knight* should be disregarded. The result is, that to make the partition legal and effectual, it should be made of the whole tract. And this is the reason why conveyances made by one co-tenant of a part in severalty, or of his interest in a part, may be avoided by the other co-tenants, when they take measures to effect partition at law. It is a violation of this principle, to attempt to do it piecemeal. If two are tenants in common of an hundred acres of land, eligible for the scite of a village, and each sells in severalty a few small house lots, constituting but a small proportion of what each is entitled to, it would be most inconvenient to sustain a separate petition for partition of each of these small lots. In such case the co-tenant, who petitions, should describe and aver his interest in the whole tract, and it would then be easy, as it would be most equitable and just for the commissioners to make partition in such a way, as to quiet the several grantees of each.

In *Miller* v. *Miller & al.*, 13 *Pick.* 237, it was decided by the Court, "as a well settled rule of law, that a tenant in common cannot enforce partition of a part of the common tenement, by

metes and bounds." And we are of opinion, that the default must be taken off; and if the petitioner would maintain his process, he must so amend, as to include the whole tract. And if upon the appointment of the commissioners, they should find the former partition just and equal, as there is much reason to believe they will, they will make it in the same manner; the effect of which will be to vest the title in the respective grantees in severalty, by estoppel. And in this mode, the attempt of the petitioner, after having enjoyed and actually sold one half of the land, to get away a part of the residue may, and should be defeated.

William Carleton *vs.* Simeon Tyler *& al.*

Where three convey lands in the same deed, covenanting to warrant and defend the premises against the lawful claims and demands of all persons claiming by, through, or under them, they are all liable on the covenant, if a legal claim under one of the three existed at the time.

This was an action of covenant broken, against *Simeon Tyler*, *Ephraim Wood* and *Joseph Jones*, wherein the plaintiff alleged, that the defendants, by their deed dated *Oct.* 1, 1833, conveyed all their right, title and interest in and to certain real estate in *Camden*, particularly described, and in the same deed, covenanted among other things, "that they would warrant and forever defend the premises, so conveyed as aforesaid, to him the said *William Carleton*, his heirs and assigns forever, against the lawful claims and demands of all persons claiming by, through, or under them, the said defendants." The breach alleged was, that *Tyler*, one of the defendants, by his deed dated *September* 22, 1810, had conveyed to one *Reed*, in fee simple, a certain parcel of land, particularly described, being part of the premises embraced in the deed from the defendants to the plaintiff; that said *Reed* had deceased, and that his widow, since the making of the deed from the defendants to the plaintiff, had recovered judgment for her dower in

the premises last described, by virtue of that conveyance; that the same was lawfully assigned to her, and that she had entered into the possession thereof. *Wood* and *Jones* had oyer of the deed from the defendants to the plaintiff, and then demurred to the declaration, and assigned the following cause. Because said deed to said *Reed* is not, and is not alleged to be, signed or executed by said *Wood* or said *Jones*, or that the widow of said *Reed* ever claimed title under said *Wood* or *Jones*.

C. R. Porter, for the defendants.

Thayer, for the plaintiff, cited *Worcester* v. *Eaton*, 13 *Mass. R.* 371; *Somes* v. *Skinner*, 16 *Mass. R.* 348; *Webster* v. *Lee*, 5 *Mass. R.* 334; *Hodges* v. *Hodges*, 9 *Mass. R.* 320; 1 *Bac. Ab.* 134; *Jones* v. *Boston Mill Corp.* 4 *Pick.* 507; *Bean* v. *Farnam*, 6 *Pick.* 269.

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

WESTON C. J. — The terms, "through or under us," used in the covenant, are broad enough to embrace all lawful claims, derived from the covenantors, collectively or severally. The covenant was joint; and we must regard it as too narrow a construction to hold, that each might have conveyed separately without a breach. We have hesitated, whether the covenant might not be taken distributively, so as to hold each severally liable, upon his own separate conveyance; but the language, expressive of a joint covenant, is too strong to justify the Court in withholding from the grantee a remedy against all, upon any breach, within the range of the covenant. It was made joint for his protection, and as such must be enforced. The case is not so clear as could have been desired; and we have been referred to no precedents, which can contribute much to its elucidation. If the defendants are held beyond what they intended or expected, they should have explained themselves. In the absence of any better or more satisfactory rule of construction, the law requires, that the terms they use should be taken most strongly against them.

Declaration adjudged good.

Samuel A. Whitney *vs.* Moses Stearns.

An admission in a contract in writing, that it was made for a valuable consideration, is *prima facie* evidence of a sufficient consideration for such contract.

If one give a written promise to be responsible for the amount the promisee may recover in a suit then pending against a third person, and judgment is recovered in that suit, the body of the debtor arrested on the execution, and he gives the poor debtor's bond, which is forfeited, and a suit is brought thereon but no satisfaction obtained; this furnishes no defence to an action on the promise in writing.

Assumpsit for rent, and also on an obligation in the following form. "*Lincolnville, Feb.* 16, 1837. For a valuable consideration, I promise *Samuel A. Whitney*, to be responsible to him for whatever sum he may recover of *Ezekiel Stearns*, before *David Alden, Jr., John Young, 2d.* and *David McKoy*, referees, to whom is referred a demand made by the said *Whitney* against the said *Ezekiel Stearns* and *Moses Stearns*." This was signed by the defendant. This action was commenced on *May* 27, 1837, and on the sixth of the same *May*, the plaintiff caused *Ezekiel Stearns* to be arrested on an execution issued on a judgment on the award of the referees, who on the same day gave a bond, pursuant to the provisions in the acts for the relief of poor debtors, to procure his release from arrest. The said *Ezekiel* failed to comply with the conditions of this bond and it became forfeited, and *Nov.* 24, 1837, *Whitney* commenced an action thereon, which is still pending. At the trial of the present action before Weston C. J. the plaintiff offered no evidence of any consideration to support the agreement other than the instrument itself.

The defendant's counsel objected, "1. That the instrument declared on, being a collateral undertaking to answer for the debt or default of another, it was incumbent on the plaintiff to prove a sufficient consideration; and that the instrument itself, not importing a consideration like negotiable paper, the mere words, "for a valuable consideration," were not sufficient to prove the fact. 2. That the plaintiff having received a bond as security for the original debt, and the condition of that bond being forfeited and having become absolute, the above instrument being of an inferior nature to the one under seal, was merged in the bond; and that the plain-

tiff having accepted of said security by bringing an action upon it, the original debt was also merged in that security, and by necessary consequence, the present instrument, which was only collateral to the original debt."

The Chief Justice left the question of consideration to the jury, stating to them, that the admission by the defendant in the contract that it was made for a valuable consideration, was evidence of that fact to be submitted to their consideration. The second objection taken was overruled, and the jury were instructed, that the collateral remedy pursued by the plaintiff on the bond, would not defeat his action on the contract, he not having obtained satisfaction upon the bond. The verdict for the plaintiff was to be amended by deducting the amount found on account of the contract, if in the opinion of the Court, the jury were not properly instructed upon either point taken by the counsel for the defendant.

F. Allen and *W. H. Codman*, for the defendant, argued in support of the propositions contended for at the trial. On the first point, they cited *Ten Eyck* v. *Vanderpool*, 8 *Johns. R.* 120; *Schoonmaker* v. *Roosa*, 17 *Johns. R.* 301; *Hunt* v. *Adams*, 5 *Mass. R.* 358; *Ulen* v. *Kittredge*, 7 *Mass. R.* 233; *Lent* v. *Padelford*, 10 *Mass. R.* 230; *Packard* v. *Richardson*, 17 *Mass. R.* 122. The whole evidence was on the face of the paper, and it was a mere question of law, and should have been decided by the Court, and not left to the jury.

W. G. Crosby, for the plaintiff, argued, that it was for the jury to determine whether there was a sufficient consideration for the promise; that it was a mere matter of evidence; and that here was the best of evidence, the admission of the defendant in writing. The testimony of a witness, that he had heard the defendant admit that there was a consideration, would have been competent evidence for the jury, and still more clearly is his written admission. The promise here was prospective, to pay the debt of another, which might, or might not exist, and was not a collateral but an original undertaking. *Perley* v. *Spring*, 12 *Mass. R.* 297. If the change of security had taken place between the parties, there might have been some color for contending, that one security was merged in the other, but the merger does not extend to change of

security against a stranger. But here there was no forfeiture of the bond at the time this suit was commenced. 5 *Mass. R.* 11; 6 *T. R.* 176; 10 *Mass. R.* 88; 3 *East*, 258; *Chitty on Contracts*, 294.

The opinion of the Court was drawn up by

EMERY J. — There appears to be some singularity in the wording of the writing called the obligation, dated *Feb.* 16, 1837, contrasted with the statement of the evidence in relation to the trial. According to our copy, the engagement is to be responsible to the plaintiff for what he "may recover of *Ezekiel Stearns* before referees, to whom is referred a demand made by the plaintiff against said *Ezekiel Stearns* and *Moses Stearns*." Why the stipulation should be adopted in that form, unless *Moses* assumed the relation of a co-defendant with *Ezekiel* for his benefit, or surety for him in the reference, is not easy to discover. Be that as it may, what we have now to settle, is the correctness or incorrectness of the Judge's instructions. The question of consideration was left to the jury on the statement to them, that the admission by the defendant in the contract, that it was made for a valuable consideration, was evidence of that fact to be submitted to their consideration.

Generally, in an action upon a simple contract the plaintiff must allege and prove a consideration. The consideration of an agreement, or even a negotiable bill or note, may be inquired into between the immediate parties; as between the drawer and acceptor of a bill, maker and payee of a note, or between an indorser and his immediate indorsee. Valuable considerations may arise by benefit to the party promising, or to another at the promiser's request, or by the promisee's sustaining loss or inconvenience, or becoming liable to charge or obligation at the request of the promiser, though he derive no advantage from it. But a promise to indemnify a plaintiff against the costs of an action for publishing a libel against a third person, at the defendant's solicitation, would be void. *Shackell* v. *Rosier*, 2 *Bing. N. C.* 634, in 29 *Eng. Com. Law Rep.* 438.

It is said, that it is not essential that the consideration should be adequate in point of actual value, that it is sufficient that a slight

benefit be conferred by the plaintiff on the defendant, or at his request on a third person at law; and that mere folly and weakness, or want of judgment, will not defeat a contract even in equity, when the folly is not so extremely gross, as that, with other facts in corroboration, does not establish a case for relief, on the ground of fraud. How then is the validity of the contract, upon this requisite, to be exhibited? It is not to be supposed, that a contract has not any effect on an admission against a party, because it is not under seal. So far from this, an admission, in such a contract, is strong presumptive evidence against the party, though it is not conclusive. For the person sought to be charged is not absolutely concluded from shewing the real truth. *Chitty on Contracts*, 5. A cent or a pepper corn, in legal estimation, would constitute a valuable consideration. Where then was the incorrectness of the direction to the jury on this point? We perceive none. If a man will deliberately confess that he has received a valuable consideration for his promise, the burthen ought surely to rest on him to shew that he was under a mistake. Should he fail of doing so, the consideration is proved. Could a jury hesitate in awarding a verdict against him, were he to appear before them, and avow, that he had received a valuable consideration for entering into the contract they were to deliberate upon?

The second instruction was, that the collateral remedy pursued by the plaintiff on the bond would not defeat his action on the contract, he not having obtained satisfaction on the bond. The bond spoken of was voluntarily given by *Ezekiel Stearns*, without consent or agreement of the plaintiff, and which the plaintiff could not prevent. Its operation was to postpone the redress of the plaintiff. But we cannot hold, that the commencing of an action upon it, vacated other collateral security, which the plaintiff possessed, unless payment was obtained. There was no express stipulation in the bond that the remedy by action or any other collateral security should not be adopted. *Emes* v. *Widdowson*, 4 *C. & P.* 151.

The bond was not accepted in satisfaction of the collateral security by the plaintiff.

Judgment must therefore be rendered on the verdict without deduction.

Caleb Whiting *vs.* Jacob Trafton.

Since the *stat.* 1835, *c.* 195, for the relief of poor debtors, the body of a debtor cannot be legally arrested on a writ declaring on a contract, unless the creditor, or his agent or attorney, first make oath that he has reason to believe and does believe, that the debtor "is about to depart and *establish his residence beyond the limits of this State*, with property or means exceeding the amount required for his own immediate support."

And if the affidavit do not state, that the debtor "was about to depart and establish his residence beyond the limits of this State," and the officer having such writ, return thereon, that he has arrested the body of the debtor, and that he gave bail, and afterwards refused to deliver up any bail bond to the creditor on demand, or to return it to the clerk's office, no action can be maintained by the creditor against the officer for that cause.

This was an action against the defendant, as Sheriff of the county, for an alleged misfeazance of his deputy, *Nathan Heywood.* The important facts in the case are found in the opinion of the Court. The affidavits on the writ against *Littlefield* were as follows. "State of *New-Hampshire. Rockingham, ss. March* 15, 1836. Then personally appeared *Caleb Whiting*, the creditor within named, and made oath, that the amount or principal part of the debt claimed by him, the said *Whiting*, creditor as aforesaid, is actually due and unpaid, and that he has sufficient reason to believe and doth believe, that the debtor within named is about to change his residence and abscond beyond the limits of the State, with property or means exceeding the amount required for his immediate support." "State of *Maine. Waldo, ss. March* 17, 1836. Then personally appeared A. B. attorney to the creditor within named, and made oath that the demand or the principal part thereof, within named, is due, and that he has reason to believe and does believe, that the said *Littlefield* is about to depart and take with him property or means exceeding the amount required for his immediate support."

Alden and *Crosby*, for the plaintiff, cited and relied upon *Simmons* v. *Bradford*, 15 *Mass. R.* 82; *Eaton* v. *Ogier*, 2 *Greenl.* 46; *stat.* 1835, *c.* 195. The oath in this State is sufficient to authorize the arrest, and that in *New-Hampshire* cannot lessen its force.

W. Kelley, for the defendant, argued, that the deputy stood only in the place of the bail; that the statute authorizing the arrest of the body must be complied with before a lawful arrest can take place; that each of the oaths is wholly defective; and that the action cannot be maintained. If the action can be supported, as no suit could be maintained on the bail bond, the damages will be but nominal.

The opinion of the Court was drawn up by

EMERY J. — This is a suit against the defendant as Sheriff of this county, because, as is alleged, *Nathan Heywood*, a deputy of the defendant, on a writ of attachment in favor of the plaintiff, against one *Horace P. Littlefield*, on the 21st of *March*, 1836, returned that he had arrested the body of said *Littlefield*, and that he gave bail, and the plaintiff having obtained judgment in his suit against *Littlefield*, took out execution, and delivered it to *Heywood* on the 11th of *May*, 1837, for service, who returned it unsatisfied for want of property belonging to *Littlefield* to be found in his precinct, and without arresting *Littlefield*, he not being found within his precinct, and the plaintiff on the 1st of *June*, 1837, demanded of said *Heywood* the bail bond given by said *Littlefield*, but *Heywood* refused to deliver it to the plaintiff, or return it to the clerk's office. The plaintiff relies upon the case of *Simmons* v. *Bradford*, 15 *Mass. R.* 82, for sustaining his action. It was decided in 1818. The Court there, speaking by Justice *Jackson*, say, "when the officer returned that he had taken bail, which he knew was not literally true, he must be understood as intending that he would himself be the bail or surety for the defendant. He stipulated in effect with the plaintiff that the latter should have all the advantage and security which he would have derived from bail regularly and lawfully taken." And evidence of the poverty of the original defendant debtor, offered in mitigation of damages, was holden to be inadmissible.

Previous to the *stat. c.* 520, passed *March* 31, 1831, for the abolition of imprisonment of honest debtors for debt, all persons were liable to arrest, though not at all times. The *stat. c.* 195, for the relief of poor debtors, passed *March* 24, 1835, repealing all other acts and parts of acts inconsistent with the provisions of this act, in the third section enacted, "that any person may be arrested on

mesne process on any contract, bond, specialty, or judgment mentioned in the second section of this act, and held to bail or committed to prison, when he is about to depart and establish his residence beyond the limits of this State, with property or means exceeding the amount required for his own immediate support; provided any creditor, his agent or attorney, shall make oath or affirmation, before a Justice of the Peace, to be certified by such Justice on such process, that he has reason to believe and does believe, that such debtor is about to depart, and take with him property or means as aforesaid, and that the demand in the writ is, or the principal part thereof, due him."

The design of this statute was not only to afford *prima facie* evidence that a debt was due to the plaintiff from the defendant, but also to prevent unreasonable detentions of the person by arrest, when there were no good grounds for believing that an intention existed on the part of the debtor, to withdraw himself and his property from the jurisdiction of the State, by establishing his residence beyond its limits. It certainly did not mean to give encouragement to capricious arrests, when a person was preparing for a mere journey for a short time, with the intention of returning and maintaining his residence in the State, and to be amenable to the first execution, when it should be recovered against him. As a check, it was deemed requisite, that nothing less solemn than the oath of a creditor, his agent or attorney, who it is supposed may be in the exercise of some information as to the merits of the demand, and of vigilance as to the movements of the principal debtor, shall authorize an officer to arrest and hold a debtor to bail on mesne process. It is a measure against the liberty of the citizen. And the preparatory steps must contain a full and clear compliance with the preliminary requirements of the statute. The oath taken in *New-Hampshire*, we cannot consider as a compliance with the requisition of the statute, because it speaks in that State, in the county of *Rockingham*, that the party believes, "that the debtor within named, is about to *change* his residence and abscond beyond the limits of the State," not saying the State of *Maine*. It was the language prescribed for the affidavit to be taken by virtue of the *stat. c.* 520, passed *March* 31, 1831, which was repealed so far as inconsistent with the *stat. c.* 195. This last act has made a change

in the phraseology on this subject. We cannot take any thing by intendment, or supply deficiencies in a matter which the legislature deemed material. Supposing it was taken with a view to be used in this State, it ought to contain all those requisites that are essential in an affidavit made in this State, to hold to bail. *Norton* v. *Danvers*, 7 *T. R.* 371, *in note*; *Omealy* v. *Newell*, 8 *East*, 364.

It would seem that there was a consciousness of defect in this matter in the breast of the agent. The oath in *New-Hampshire* was certified to be taken on the 15th day of *March*, 1836. And on the 17th day of *March*, 1836, the certificate of the Justice of the Peace in our county of *Waldo*, was superadded, as to the oath of the attorney of the creditor. This certificate is totally defective in omitting the very essential words, "*establish his residence beyond the limits of the State.*" It is by no means a compliance with the law. The words, "as aforesaid," in the proviso in the third section, decidedly indicate that it is necessary to allege in the oath the fact of the good reason to believe, and the belief that the person to be arrested is about to depart and establish his residence beyond the limits of the State, with property or means exceeding the amount required for his own immediate support, as well as that the demand in the writ is, or the principal part thereof due him.

In some of the highest Courts of the country from which our ancestors came, the practice is invariably to reject as inadmissible supplemental or explanatory depositions, to rectify an omission, or to explain an ambiguity in the original affidavit of debt. And the rule is founded partly on the ground that if supplemental affidavits were received, the original would be drawn with carelessness, and lead to the practice of arresting parties on vague and ambiguous documents. *Jacks* v. *Pemberton & al.* 5 *T. R.* 532; *Mallary & als. assignees*, v. *Buckhtz*, 2 *M. & S.* 513.

In one of the tribunals in that country, where the affidavit to hold to bail is defective, the Court of Common Pleas would formerly exercise its discretion in receiving or rejecting supplemental and explanatory affidavits, and has not, in every instance, as in the Court of King's Bench and Exchequer, interdicted the admission of these auxiliary documents. It is deemed an indulgence to be received only to supply something which is ambiguous on the face of the original instrument, which *the Court, for its own satisfaction*

is desirous of having explained. *Green* v. *Redshaw*, 1 *Bos. & Pul.* 227; *Garnham, ex'rx,* v. *Hammond*, 2 *Bos. & Pul.* 298, *and cases there cited.*

Now, it is said, that by a general rule of all the Courts *there*, no supplemental affidavit is allowed to supply any deficiency in the affidavit to hold to bail. And in *Wooley* v. *Escudier*, 2 *Moore & Scott*, 392, a rule was made absolute, with costs, that a bail bond, given by the defendant, should be delivered up to be cancelled, and the defendant discharged, on entering a common appearance, on the ground of the insufficiency of an affidavit, in not stating by whom a bill of exchange was indorsed to the plaintiff.

It has been held, that where the defendant has pleaded to the action, or suffered judgment by default, and notice of executing a writ of inquiry has been given, the defendant cannot, after such an implied acquiescence in the plaintiff's proceedings, object to the affidavit to hold to bail. *Levy* v. *Duponte*, 7 *T. R.* 372, *in note*; *Desborough* v. *Copinger*, 8 *T. R.* 77.

Whatever construction may have been made in respect to the relative rights of the plaintiff and defendant in the first suit, we think that the officer is not to be subjected to suffering in damages, where, by the plaintiff's own laches, the officer could not be justified in making the arrest. For by the first section of the *stat. c.* 195, it is enacted, that no person shall be arrested on contract express or implied, or judgment thereon, when the original debt or damages are less than ten dollars, and by the second section it is enacted, "that in all other cases on contracts, express or implied, bond or other specialty, or on a judgment in civil actions, *no person shall be arrested or imprisoned on mesne process, except as hereinafter excepted*," and then follows the third section before recited.

A cause of action cannot be derived from an illegal source, or culpable breach of duty. The first fault is here on the part of the plaintiff. No bail could rightfully be required in the case under consideration. The return of the officer, that he had taken bail, was most indiscreetly made. But the plaintiff has not entitled himself to take any advantage of it. The law has been so materially changed since the decision of *Simmons* v. *Bradford*, that we cannot consider it as forming a rule for our guide in the present action. According to the agreement of the parties, a nonsuit is to be entered.

Reuben Whittier *vs.* Edward K. Vose *& al.*

The declarations of the payee of a negotiable note, made while he retains it in his possession, are admissible in evidence, although he may previously have written thereon his indorsement to a third person in whose name the action is brought.

If one party be erroneously permitted to give in evidence the declarations of a supposed agent, and afterwards the agent is introduced as a witness by the other party, and testifies in relation to those declarations, such erroneous admission of evidence furnishes no cause for setting aside the verdict.

Where a sale of land has been effected by fraudulent representations, and an action is brought by the purchaser to recover the damages sustained thereby, the commencement and pendency of such suit does not preclude the purchaser from giving evidence of the fraud in defence of an action on a note given as the consideration of the sale.

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

Assumpsit on a note of hand, dated *August* 22, 1835, for $1575,75, payable to *Benjamin Carr* or order, in one year from date, and by him indorsed, "without recourse." The exceptions, without stating the evidence, or that any had been offered, after the description of the note, proceed to state, "that the defendants contended, that the transaction out of which the note originated was fraudulent. The plaintiff objected to any evidence to impeach the consideration of the note, it being sued by an indorsee; but it was contended by the defendants, and proved by the admissions of the plaintiff, that the plaintiff and *Carr*, the indorser, and *Theodore S. Brown* were jointly interested in the land on account of which the note was given, and that said *Carr* sold it on the joint account of the three, and as their agent, and on this ground, evidence tending to show the transaction fraudulent was admitted. The Judge instructed the jury, that if *Carr* made fraudulent representations to induce the defendant to purchase said land, then the whole transaction was fraudulent, even as to the plaintiff and *Brown*, if *Carr* was by them authorized to effect the sale, and they adopted it. The defendants offered to prove that *Carr*, six months after the sale, admitted that he had made to the defendants at the time of the sale, certain representations which had been previously made to said *Carr* by the plaintiff as to the land, before

the time of sale, which the defendants contended were false. To this evidence the plaintiff objected, but it was admitted. The plaintiff proved that the defendants commenced an action against said *Carr* for $6000 damages, and that the action was still pending, for the false and fraudulent representations made by *Carr* to induce the defendants to purchase the land. And the plaintiff contended, that by that act the defendants had made their election to affirm the contract, and therefore that they had no defence to this action, even if there was fraud in the contract, and requested the Judge so to instruct the jury, which he declined doing. The defendants tendered, at the trial, to the plaintiff a deed, duly executed and acknowledged, of the land to *Carr*, *Whittier* and *Brown*, and an offer of the amount already paid, on condition of receiving their notes back. The deed was put on file. It appeared in evidence that the note in suit was indorsed by *Carr* in the winter of 1836—7, and was not delivered to the plaintiff until after the action was commenced, the writ being dated *March* 4, 1837. And upon this evidence the Judge left it to the jury to determine whether there was an offer by the defendants to rescind the contract prior to the commencement of the suit." The verdict was for the defendants, and the plaintiff filed exceptions. The exceptions were signed and allowed by the Judge, and immediately following there was a statement subjoined, signed by the Judge, at the request of the *plaintiff's* counsel, in which it appears that "the above named *Benjamin Carr* was introduced by the plaintiff as a witness on the trial after the above evidence had been given in by the defendants, and was fully examined as to the whole transaction, but particularly as to the admissions which he was alleged to have made after the transaction was completed, as to the representations made to him sometime before the sale by the plaintiff as to the value of the land, and he denied that he had made some of the material admissions after the sale, or such representations at the time of sale, or that the plaintiff had ever so represented to him. These alleged admissions were testified to by *Rufus C. Vose*, a brother of the defendants."

W. Kelley argued for the plaintiff.

1. The admission of the confessions of *Carr*, made six months after the transaction had taken place, was erroneous. If he was

agent, it was only for that single transaction, and no admissions made afterwards can be evidence. There is here no pretence of a general agency. Nor are such confessions admissible, where the agent can be called as a witness. *Masters* v. *Abraham*, 1 *Esp. R.* 375 ; *Hellyar* v. *Hawke*, 5 *Esp. R.* 72 ; *Bridge* v. *Eggleston*, 14 *Mass. R.* 245 ; 2 *Stark. Ev.* 43, 60.

2. The defendant, by bringing his action against *Carr* for the fraud, has elected to consider the contract as binding. He also made the same election by not tendering a reconveyance of the land within a reasonable time. *Kimball* v. *Cunningham*, 4 *Mass. R.* 502 ; *Norton* v. *Young*, 3 *Greenl.* 30 ; *Conner* v. *Henderson*, 15 *Mass. R.* 319.

W. G. Crosby and *J. S. Abbot*, for the defendants. The note was due, when it came into the hands of the plaintiff, and therefore subject to any defence which could be made, if the action was by *Carr*. The declarations of *Carr* are admissible, because at the time they were made the note was in his hands, and because he was jointly interested in it with the plaintiff, and because *Carr* was called as a witness by the plaintiff. It is immaterial which was first introduced. When the admissions were made, *Carr* was acting as agent of the plaintiff and *Brown* as well as for himself. The principal is as much bound by the declarations of his agent, as if they had been made by himself. The plaintiff, by a recovery in this action, would be enabled to reap the fruits of his own iniquity. *Paley on Agency*, *c.* 3, § 1, 2 ; *Tucker* v. *Smith*, 4 *Greenl.* 415 ; 4 *T. R.* 39 ; 1 *Campb.* 127 ; *Fox* v. *Whitney*, 16 *Mass. R.* 118 ; *Stark. Ev.* 44, 45, 47 ; *Parker* v. *Merrill*, 6 *Greenl.* 41. The offer on the part of the defendants to rescind the contract was properly left to the jury, and they have settled it. Bringing an action to recover damages insists on the fraud, and does not negative it. This defence does not afford a perfect remedy, but the defendants may avail themselves of it, if they choose, as no satisfaction or even judgment has been obtained in the other.

The opinion of the Court was by

Emery J. — The note in this case was dated *August* 22, 1835, signed by the defendants, payable in one year from date to *Benjamin Carr*, or order, by him indorsed, "without recourse." The

writ in the suit bears date the 4th of *March*, 1837. From the case as stated in the exceptions, it may be concluded, that *Carr*, *Whittier & Brown* were jointly interested in the land for which the note in question was given; that *Carr* sold the land on the joint account of the three and as their agent; that in the winter of 1836–7, the note was indorsed by *Carr*, but not delivered to the plaintiff till after this action was commenced. Nothing then in the evidence contradicts the inference that the note was in *Carr's* possession until after this prosecution was instituted.

Whatever was said by *Carr* during that period, or cotemporary with his possession of the note, would be evidence. *Collenridge* v. *Farquharson*, 1 *Stark. Cases*, 207, *(Exeter Ed.)*

Fraud will vitiate a contract, although the principal take no part in it, for he is civilly responsible for the acts of his agents. And the agent's sayings within the scope of his authority, whether true or false, are just as binding on the principal as if they had been actually made by him. 2 *Stark. Ev.* 60; *Doe* v. *Martin & al.*, 4 *T. R.* 39. In cases where partners and others possess a community of interest in a particular subject, not only the act and agreement, but the declaration of one in respect of that subject matter, is evidence against the rest. Whatever might be said as to the proof of the admissions of *Carr*, had nothing more occurred in the trial, every objection on that score, is entirely done away with, by the introduction of *Carr* himself, as a witness, who was fully examined as to the whole transaction. He denied that he made some of the material admissions after the sale, or such representations at the time of the sale, or that the plaintiff had ever so represented to him. Yet the whole evidence went to the jury. And we must conclude from their verdict upon the evidence, that they found that *Carr* made fraudulent representations to induce the defendants to purchase the land; that *Carr* was by the three, authorized to effect the sale; and they adopted it.

The *false* representations are not made *true* by the commencement of an action against *Carr* for recovery of damages on account of the defendants having been induced by those representations to make the purchase. That action might have been a precautionary measure to protect themselves against the consequences of giving the notes, when they might not be satisfied with the

strength of the proof of which they were informed, they could bring forth to connect the plaintiff with the transaction. It is still pending. It may never go to judgment. But the remedy for making false representations, if made fraudulently with intent to deceive, and damage ensue, will lie against a person not interested in the property, as well as if he were owner. The pursuit of such a remedy is not necessarily an affirmance of the contract. It might rather go to shew that no confirmation ought to be made. The damages in such an action might possibly be affected in some measure by the success of an entire defence against the notes given. A party may have a defence against a claim upon a contract on the ground of fraud upon him; but this could not constitute an answer to *his* action upon the contract, for a party cannot avail himself of his own wrong.

We cannot say the Judge was wrong in declining to give the requested instruction on that point.

The subject of the offer by the defendant to rescind the contract prior to the commencement of the suit, was left to the jury upon the evidence. As a formal tender may be excused by the declarations or other acts of a creditor, the question, whether there has been an offer and refusal, are questions for the determination of a jury. *Warren* v. *Mains*, 7 *Johns. R.* 476; *Coit* v. *Houston*, 3 *Johns. Cas.* 243.

Upon a review of the circumstances developed, we are not satisfied, that we ought to send the case to a new trial, as what is stated, leads us to the belief, that substantial justice has been done by the verdict. The plaintiff can avail himself of the deed which is left on file, if he chooses to do so on the terms upon which it was deposited.

Exceptions overruled.

JOHN W. BAILEY *vs.* JOSEPH HALL.

Where goods are attached by a deputy sheriff on mesne process, the officer is not liable to the suit of the debtor while the lien created by the attachment continues, although he does not keep the property safely; and the statute limitation of four years within which the debtor may bring a suit against the Sheriff, for the neglect of the deputy, in suffering the goods to be destroyed, begins to run from the time the attachment is dissolved.

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

Trespass on the case against *Hall*, as late Sheriff of the county, for the default of *Spencer Arnold*, one of his deputies. With the general issue the defendant filed a brief statement, setting forth that the cause of action did not accrue to the plaintiff at any time within four years next before the commencement of the suit. This suit was commenced *Jan.* 23, 1837, and contained two counts; one trover, for the conversion of a quantity of crockery ware, the property of the plaintiff; and the other alleging, that in *May*, 1832, *Arnold* had a writ against the plaintiff in favor of one *Howard*, and attached thereon the crockery ware, but did not safely keep the same while the suit was pending in favor of *Howard*, and for thirty days after judgment was recovered therein, but within that time wasted and destroyed the same. It appeared that *Arnold* attached the crockery ware on *Howard's* writ in *May*, 1832; that it was deposited by him in a barn not locked, and that within three weeks after the attachment it was destroyed by some person unknown. Within a few days after the destruction of the crockery the plaintiff had knowledge of it. The action, *Howard* against the plaintiff, was entered at the *August Term*, 1832, of the Court of Common Pleas, in *Kennebec*, and judgment rendered at the *April Term*, 1833, and execution issued *April* 19, 1833. The crockery ware was not applied to the satisfaction of that execution, nor in any way accounted for by the officer to the creditors of the plaintiff. In *September*, 1833, the plaintiff demanded the crockery ware of *Arnold*, or the pay for it, but he did not pay for it, saying that the property was destroyed without his knowledge, and that he did not think he ought to pay for it.

The defendant requested the Court to instruct the jury, that the cause of action accrued at the time when the property was destroyed and the plaintiff had notice of the fact. The Court declined, and instructed them, that the cause of action accrued on the expiration of thirty days after the judgment was rendered in *Howard's* suit, or on the discharge of the execution, if discharged within the thirty days. The verdict was for the plaintiff and the defendant filed exceptions.

W. G. Crosby, for the defendant, contended, that when an action arises from the misfeazance of a party, the statute of limitations begins to run from the time the act causing the liability is done or becomes known. *Hinsdale* v. *Larned*, 16 *Mass. R.* 65; *Miller* v. *Adams*, 16 *Mass. R.* 456; *Battley* v. *Faulkner*, 3 *B. & A.* 288; *Bishop* v. *Little*, 3 *Greenl.* 405; *Williams College* v. *Balch*, 9 *Greenl.* 74; *Wilcox* v. *Plummer*, 4 *Peters*, 172; *Angel on Lim.* 293. By the *stat.* 1821. *c.* 62, § 16, all actions against Sheriffs for the misconduct and negligence of their deputies shall be commenced or sued within four years next after the cause of action. An action accrues to a party whenever he has a right to commence it. When the property was destroyed, it could not be sold to pay the demand on which it was attached, and the cause of action accrued as soon as the fact was known to the plaintiff. The action is brought for negligence in suffering the property to be destroyed, and the deputy was guilty of that misfeazance more than four years before the commencement of this suit.

Allyn, for the plaintiff, argued, that the ruling of the Judge was right on either of these two views:—1. While the lien of the creditor by attachment existed, no injury could happen to the plaintiff, or its extent must be unknown. The execution might go into the hands of the deputy, and he might pay the full value of the property to the creditor, and so the plaintiff would not be injured. If the suit therefore was brought before that time, it could not be maintained, or the damages must be merely nominal. *Prescott* v. *Wright*, 6 *Mass. R.* 20; *Rice* v. *Hosmer*, 12 *Mass. R.* 127; *Mather* v. *Green*, 17 *Mass. R.* 60.

2. The same evidence will support either count in the declaration. Trover cannot be maintained until the plaintiff has the right

to possession. This he cannot be entitled to while the attachment lasts. *Ladd* v. *North*, 2 *Mass. R.* 514.

The opinion of the Court was drawn up by

WESTON C. J. — Where goods are attached on mesne process, the duty of the officer to the defendant is, to redeliver them to him, if the plaintiff does not prevail in his action, or if the attachment is dissolved, by payment made to the creditor, or otherwise. While the lien, created by the attachment continues, the officer is not, in our opinion, liable to the suit of the debtor, although he does not keep the property safely. He is liable to the creditor, whose claim is paramount to that of the debtor, until the attachment is dissolved.

It does not appear to us, that a right of action accrues in favor of the debtor, until he is entitled to a return of the goods. He has then a claim to a full indemnity, free from any lien in favor of the creditor. If the execution is, within thirty days of the judgment, put into the hands of the officer, with directions to seize the goods attached, if he fails to do so, he is liable to the creditor for his neglect, but the attachment no longer continues. *Wheeler & al.* v. *Fish*, 3 *Fairf.* 241. While the officer lawfully holds the goods for the creditor, to whom he is responsible for their safe keeping, the remedy of the debtor in relation to them is postponed, until the attachment is dissolved. If the attachment is however preserved, and made effectual by a seasonable sale on the execution, we do not mean to say, if the goods have, by the misconduct of the officer, deteriorated in value, and have for that reason sold for a less sum, to the prejudice of the debtor, that he may not have an action for the injury.

Exceptions overruled.

ARCHIBALD JONES *vs.* WALDO PIERCE *& al.*

Where the proprietor of land, overflowed by a dam owned by different persons, proceeded by separate complaints, and recovered a judgment for yearly damages against each owner of the dam for flowing different portions of the complainant's land, and where afterwards one of the respondents becomes sole owner of the dam; if the proprietor of the land seek an increase of his yearly damages, he may combine the whole subject matter in one complaint against the then owner of the whole dam.

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

This was a complaint for flowing the land of *Jones* against *Pierce, Treat* and *Lord,* under the statute regulating mills, wherein he claims an increase of damages above what had been before allowed him. To maintain his complaint, *Jones* offered in evidence a judgment in his favor against *Pierce, Treat* and one *Mayo,* on a complaint in which he alleged, that they flowed a part of the land described in the present complaint. The yearly damages were estimated at nine dollars. He also offered in evidence, a judgment on another complaint by him against the present respondents, for flowing the remainder of the land described in the present complaint, in which the annual damages were assessed at five dollars. The title which *Mayo* had at the time of the filing of the complaint, wherein he was a party, was in the respondents at the time of filing this complaint. The respondents objected to the admission of the records of those judgments upon the ground, that the parties were not the same, *Mayo,* one of the mill owners, at the time of filing the first complaint, not being a party in the second, nor in the present complaint; and that two reports and judgments upon the same could not be united so as to constitute a foundation for the present petition for increase of damages. The Judge overruled the objection, and permitted the evidence to be introduced, and it went to the jury, and a verdict was returned for the complainant. The respondents filed exceptions.

W. Kelley, for the respondents, argued in support of the grounds taken at the Common Pleas; and also urged, that by joining the two processes it might happen, that in one the damages would be reduced, and in the other increased, and in that way the respond-

ents be compelled to pay costs, when they should receive them. He cited *Vandusen* v. *Comstock*, 9 *Mass. R.* 203; *Axtell* v. *Coombs*, 4 *Greenl.* 322.

W. G. Crosby argued for the complainant. A judgment pursuant to the statute, runs with the land, and binds not only parties to the record and privies, but the grantees or assignees of the land. *Commonwealth* v. *Ellis*, 11 *Mass. R.* 462. Had the complaint been filed against *Mayo*, he might have avoided it by pleading that he was not an owner of the dam. *Lowell* v. *Spring*, 6 *Mass. R.* 398.

The opinion of the Court was by

WESTON C. J. — The complainant, being the owner of the whole tract flowed, and the respondents the owners and occupants of the mill, it was most convenient and least expensive to all the parties concerned, to combine the whole subject matter in one complaint. There can be no reasonable objection to such a course of proceeding; and the object of the complaint, the land flowed and the liability of the respondents are stated with sufficient precision. *Mayo* having ceased to be an owner, and the respondents having succeeded to his title and occupancy, there would have been no propriety in naming him as a respondent.

If the respondents would have raised the point, whether there had been any adjudication, which justified a complaint embracing the whole land, or whether they were bound by it, they should have taken the objection in some other mode. No such question was properly submitted to the commissioners or to the jury. They were called upon to determine points of a different character.

Exceptions overruled.

William Houston *vs.* Henry Darling *& al.*

Where a vessel is let to be employed for the season in fishing, to one who is to be master, and is to victual and man her, and is to pay to the owners for her hire a certain proportion of her earnings, and is to take his outfits and supplies of them; the owners are not liable during the time for any outfits furnished by others at the request of the master.

If a creditor release one of several who are joint promissors to him, all are thereby discharged.

Thus, if supplies are furnished to the owners and sharesmen of a vessel, let on shares, on their joint responsibility, the release of one is a release of all.

Assumpsit for a balance of $60,20, claimed of the defendants as owners of the schooner *Polly*, for a quantity of fish barrels. The charge in the account annexed to the writ was made to "Schooner *Polly* and sharesmen," and amounted, without the credit, to $165,20. It was admitted that the defendants were owners of the schooner. *Alexander C. Todd*, master of the *Polly*, when the barrels were delivered, was called as a witness by the plaintiff, and objected to by the defendants. The plaintiff released him, and he was admitted. From his testimony it appeared, that about *April* 24, 1832, he took the *Polly* of the defendants for the season, to be employed in fishing upon the usual terms; he to be master, and to victual and man her, and to pay to the defendants a certain portion of her earnings; and that it was agreed, that he should take all the outfits and supplies for the schooner of the defendants, who were merchants in *Bucksport;* that the schooner was engaged in the cod fishery until *August*, 1832, when she returned to *Bucksport*, and all the fish were delivered to the defendants to be cured and sold for the benefit of all concerned; that the parties then agreed to employ the schooner for the remainder of the season in the mackerel fishery upon the same terms; that he applied to the defendants for barrels, but they had not enough, and wished him to ascertain if any could be obtained at *Prospect*, and inform them of the prices and terms; that he applied to the plaintiff who had some barrels on hand, obtained his prices and terms, and informed the defendants thereof by letter, and received from them a written answer, advising him to take them, which he did. He testified, that they were purchased by

him for the benefit and on the credit of the owners and sharesmen of the schooner *Polly*, and that at the time of the delivery of the barrels to him, a bill was made out and delivered to him, charging the barrels to the owners and sharesmen of the schooner; that it was agreed between him and the plaintiff, that they should be paid for at the close of the season; that the mackerel fishing was a losing concern, as he did not receive enough to pay for victualling and manning; that on the return of the schooner, a settlement was had between the parties concerned, in which the barrels "were charged to the great general bill;" that all the outfits and supplies which had not been used, among which were 150 barrels, were then divided between the owners and sharesmen, the owners of the schooner receiving three tenths and the sharesmen seven tenths, which were their respective proportions; that something was then said about the plaintiff's bill, and he told the defendants that it ought to be paid. He further testified, that he considered the owners and sharesmen all bound to pay this bill; and that it was the custom on the *Penobscot River* for the owners of vessels engaged in fishing upon the usual shares, as in this case, to pay their own proportion of all articles included in the great general bill; and that barrels are always included in that bill. It was then agreed by the parties to take the case from the jury, and upon the evidence to submit the whole matter to the opinion of the Court, who were to make the same inferences from the evidence, which a jury might properly do, and should order a nonsuit or default according to their opinion.

W. Kelley, for the plaintiff, argued, that the defendants were liable: — 1. By the terms of the contract. *Emery* v. *Hersey*, 4 *Greenl.* 407. 2. Because they directed the purchase. 3. Because the property was put into the common stock in the great general bill. 4. By the usage on the river. *Williams* v. *Gilman*, 3 *Greenl.* 276.

W. G. Crosby argued for the defendants, that where a vessel is let on shares, and the master is to man and victual her, as in this case, that the owners are not liable for the contracts of the master. *Reynolds* v. *Toppan*, 15 *Mass. R.* 370; *Taggard* v. *Loring*, 16 *Mass. R.* 336; *Perry* v. *Osborn*, 5 *Pick.* 422; *Cutler* v. *Win-*

sor, 6 *Pick.* 335; *Thompson* v. *Snow*, 4 *Greenl.* 264; *Winsor* v. *Cutts*, 7 *Greenl.* 261. By the plaintiff's own showing, *Todd*, the master, was liable as a sharesman, and the release of one promissor discharges the whole. *Walker* v. *McCullock*, 4 *Greenl.* 421; *Gardiner* v. *Nutting*, 5 *Greenl.* 140; *Ward* v. *Johnson*, 13 *Mass. R.* 148; *Tuckerman* v. *Newhall*, 17 *Mass. R.* 581. The whole of the great general bill, is first deducted from the proceeds, and whatever remains should be divided.

The opinion of the Court was by

WESTON C. J. — We do not perceive sufficient ground for distinguishing this case from others, cited for the defendants, where the owners were held not liable for supplies furnished for a vessel, which the master had taken on shares. The master was to take the outfits and supplies from the owners, but it was to be in their character as merchants. The letter of the master, which is a part of the case, shows that he was to be the purchaser of the barrels. They were, it seems, to be charged in the great general bill, but this was with a view to a proper adjustment of the business, among the parties concerned. We cannot deduce from the testimony of the master, that it was the intention of the owners to pledge their credit for the barrels, which it belonged to him to purchase. Their letter to him contains only matter of advice, as to the course which it would be proper for him to take.

But if the plaintiff's claim was against the owners and sharesmen of the vessel, as he charged it, he has released the master, who was one of the principal sharesmen. And it is a well established principle of law, that if a creditor releases one of several, who are jointly liable to him, all are thereby discharged. *Tuckerman & al.* v. *Newhall*, 17 *Mass. R.* 581.

Plaintiff nonsuit.

WALDO BANK *vs.* JOSEPH R. LUMBERT *& al.*

If the name of a firm be affixed to a negotiable paper by one of the members of the firm for his individual accommodation, and the note is discounted at a bank in the usual manner, without knowledge of such fact, the other members of the firm are bound, although the note is made out of the course of the partnership business, and without the knowledge or consent of the other partners.

THIS case came before the Court upon a statement of facts agreed by the parties. It was agreed, that so much of the statement as was founded on the testimony of *French*, one of the drawers of the draft in suit, should be excluded, if the Court should deem it inadmissible on objection made by the plaintiffs. One of the defendants in his own name and in the name of the company, gave to *French* a release under seal, but no authority was shown from his partner to execute the release. The statement of facts in the opinion is sufficiently full to dispense with any additional statement.

W. Kelley, for the plaintiffs, contended, that it was sufficient to enable the plaintiffs to recover, that the defendants, being payees and indorsers, were bound to see that the bill was fair and proper. The plaintiffs took the bill on their responsibility, without the slightest cause of suspicion. If every name prior to the defendants' was a forgery, still they are bound. Although the bill may be fraudulent in the hands of the payee, still it may be good if it come into the hands of a *bona fide* holder in the ordinary transaction of business, as a discount. 2 *Stark. Ev.* 267; *Boardman* v. *Gore*, 15 *Mass. R.* 231. It is sufficient to charge both partners, if the bill be drawn by one in the name of the firm, and it be negotiated to a third person in the usual course of business, without knowledge by the holder of any want of authority. *Collyer on Part.* 220, 241, 279, 289, *and cases cited; Foster* v. *Andrews*, 2 *Penns. R.* 160. Without the testimony of *French*, there is no pretence of a defence. He could not be a witness without being released, being directly interested. *Pierce* v. *Butler*, 14 *Mass. R.* 303. One partner cannot bind another by a sealed instrument. *Crawford* v. *Millspaugh*, 13 *Johns. R.* 87; 7 *T. R.* 207.

Rogers, for the defendants, said, that in *Chazournes* v. *Edwards*, 3 *Pick.* 5, the Court, upon a review of the authorities, establish this doctrine, that where a note is given in the name of a firm, by one of the partners, for the private debt of such partner, and known to be so by the person taking the note, the other partners are not bound by such note unless they have been previously consulted and assented to the transaction. The same principle is recognized in many other cases. *Stearns* v. *Burnham*, 4 *Greenl.* 84; 1 *Wend.* 529; 3 *Wend.* 415; 6 *Wend.* 615; 7 *Wend.* 158; *ib.* 309; 11 *Wend.* 75; 14 *Wend.* 141, 146. He then contended that this was a transaction for the benefit of *Greely*, and a fraud upon his partner; that the draft in suit, which grew out of the transaction, was void; and that the Bank took it under such circumstances, as that they must be considered as having knowledge of the facts. If the party taking the paper can be considered as being advertised that it was not intended to be partnership property, it will not bind them. 8 *Ves.* 542. The principle upon which one partner may bind another is, that each is made the agent of the others for the purpose of entering into contracts for them within the scope of the partnership concern. 6 *Bing.* 776. If the facts afford a defence to the partner of *Greely*, they are equally available to the defendants as indorsers. 3 *Pick.* 5, before cited. The release of one of the defendants in the name of the company is valid. 3 *Johns. R.* 68; 13 *Johns. R.* 286; 14 *Johns. R.* 387.

The opinion of the Court was drawn up by

Emery J. — The case stated exhibits the claim of the plaintiffs against the defendants as indorsers of a draft dated *September* 16, 1836, in their favor, by *French & Greely* on *David Greely*, merchant, *Bangor*, and by him accepted, for $1500, payable in four months after date, at the *Suffolk Bank*, *Boston*.

The presentment, protest and notices in due form are admitted.

The case has been elaborately and ingeniously argued. It is objected, if *French* be legally admissible as a witness, that *Greely* was not authorized to use or sign the name of the firm in any transactions disconnected with partnership transactions. That this, and the other drafts mentioned in the agreed statement of facts, were all made and discounted by *Greely* for his own transactions, and in

no way connected with the company of *French & Greely*, and that no part of the proceeds of said drafts ever went to the benefit of the company.

The cashier says the above drafts were all received and discounted by the Bank in the regular course of business, and that he knew nothing of the relation of the parties to each other, nor the want of authority of any of the parties to sign the partnership name, or to bind their respective companies, and that there was no antecedent debt due from *Greely* to the Bank. That he did not know any thing about *David Greely*, nor that he was a member of the firm of *French & Greely*.

By said *French* it is further disclosed, that the house of *French & Greely* entered into partnership *October* 29, 1834, ceased doing business in *August*, 1836, and was dissolved in *December* following. The business of the firm, during its continuance, was large, and the amount of the transactions with the banks in the vicinity $100,000. *Greely* brought into the firm $2000 at first. That *French* had some suspicions that *Greely* was using the company name improperly the last of *July*, 1836, and had actual knowledge of the fact sometime in the following *August;* but gave no notice until *December*, when the partnership was dissolved. In *January*, 1836, *Greely* was absent several weeks at *New-York* or *Boston*, and again, nearly the whole month of *May* and into *June* following; again in *August*, and then again in *October* following.

Can the Court, from the facts stated, infer that the Bank had express or implied notice of the particulars of the connection between *French & Greely;* or that *French* had no express or implied notice of *Greely's* proceedings with the *Waldo Bank?* The tendency of the facts stated, is stronger to show that *Mr. French* had notice enough to put him upon inquiry in *July*, and actual knowledge in *August*. And there is wanting a satisfactory explanation how the renewals in *May*, with the $500, was procured, if *Greely* was absent during that month and into *June* following.

We are not satisfied, that the circumstance of the application being by *Greely* should be implied notice to the Bank. Express notice is not pretended, but absolutely denied.

Occasion is often given to lament the liability to which partners are unexpectedly subjected. In proper cases, the Court uniformly

endeavor to apply the legal limitation of responsibility. But in this case, the defendants engaged conditionally to meet the demand of the plaintiffs, if the acceptor did not, provided the requisite steps were taken to charge them as indorsers. These preliminary courses are admitted to have been regularly pursued.

In this suit, it is immaterial whether *French* received notice.

The case cited by the defendant's counsel from 1 *Wend.* 529, *Laverty & al.* v. *Burr & al.* where the partners who did not sign the indorsement were held not to be bound, was a case in which the note was indorsed by one of the members of the firm, as security for a third person, and the person to whom the note was passed *knew the facts.* Afterward a decision was made in *New-York*, reported in 15 *Wend.* 364, *Catskill Bank* v. *Stall*, that if for the accommodation of a third person, the name of a firm be affixed to negotiable paper, by one of the members of the firm, and the note is discounted by a bank, without knowledge of such fact, the other members of the firm are bound, although the note is given out of the course of the partnership business, and without their knowledge or consent.

It becomes unnecessary to examine particularly as to the admissibility of *French* as a witness, though the inclination of our opinion is against it, because, whether in or out of the case, we do not perceive a legal defence for the defendants in this action. According to the agreement of the parties, the defendants must be defaulted.

WALDO BANK *vs.* DAVID GREELY *& al.*

In an action against all the partners, on a note made by one of them in the partnership name, it is not incumbent on the plaintiff, in the first instance, to show that the note was given for a partnership transaction.

THIS was an action against *Greely & French*, as drawers of the same bill described in the case *Waldo Bank* v. *Lumbert & al.*, *ante, p.* 416, and was submitted on the same arguments, and on the same facts, with the exclusion of the testimony of *French.*

W. Kelley, for plaintiffs.

Rogers, for defendants.

The opinion of the Court was drawn up by

EMERY J. — In this case it is agreed, that all the facts admitted in the statement of facts in the case of *Waldo Bank* v. *Lumbert & al.*, excepting the testimony of *French*, are to be received as admitted in this case. The result is, that nothing but the articles of partnership presents any thing whereon to raise the semblance of a defence in this action. And although it may be feared, that injury may result to *French ;* those articles and the books do not furnish that satisfactory evidence to relieve the defendants, which they earnestly desire. These books are their own private memoranda. They may shew all their disbursements, receipts and liabilities, and they may not. Merely producing them throws no burthen of proof on the plaintiffs. The defendants must go further. But it is not incumbent on the plaintiffs in the first instance to show that a note or draft negotiable, was given for a partnership transaction, though it were made by one of the partners in the partnership name. *Vallett* v. *Parker*, 6 *Wend.* 615.

According to the agreement of the parties, the Court upon the state of facts agreed, are obliged upon legal principles to decide, that the plaintiffs are entitled to judgment. Because excluding *French's* testimony, and the presentment, protest and notice in due form are admitted.

The defendants must be called, and judgment be rendered for the plaintiffs.

Isaac Lothrop *vs.* Samuel S. Abbott.

The return of an officer on a writ, that he has attached certain articles of personal property, in the absence of all opposing testimony, is sufficient evidence of a valid attachment until judgment is rendered in the suit, and for thirty days after judgment.

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

Replevin for a pair of oxen. The defendant justified the taking of the oxen under an attachment of them by an officer, *August* 12, 1835, as the property of one *Zenas Lothrop*. The plaintiff proved by the same *Zenas Lothrop*, that he sold and delivered the oxen to the plaintiff in the fall of 1835, for sixty dollars, and that the plaintiff paid three dollars in cash, and gave his note for the residue. The plaintiff also proved, that the same oxen had been attached as the property of one *Harding;* that *Zenas Lothrop* had replevied them as his property; and that the return of the officer on the writ of replevin, shew that on *August* 11, 1835, he delivered the oxen to *Zenas Lothrop* in the county of *Waldo*. The defendant proved by the officer's return, that the oxen were attached by *James Cook*, a deputy sheriff, in the county of *Lincoln*, *August* 12, 1835, as the property of *Zenas Lothrop*, at the suit of one *Page*, which suit was still pending when the present action was commenced. The only instruction or ruling of the Judge was, that the return of *James Cook* on the writ of *Jesse Page* against *Zenas Lothrop* and another on the twelfth day of *August*, 1835, was *prima facie* evidence of an attachment in the absence of evidence to rebut or control it, which would be valid until thirty days after judgment. No instruction was requested. The jury found, that the oxen were not the property of the plaintiff, and he filed exceptions.

Harding, for the plaintiff, said, that he had heard of a rule that the return of an officer was in some cases conclusive, but never before that it was *prima facie* evidence. An officer cannot make an attachment, unless he can take the property into his possession at the time. *Lane* v. *Jackson*, 5 *Mass. R.* 163; *Watson* v. *Todd*, *ib.* 271; *Vinton* v. *Bradford*, 13 *Mass. R.* 114; *Knap*

v. *Sprague*, 9 *Mass. R.* 258. The return must be false, because the oxen were then in the county of *Waldo*, where *Cook* could not attach them. The false return of an officer cannot defeat a *bona fide* sale.

J. S. Abbott, for the defendant, said, an officer's return was conclusive as to the facts contained in it, except in an action against him. *Slayton* v. *Chester*, 4 *Mass. R.* 478; *Estabrook* v. *Hapgood*, 10 *Mass. R.* 313; *Bean* v. *Parker*, 17 *Mass. R.* 591. The jury found that the oxen were not the property of the plaintiff, when he replevied them, and that is a sufficient defence.

The opinion of the Court was by

WESTON C. J. — The question in controversy between these parties was, whether the oxen replevied in this suit, at the time of the sale made by *Zenas Lothrop* to the plaintiff, were under attachment, as the property of *Zenas*, at the suit of *Jesse Page*. The officer who served the writ in favor of *Page*, returned that he had attached these oxen, on the twelfth of *August*, 1835, which was prior to the sale to the plaintiff. The Judge ruled, and so instructed the jury, that this was *prima facie* evidence of that fact, and that in the absence of all opposing testimony, the attachment would be valid, until thirty days after judgment. It does not appear to us, that the correctness of this opinion can be questioned. It was the legal and appropriate evidence of the existence of an attachment. No question as to what constitutes an attachment, or under what circumstances it is to be regarded as dissolved, is involved in this instruction.

If the counsel for the defendant would have raised the point, whether upon the evidence in the case, any attachment was in fact made, or whether if made, it was not lost or abandoned, he should have moved the Court to have instructed the jury, according to his views of the law. We are called upon only to decide upon the correctness of the instructions given, not whether other and further instructions might not have been appropriate. Other instructions may have been given; although those only are stated, in regard to which exceptions are taken. The exceptions are overruled; and there must be judgment for a return, damages and costs.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1840.

BARRETT POTTER, *Judge, &c. vs.* EUNICE TITCOMB, *Executrix.*

Under *stat.* 1831, *c.* 514, to abolish special pleading, the points in a brief statement, are equivalent to one or more special pleas in bar, under leave to plead double; and the final judgment depends upon what the law, as applied to the case, may require after the facts in controversy shall have been settled.

Where the general issue is to be determined by the Court, by an inspection of the record, and facts are set up in defence by brief statement, to be properly settled only by a jury, the determination of them must be referred to the jury; and when their verdict thereon shall have been returned, it will be for the Court, on view of the whole case, to decide, whether the action has or has not been sustained.

If there has been a joinder of the general issue, and the facts alleged in the brief statement have been directly controverted by a counter statement, no other formal joining of the issue can be required.

THIS was a *scire facias* by the administrator of the estate of *Elizabeth Titcomb*, the widow of *Moses Titcomb*, deceased, on whose estate *Joseph Titcomb* was administrator, to have execution against the estate of said *Joseph*, of whose will the defendant was executrix, for one half of a judgment recovered against the said *Joseph*, for delinquency as administrator.

Plea, that there is no such record as the plaintiff has declared on, with a verification. To this the plaintiff replied, that there is

such record of recovery, &c., "and this he is ready to verify by said record, and prays an inspection thereof by the Court." This is joined by saying, "and the said *Eunice Titcomb* doth the like."

The defendant filed with the plea a brief statement, in substance,

1. That *Elizabeth Titcomb* was never married to *Moses Titcomb*.

2. That *Joseph Titcomb* had fully paid the judgment against him.

3. That *Elizabeth Titcomb* was not entitled to recover.

4. That *Moses Titcomb*, for whose benefit this suit is brought, claiming as assignee of *Elizabeth Titcomb*, was not entitled to recover.

5. That the whole amount of the judgment recovered had been paid to the heirs at law and their assigns, the said *Joseph* retaining only his share, and paying to the assignee of the widow whatever she was entitled to have.

6. That *Elizabeth Titcomb* had legally transferred to said *Joseph Titcomb*, deceased, for a valuable consideration, all her interest in the estate of her late husband.

To each particular in the brief statement the plaintiff replied, and concluded his replications severally with a prayer, "that this may be inquired of by the country." These issues were not joined by the defendant. The following motion was made by the counsel for the plaintiff.

And now the plaintiff, having tendered to the defendant issues to the country upon all the matters of fact in her brief statement contained, and prayed that a jury may be impannelled to try the same — and the said *Eunice Titcomb*, executrix, having here in court refused to join the said issues, or any of them, and thus abandoned her said brief statement, the plaintiff hereupon prays that the Court will proceed to the trial of the general issue, which is joined, by an inspection of the record of the judgment declared on, and render judgment thereon; and that the plaintiff may have his execution, &c.

Hopkins, for the plaintiff, contended, that the defendant should join the issues tendered, and in the same manner as if the matter of the brief statement had been in special pleas, before the statute abolishing special pleading; and that there was no difficulty in taking that course.

Mellen & Daveis, for the defendant, said, that if there was to be no special pleading, they knew not any mode of trying distinct issues of fact in the same case before both the Court and the jury; that they only wanted the advice of the Court on the subject; that they knew not what authority there was under the statute for joining more than one issue; and in this case the general issue was to be tried by the Court; and they did not perceive how the jury were to try any issue in the case.

The opinion of the Court was drawn up by

WESTON C. J. — Special pleading having been abolished by law, it becomes the duty of courts of justice so to mould their proceedings, under the substitute provided, a brief statement, that it may supply its place. And there can be no difficulty in effecting this object. The points in a brief statement are equivalent to one or more special pleas in bar, under leave to plead double. The final judgment depends upon what the law, as applied to the case may require, after the facts in controversy shall have been settled. And this is in accordance with the old system, where upon different sets of pleadings, some issues might be found for the plaintiff, and some for the defendant. The mode of trial, preliminary to final judgment, depended upon the issue, which was referred to the decision of the Court, or of a jury, according to the nature of the question presented.

Upon double pleading, a resort might become necessary to both these modes of determining the questions raised in the same case. Carrying out this analogy, which the plea of the general issue with a brief statement plainly requires, if the general issue, as in this case, is to be determined by an inspection of the record, the facts set up in defence in the brief statement can be settled only by the jury, to whom they must be referred. Being directly controverted in the counter statement, no other formal joining of the issue can be legally required. A trial must be had before the jury, who will determine the facts, and it will be for the Court then to decide, whether the action has or has not been sustained, and for which party judgment ought by law to be rendered.

Enoch Gammon *vs.* Alfred Dow *& al.*

Where the condition of a bond stipulates, that the obligor shall pay a certain note, given by the obligee to a third person, according to the tenor thereof, and in conclusion says, that the bond shall be void, if the obligor shall pay the note *on reasonable demand made therefor* ; an action on the bond, commenced six months after the note fell due, cannot be maintained without proof of the demand on the obligor prior to the suit.

Debt on a bond given by the defendants to the plaintiff, dated *March* 11, 1835. The bond provided that the defendants should pay certain notes given by the plaintiff to a third person, payable at different stipulated times, and also pay certain notes payable at different times, given to the plaintiff by the defendants. The bond concluded thus. " All which are to be paid according to the tenor of said notes respectively. Now if said *Dow* and *Thorp* shall and do, on reasonable demand made therefor, pay to them or their order the full amount of the notes aforesaid, with interest which has accrued and which may accrue thereon, then this obligation, &c." One of the notes, payable to the third person, had fallen due *March* 10, 1836, and this action was commenced *September* 8, 1836, but the plaintiff had made no demand whatever of the defendants for payment of either of the notes. Several other questions were presented in the statement of facts, and argued by counsel, but the Court made no decision thereon.

W. P. Fessenden, for the plaintiff, contended, that the true construction of the bond was this. The defendants were to pay the notes within a reasonable time after the notes fell due. Such time had elapsed before the suit was brought.

Fessenden & Deblois, for the defendants, argued, that no action could be supported on the bond, by its terms, until after a reasonable demand, which must be made after the note fell due.

The opinion of the Court was drawn up by

Weston C. J. — The plaintiff, to sustain his action, must show, that when it was commenced, there was a breach of the condition of the bond. This depends upon its terms, to which we must look to ascertain the liability assumed by the defendants. It consisted in certain payments, which were to be made by them, on

reasonable demand. This evidently implies, that before they could be chargeable with a breach of the condition, a demand must first be made upon them; and that demand was to be a reasonable one. What would be a reasonable demand, we are under no necessity of deciding, for none whatever was made. If the condition of the bond had been, to pay the notes at their maturity, no demand would have been necessary. But we must take the contract, as the parties have made it; and by that, a reasonable demand was first to be made by the plaintiff.

Judgment for the defendants.

Inhabitants of PORTLAND *vs. Inhabitants of* NEW-GLOUCESTER.

Before the pauper was two years old, his mother being then dead, his father, living in *Baldwin*, gave him away to one *Sanborn* and his wife, then living in *New-Gloucester* or in the vicinity, to be brought up as their own child, and never after exercised any control over him, never supplied him with any thing, never took care of him, or received any thing from him, and never saw him, excepting once or twice as a visitor. The pauper continued from that time until after he became twenty-one years of age, to be a member of the *Sanborn* family, who were very poor and drunken, and was by them regarded as having a home with them, and he considered his home there, and whatever of control over him was exercised by any one, was exercised by the *Sanborns*. On *March* 21, 1821, the pauper, being then a minor, dwelt and had his home with the *Sanborns* in *New-Gloucester*. *The Court held*, that the pauper was emancipated, and therefore gained a settlement in *New-Gloucester*, by thus residing there at the passage of that act.

THIS action was to recover expenses for the support of *Daniel Kelley*, his wife and children, alleged to have their settlement in *New-Gloucester;* and the question at issue was, whether the settlement of the paupers was in that town? The plaintiffs introduced testimony tending to prove, that *Daniel Kelley*, who was the son of *Isaac Kelley* of *Baldwin*, was, when between one and two years of age, carried by his father to the residence of *Solomon Sanborn* and wife, in *Thompson Pond Plantation*, or *New-Gloucester*, and

given away to *Sanborn* and wife, by the request of the child's mother, who was a sister of *Sanborn*, and who had then lately deceased, as their own child; and that the father of the pauper never afterwards exercised any control over him or supplied him with any thing, or received any of his earnings, and that he never visited him but once or twice afterwards, and that *Daniel Kelley* remained with the *Sanborn* family as a member of it until he was married; that from 1822, being then from fourteen to sixteen years of age, he went out to work in the summer seasons for about five years, and one or more winters, returning to *Sanborn's* when not so employed. There was testimony tending to prove, that the *Sanborns* were very poor all the time, and that they lived in log huts put up as temporary abodes, in various places in *Thompson Pond Plantation*, in *Raymond*, on the eighty rod strip so called, and in *New-Gloucester*, and that they wandered about begging and doing occasionally little jobs of work for a day or two, and that *Kelley* was about, often with them or one of them. Some of the witnesses spoke of *Sanborn* as a common beggar and common drunkard, and *Sanborn* and wife had been supported by the town of *New-Gloucester* for the last nine or ten years. There was testimony tending to prove, that on *March* 21, 1821, the *Sanborns* lived in a house or hut in *New-Gloucester*, and had so done for a year or two before, and that *Kelley* was there with them, and also testimony contradictory thereto.

At the trial before SHEPLEY J. the evidence was all submitted to the jury, who were instructed, that if from the testimony they were satisfied, that the father of the pauper, when he was between one and two years of age, his mother being dead, gave him away to the *Sanborns* to be brought up as their own child, and that the father never exercised any control over the child after that time, and never supplied him with any thing, or took care of him, or received any thing from him, or saw him except once or twice as a visitor, and that he continued from that time until he was married, to be a member of the *Sanborn* family, and was by the *Sanborns* regarded as having a home there, and that he considered that his home, and that whatever control over him was exercised by any one was exercised by the *Sanborns*; he should be regarded as emancipated. And that if they should find that he was emancipated, they

would consider the testimony relating to the residence of the *Sanborns* on *March* 21, 1821, and if satisfied, that they at that time had their residence and dwelling in *New-Gloucester*, then *Kelley*, if then resident with them, would acquire a settlement in *New-Gloucester*; that if *Kelley* was not on that day actually in that family, yet if they were so resident in *New-Gloucester*, and *Kelley* was a member of their family, and both he and they regarded that as his home, if absent on that day and for a few weeks or months, designing at the expiration of that time to return there as his home; he must be regarded as having his residence in *New-Gloucester* on that day; and that if the jury were not satisfied that *Kelley* was emancipated, and that he was a resident of *New-Gloucester* on *March* 21, 1821, upon the principles before stated, their verdict should be for the defendants; and if so satisfied, for the plaintiffs. The verdict for the plaintiffs was to be set aside, if the instructions were erroneous.

The parties agreed, that the Judges living in *Portland* should sit in the case.

S. Fessenden & Deblois argued for the defendants, that the facts proved in the case did not show an emancipation. There is no such thing as an emancipation, when the father has the power of reclaiming the child. This power he could exercise at any day. The question is this, is a parent at liberty to abandon his child to a beggar and a drunkard, and thus be freed alike from his duties, his liabilities and his rights? It is utterly opposed to the moral obligations between parents and children, to the interests of society, and to the laws of the State. During minority, the child must be under some one, and while the father lives, it must be under him, and he cannot delegate the power to another. The legitimate minor cannot have a settlement separate from its father's in the father's lifetime. *Wells* v. *Kennebunk*, 8 *Greenl.* 200; *Lubec* v. *Eastport*, 3 *Greenl.* 220; *Wiscasset* v. *Waldoborough*, *ib.* 388; *Sidney* v. *Winthrop*, 5 *Greenl.* 123; 3 *T. R.* 114; *ib.* 353; *ib.* 355; 2 *B. & Ad.* 865; 2 *B. & Cr.* 345; 8 *T. R.* 479; *Reeves' Dom. Rel.* 283; *Charlestown* v. *Boston*, 13 *Mass. R.* 469; *Springfield* v. *Wilbraham*, 4 *Mass. R.* 493; *Dedham* v. *Natick*, 16 *Mass. R.* 135; 2 *Johns. R.* 375. But if the father could abandon his duties and his rights, he merely transferred them to *Sanborn*,

and the child was under his control, as he otherwise would have been under his father's, and is not emancipated.

Longfellow, Sen. argued for the plaintiffs, that the only question in the case was, whether the Judges' instructions in relation to what constitutes an emancipation are correct. The jury have settled all the rest in our favor. The father has the power to give up and surrender his parental rights over the child. This he did, and this is of itself an emancipation. There is no distinction in the pauper laws between the rich and the poor. The same rule holds as to both, until they become paupers. The instructions of the Judge are fully supported by the cases *Wells* v. *Kennebunk*, 8 *Greenl.* 200; *Leeds* v. *Freeport*, 1 *Fairf.* 356; *Springfield* v. *Wilbraham*, 4 *Mass. R.* 496. The decisions go to the full extent, that a minor may gain a settlement, if emancipated. *Parsonsfield* v. *Kennebunkport*, 4 *Greenl.* 47; *St. George* v. *Deer Isle*, 3 *Greenl.* 390.

The opinion of the Court was drawn up by

Weston C. J. — The jury have found, that the pauper resided, on the twenty-first of *March*, 1821, in the family of *Solomon Sanborn*, at his house in *New-Gloucester*. That before he was two years old, the father of the pauper had relinquished to *Sanborn* his parental rights over the child. That he had accepted him, and that from that period, *Sanborn's* house was regarded by him, the father and the child, as his home. That thereafter, he received no maintenance or assistance from the father, who practically divested himself of all care or control over the child, the duties belonging to the parental relation, so far as they were fulfilled, being assumed and discharged by *Sanborn*.

If a minor cannot, by any voluntary act of his own, change his domicil or acquire a new one, without the consent of his father, or his mother, if she be the surviving parent, there seems no good reason why this may not be done, by the appointment of his father and the free consent of all, whose interest may thereby be affected. And in the case before us, it does appear, that *Sanborn's* house, under the circumstances, became the pauper's home. This however is not necessarily or uniformly coincident with settlement. It was made so, at the period referred to by the literal terms of the

statute, upon which the plaintiffs rely. A question then arises, whether there is any limitation or exception to the generality of its application. Such exceptions have obtained even under the pauper laws, which depending upon positive and arbitrary enactment, have generally received a strict construction.

Thus, under the act of *Massachusetts*, of 1793, *c.* 34, the ninth mode of gaining a settlement, although extending by its terms to every person, without any discrimination as to age, which is made in other modes in the same statute, has been understood not to apply to minors, who had parents living. *Hallowell* v. *Gardiner*, 1 *Greenl.* 93, and the cases there cited. So although the second mode, in the same statute, provides, that legitimate children should follow the settlement of their father, until they gain one in their own right, this has been held to be limited to the settlement of their father, during their minority, and not to extend to a settlement acquired by him, after they cease to be minors. *Springfield* v. *Wilbraham*, 4 *Mass. R.* 493.

Under the statute in question of *March* 21, 1821, *c.* 122, *sec.* 2, which fixes the settlement, where the party dwelt and had his home on that day, notwithstanding the generality of its terms, it has been held, with certain exceptions, not to extend to minors. *Lubec* v. *Eastport*, 3 *Greenl.* 220. *Mellen C. J.* there says, "it is very clear that a wife and minor children, which compose a part of the husband's and father's family, cannot gain a settlement distinct from his. It would lead to a separation of husband and wife, and parents and children. Policy forbids this." And the necessity and propriety of a construction, which will avoid such a result, is enforced in *Hallowell* v. *Gardiner*, before cited, and in *Shirley* v. *Watertown*, 3 *Mass. R.* 322.

The exception is to be limited by the reason, upon which it is founded. Hence in *Lubec* v. *Eastport*, it was decided, that it does not embrace the case of minors, who are emancipated. In *Springfield* v. *Wilbraham*, *Parsons C. J.* holds, that the principle of derivative settlements, in the case of minors, is founded on the right of the father to their services and to the control of their persons. When this ceases, he adds, "it is not easy to devise any good reason, why they should not be considered as emancipated."

The principle is held to depend upon rights, which may be waived or transferred, and not upon duties, which are matter of legal or moral obligation. A father may emancipate his child, or transfer his parental rights to another. But this does not relieve him from the obligation of furnishing them with necessary support, if it is not otherwise provided. And this obligation does not even cease with minority, if the parent be of sufficient ability. The duties and obligations of the parent, are not now the subject in controversy. The case finds a direct and express waiver and transfer of parental rights, fully and practically carried out from infancy, without any interference whatever on the part of the father. The appointed and substituted home, such as it was, was always made welcome to the child, and was acceptable to him. He could have remembered no other. He knew no other. It appears to us, therefore, to be a case, not within the reason of the exception, raised by the construction, to the literal operation of the statute.

In *Wells* v. *Kennebunk*, 8 *Greenl.* 200, emancipation was held to result from the waiver of parental rights, and the substitution of another home, not so direct and less strongly marked, than are presented here. The father of the pauper was insane, and incapable of legal volition. He died the year before the act of 1821 passed, whereupon the mother became the head of the family, and entitled as such to the services of the minor and the control of his person. *Dedham* v. *Natick*, 16 *Mass. R.* 140. He was left at her father's for many years, and was there residing at the passage of the act of *March*, 1821. Her relinquishment of her parental rights, was deduced by implication from the facts and circumstances. *Mellen C. J.* says, "she seems to have resigned him (the minor) to the care, government and protection of the grandfather." What was there matter of inference, is here expressly proved and found.

Judgment on the verdict.

ISAAC MANSFIELD *& al. vs.* JONATHAN H. C. WARD.

An action against the defendant for having knowingly and wilfully made a false answer, when summoned as a trustee at the suit of the plaintiff on the *stat.* 1821, *c.* 61, § 12, "concerning foreign attachments," is a penal action, and must be brought within one year from the time the trustee was discharged by judgment of Court, or it will be barred by the *stat.* 1821, *c.* 62, *sec.* 14, limiting penal actions to one year.

THIS was a special action on the case against the defendant, for having knowingly and wilfully made a false answer when summoned as trustee at the suit of the plaintiff, brought on the *stat.* 1821, *c.* 61, *sec.* 12, which provides, "that any person summoned as a trustee, who shall on examination, &c. knowingly and wilfully answer falsely, &c. shall out of his own proper estate be liable and subject to pay to the plaintiff in the action, his executors or administrators, the full amount of such judgment, as he, they, or any of them, may have recovered against the principal, in case the same be unsatisfied; otherwise, such part thereof as may remain unsatisfied, together with the legal interest thereof, and double costs of suit, to be recovered in a special action on the case."

At the trial before SHEPLEY J., it was admitted, that the action was not commenced within one year from the time the trustee was discharged by judgment of Court. The Judge thereupon was of opinion, that the action was barred by the statute of limitations, as a penal action. The plaintiffs then submitted to a nonsuit, which was to be taken off, if it be not so barred.

Fessenden & Deblois cited and commented upon the *stat.* 1821, *c.* 61, *sec.* 12, and the statute limiting penal actions to one year, *stat.* 1821, *c.* 62, *sec.* 14, and contended, that the twelfth section of the foreign attachment law, in giving the right of action to the plaintiff, his executors or administrators only, is not in this respect a penal statute, but a remedial statute. Statutes against frauds are called remedial statutes, and are to be construed liberally and beneficially. *Twyne's Case*, 2 *Coke's R.* 82; 6 *Dane*, *c.* 196, *sec.* 17; 3 *Inst.* 381, *b*; 2 *Co. R.* 7; *Cro. Car.* 532. It is remedial, because the plaintiff can recover only so much as he has lost by the fraud of the trustee. And this was the construction put on the *stat.* 9 *Ann*, *c.* 14, against gaming. 2 *Bl. Rep.* 1226; *Com. Dig. Action on*

Stat. A 1. Where the sum to be recovered, is given to the *party grieved* only, the statute is remedial. As in actions to recover three times illegal fees taken. 2 *T. R.* 148. In case of false return of a member of parliament. *Willes*, 597; 1 *Wilson*, 125. In case of wilful holding over by a tenant. 5 *Burr.* 2694. It is remedial where the whole penalty is given to the party grieved. *Yelv.* 53, *and note*. A penalty must be created by express words. 2 *Johns. R.* 379. This statute is remedial, because it is extended to executors and administrators, and does not die with the person to whom the wrong is done. *Bac. Ab. Ex. & Ad. P.* It is considered remedial in *Whitman* v. *Hunt*, 4 *Mass. R.* 272. The remedy is extended farther than we claim in *Coffin* v. *Cottle*, 16 *Pick.* 385. If the sum to be recovered had been given to an informer, or to any one who sued, the provision might be deemed penal. But here the person suffering the injury, and he alone must bring the suit, and the statute is remedial. *Commonwealth* v. *Howes*, 15 *Pick.* 231; 1 *Tidd's Prac.* 14; 1 *Shower*, 353. The ground of the action is fraud, and the year, if limited to that, should commence at the time when the fraud is discovered, and not from the time of judgment. *Welles* v. *Fish*, 3 *Pick.* 74; *Homer* v. *Fish*, 1 *Pick.* 435; 1 *Strange*, 253. Merely giving double costs does not make the statute penal. *Willes*, 597.

Codman & Fox, for the defendant, contended, that the section of the statute on which the action is founded is penal, and within the limitation of one year against penal actions. When a statute acts upon the offender and inflicts a penalty, it is to be taken as a penal statute, and construed strictly. 1 *Bl. Com.* 88. It is penal because it makes the offender guilty of perjury; because it gives double costs; and because if the trustee swears falsely as to a single dollar, he is compelled to pay the whole amount of the debt, however large it may be. Statutes far less penal than this have been held penal. Statute relating to costs. 4 *Bac. Ab.* 79, 80. For rendering a false account of duties. 1 *Bos. & P.* 51. Statute against usury. *Peake's Cases*, 164. Statute compelling executors to present a will for probate, within thirty days. *Hill* v. *Davis*, 4 *Mass. R.* 137; *Moore* v. *Smith*, 5 *Greenl.* 490. Laws restraining the taking of fish. *Boutelle* v. *Nourse*, 4 *Mass. R.* 431; *Melody* v. *Reab*, *ib.* 471. Statute restraining livery stable keepers

from giving credit to undergraduates. *Soper* v. *President, &c. Harvard College,* 1 *Pick.* 177. Statute for the suppression of lotteries. *Nichols* v. *Squire,* 5 *Pick.* 168; *Commonwealth* v. *Howes,* 15 *Pick.* 231. Statutes against taking logs. *Frost* v. *Rowse,* 2 *Greenl.* 130; *Little* v. *Thompson, ib.* 228. Statute respecting false certificate of witness. *Chesley* v. *Brown,* 2 *Fairf.* 143. Statute for selling spirituous liquors without license. *Wiscassett* v. *Trundy,* 3 *Fairf.* 204.

The opinion of the Court was by

SHEPLEY J. — The twelfth section of the act of 1821, *c.* 61, provides, that any person summoned as trustee, who shall upon his examination, knowingly and wilfully answer falsely, shall be adjudged guilty of perjury; and shall also be liable to pay to the plaintiff in the action, his executors or administrators, the full amount of such judgment or such part of it as may remain due, with interest and double costs. And the question is, whether an action brought upon it is within the fourteenth section of the *stat. c.* 62, requiring that actions upon any penal statute for a forfeiture, shall be commenced within one year after the offence committed. The party, who knowingly answers falsely, is not only to be punished for the crime of perjury, but however trifling may be the amount supposed to be entrusted to him, is subjected to pay the whole debt, be it ever so large. Nor is it necessary, that the plaintiff should show, that he has suffered any loss or injury by reason of such false answer. It is sufficient for him to prove such falsehood, and that the judgment remains unsatisfied. The statute provision is in effect, that one party in such case may be compelled to pay to the other his whole debt, although he has not actually injured him, or occasioned him any loss; and the only ground of recovery upon such proof must be punishment of the person guilty of the offence. The recovery cannot be to compensate the plaintiff for an injury, but he recovers because he is authorized thus to punish the offender. Examining the statute, unbiassed by technical reasoning, or by decided cases, and one is irresistibly brought to the conclusion, that a statute which subjects one person to pay to another, whom he has not actually injured by his offence, an amount of money, limited only by the amount which one may owe

another, must be a penal statute; and that an action upon it, in which the party recovering is not obliged to prove any debt due to him from, or injury occasioned him by the defendant, must be a penal action.

Has the phrase "penal statute" acquired such a legal or technical meaning, that it is to be considered, that the legislature used it in that particular sense? It is contended, that there is a distinction between remedial and penal statutes, and that no statute is considered penal, when the action is given to the party aggrieved. Admitting the distinction to be correctly stated, is one considered a party aggrieved, who to maintain his action is not required to prove that he has suffered injury?

Woodgate v. *Knatchbull*, 2 *T. R.* 148, was an action on the statute 29 *Eliz. c.* 4, to prevent extortion, which provides, that the officer "shall lose and forfeit to the party grieved his treble damages;" and when the party, who had been compelled to pay more than legal fees, sued for treble such illegal fees, that part of the statute was considered remedial.

Wynne v. *Middleton*, 1 *Wilson*, 125, was an action upon the statute 7 and 8 *W.* 3. *c.* 7, which provides, that a party aggrieved by a false return of a member to parliament may recover double damages; and the Court say, "we think that this is not a penal statute, but if it be, it is also a remedial law."

Wilkinson v. *Colley*, 5 *Burr*, 2694, was an action on the *stat.* 4 *Geo.* 2, *c.* 28, which provides, that a tenant wilfully holding over after the determination of his term, and after notice given to quit, "shall pay at the rate of double the yearly value," against the recovering of which said *penalty* there shall be no relief in equity." The reporter says, "they held this to be a remedial law; the penalty is given to the party aggrieved."

Bellasis v. *Burbriche*, 1 *Ld. Raymond*, 170, was case for rescue of a distress for rent, and after verdict for plaintiff a motion was made in arrest for the reason, among others, that it being a penal action, because treble damages were given, the venire was not correctly awarded, and Powell said "that it would be a question whether penal actions should be construed to extend to cases where the party grieved brought the action, or whether it should be extended only to common informers."

In these cases it will be perceived that the party aggrieved, in whose favor the statute is considered remedial, is one who, to entitle him to recover, must prove that he has suffered injury.

It is supposed in the argument, that some light may be thrown upon the question by the decisions respecting costs; and that they are not allowed in England in actions on penal statutes, but are on remedial. By the common law, costs were not recoverable in any case. The statute of *Gloucester* gave costs, where the party recovered damages. In *Eaton* v. *Barker*, 3 *Lev.* 374, it was decided that a *qui tam* plaintiff could in no case recover costs, because no debt can be said to be due to him until recovered by a verdict, and he can therefore have no damages for detention. Where a statute gives a sum certain to the party grieved, it has been decided he shall recover his costs, because the penalty being due presently as a compensation for his injury, he suffers damages by the neglect to pay, and is therefore entitled to costs. *North* v. *Wingate*, *Cro. Car.* 559; *Ward* v. *Snell*, 1 *H. Bl.* 10; *Creswell* v. *Houghton*, 6 *T. R.* 355; *Tyte* v. *Glode*, 7 *T. R.* 267. In these cases, also, the party grieved is the one who has suffered, and must make proof of it before he can recover.

Again it is said, that our statute is a modification of the statute of 31 *Eliz. c.* 5, § 8, and that it has been decided that the statute of *Eliz.* does not extend to an action brought by the party aggrieved. That statute provides, that all actions brought upon any statute penal, whereby the forfeiture is limited to the Queen, shall be brought within two years, and all actions, where the forfeitures are limited to the Queen *and* another that shall prosecute, shall be brought within one year after the offence committed. Two classes of penal actions are here included, those where the penalty is given wholly to the sovereign, and those where it is given partly to the sovereign and partly to a prosecutor or common informer. Hence it was decided in *Culliford* v. *Blandford*, 1 *Show.* 358, that an action for a false return of a member of parliament on that clause of the statute of 23 *H.* 6, which gives to the King a penalty of forty pounds, to the party that should have been returned a like sum, and in his default to sue within three months to any person who would sue for it, was not within that statute, the penalty being given wholly to the party or person sueing, and not to him and the

King jointly. Can it be contended, that the statute, so far as it gave a penalty to any one who should sue for it, in case the party aggrieved should not, was not a penal statute, and the action a penal action? The statute of *Maine* extends to the two classes named in the statute of *Eliz.*, and also to a third class where the penalty is limited wholly to the party or person prosecuting. And it was therefore decided by this court in *Moore* v. *Smith*, 5 *Greenl.* 490, that an action against one named executor for not filing the will agreeably to the eleventh section of the statute, *c.* 51, which gives the whole penalty to the party interested in the estate devised, was within our statute and must be brought within a year.

The decisions as to what actions are within the statute of *Eliz.* throw little light upon the question, because there is a class of penal actions upon penal statutes, though they may be few in number, which are not included within that statute, but are included within ours. It is said, that in this case, the law implies, that the plaintiff is injured, and therefore the action is given to his legal representatives. It may be true, that the probability of an injury to the plaintiff might be the cause of thus extending the right of action. But the matter under consideration, is not the motive for such extension, but whether one who is not obliged to prove an injury, is to be regarded as the party aggrieved; and whether the phrase, penal statute, has such a legal signification, that it cannot be regarded as including a case, where a party may possibly have suffered, but where his right of recovery does not rest upon any proof of injury. No decided case has been brought to the knowledge of the Court, to prove that such a statute is not to be considered in the legal sense of the term a penal statute.

It is not intended to decide, whether there may not be a penal statute, which gives the penalty wholly to one, who to enable him to recover, must prove an actual injury, but only that a statute is to be considered penal, when the party recovering is not obliged to make any such proof of injury.

Nonsuit confirmed.

THOMAS WARREN *vs.* OCEAN INSURANCE COMPANY.

The authority of an agent to act for a corporation, need not be proved by record or writing, but may be presumed from acts, and the general course of business.

Where by the uniform practice of an insurance company, a deviation from the risk assumed in the policy is waived by the President, for a compensation agreed upon by him and by the assured, and the waiver and assent with the terms thereof are written across the policy, without any new signature, and recorded by the secretary; a contract made in that manner, is binding upon the corporation.

And after such contract has received the assent of the assured and of the President of the company, and has been written upon the policy, it is the act of the corporation, although the secretary may not record it upon the record book.

Where the custom of an insurance company is to dispense with the signature of the assured to the premium note until after the policy is recorded, the omission to sign the note when the risk is taken, does not render the contract void from want of consideration.

In an action on a policy of insurance, it is competent for a Judge at the trial, to permit an amendment of the declaration by adding a new count, varying from the original, only in the date of the policy declared on.

ASSUMPSIT on a policy of insurance, for the plaintiff and for whom it may concern, on the brig *Pactolus*, dated *March* 5, 1838, for her voyage from *Havana* to her port of discharge in the *United States*, and averring a total loss by the perils of the seas, within the risk taken by the company. Before any plea was put in, the plaintiff moved for leave to amend, by filing a count similar in all respects to the first, excepting that the date of the policy was alleged to be on the *fourteenth*, instead of the *fifth* of *March*, the policy being set out at length in each count. The defendants objected to the amendment, but it was permitted by EMERY J. who presided at the trial. The *Pactolus* was lost *February* 21, 1838, *in going from Havana to Matanzas* by perils of the sea. The policy of insurance numbered 3427, when produced at the trial, had upon it, written across its face in the handwriting of the secretary, in red ink, these words. "*The brig herein named with cargo, has liberty to proceed from Havana to Matanzas to finish loading, and the risk to be continued at and from thence to her port of discharge in the United States, cargo valued at the same. For*

which the sum of forty dollars is added to note 3427. *March* 14, 1838." A writing on the policy in blue ink was spoken of by the witnesses, but the copies do not show its tenor. It seems to have been a protest by the defendants, that they were not bound by the policy, made after the writing in red ink, and when the plaintiff was not present. Several witnesses testified in relation to the time when, and the circumstances under which the writing in red ink, called the *healing* of the policy, was made. The variations in statement, are material only on questions of fact, settled by the jury, and are unimportant in determining the questions of law. The statement by the secretary at that time, who was called by the defendants, is in substance this. On the morning of *March* 14, 1838, about half past 8 o'clock, the President of the company, *Bartol*, and Col. *Warren*, the plaintiff, came into the office together; that *Warren* came in stating, that he had received a letter from the master of the *Pactolus*, saying, that he was at *Havana* partly loaded, and should proceed next day to *Matanzas* to finish loading; *Warren* remarked, that he believed his policy was then in the office, and witness told him he believed it was; *Bartol* told *Warren* "it ought to be healed," or, "you want to heal it;" *Warren* said he wanted it healed, and asked *Bartol*, what he would charge him for liberty to go to *Matanzas; Bartol* told him he would do it for a half per cent.; *Warren* inquired, whether that was the usual rate, what we were in the habit of charging. *Warren* then concluded to give it, and have it healed, and told *Bartol* so; they both requested the witness to make the necessary writing and put it on the policy; witness took a separate piece of paper and wrote on it what he thought necessary, and asked *Warren* if that would answer; *Warren* said yes, and witness then wrote it in red ink athwart the policy. After he had copied the paper on to the policy, he then turned to the register, and began to copy it there. *Woodbury*, a director, came in after the bargain was made, while the witness was copying from the separate piece on to the policy, and asked what the Colonel wanted; *Warren* said he had been getting some insurance, and witness thinks *Warren* asked, if half per cent. was not too much, and *Woodbury* said no, not half enough. After the witness had finished the writing on the policy, and had written one word on the record book, *Farmer*, another di-

rector, came in with a letter in his hand, and said, Colonel, do you know your *Pactolus* is in trouble? Witness ceased writing, and *Warren* in reply to *Farmer* said, where, what; *Farmer* was at the desk looking over the letter, and *Warren* went and looked over his shoulder, and appeared to be reading the account of the loss, and as soon as he got through went out of the office, this being about nine o'clock. Witness asked if he should go on; *Bartol* and *Woodbury* said "no, stop where you are." This was before *Warren* went out. *Warren* said nothing before he went out about giving a note or paying the premium. About a month after the healing, heard *Warren* and *Bartol* in conversation about the policy, in which *Warren* said "he hoped there would be no tricking about it," and *Bartol* replied, "every thing shall remain as it was." About the same time witness told *Warren* he had several policies in the office and offered them to him, and he replied, that when he took one he would take all, and declined taking any unless he could have that of the *Pactolus*, and witness refused to let him have that, and it was brought into Court by witness on the trial; *Bartol* promised *Warren* a copy, and he had it. The witness stated that it was customary to leave policies in the office, and has known them to lie until the notes were nearly matured before the assured came in to take the policies and sign the notes; witness gave up to *Warren* six policies where the risks were then all up but one, and *Warren* had not given any notes for either of them until that time. *Warren* and *Waite*, the owners of the *Pactolus*, were stockholders in the company. The plaintiff called the former secretary of the company, who testified, that the mode of doing business in the office was, that the party wishing insurance, stated what he wanted, and the secretary put it down on the book, and if the President agreed to take the risk, he stated the rate of premium or risk to the secretary, that would be required; the secretary informed the applicant, and if he assented to the terms the agreement was then entered on the proposal book, and signed by the applicant, and the risk was then considered as taken, and the policy was made out afterward; that the *healing* did not go on to the proposal book, but went on to the policy, and then into the record; that policies are frequently left in the office after they are executed, and the premium notes are often left filled up a long time before they are

signed. Usually when the assured takes the policy, he signs the note. The note itself is filled up and numbered, and the assured has nothing to do but to come in and sign it. The proposition first taken down by the secretary, is a mere memorandum, made for the purpose of bringing the subject before the President. When a policy is healed, they generally take another note, but the old note remains as it was. Other witnesses testified, that they had had policies healed at that office, and that it was done by writing in red ink on the face of the policy crosswise in the manner it was on this, and that the notes were seldom signed at the time, and were paid afterwards. Before the suit, the plaintiff offered the amount of the premium for insurance and healing, and it was refused. The case shows, that the 1st, 2d, 3d and 4th articles of the by-laws of the company were read in the case, but are not found in the copies. But from other papers in the case, it appears, that by Article 1, the President, among other duties, was "to take such general superintendance of the institution as will have the most effectual and productive operation." The 4th article provides, that "on concurrence of the President, or in case of his absence or sickness, on the approbation of two directors, as to the terms of insurance, the Secretary shall then proceed to fill up and execute such policy which when completed is to be immediately recorded, and shall be considered binding on the company and on the insured, though the note may not have been given for the premium."

After the evidence on the part of the plaintiff was closed, the counsel for the defendants requested the Judge to order a nonsuit, which was declined.

The counsel for the defendants, requested the Judge to give to the jury the following instructions.

1. That a consideration is necessary to constitute a contract, and that as in the present case, no consideration was paid or secured by said *Warren* to said company, no binding contract was made by said company on the 14th of *March*, 1838.

2. That a verbal promise is not sufficient to constitute a consideration for the supposed contract in this case, unless the contract of insurance was first written, signed, and recorded, according to the by-laws of the company.

3. That in this case, the evidence offered, does not prove a consideration sufficient for any contract of insurance.

4. That an actual or constructive delivery of a policy, or notice that the contract duly executed is completed, is necessary.

5. That the evidence in this csse, does not prove that any contract was made and completed.

6. That the alleged contract was not completed according to the by-laws of the company, and so it created no obligation on the company.

7. That as the original policy was vacated by a deviation to *Matanzas*, prior to the 14th of *March*, when the alleged contract was made, and as the vessel prior to that day was lost, and uninsured, no new insurance could be made by the company on the vessel, that would protect the vessel on her return voyage from *Havana* to *Matanzas*, and thence to the *United States*, unless the same was signed by the President and two directors, and countersigned by the secretary of the company.

8. That a corporation cannot bind itself, except in the mode prescribed in its charter, or in virtue of some contract made by an agent of the corporation duly authorized for the purpose.

9. That a corporation cannot bind itself by any verbal contract.

10. That the law requires the same solemnities and authentication to alter a policy, changing or increasing the risk or premium, as it does to make a new binding policy.

11. That the President of said company has no authority whatever as an officer of said company, except what is given to him in its charter or by-laws.

12. That as it appears by the by-laws of the company, that they do not give any authority to the President to assume or change any risk, beyond the power given by the statutes of the State, the pretended contract on the 14th of *March*, between said *Warren* and the company, did not bind said company.

13. That the conversation which took place in the office on the 14th of *March*, as testified by *Wright*, the secretary, between *Bartol* and *Warren*, and what was written by *Wright*, without completing the record, and without any consideration being paid or secured, with the whole testimony of what ther took place, and was said and done, did not constitute a contract to bind the defend-

ants according to law, and that the testimony in the case, of what took place in the insurance office, at that time before the plaintiff went out of it, and the evidence of what was then done in writing, did not constitute a contract to bind the defendants according to law, and that the action cannot be maintained.

The fourth and eleventh requested instructions were given to the jury without qualification, the residue of the requested instructions, precisely as requested, were not given. But the Judge did inform the jury, that there must be a consideration for a contract; and further instructed them, that it was admitted in the discussion, that the policy of the 5th of *March*, 1838, was correctly made and to be good and binding, but it is not admitted, that the healing afterward attempted, was of any binding efficacy; that a copy was first read, because the original was in the hands of the defendants, and they had been notified to produce it, but as it is however now produced, it is to be considered as if in at first; that the defendants put on it the writing in blue lines, lest they should seem to be admitting, that it was fully completed; and you are to determine the question, how far certain acts have been done in order to render the contract binding. The first inquiry is, was this contract executed? Next, was it executed under such circumstances as to bind the defendants? And this question would remain even if the premium note had been signed or paid. The owners are proved to be stockholders in this company, and the by-laws are binding on the company, and it is presumed, that those who are members of the same association, know what those laws were. As individuals they can contract with the corporation of which they are members, as well as a stranger could; that the usages of the plaintiff as to policies of this office has been shewn, and countenance has been given to those usages by the practice under the by-laws, both as to policies and notes for premium; that the defendants say that "the contract of the 5th of *March*, was dissolved by deviation, and that the same steps must be taken in healing, as if it were a new insurance," the defendants might waive all objection on account of deviation, if they chose, and the contract remain unaffected by it. Deeds even of lands may be altered by consent of parties. If deeds may be thus altered, contracts not under seal may for a stronger reason.

Was or was not the agreement for the alteration perfected before the news of the loss? The by-laws are as much binding on the plaintiff as the defendants.

It is not necessary to put the description of alteration about to be made on the proposal book, when the parties understand the facts, unless required.

The agreement of the President and secretary with the plaintiff binds, even if two directors did not agree to it.

The policy filled up and executed is binding, and the recording is not necessary for the insured; if filled up and executed with the assent of the President, it binds, though not recorded.

Impressions of witnesses are not to be received by the jury as evidence.

If from the evidence, the jury are satisfied that the parties agreed, that what was done should not be binding, you must discharge the defendants.

This part of the case must stand or fall by the agreement of the parties *at the time.* And if *Warren* heard the President say, stop, and agreed that the secretary should stop then, *and the business end there,* the plaintiff cannot recover. But if you are satisfied, that the agreement was, that the alteration should be made, and that it was so written on the policy before the President's remark, stop, then the alteration is binding on the defendants. There was sufficient consideration for it.

Other instructions were given by the Judge relating to different points of defence. The verdict of the jury was for the plaintiff on the new count filed. If the instructions given were erroneous; or if any of the instructions requested and withheld ought to have been given, or if on the evidence the action is not maintainable, the verdict is to be set aside. There was a motion for a new trial because the verdict was against evidence, and the whole evidence is reported. But comparatively a small portion of it is here given.

Mellen and *Daveis,* for the defendants, argued, that this was a perfect writ at first, and not within the statute of amendments. The same contract cannot begin to exist on two different days. The contract first declared on was one made on the 5th of *March,* and the one declared on in the amended count was made on the

fourteenth. This was introducing a new cause of action. *Rule of Court*, 15.

The nonsuit should have been ordered because the plaintiff had not made out a case showing that the company were liable. This objection may with propriety be examined under the next.

But the main question in this case is, was there enough done on the fourteenth of *March* to make the contract binding on the company? It is confidently contended that there was not.

1. The recording of the policy was a condition precedent to its validity. This was never done, or intended to be done. Before the completion of the contract, so as to make it binding on the parties, information of the loss came into the office, and the defendants refused to go on and complete it. This they had a right to do by law without reasons, and in this case they had abundant cause to justify them. The by-laws of the company required all policies to be recorded, and it is indispensible that it should be done, before it can be the contract of the corporation.

2. It is not the contract of the corporation, because it was not signed by the President, or countersigned by the secretary. Both these are expressly required by the *stat.* 1821, *c.* 139, § 1, "to define the powers, duties and restrictions of insurance companies." Where the statute prescribes the mode in which an act shall be done, it must be done in that way, or the corporation will not be bound. This was the point decided in *Head* v. *Prov. Ins. Co.* 7 *Cranch.* 127. That case has never been overruled, and is decisive of this action in our favor. The *healing* of the policy was a new contract of insurance, and required all the forms of the original one to bind the company. Individuals may contract as they please, but corporations can be bound only in the mode prescribed by law. 2 *Phillips on Ins.* 4; *Hayden* v. *Middlesex Turnp.* 10 *Mass. R.* 397; 1 *Wash. C. C. Rep.* 93; *Beaty* v. *Marine Ins. Co.* 2 *Johns. R.* 109; *Bank of U. S.* v. *Dandridge*, 12 *Wheat.* 64.

3. There was no consideration for the contract, if one had been made in proper form, and with sufficient authority. The plaintiff gave no note, paid no money, and did not agree to do either.

4. There was no delivery of the policy. This was necessary. The secretary did not agree to keep it for the plaintiff, but refused to do so.

Deblois, for the plaintiff.

1. The amendment was properly allowed. The same policy is set out in both counts, and the loss is the same in both in all its circumstances, and it is therefore manifestly the same cause of action. *Stat.* 1821, *c.* 59, § 15; *Rule* 15, *S. J. Court*, 1 *Greenl.* 415; *Bridge* v. *Austin*, 4 *Mass. R.* 115; *Colt* v. *Root*, 17 *Mass. R.* 229; *Green* v. *Lowell*, 3 *Greenl.* 373; *Phillips* v. *Bridge*, 11 *Mass. R.* 246; *Anderson* v. *Brock*, 3 *Greenl.* 243; *Kincaid* v. *Howe*, 10 *Mass. R.* 203; *Leighton* v. *Leighton*, 1 *Mass. R.* 433.

2. The proper mode of declaring was upon the instrument as finally healed and perfected on the 14th of *March*. *Robinson* v. *Tobin*, 1 *Stark. R.* 268.

3. The contract of *March* 14th was perfected. The terms had been settled, and even the language of those terms reduced to writing, and by the assent of both parties placed upon the policy by the secretary. Nothing remained to be done to complete the bargain and perfect the same. It was not necessary that the signatures should be affixed to what is called the *healing*. By writing the same upon the policy by the secretary, under direction of the President, those very signatures were adopted to the healing or alteration. It is the same as filling up a blank policy signed before by the President and secretary. *Stocking* v. *Fairchild*, 5 *Pick.* 181; *Turner* v. *Burroughs*, 8 *Wend.* 144; *Bell* v. *Marine Ins. Co.* 8 *Serg. & R.* 98; *Kensington* v. *Inglis*, 8 *East*, 273; *Kenyon* v. *Berthen*, 1 *Cowper*, 11, *in note*; *Bean* v. *Steeport*, 1 *Doug.* 11; *De Halm* v. *Hartley*, 1 *T. R.* 343; *Phillips on Ins.* 18; *Robinson* v. *French*, 4 *East*, 140; *Ewer* v. *Washington Ins. Co.* 16 *Pick.* 502. A policy of insurance on a ship, lost or not lost, is good, the ship having been accepted for insurance, and the premium paid, although the policy was not actually executed and stamped, until the loss had happened. *Mead* v. *Davison*, 3 *Adol. & Ellis*, 303. The alteration called a healing, may be made with the consent of both parties, as in a deed, bond or note. *Smith* v. *Croker*, 5 *Mass. R.* 538; *Woolley* v. *Constant*, 4 *Johns. R.* 54; *Zouch* v. *Claye*, 2 *Levinz*, 35; 4 *Com. Dig.* 169, *Fait*, (*F* 1;) *Kershaw* v. *Cox*, 3 *Esp. R.* 246; *Kennerly* v. *Nash*, 1 *Stark. R.* 368.

4. The contract was completed by those authorized on the part of the defendants. The general business of taking risks was entrusted by the by-laws to the President specially, and the intervention of himself and the secretary was all that was necessary to bind the corporation. If they were competent to take the first risk, they were competent to take the additional one from *Havana* to *Matanzas*. *Perkins* v. *Washington Ins. Co.* 4 *Cowen*, 645. A person may become the agent of a corporation, as he may of an individual, without any deed or writing. Were it not so, there would be no safety in dealing with a corporation, unless it were with a full board of directors. They would have all the advantages of employing agents, and be under no responsibilities for their acts. *Randall* v. *Van Vechten*, 19 *Johns. R.* 60; *Mott* v. *Hicks*, 1 *Cowen*, 513; *Danforth* v. *Scho. Turn. Cor.* 12 *Johns. R.* 231; *Bank of Columbia* v. *Patterson*, 7 *Cranch*, 306; *Dunn* v. *Rector of St. Andrews Church*, 14 *Johns. R.* 118.

5. The recording of the original policy, or of the healing thereon, is a mere ministerial act of the secretary, and constituted no part of the contract between the insurers and the assured. *Kohne* v. *Ins. Co. North America*, 1 *Wash. C. C. Rep.* 93. The secretary is the servant of the company, and not of the plaintiff, and they cannot avail themselves of the neglect of their servant to avoid their contract. 1 *Wash.* 93, *and* 3 *Adol. & Ellis* 303, before cited. The insurers confess themselves to have received the premium in the policy, and it binds them. *Phillips on Ins.* 76; *Marshall on Ins.* 334; 1 *Camp.* 532.

Preble, on the same side, remarked, that he had but one point in addition to those of the gentleman who had preceded him. The President was the general agent of the corporation to effect insurances, and his acts are therefore binding upon them. The regulations of the company, and the testimony of all the witnesses, show that he was authorized and employed alone to transact the business. In every instance the President has determined the premium, and taken the risk, without consulting any one.

He replied to the arguments of the counsel for the defendants.

The opinion of the Court was by

EMERY J. — In this case, it is insisted by the defendants that the amendment allowed before issue joined, was in violation of the 15th rule of this Court. The restriction in that rule is, that amendments will not be allowed, unless consistent with the original declaration, and for the same cause of action. By inspecting the declaration, we discover that the same policy is described in both, excepting as to date. Conformably to our practice, we consider that the amendment was warranted. *Matthews* v. *Blossom*, 15 *Maine R.* 400.

The motion for a nonsuit, we think, cannot be sustained, for such evidence was exhibited as called for the intervention of a jury to pronounce upon its effect. The case cited from 2 *Peere Williams*, 170, *Da Costa* v. *Scandrett*, is very different from this. That was for an injunction, and to be relieved against the insurance as fraudulent, because *one* having a doubtful account of his ship described like his, was taken, insured her, without giving any information to the insurers of what he had heard, either as to the hazard or circumstances which might induce him to believe that his ship was in great danger, if not actually lost. It was held that the concealing of this intelligence was a fraud. The policy was ordered to be delivered up with costs, but the premium to be paid back and allowed out of the costs. This was decided in 1723.

In the present case, the letter which the plaintiff had received was immediately communicated to the supervising officers of the company, before the healing was agreed upon. This subject seems to have been fully settled by the verdict.

But with the usual candor of the learned counsel for the defendants, it is frankly admitted, that the material part on which they rely is the question, was the contract executed so as to bind the company?

In ordinary circumstances between individuals it is conceded that what was proved to have been done might be sufficient. But it is insisted that the defendants are acting as agents for others, with restricted powers, to be executed only in strict conformity with the provisions of the charter. And that all the prerequisites for the due execution of the original contract should be fully complied

with, in respect to the healing, inasmuch as it was giving life and vigor to a contract which was vacated by the deviation from the original voyage.

We are well aware of the delicacy and difficulty of the situation of the directors of such an institution as that of the defendants. And that therefore the directors may feel bound to press every objection against responsibility on supposed contracts.

It is urged that the case of *Head & Amory* v. *Providence Insurance Company*, 2 *Cranch*, in the opinion of C. J. MARSHALL, which has never been overruled, is decisive of the present case. What is decided there is, that the act of incorporation is to the defendants an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting, they must observe that mode, or the instrument no more creates a contract than if the body had never been incorporated.

In the present case, there was no agreement to vacate the first policy, but merely to heal the infirmity resulting from the deviation. In *Head & Amory* v. *Prov. Ins. Co.* it is said in the opinion, that a contract varying a policy is as much an instrument as the policy itself, and therefore can only be executed in the manner prescribed by law.

The inquiry now is rather a question as to the effect of evidence, whether the company, through their officers, have assented to the proposition of the plaintiff for the healing, and acted under it conformably to the requisition of the charter and by-laws of the corporation. 12 *Wheat.* 64, *Bank of U. S.* v. *Dandridge, at page* 73. The verdict has established that it was the same policy, and that the healing was completed.

After the lapse of twenty-three years from the time of the decision of *Head & Amory* v. *Prov. Ins. Co.*, in the case of the *Bank of the U. S.* v. *Dandridge*, though the decision in *Head & Amory* v. *Prov. Ins. Co.* was received and approved, yet in the case of the bank it was said by Justice *Story*, delivering the opinion of the Court, "We do not admit, as a general proposition, that the acts of a corporation, although in all other respects rightly transacted, are invalid merely from the omission to have them reduced to writing, unless the statute creating it makes such writing indispensible as evidence, or to give them an obligatory force. If the

statute imposes such a restriction, it must be obeyed; if it does not, then it remains for those who assert the doctrine, to establish it by the principles of common law, and by decisive authorities. None such have, in our judgment, been produced. By the general rules of evidence, presumptions are continually made in cases of private persons, of acts even of the most solemn nature, when those acts are the natural result or necessary accompaniment of other circumstances. The same presumptions are, we think, applicable to corporations; *acts done by the corporation which presuppose the existence of other acts to make them legally operative are presumptive proofs of the latter.*"

If there be justice in the foregoing suggestion, it cannot be inapplicable to cite the case of *Mead* v. *Davidson*, 3 *Adol. & Ellis*, 303. "Insurance was proposed on the plaintiff's ship *Crisis*, to a mutual insurance society, called the *British Association of London*, of which the plaintiff and defendant were members, in *February*, 1829, and the premium paid, lost or not lost, from *February* 15, 1829, to *February* 15, 1830. The policy was formally executed on the 21st of *October*, 1829. The loss had before that day become known to both parties. By the practice of the society, policies used to be filled up and delivered out as members applied for them. By the rules of the society, the sums insured, were to commence on the day of the ship being accepted by the committee, and to continue in force twelve months from that time, paying five per cent. charge for policies, power of attorney, and two guineas for survey. A nonsuit had been entered with leave to move to set it aside." *Denman C. J.* in the course of his opinion says, "he, the plaintiff, bought and paid for the underwriter's promise to indemnify. If his ship had arrived, the underwriter would have kept the whole premium; though she has perished he cannot be relieved from his agreement. *Equity would have compelled him to execute the formal policy whenever tendered to him. In voluntarily executing he has only performed a manifest duty, and cannot now retract the obligation.*"

The question in the case of *Head & Amory* v. *Prov. Ins. Co.* was whether a certain paper, written by the secretary but not signed, was a settlement or cancelling by the President and directors.

It is urged, that a by-law should not violate any provision of the charter of corporation. The correctness of this argument is readily acknowledged. But the by-laws should be deemed to have been adopted with an intention of facilitating the exercise of all the powers given by the charter, and should have a liberal construction in order to give just effect to the deliberate arrangement of the corporation, if not found *directly opposed* to the provisions of the charter.

We do not perceive that more should be required than to accomplish the expression of the views of the parties, as to what they intended to be bound, in the forms by themselves prescribed, if they are susceptible of being justly considered conformable to the substantial requisitions of the charter. Ought it to be a question whether after the deviation was known, and a consent to heal it, as it is called, and an additional liberty given, on further consideration, it should be considered otherwise than as a waiver of all exceptions as to the deviation. Certainly the corporation were competent thus to waive.

For the purposes of justice, to prevent conclusions unfavorable to the fair views of parties concerned, we must give the same construction as we should give to acts of others in similar circumstances.

We do find that the instrument produced is signed by the President, countersigned by the secretary, recorded as to all which took place on the 5th of *March*, and displaying the healing clause. It appears perfect in its form with different dates, the healing being on the 14th day of *March*.

On the evidence, we find that all the important acts to complete the contract, as between the parties, were done before the secretary began to record the healing. This particular matter was to be performed principally for the benefit and accommodation of the defendants.

We must regard the previous signing by the officers, was by them approved and adopted as sufficient as to the healing clause, without a reiteration of the form of running over with a pen the same letters of their names.

The beginning to record the healing was such a subsequent act, as on this part of the subject carries indubitable presumptive evi-

dence, that all the previous necessary forms had been complied with. We cannot exclude from our consideration the usages of the parties, which we consider were rightly introduced in proof. A contrary construction would draw this consequence, that the act incorporating this company, instead of being an enabling act to effect insurances, would rather become an act for enabling a corporation, acting by its agents, to sustain its agreements when beneficial to them, and to evade them, when disasters came, against which it was apprehended they had insured. Because it would be only necessary to procrastinate the recording of all healings, and take the hazard of being relieved upon some future intelligence.

It may not be too much to say that the peculiarity of the occurrences first presented to the consideration of the office, tending to excite suspicion, might well induce them to bring the subject to judicial investigation; and the trial before the jury, the proper tribunal for settling such questions, has freed the plaintiff from all imputation of fraud or concealment.

We do not perceive error in the instructions given by the Court to the jury, or in the declining to give the requested instructions, and therefore there must be judgment on the verdict.

James L. Farmer *vs.* John Rand.

Each indorser of a promissory note, is entitled to one day for giving notice to the party next liable; but the time is to be calculated from the day on which the notice was in fact received, and is not enlarged, if he has received notice earlier than might in strictness have been required.

If the indorser of a note in blank, prove that a waiver of demand and notice was afterwards written over his name, in the presence of the plaintiff, when the indorser was not present or assenting thereto, he is thereby discharged, unless the plaintiff bring proof to show his liability.

Assumpsit by an indorsee against an indorser of a note. The same action was before tried, and a case reserved for the opinion of the whole Court, is reported in 14 *Maine Rep.* 225. A copy of the note and of the indorsements thereon, as well as the facts then in evidence, appear there. The declaration in one count averred

a demand and notice. On this trial there was evidence, which the plaintiff contended, proved a demand and notice, but which was controverted by the defendant. The note fell due on *Saturday, July* 2, 1836, the third day being *Sunday*. The demand was made in *Boston, July* 2d, and the notice received at *Portland,* by the Bank, *July* 4. There was also evidence, that when the note passed from the hands of the defendant, his indorsement thereon was in blank, and that afterwards, when he was not present, the waiver of demand and notice was written over the names of the indorsers by *Sewall,* another indorser, in the presence of the plaintiff. There was no evidence of any knowledge or assent on the part of the defendant to the waiver of demand and notice.

At the trial before SHEPLEY J. the plaintiff contended, that as he had not declared on the waiver, the burthen of proof was upon the defendant to show that it was improperly placed there. The jury were instructed, that if they were satisfied from the testimony, that the notice to the defendant was placed in the door of the office, it being closed on *Tuesday,* that would be sufficient to charge him, but that if not placed there until *Wednesday,* it was too late. Also, that if they were satisfied, that the waiver and engagement to pay at all events, were placed upon the back of the note, after it had passed from the defendant with his indorsement in blank, and without his consent, the contract was materially altered thereby, and he was discharged, unless it was proved by the plaintiff that such waiver and engagement did not apply to the defendant.

The verdict was for the defendant, and was to be set aside, if the instructions were not correct.

D. Goodenow, for the plaintiff, contended :—

1. It was soon enough to give notice on *Wednesday, July* 6. The third day being *Sunday,* and the fourth, the anniversary of the declaration of independence, it was not necessary to move in giving notice in *Boston* until *Tuesday* the 5th. The Bank in *Portland* had the same time to notify the defendant, as if the notice had not been received until *Tuesday,* and therefore the defendant had actual notice as early as he was entitled to by law. 3 *Kent, 2d Ed.,* 106; 4 *Bingh.* 715; 8 *B. & Cr.* 387; 14 *Mass. R.* 116; 1 *Pick.* 401; 5 *Wend.* 566; 2 *Caines' Cases,* 195; 15 *Wend.* 364. But due diligence to give notice is all which is required.

2. The instruction relating to the burthen of proof was erroneous. Fraud is not to be presumed, but must be proved; and if the defendant would avoid his liability by reason of it, he must prove it. *Gooch* v. *Bryant*, 13 *Maine R.* 386; 10 *East*, 216.

3. The instructions were also erroneous in holding, that it was incumbent on the plaintiff to prove that the waiver and engagement did not apply to the defendant. 3 *East*, 192. If the indorsement be in blank, the indorser puts it in the power of the holder to overwrite what he pleases, and he may use it as an acquitance or an assignment. 1 *Stark. Ev.* 376, 377, and cases cited.

4. The waiver written by *Sewall*, if without the consent of *Rand*, was not such an alteration as to discharge *Rand* from payment to an innocent indorsee for a valuable consideration. 4 *T. R.* 336; *Pigott's case*, 1 *Co.* 27; *Hatch* v. *Hatch*, 9 *Mass. R.* 311; *Fuller* v. *McDonald*, 8 *Greenl.* 213; *Josselyn* v. *Ames*, 3 *Mass. R.* 274; *Northampton Bank* v. *Pepoon*, 11 *Mass. R.* 292; *Emerson* v. *Cutts*, 12 *Mass. R.* 78; *Nevins* v. *De Grand*, 15 *Mass. R.* 436; *Putnam* v. *Sullivan*, 4 *Mass. R.* 45; *Thurston* v. *McKown*, 6 *Mass. R.* 428; 5 *Munf.* 581; 3 *Day*, 12.

Rand, *pro se*, said the only question before the Court was this; were the instructions right? To show that the instruction with respect to the notice was correct, he cited *Bayley on Bills*, 172. The instruction with regard to the alteration was founded upon and warranted by the decisions of this Court in this case, in 14 *Maine R.* 225; and by *Master* v. *Miller*, 4 *T. R.* 336, cited for the plaintiff. As to the burthen of proof. We proved that the alteration was made in the presence of the plaintiff, by one who neither had nor pretended to have authority from the defendant, and when he was not present. It was then for the plaintiff to show an authority from the defendant, or an assent by him.

The opinion of the Court was drawn up by

Weston C. J. — The Bank of *Cumberland* was entitled to one day, to give notice to prior parties. Notice on *Tuesday*, the fifth day of *July*, would have been seasonable; but a delay until *Wednesday*, the sixth, cannot be excused. If parties prior to them had notified earlier than might have been in strictness required, it

does not enlarge the time allowed by law to subsequent parties. *Bayley*, 271; *Turner* v. *Leach*, 4 *B.* & *A.* 454.

The effect and materiality of the alteration has been before decided. *Farmer* v. *Rand*, 14 *Maine R.* 225. It was there held, that the waiver as it stands upon the note, apparently applies to and binds the defendant. It was sufficient for his purpose, to show that it was unauthorized. Unless therefore the proof was changed by testimony, on the part of the plaintiff, the objection was fatal, and the jury were properly instructed on this point.

Judgment on the verdict.

JAMES L. FARMER *vs.* KIAH B. SEWALL.*

The words, "we waive all notice on the promiser and indorsers, and guaranty the payment at all events," written by the indorser of a note over his name, are a waiver of both demand and notice.

The sale of a negotiable note, free from usury when made, at a greater discount than legal interest, is not conclusive evidence of usury, although the party making the sale is unconditionally liable by his indorsement.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

This action was brought against the defendant, as indorser of the same note, of which a copy is found in the case, same plaintiff v. *Rand*, 14 *Maine R.* 225. The plaintiff proved, that the waiver of notice, written upon the back of the note and above the signatures of all the indorsers, in the following words, "we waive all notice on the promiser and indorsers, and guaranty the payment at all events," was written by the defendant. The Judge ruled, that such waiver so written, dispensed with the necessity of proof on the part of the plaintiff of a demand upon the maker of the note at the time and place fixed for payment. The defendant then showed that the note in question was discounted or purchased

* SHEPLEY J. was employed in the trial of criminal causes, when the argument was had, and took no part in the decision of the case.

by the plaintiff of the defendant at a rate of discount not less than eighteen per cent. per annum, and thereupon moved the Court to instruct the jury, that if they were satisfied that the note in question was discounted or purchased by the plaintiff of the defendant at a greater rate of discount than six per cent. per annum, and that the plaintiff at the time of the discount or purchase took the indorsement and guaranty of the defendant upon the back of the note, then the contract was usurious, and the plaintiff could not be entitled to recover the excess over and above the legal rate of discount, but such excess should be deducted from the amount due upon the face of the note. The Judge declined to give the instruction, and instructed the jury that if from the evidence they were satisfied the rate of discount was influenced by the consideration of doubts as to the solvency or ability of those whose names were on the note, the fact that the plaintiff took the indorsement and guaranty of the defendant upon the back of the note, would not be conclusive that the transaction was usurious. The verdict was for the plaintiff for the full amount of the note and interest. The defendant excepted to the ruling and instruction of the Judge.

Rand, for the defendant, argued, that as the plaintiff took the absolute liability of the person who sold the note at a discount, as well as the others, that the transaction was usurious. The holder of a note may sell it at a discount, without the contract being usurious, if he does not make himself liable. But it would be strange that the contract should be usurious, if the plaintiff took eighteen per cent. discount on the plaintiff's own note, and not be usurious, when he took the same interest and the unconditional security of the defendant and several others. *Churchill* v. *Suter*, 4 *Mass. R.* 156; *Van Schaack* v. *Stafford*, 12 *Pick.* 565; *Simpson* v. *Warren*, 15 *Mass. R.* 460; 15 *Johns. R.* 44; *Warren* v. *Crabtree*, 1 *Greenl.* 167; *stat.* 1834, *c.* 122; *Lowell* v. *Johnson*, 14 *Maine R.* 240. Whether this was a waiver of both demand and notice, depends upon the meaning of the words.

D. and *W. Goodenow* argued for the plaintiff, and contended, that there was a waiver of demand and notice: on the other point, that the amount of the instruction was this. That if the note was made for the purpose of being sold to the plaintiff at a

discount, and was a mere cover for an usurious loan, then the contract would be usurious. But if the note was fair in its inception, and taken in the usual course of business, the sale at a discount would not render the transaction usurious, even although all the parties to it were held liable. And such is the law.

The opinion of the Court was prepared by

WESTON C. J. — The question, presented in this case, has been settled by this Court in the case of *French & al.* v. *Grindle*, 15 *Maine R.* 163. It must be assumed, that the note, in the hands of the defendant, was available before he indorsed it to the plaintiff, as it does not appear to have been made for the accommodation of the defendant, or to have become operative and binding for the first time, upon his indorsement. It was not therefore, according to the case cited, an usurious transaction.

The Judge was requested to instruct the jury, that the negotiation of the note was usurious, and that as a consequence, the excess beyond legal interest was not recoverable. This consequence resulted in pursuance of the *stat.* of 1834, *c.* 122; and if the ground assumed had been warranted by law, the plaintiff by the same statute, could not have recovered costs, but was liable to pay them. The Judge was right in withholding the instructions required. Whether the defendant was entitled to any deduction upon any other ground, distinct from the charge of usury, was not a question raised at the trial, or one upon which the Court was moved to give any instruction.

Exceptions overruled.

ALPHEUS BEAN *vs.* BARKER BURBANK.

A contract in writing to convey lands, at a fixed price, and within a stated time, on the payment of a certain sum, where nothing was paid or agreed to be paid by the other party to obtain such contract, is void for want of consideration.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

The action was assumpsit, on a written instrument, of which a copy follows. "*Shelburne, April* 9, 1835. I hereby agree to give *Mr. Alpheus Bean*, a good and sufficient deed of six thousand acres of the common and undivided land in the town of *Shelburne*, county of *Coos*, in the State of *N. H.*, provided he, the said *Bean*, shall give me satisfactory security for the same at twenty cents per acre, one fourth part down, and the remainder in three annual payments with interest annually; this refusal not to run beyond sixty days from date, and this refusal shall be null and void after that time. *Barker Burbank.*"

The plaintiff's counsel in opening the cause to the jury, stated, that among other things, he should prove, that this action was commenced for the benefit of certain individuals, who, in a few days after the date of said agreement, purchased *Bean's* interest therein, took an assignment thereof, and paid therefor the sum of twelve hundred dollars; and that they, before the expiration of the term of sixty days therein mentioned, tendered to the said *Burbank*, the sum of twelve hundred dollars in specie, and also tendered him one fourth part of said sum in cash, and satisfactory security for the remaining three quarters, payable in accordance with the terms of said agreement, neither of which said offers was accepted, but each of them was refused, and that the said *Burbank* refused to give a deed, and assigned as a reason, that it was not in his power to do it. The plaintiff then offered to read to the jury, the agreement declared on. Whereupon the defendant's counsel objected, that the contract or agreement offered in evidence was "*nudum pactum*, and void for want of consideration." And the Judge who presided ruled accordingly and directed a nonsuit, to which the plaintiff excepted.

Codman, for the plaintiff, contended, that the nonsuit was erroneously ordered, and cited *Jacob's Law Dic. Consideration; stat.* 1821, *c.* 53, *sec.* 1; *stat.* 1829, *c.* 431; 3 *Burrow*, 1663; 1 *Dane, c.* 1, *art.* 46, *sec.* 1, 2, 3, 4; *Stanley* v. *Bruns. Hotel Cor.* 13 *Maine R.* 51; *Atwood* v. *Cobb*, 16 *Mass. R.* 227; *Getchell* v. *Jewett*, 4 *Greenl.* 350; *Barstow* v. *Gray*, 3 *Greenl.* 409; *Barrell* v. *Trussell*, 4 *Taunt.* 117; *Williams College* v. *Danforth*, 12 *Pick.* 541; *Coggs* v. *Barnard*, 2 *Ld. Raym.* 909; 5 *T. R.* 150; 1 *Powell on Con.* 207.

Preble and *Deblois* argued in support of the ruling of the Judge at the trial; and cited *Wilson* v. *Clements*, 3 *Mass. R.* 1; 1 *Saund.* 210, *and note;* 2 *Saund.* 13, *and note;* *Cro. Eliz.* 126; 7 *T. R.* 346, *in note;* 4 *Johns. R.* 280; *Powell on Con.* 331, 355; 1 *Com. on Con.* 13; 10 *Johns. R.* 246; 2 *Johns. R.* 442; 5 *Johns. R.* 272; *Mills* v. *Wyman*, 3 *Pick.* 207; *Parish* v. *Stone*, 14 *Pick.* 198; *Hill* v. *Buckminster*, 5 *Pick.* 391; *Bowers* v. *Hurd*, 10 *Mass. R.* 427; *Cabot* v. *Haskins*, 3 *Pick.* 83; *Yelv.* 134; 12 *Johns. R.* 90; *ib.* 397; *Cooke* v. *Oxley*, 3 *T. R.* 654.

The opinion of the Court was by

WESTON C. J. — The agreement upon which the plaintiff declares, was a contract for the sale of lands, of which a memorandum having been made in writing, and signed by the party, sought to be charged, there was a sufficient compliance with the requirements of the statute of frauds. But the common law requires, that such an agreement, to be binding, must have been made upon sufficient consideration. Such consideration need not be recited or set forth in the instrument, but it must exist in fact, proof of which is essential to its legal enforcement. *Packard* v. *Richardson & als.*, 17 *Mass. R.* 122.

The counsel for the plaintiff insists, that the proof offered by him, was evidence of a sufficient consideration; and he has cited a number of cases to support this position, some of which will be noticed. In *Pillans & al.* v. *Van Mierop & al.*, 3 *Burrow*, 1663, *Wilmot J.* assumes, that the defendants, when they promised to accept the bill in question, did so, upon the strength of funds in their hands. And if this had been true in point of fact, it would doubtless have been a good consideration. In *Stanley* v. *The Hotel Corporation*, 13 *Maine R.* 51, the question of consideration was not raised, but whether the contract was completed, or rested merely in proposition. There was evidence however of certain stipulations of the plaintiff, which the jury must have found. The consideration in *Barrell* v. *Trussell*, 4 *Taunton*, 116, was a forbearance of the plaintiff, at the request of the defendant, to sell certain goods, which was a damage to the plaintiff. In *Barstow* v. *Gray*, 3 *Geeenl.* 409, the consideration was, the actual pur-

chase of wheat, upon the offer of the defendant, which was accepted by the plaintiff, and the transportation of the same from *Hallowell* to *Boston*, according to the terms of the offer. The promise in *Getchell* v. *Jewett*, 4 *Greenl.* 350, was based upon the actual conveyance of certain property by the plaintiff to the defendant. In *Williams College* v. *Danforth*, 12 *Pick.* 541, the plaintiffs became bound, by an assent to the terms of the agreement, by a formal vote entered upon their records. And in *Atwood* v. *Cobb*, 16 *Mass. R.* 227, there was parol evidence, that the plaintiff had agreed to buy, what the defendant had agreed to sell.

When the promise declared on was made, there was no consideration moving from the plaintiff. He was not bound, nor did he sustain any damage. If the defendant was bound, he was not only holden to sell for a certain price, but he was deprived for sixty days of the right to sell to others; and this without any stipulation whatever on the part of the plaintiff. It was a contract all on one side, without mutuality, quite as much so as that of *Cooke* v. *Oxley*, 3 *T. R.* 654, which failed upon this objection.

Exceptions overruled.

Josiah Whitman *& ux. vs.* Lucy Watson.

In the year 1803, a settlement was made by the Judge of Probate of that part of the real estate of an intestate which had been assigned to the widow as her dower, upon the eldest son, on his paying out to the other heirs their respective shares of the value thereof, and at the same time a bond with surety was given by the son to such heir for his share thereof. In 1807 the amount of the share was paid, and the heir acknowledged the payment on the back of the bond. In an action brought after the death of the widow in 1835, *it was held*, that such reception of the money and acknowledgement of payment by the heir, were an assent to the proceedings of the Probate Court, and a waiver of all objections to them, although it did not appear that the other heirs had been paid.

This was a writ of entry demanding a tract of land in *Portland*. *Henry Dinsdell* died intestate, seized of the demanded premises

and of other land adjoining, prior to *August*, 1802. By proceedings in the Probate Court, the lot demanded was regularly assigned to the widow of the deceased as her dower in the estate, *October* 13, 1802, and she entered thereon and occupied it until her death, in 1835. Application was made to the Judge of Probate for a division of the real estate, and a warrant was issued therefor and returned at a Probate Court, *April* 28, 1803; and the Judge, on the last day, by his decree, reciting that it had been made to appear to him that the estate could not be divided without great prejudice to, or spoiling the whole, and that it would accommodate no more than one, and that *William Dinsdell*, the oldest son, was willing to accept the whole, and pay out to the other children their equal shares according to an appraisement then made, ordered and assigned to the said *William* the whole of the real estate; and directed him to pay to the defendant, who is a daughter of *Henry Dinsdell*, and to three other daughters, three hundred dollars each, with interest. On the same 28th of *April*, 1803, *William Dinsdell* gave a bond with surety to the defendant, conditioned to pay her the $300 for her share. On *January* 28, 1807, *W. Dinsdell* paid that sum and interest, and the defendant and her husband, on the back of the bond, acknowledged that they had received payment in full. The plaintiffs derived title to the premises under *William Dinsdell*, and proved an entry after the death of the widow, and before the commencement of the suit. Judgment was to be entered according to the legal rights of the parties.

Preble and *W. Goodenow* argued for the plaintiffs, and contended, that the Judge of Probate had the power to assign the whole real estate at that time, subject to the widow's right of dower, the decisions only going to make void second assignments after the death of the widow; that the Judge of Probate had jurisdiction of the subject matter, and his proceedings will be upheld, though informal, after more than thirty years have intervened; that a decree may be good in part, and not for the whole; and that the defendant, having assented to the proceedings and received the value of her share more than thirty years ago under this decree, cannot now be protected in her fraudulent attempt to obtain the land as well as the pay for it. *Bradbury* v. *Jefferds*, 3 *Shepl.* 212; *Smith* v. *Rice*, 11 *Mass. R.* 512; *Rice* v. *Smith*, 14 *Mass. R.*

434; *Newhall* v. *Sadler*, 16 *Mass. R.* 122; *Proctor* v. *Newhall*, 17 *Mass. R.* 81.

Codman & Fox, for the defendant, contended, that the Judge of Probate had no jurisdiction in the matter, and that his assignment of the land covered by the widow's dower, was extrajudicial and entirely void. *St. of Mass.* 1783, *c.* 36, § 5; *Sumner* v. *Parker*, 7 *Mass. R.* 79; *Hunt* v. *Hapgood*, 4 *Mass. R.* 117. As the decree of the Judge was entirely void, the reception of the money could not pass a title. Here the money was not paid until long afterwards, and could not legalize what for years had been a mere nullity. Besides, the other heirs were not paid at any time, and that makes the whole void.

The opinion of the Court was by

Emery J. — This case does present questions of importance in regard to proceedings in the Probate Court almost forty years ago. And though questions have sometimes been agitated as to the propriety of holding void the proceedings anciently, of that Court, as to the reversion of the widow's dower, if done by way of distribution before her death, on the ground of a want of jurisdiction, where too no appeal had been interposed. Yet it seems now to be well settled. *Sumner* v. *Parker*, 7 *Mass. R.* 79.

If the Judge of Probate adopt a course expressly prohibited by law, or the decision be upon the rights of persons, and has been made without their being notified, or over whom, he has not jurisdiction, if there be no laches attributable to the party grieved, to obtain redress by appeal, it is left to that party to consider the proceeding void.

But if the party had an opportunity to appeal, and if he had assented to those proceedings, it would not meet with so ready admission that the individual should treat the act or decree as ineffectual.

Henry Dinsdell was the original owner of the estate in question, and in 1802 it was assigned to the widow, which she held as her dower till 1835. On the 28th of *April*, 1803, the Judge of Probate, on its having been made to appear to him that the estate could not be divided without great prejudice to or spoiling the whole, and that it would not accommodate more than one, and that

William Dinsdell, the oldest son, was willing to accept the whole and pay out to the other children their equal shares, according to an appraisement then made, ordered the whole to him, directing him to pay to the defendant, who is a daughter of the said *Henry*, and to three other daughters, three hundred dollars each with interest, and on that 28th day of *April*, 1803, said *William* gave a bond with surety to the defendant, to pay her share of $300, which was, by an indorsement on the back of the bond, under date of *January* 28, 1807, acknowledged by her and her husband to have been paid in full.

Though it is not set forth that any special direction was given by the Judge of Probate that security should be given, as bond was given to the defendant that day with surety, to pay that sum, which she and her husband acknowledged to have been paid in full, we consider that as to this party, it must be held that she assented to the assignment, and has really had her enjoyment of the value of the portion of her father's estate over thirty-three years. And the principal objection in the argument against the plaintiff's claim as against her, is, that it does not appear that the other children have been notified, or assented to the assignment to *William*.

This case, as to its principal elements, to wit, the decree of the Judge, and the acceptance of the bond and its payment, arise under the *Massachusetts* statutes previous to the separation. And without going into a minute criticism upon the cases of *Hunt* v. *Hapgood*, *Sumner* v. *Parker*, *Newhall* v. *Sadler*, *Proctor* v. *Newhall*, and others which have been cited, we must regard the opinion of the Court in *Rice & ux.* v. *Smith*, 14 *Mass. R.* 431, as an authority in support of our construction. It is there expressly held, that the proceedings of the Probate Court may be valid and effectual as to the share of one of the heirs, though ineffectual as to the share of another, and that the reception of the money awarded to an heir, and a certified assent to the assignment, is equivalent to direct evidence that she was notified of the proceeding, and is indeed stronger than such evidence; because, instead of an implied and tacit assent, it shews an express agreement, and a waiver of all objections to the proceedings. And in the facts agreed, we must take the acknowledgement in this case of the defendant and her husband, that the bond for her share has been paid in full, as including sub-

stantially all that was proved in the case of *Rice & ux.* v. *Smith*, 14 *Mass. R.* 431. It amounts to an equivalent to notice, an assent to the proceedings in the Probate Court, and a waiver of all objections to them. According to the agreement of the parties as reported to us, judgment must be rendered, that the demandant recover the premises demanded and costs.

DANIEL C. ALDRICH *vs.* JOHNSON WARREN.

Where a note, or other negotiable paper, is shown to have been fraudulent in its inception, or to have been fraudulently put into circulation, the burthen is thrown upon the holder, to prove that he came fairly by the note, and without any knowledge of the fraud; and it is not enough that it was negotiated before its maturity, but it must be made to appear to have been done fairly, in the due course of business, and unattended with any circumstances justly calculated to awaken suspicion.

If three combine and conspire to defraud another as a common object, the declarations and actions of one are evidence against all.

Testimony to prove that false certificates of the value of an article sold, were by the seller exhibited to others than the purchaser, for the purpose of effecting a sale, being evidence of a general design to deceive any one who could thus be drawn in to make the purchase, is admissible to prove the sale to be fraudulent.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Assumpsit upon a note of hand, signed by the defendant, dated *August* 20, 1835, and payable to *Barzillai Latham*, or bearer, at the *Casco Bank* in *Portland*, in ninety days, for the sum of $406,50. The defendant rested his defence upon the ground, that the note was obtained by fraud, and was without consideration, and that the plaintiff was not an innocent holder of the note for a valuable consideration. To make out his defence, the defendant offered the deposition of one *Hoyt*, parts of which were objected to, but the whole was admitted. Among others of a similar character objected to, are the following question and answer. "10th

int. Did or did not said *Latham* represent to you, that the signers of said certificates were fine and honest men, and had signed nothing but what was true and correct? Answer by deponent. He did." The defendant also offered evidence showing that the note in suit was one of several given as the consideration of the assignment of a bond from one *Perkins* to *Latham*, *Bradley* and *Cushman* of the right to purchase on certain terms, an undivided portion of a certain No. 4, in an eighth range, and by the two latter assigned to *Latham*. To induce the deponent to make a purchase of the same land, certain certificates were exhibited by *Latham* to him, representing that there was a large quantity of valuable timber on the township, when in fact there was little timber or none, and the township was nearly worthless. The certificates were either intended by the makers to apply to another township No. 4, and were by *Latham* applied to this, or were false. There was testimony tending to show, that *Perkins*, *Bradley* and *Cushman* knew of the fraud, and were to share in the profits. This testimony was objected to by the plaintiff but admitted. The defendant introduced evidence tending to show, that these certificates had been shown to *Hoyt* and others to induce them to purchase the same land, which was objected to by the plaintiff, but admitted. There was no direct evidence that the plaintiff was induced to make the purchase by the exhibition of these certificates. There was some testimony creating suspicion, that the plaintiff was but the agent of *Latham* and others in bringing the suit, rather than proving the fact. The defendant here rested. The Judge ruled, that if it was made out, that there was fraud in the inception of the note, the burden of proof was on the plaintiff to show, that he came innocently by it and paid a fair consideration for it. The plaintiff objected, insisting that it was for the defendant to adduce evidence to show, that the plaintiff was not the innocent holder of the note for a valuable consideration. The objection was overruled. The plaintiff then introduced certain testimony for the purpose of showing that the note was indorsed to the plaintiff before it was due, and was his property.

The Judge instructed the jury, that the note declared on having been read to them, the plaintiff must be considered as having made out a good case *prima facie*; that if the defendant would avoid

the note for fraud in obtaining it, he must make satisfactory proof of the fraud; that if they were satisfied, that a conspiracy had been formed in reference to the bond from *Perkins*, between *Latham*, *Cushman* and *Bradley*, with an intention of defrauding some one, in such case, they would consider whatever either said or did, in furtherance of the object, as evidence against them all; that if *Latham* was set forward by the others for the purpose, and had designedly employed another person to aid him in deceiving the defendant, and had thereby imposed upon the defendant, and induced him to give the note in question without adequate consideration therefor, the note must be considered as void; unless the evidence in the case should satisfy them that the plaintiff was the innocent and *bona fide* holder of the note.

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

W. P. Fessenden, for the plaintiff, argued, that the testimony of *Hoyt* and others, that *Latham* had made fraudulent representations to them in respect to this land, was mere hearsay, and the relation of attempts to defraud others not communicated to the defendant, and therefore not admissible in evidence. 2 *Stark. Ev.* 470; *Flagg* v. *Willington*, 6 *Greenl.* 386; *Somes* v. *Skinner*, 16 *Mass. R.* 348; *Peake's N. P. Cases*, 95; 1 *Car. & P.* 65. The same objection applies to the exhibition of the certificates. There is no proof that they were shown to the defendant, or that he had any knowledge of them. The declarations and conversations of *Latham*, *Cushman* and *Bradley*, were improperly admitted. The decisions of the Judge in relation to the burthen of proof were erroneous. When it is shown that there was fraud in obtaining the note, it throws the burthen on the indorser to show, that the note came into his hands before it was due. This is sufficient for him. The plaintiff cannot prove a negative, that he did not know of the fraud, but the defendant is to prove that he had that knowledge. This is the extent of *Munroe* v. *Cooper*, in the 5th of *Pick.*

Codman & Fox argued for the defendant, and cited 3 *Burr.* 1516; 1 *Camp.* 100; 2 *Campb.* 574; *Douglas*, 633; 13 *East*, 134; 2 *Car. & P.* 606; *Chitty on Bills, (8th Ed.)* 652; 2 *B. & Ad.* 291; 2 *Crompt. M. & R.* 342; 1 *Moody & M.* 80; 5

Binn. 469; 10 *Johns. R.* 231; *Munroe* v. *Cooper*, 5 *Pick.* 412; 3 *Kent*, 79; *Commonwealth* v. *Crowninshield*, 10 *Pick.* 497; 3 *Serg. & R.* 320; 2 *Stark. Ev.* 402; *Seaver* v. *Dingley*, 4 *Greenl.* 306; *McKenney* v. *Dingley*, 4 *Greenl.* 172.

The opinion of the Court was by

WESTON C. J. — The law is well settled, that where a note, or other negotiable paper, is shown to have been fraudulent in its inception, or to have been fraudulently put into circulation, the burthen is thrown upon the holder, to prove that he came by the possession fairly, without any knowledge of the fraud. It is not enough merely to show, that it was negotiated before its maturity. It must appear to have been done fairly, in the due course of business, unattended with any circumstances, justly calculated to awaken suspicion. This doctrine is established by the cases cited for the defendant. They are principally collected in *Munroe* v. *Cooper & al.*, 5 *Pick.* 412, which is an authority directly and strongly in point.

It appears, that the certificates made by *Moore*, *Furber* and *Hatch*, were intended to apply to a different township from that for which the note in question was given, although designated by the same number and range; and it further appears, that there was testimony, not objected to, tending to show that this fact was known to *Latham*, the payee of the note, and to *Cushman* and *Bradley*. The testimony of *John C. Shaw* was objected to at the trial; but we hold it to have been legally admissible, being conversation between *Latham* the payee, and *Bradley* and *Cushman*, in relation to the sale to the defendant. *James Moore* also deposes, that in *September*, 1835, he was present at *Cushman's* office, when he, *Latham* and *Bradley* were attempting to adjust their respective claims to the money received or expected from the sale of the bond, and that a controversy arose between them on that occasion. A copy of the bond in the case, shows that they all had an interest in it. If fraud was meditated or consummated, by means of the certificates, there was evidence enough in the case to justify the submission of the question to the jury, whether it was not in pursuance of a combination and conspiracy between the three. This being found or proved, all were implicated in the acts and

declarations of either, in aid of their common object; and the jury were properly instructed upon this point. 2 *Stark.* 402; *Commonwealth* v. *Crowninshield*, 10 *Pick.* 497.

The fact is established, that certificates were procured, applying to a different township, and that they went into the hands of *Latham*, through whose agency the sale was effected. Were these procured for the fraudulent purpose of being palmed off by him, as a true and fair representation of the township, a bond of which he proposed to sell, and which he did sell to the defendants? This is proved by the deponent, *Hoyt*, to whom they were exhibited by *Latham*, when he sought his assistance in the sale of the bond. And we are of opinion, that this testimony was admissible, as showing a general fraudulent design, on the part of *Latham*, to effect a sale, by the aid of these certificates. They might have been procured for a lawful purpose, if *Latham* and his colleagues contemplated a purchase and re-sale of the township, to which they really applied. The exhibition of them to *Hoyt*, as referring to that described in the bond, showed that they were obtained and used for the purposes of deception.

It has been contended, that if they were thus used, in the negotiations made or attempted with *Hoyt*, that fact has no tendency to prove a similar deception practised upon the defendant. But if it is evidence of a general design to deceive any one, who could thus be drawn in to make the purchase, it has that tendency. And such an inference is well warranted from the testimony. They were exhibited to the deponent, to induce him to aid in the sale of the bond generally, as accompanying documents. The same witness, in answer to an interrogatory put by the plaintiff, deposes, that at that period such representations were the principal inducements, operating upon purchasers. The defendant was led to promise a large sum of money, for what had in fact no real value. He resists payment on the ground of fraud. As a part of his proof upon this point, it was competent for him to show, that the promisee went into the market with fraudulent documents, to aid him in the sale of that, which constitutes the consideration. Upon examining the testimony objected to, we find nothing inadmissible of sufficient importance to invalidate the verdict, rendered for the defendant.

Exceptions overruled.

Moses Quimby *vs.* John D. Buzzell.

If the attesting witness to a promissory note be called, and does not prove the handwriting of the name to be his, it is competent to prove it by the testimony of other witnesses.

The *stat.* of 1838, *c.* 343, in addition to the limitation act of 1821, extending to an indorsee the same right to sustain an action upon a negotiable note, attested by a witness or witnesses, after six years from the time the cause of action accrued, which is given to the original promisee by the tenth section of the *stat.* 1821, *c.* 62, applies to an action on a witnessed note held by an indorsee at the time the act of 1838 was passed.

Exceptions from the Court of Common Pleas, Whitman C. J. presiding.

Assumpsit as indorsee of a note of which a copy follows. "*Cape Elizabeth*, *June* 6, 1831. For value received, I promise to pay *Jonathan Morgan*, or order, twenty dollars and sixty-five cents, payable in nine months with interest. *Charles R. Gammon.* Attest, *John Emery.* *John D. Buzzell*, (Surety.")

The writ was dated and served *May* 7, 1838. *Gammon* died before the suit was commenced. With the general issue the statute of limitations was pleaded by brief statement. The subscribing witness was called by the plaintiff, and testified, that he did not recollect that he ever saw the note signed by the defendant, and that he could not testify, that he signed the note as a witness, but the signature looked like his, with the exception of the three last letters. The plaintiff then offered to prove by other testimony, that the signature of the witness was the handwriting of *John Emery.* This testimony was objected to by the defendant, but admitted. The defendant contended, that as between indorsee and maker, the note was barred by the statute of limitations, and was the same in law as if not witnessed; and that the plaintiff could not show the execution of the note by any one but the subscribing witness. The Judge ruled, that the testimony was admissible, and that the action could be sustained, though brought in the name of an indorsee, as the *stat.* of *March* 23, 1838, merely removes a bar to the plaintiff's right to recover, and gives indorsees the same remedies that former statutes gave payees or promisees of witnessed notes. On the part of the defendant, it was contended, that the

statute of 1838 was not passed until subsequent to the expiration of six years from the date of the note, and that this statute could not revive claims that by law had become extinct. The Judge ruled, that the statute of 1838 removed the bar which had been created by statute as respects indorsees. The verdict was for the plaintiff, and the defendant excepted.

The case was argued in writing, by *F. O. J. Smith*, for the defendant, and by *Morgan*, for the plaintiff.

For the defendant, it was contended: —

1. The Judge ruled erroneously that the plaintiff's suit was not barred by the statute of limitations of 1821, *c.* 62, *sec.* 7 and 10.

The suit was not brought within six years next succeeding its maturity, and is not brought in the name of the original promisee. The fact that the note was witnessed, if established by proper testimony, can afford no aid to the plaintiff in view of the statute of 1821. It is on the footing of one not witnessed. *Frye* v. *Barker*, 4 *Pick.* 384.

But it is maintained on the other side, that by the act of 1838, *c.* 343, the exception of the act of 1821 in favor of original promisees on notes witnessed, has been extended to indorsees on all such notes — on those made prior to the passage of the act of 1838, as well as those of a subsequent origin — thus placing the indorsee, now plaintiff, in regard to the note now in question, upon the same footing, and vesting him with all the rights of recovery upon it, that the original promisee ever had. That such will be its effect, because such are its provisions, upon all notes originating since its enactment, is not questioned. But to apply the provisions of that act — no matter what its language may be — to any note which originated anterior to the existence of that law, and which had also been indorsed anterior to the existence of that law, and which, moreover, had expired and become a *nudum pactum* in the hands of the plaintiff, the indorsee, by the force and limitation of the law under which and in reference to which it had been made, anterior to the existence of the law of 1838, would be to stretch both legislative and judicial power beyond the mere resurrection of defunct rights and expired obligations of parties, to the absolute, out and out, creation of new rights and new obligations between the parties, securing to the one party the former, and subjecting

the other party to the latter. The act of 1838, is not, as the plaintiff's counsel contends, a modification of the plaintiff's remedy. It is, so far as it can affect them, a modification of both the plaintiff's and defendant's rights, and its effect is to create a legal liability where none had continued to exist, between parties who had ceased to stand in the relation of creditor and debtor. In the course of his argument, which is much too extended for publication, he cited *Ashley, appellant,* 4 *Pick.* 21; *Blanchard* v. *Russell,* 13 *Mass. R.* 1; *Kimberly* v. *Ely,* 6 *Pick.* 451; *King* v. *Dedham Bank,* 15 *Mass. R.* 454; *Call* v. *Hagger,* 8 *Mass. R.* 429; *Foster* v. *Essex Bank,* 16 *Mass. R.* 271; *Springfield Bank* v. *Merrick,* 14 *Mass. R.* 325; *Hampshire* v. *Franklin,* 16 *Mass. R.* 84; *Medford* v. *Learned,* 16 *Mass. R.* 217; *Sturgis* v. *Crowninshield,* 4 *Wheat.* 122.

2. He argued, that it was not competent for the plaintiff to prove the signature of the supposed witness to the note by any other testimony than that of the witness himself, he being present at the trial. He cited *Smith* v. *Dunham,* 8 *Pick.* 246.

Morgan, for the plaintiff, argued: —

1. The statute of 1838 has taken away no vested right; but merely enlarged the remedy, by extending the same remedy to the indorsee which the indorser previously had by the statute of 1821. By that statute, the payee could have recovered the note, and it could make no difference with the defendant by whom the recovery was had.

2. The statute of 1838 compared with that of 1821, is analogous to the *stat.* 1835, *c.* 195, with that of 1822, *c.* 209. These statutes do not alter the contract, but only modify the remedy, and therefore do not come within the provision of the constitution prohibiting the legislature from passing laws impairing the obligation of contracts.

3. The common law has no limitation. 3 *Bac. Ab.* 500, *Limitation (A.)* Statutes of limitation are therefore only modifications of the common law as to the mode or time of recovery, and do not interfere with the contract itself. All such laws are constitutional. The statute of 1838 merely removes the prohibition against bringing the suit on a witnessed note, after six years, in the name of the indorsee, and places him in the same situation as the payee of the note.

4. The jury might have found as they did, upon the testimony of the subscribing witness alone, and the additional evidence could not impair the verdict. But the law only requires that the subscribing witness should be called, but does not exclude other testimony to prove the case. The witnesses may as well testify to the handwriting of the subscribing witness, as to any other fact.

The opinion of the Court was by

EMERY J. — The note in this case, bears date the 6th day of *June*, 1831, given by the defendant and one *Charles D. Gammon*, since deceased, to *Jonathan Morgan*, or order, by him indorsed to the plaintiff, payable in nine months, with interest. The writ is dated the 7th of *May*, 1838.

The note purports to be witnessed by a man who on being introduced as a witness, testified, that he did not recollect that he ever saw the note signed by the defendant, and that he could not testify, that he signed said note as a witness, but the signature looked like his, with the exception of the three last letters. The witness could not say that the signature was or was not his handwriting. Other evidence was rightfully introduced, because the matter to be established was, whether it was a note attested by one witness within the meaning of the statute. The want of recollection of the witness was not sufficient to prevent the legal effect of other testimony going to establish that point. In *Alexander* v. *Gibson*, 2 *Campb.* 555, where a witness for the plaintiff having disproved a fact, which he was called to prove, the plaintiff was permitted to call other witnesses to prove the fact. *Richardson* v. *Allen*, 2 *Stark.* 296, and note on 297th page.

In this case under consideration, the defendant was a surety. But as to the holder of the note, the law recognizes no difference in regard to liability between the principal and surety. The contract is to be regarded as a note properly witnessed. And to be within the exception of the statute exempting such a note from the general statute of limitation in the seventh section.

The limitation for the commencement of an action is a very different thing from a statutory provision, that a contract of a certain description, or evidenced in a certain manner shall be void ; as in regard to the recovery of penalties. No objection is presented to the

justness of this contract in the form of a negotiable note. The moral obligation to pay remained on the promiser. And any new promise which he should have made, had the note not been witnessed, to discharge it, would have bound him, without any new consideration.

In general, statutes of limitation are to be deemed entirely prospective. Such words however, may be used as in a certain sense to give a law of this character a retrospective operation. Where the intention of the statute is understood, if expressed with sufficient clearness and distinctness to enable the Court to collect it from any part of the act, the Court is not at liberty to *exclude words*, but to construe the whole, with reference always to that which appears to be plainly and manifestly its object. *Bloxam* v. *Elsee*, 6 *B. & C.* 174. And a remedial statute is to be so construed, as most *effectually to meet the beneficial end in view, and to prevent a failure of the remedy. Dwarris on Stat.* 718.

It is manifestly one of the objects of the statute of *March* 23, 1838, *c.* 343, to allow the same remedy for an indorsee of negotiable paper, that was secured to the original promisee, his executor or administrator, if attested by one or more witnesses, as set forth in the 10th section of *stat. c.* 62. It was only carrying out the original view of the promiser to pay the original promisee or his order. Whether the *stat. c.* 343 does not go much further, it is not necessary now to determine. But it does say, that "the act to which it is additional, shall not extend to bar any action hereafter brought upon any note, or contract in writing, made and signed by any person or persons, and attested by one witness or more, whereby such person or person *has* promised, or shall promise to pay any other person or person, his or their order, or bearer, any sum of money, whether such action be brought in the name of the original promisee or promisees, his or their executors, administrators, or the indorsee or indorsees, assignee or assignees of such promisee or promisees, his or their executors or administrators, any law or usage to the contrary notwithstanding."

This statute has then only removed the bar to the indorsee's pursuing a remedy in his own name, which, on such a note as the present, attested as the jury have found by one witness, might have been pursued in the name of the original promisee, had this statute not been passed. The exceptions therefore must be overruled.

JACOB S. ROLLINS *& ux. Adm'rs vs.* ISAAC DYER *& al.*

Receipts are not in all cases conclusive; they afford *prima facie* evidence of what they purport to declare, but are subject to be overthrown by counter proof from the other party.

EXCEPTIONS from the Court of Common Pleas, WHITMAN C. J. presiding.

Assumpsit on a note of hand, dated *May* 27, 1833, for the sum of $465, payable in two years with interest, given by the defendants, *Dyer* and *Dorrance* to *Benjamin Poland* or order. *Poland* deceased within about twenty-four hours after the note was given, and *Lucy Poland*, one of the plaintiffs, was appointed administratrix on his estate, and has since been married to *Jacob S. Rollins*, the other plaintiff. The estate was represented insolvent, and proved to be so in fact, paying but thirty per cent. The defence set up was, payment by *Dyer* to the administratrix before her marriage with *Rollins*, and as evidence of such payment produced a receipt of which the following is a copy. "*June* 3, 1835. Received of *Oliver B. Dorrance* and *Isaac Dyer* the amount due upon their note given to *Benjamin Poland*, late of *Standish*, deceased; said note being given in *June*, 1833, and the possession thereof obtained wrongfully by *Samuel Dennett* of *Standish*. And this is a full discharge of said *Dorrance* and *Dyer* from further liability on said note. *Lucy Poland*, adm'x of the estate of *Benjamin Poland*." The defendants also produced in evidence a notice from the administratrix, dated *May* 20, 1835, to *Dyer*, that the note was wrongfully obtained by *Dennett*, and requiring payment to be made to her. There was an entry on the back of the writ, that the action was brought for the benefit of *Samuel Dennett*, and the counsel appearing for the plaintiffs, contended at the trial that the note was *Dennett's* property. It was proved, that the note was delivered to the agent of *Dennett*, on the day it bears date, by one *Watson*, in exchange for notes against *Poland* in favor of *Dennett*, to the same amount. *Watson* testified, that he wrote and took the note in *Portland*, for said *Benjamin*, and delivered it on the same day to *Dennett's* agent, but that he had no authority whatever from the said *Benjamin*, or directions from him, so to dis-

pose of the note, or to make any disposition or assignment thereof; that he acted entirely without authority; and that he had not informed *Benjamin Poland* of what he had done. It was proved, that *Poland*, on the 27th of *May*, when these transactions took place, was extremely sick, and died within about twenty-four hours of the time. The plaintiffs produced in evidence a letter from *Dorrance* to *Dennett*, dated *October* 23, 1835, in which he says, that he had been notified to pay the note to the heirs of *Poland* and not to *Dennet*, but "that he had as lief pay it to you, and a little rather, as we have always been friends."

The defendants contended, that the plaintiffs could not recover; that no assignment of the note to *Dennett* had been proved; and that the payment to the administratrix, as proved by her receipt, should be a sufficient bar and defence to the action. WHITMAN C. J. instructed the jury, that receipts were not in all cases conclusive; that evidence was admissible to show that they were given through mistake and misapprehension; that from the letter of *Dorrance*, and the other circumstances in the case, they would consider whether it was or was not reasonable for them to believe, that the receipt produced was given without the payment of money or any other thing on account of said note, and whether the administratrix had not been induced to sign it, and also the letter signed by her, under an apprehension that it was necessary in order to defeat the claim which *Dennett* was setting up to said note. And that if they should be satisfied, that it had been so obtained from her without any consideration, the plaintiffs were entitled to recover the amount of the note, in order that the same might be distributed among the creditors of *Poland*. The verdict was for the plaintiffs, and exceptions were filed by the defendants.

Swasey, for the defendants, contended, that this was the suit of *Dennett*, and not of the administrators; that the attorney appearing in the action so avowed and it so appears on the exceptions; it was so stated on the writ itself, and the administrators did not authorize the prosecuting of the suit in their names, but resisted it. That the claim of *Dennett*, as assignee, was without any foundation in evidence, law, or equity. His mere possession of the note would not enable him to bring the suit. The general principle of

law, that receipts are liable to be explained by parol proof of fraud or mistake, is not denied. If the suit had really been brought by the administrators for the benefit of the estate, there is no evidence of fraud or mistake in obtaining the receipt. The only pretence of evidence, the letter of *Dorrance*, might have been written in ignorance of the payment by *Dyer*. The principal objection to the charge is, that it was wholly inappropriate and erroneous as applied to this action by *Dennett*. He had no right to contest the validity of this receipt. The recovery in this suit will not place the money in the hands of the administrators, to be distributed among the creditors, but will give it to *Dennett*, the only person who seeks it, and who should not have it. The issue on the trial between the parties was, whether *Dennett* had shown a legal assignment to him, and the charge relates to the right to recover, if the suit had been for the benefit of the administrators.

Poole, for the plaintiffs, said that the defence relied on, was payment, and the only evidence of it was a receipt in general terms, not expressing even what sum was received. This is contradicted by the letter of one of the defendants, written four months after the receipt was given. The question for the consideration of the Court is simply whether the charge of the Judge of the Court of Common Pleas, "that receipts were not in all cases conclusive," was right or wrong. He did not propose going into an argument to show the practical utility and importance of the rule, but to confine himself to a reference to some of those cases where it has been determined. *Stackpole* v. *Arnold*, 11 *Mass. R.* 27; *Tucker* v. *Maxwell*, *ib.* 143; *Johnsan* v. *Johnson*, *ib.* 359; *Wilkinson* v. *Scott*, 17 *Mass. R.* 249; *Ensign* v. *Webster*, 1 *Johns. Cas.* 145; *House* v. *Low*, 2 *Johns. R.* 378; *M'Kinstry* v. *Pearson*, 3 *Johns. R.* 319; *Kipp* v. *Denniston*, 4 *Johns. R.* 23; *Tobey* v. *Barber*, 5 *Johns. R.* 68; *Johnson* v. *Weed*, 9 *Johns. R.* 310; *Shephard* v. *Little*, 14 *Johns. R.* 210; *Bowen* v. *Bell*, 20 *Johns. R.* 338; *Steele* v. *Adams*, 1 *Greenl.* 2; *Skaife* v. *Jackson*, 3 *B. & Cres.* 421; *O'Neale* v. *Lodge*, 3 *Har. & M'Hen.* 433; *Trisler* v. *Williamson*, 4 *Har. & M'Hen.* 219; *Thompson* v. *Faussat*, 1 *Peters C. C. R.* 182; *Rex* v. *Scammonden*, 3 *T. R.* 474; *Harnden* v. *Gordon*, 2 *Mason*, 541.

The opinion of the Court was by

WESTON C. J. — There is no evidence of any valid assignment of the note in question to *Samuel Dennett*, nor is any such fact assumed in the instructions of the Judge. By an indorsement on the writ, it is stated to have been commenced for the benefit of *Dennett*, as the party in interest. That is an affair between the plaintiffs and *Dennett*, but affords no matter of defence, unless it appeared, that the note had been paid to him, which is not pretended. The plaintiffs on record do not disavow the suit, and if recovered in their names, they will be answerable in their representative capacity, for its due appropriation. That is a question, which does not concern the defendants. The note is evidence of a debt against them, which is recoverable at law, unless it has been paid.

The only legal point in the case is, whether on the evidence offered of payment, the jury were properly instructed. The receipt was *prima facie* evidence of that fact; but it was not conclusive, and was open to be contradicted by any testimony, which might fairly bear against it. The leading case of *Stackpole* v. *Arnold*, 11 *Mass. R.* 27, is an authority to this effect, which is in accordance with the uniform practice of our Courts. The same principle is more fully laid down in *Harnden* v. *Gordon & al.*, 2 *Mason*, 541, and it is well sustained by these and other decisions, cited for the plaintiffs.

But it is contended, that there existed no testimony, which made it necessary or proper, to present this view of the law to the consideration of the jury. The receipt was evidence, that the note was paid in *June*, 1835. *Dorrance*, one of the defendants, and a joint promisor of the note, on the 23d of *October* following, by fair implication from his letter of that date, admits the note to be due and unpaid. This was evidence against the receipt, which was properly left to the jury. It was their province to determine the fact. The instructions of the Judge appear to us to have been in conformity with law.

Exceptions overruled.

APPENDIX.

The Legislature have power to grant divorces, in cases where the Supreme Judicial Court have no jurisdiction; but where the Court have the jurisdiction, the constitution forbids the exercise of that power by the Legislature.

STATE OF MAINE.

IN SENATE, Feb. 11, 1840.

Ordered, That the Justices of the Supreme Judicial Court, be requested to give their opinion on the following questions, to wit:

QUESTION 1st. Have the Legislature the power to grant Divorces, in cases where the Supreme Judicial Court have jurisdiction?

QUESTION 2d. Have the Legislature the power to grant Divorces, in cases where the Supreme Judicial Court have no jurisdiction?

To the Honorable the Senate of the State of Maine:

The Justices of the Supreme Judicial Court, in obedience to your order of the eleventh inst., have considered the questions thereby proposed to them, and now have the honor to transmit the following observations as their opinion.

The questions presented to the Justices under that clause of the constitution, which requires them "to give their opinion upon important questions of law and upon solemn occasions," are perhaps almost necessarily presented under circumstances indicating that an opinion is expected speedily. And they are received, when the mind, having been greatly exhausted by the pressing labors of other official duties, no longer possesses its natural vigor, and cannot exercise even its accustomed extent of thought or power of reason. And it cannot be allowed the time for that extensive research and patient examination and reflection, which the importance of the questions, often a little aside from the range of its accustomed studies and duties, may demand. And it is not excited to action and aided by the elaborate examination and forcible reasoning of other minds, which have been interested to examine and argue them.

Opinions formed under such circumstances, can scarcely claim the respect which might be readily yielded to those formed under more favorable auspices.

Marriage is usually and justly regarded in christendom, as an institution of divine origin, and regulated, to a certain extent, by the divine command. And in countries where neither the Jewish law nor christian religion has been received, regulations of it have been regarded as disclosed by the light, and existing in the law of nature. There can, however, be no doubt, that it is subject to the regulation of municipal law, in all those numerous incidents wherein the divine law is silent. The mode of entering into the contract; to what extent and in what manner it shall affect the personal liberty and safety of the parties, and in what manner these shall be protected and secured; the effect which it shall have upon their estates during its continuance and after it is terminated by death; the duties which it imposes upon each, and the obligations under which it places them to others, are some of the matters coming rightfully within the control of the legislative power. And they prove, that it is also a civil institution to be regulated by law for the common good. The common law considers it in no other light than as a civil contract, leaving morality and religion to act upon it according to their own principles. This contract, to be binding, must, like others, be entered into by those having ability to contract, and who freely do so in the manner which the law prescribes or allows. When thus executed, it confers upon the parties certain legal rights, according to the then existing state of the law. The rights of the parties to their property or estates, are no longer the same. Former rights are diminished or modified, and new ones are acquired. These rights the law recognizes as having been derived from the contract of marriage, and enforces them. Here then is a contract, valid in law, and from the obligations of which neither party can be freed, but by some course of procedure which the law admits to be effectual, to declare that it is no longer binding. Whatever this may be, it has the effect of depriving one party to the contract of legal rights, and of releasing the other party from legal obligations.

Such rights and duties, when acquired and existing by virtue of a deed, bond, promissory note, or other contract of similar character, cannot be destroyed or released by the legislative power. To

do this, would violate that clause in the constitution of this State, which declares, that the legislative power shall pass no "law impairing the obligation of contracts." The rights and obligations secured by this class of contracts, are precisely such as the parties to them, acting in obedience to the laws, choose to make them; and such as the contract itself sets forth and defines. The only proper proof of them is found in the language of the contract. The Legislature, by no law of general policy for the regulation of municipal affairs, or of moral or intellectual culture, would act upon or affect them. These contracts may be dissolved at the election of the parties interested. In all these respects, they are unlike and differ from the marriage contract — that cannot be dissolved by the consent of the parties. The State has an interest in it as a civil institution, designed to cherish virtue and to promote the happiness of the community. All the rights and duties arising out of it, except those occasioned by the difference of the sexes, are not provided for in the contract; nor are their existence proved by it. They are acquired solely by a law of the State, and are such as that determines that they ought to be. It is for the legislative power to determine what will promote the general welfare and the happiness of the people in the regulation of this relation in life, as well as in that of parent and child, and master and servant. It may by law declare, that the husband shall have no right to the estates of the wife, and the wife none to those of the husband. Such a law would change the rights of the parties as they have heretofore existed under the marriage contract, in all those cases where the title had not been changed by being reduced to actual possession. And in the same manner may every right and duty existing under it, saving those before excepted, be altered or destroyed by general laws regulating the relation of husband and wife. And the contract itself will be left shorn of all privileges and duties, rights and obligations, except those personal ones before named. No rights or duties would be left, which could be asserted and enforced in a court of common law. In an ecclesiastical tribunal, there might be a suit relating to marital rights. This, however, may be regarded as a process to enforce moral duties. Was it intended by that clause in the constitution, to preserve the mere existence of a contract, when all other rights than these were liable to be destroyed? Or was it intended to protect

those contracts only, securing a pecuniary or other beneficial interest, which could become the subject of estimation, and of compensation?

The language used in the constitution of this State for the preservation of the obligation of contracts, appears to have been copied from the constitution of the United States. Several cases have come before the Supreme Court of the United States, requiring a construction of that clause of the constitution. It is believed that in no one of them has it received a more enlarged construction, than in the case of Dartmouth College against Woodward, reported in the 4th vol. of Mr. Wheaton's reports. It was there decided, that a grant of an eleemosynary private corporation, was a contract protected by that clause, although there was no other party who could or did complain, than the Trustees under the charter. Among the reasons prominently assigned for this construction, are the following: — "It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the constitution, and within its spirit also," unless, says the opinion, its being invested in trustees makes a difference. It had been alleged in the argument of that case that a construction so enlarged, would include many contracts never designed to have been included, and among others, the marriage contract. In answer to this argument, Chief Justice Marshall observes:

"The provision of the constitution never has been understood to embrace other contracts than those with respect to property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any State Legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire, whether such an act be constitutional." Where it is said that this clause has never been understood to restrict the right to legislate on the subject of divorces, it is supposed that reference was made to the practice existing before, and continued since, the adoption of the constitution of the United States, in many of the State Legislatures, to grant divorces. This practice, continued to this day in

several of them, and being, it is believed, the only method by which a divorce can now be obtained in four or five of them, exhibits a practical construction of that clause, indicating that it was not intended to operate upon the marriage contract. The more this clause is extended by construction, the more is the legislative power of the States diminished. These considerations lead the undersigned to the conclusion, that a just construction of that clause does not forbid the Legislature to grant divorces.

The constitution of this State provides, that "the powers of this government shall be divided into three distinct departments, the legislative, executive, and judicial," — and that "no person or persons belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted," — and that "the judicial power of this State shall be vested in a Supreme Judicial Court and such other Courts as the Legislature shall from time to time establish." The constitution does not define the extent, or prescribe the limits of the judicial power. The Supreme Court cannot exercise its judicial power by virtue of the constitution alone, but must ascertain the extent of its powers and duties from the enactments of the Legislature. The judicial power is, therefore, in our constitution, whatever the laws of the State, from time to time enacted, declare it to be. And when any subject is thus declared by law to be of judicial cognizance, it becomes a part of the judicial power, in the only sense in which that term in the constitution can have a practical operation. Other departments of the government, while it so remains a part of the judicial power, are forbidden to exercise it. If the Supreme Court acts upon a question of divorce over which it has jurisdiction, and decides that by the rules of law and evidence a divorce cannot be granted — and the party then applies to the Legislature, and it takes jurisdiction and grants the divorce, it practically allows the party an appeal from the highest tribunal established by or known to the constitution. And it would appear to present one of the practical evils designed to be provided against in that clause of the constitution. It would present the spectacle of two different departments of the government acting upon the very question which had been committed to one of them to determine finally as a judicial question. The result of this reasoning is, that in the opinion of the undersigned,

the Legislature cannot "grant divorces in cases where the Supreme Judicial Court have jurisdiction."

There may be questions, in their nature essentially judicial, which have not been thus assigned to, and incorporated into the judicial power. And the question arises, and it is one of great delicacy and importance, and calling for a more extensive research and examination than can now be permitted, whether any subject, although in its nature judicial, can, under our constitution, be regarded as coming within the judicial power, unless it has by law been so assigned to it. There is no other mode of ascertaining with certainty, what subjects are comprehended within that power. Men's judgments may greatly differ respecting what questions are in their own nature essentially judicial. One of the principal objects of the provision for the division of power, doubtless, was to avoid the danger and mischief of a conflicting exercise of power upon the same subject. By the proposed construction, this can never take place between the legislative and judicial powers, in those cases over which the judicial power by law has no jurisdiction, although they may be apparently proper for judicial decision. To declare that all questions apparently more fit for the exercise of judicial than legislative power, were included within the judicial power, would be, therefore, to extend that power by construction, beyond what is necessary to avoid the mischiefs to be apprehended from a conflict of power. And it would leave the judicial power so vague and undefined, as to afford frequent occasions for those very conflicts and mischiefs which it was the intention to avoid. It may be objected to this construction, that it would permit the Legislature by refusing to pass any law giving to the judicial power cognizance of any class of contracts or questions, to usurp the whole judicial power, and to decide upon all contracts and questions arising between party and party. It is not to be presumed, that it would refuse to perform its duty and so violate the constitution as to annihilate, for all practical purposes, one department of the government. And if it could be supposed to do so, it could not itself exercise the power thus improperly withheld, in all that class of cases which are required by the constitution to be tried by a jury. The objection is not believed to be of sufficient importance to require that other insuperable difficulties existing to prevent such an exercise of power, should be stated. An eminent jurist, and one possessed of

high powers of mind, has declared that the question of divorce involves investigations which are properly of a judicial nature. There may, however, be in the judgment of the Legislature, other proper causes of divorce than such as have by law been assigned to, and thereby become a part of the judicial power.

Under written Constitutions and laws, defining the powers and duties of the different departments of government, the justness of the old maxim, that a good judge acts well his part by enlarging his jurisdiction, is not perceived. The better rule would seem to be for all to exercise the powers granted, without any attempt to enlarge or restrict them by a strained construction.

If this reasoning be not erroneous, it will be perceived, that the language of the Act of *March* 5, 1834, declaring, "that the Supreme Judicial Court shall have exclusive jurisdiction in all cases of divorce," does not enlarge or extend the judicial power beyond the cases over which it has jurisdiction; and such does not appear to have been the intention of the Legislature. Nor could the Resolve passed in the Senate, on the 8th, and in the House, on the 9th of *March*, 1838, for the like reasons, have any such effect; even if it could be regarded as any thing more than the deliberate judgment of the two branches of the Legislature then existing. Other reasons have been noticed, which appear rather to exhibit the inexpediency, or the danger, or the injustice of the exercise of the power by the Legislature, than to prove it to be unconstitutional.

While they may believe with the distinguished jurist before alluded to, that "the jurisdiction over divorces ought to be confined exclusively to the judicial tribunals under the limitations prescribed by law," the undersigned, from the information to which they can now obtain access, are not prepared to deny, that "the Legislature have the power to grant divorces, in cases where the Supreme Judicial Court have not jurisdiction;" and they therefore answer the second question in the affirmative, and the first in the negative.

NATHAN WESTON,
NICHOLAS EMERY,
ETHER SHEPLEY.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

CONVEYANCE.

EXECUTION.

EXECUTORS AND ADMINISTRATORS.

EXTENT.

PLEADING.

1. The averment in the declaration of a demand, not required by the contract, or by law, may be rejected as surplusage, and need not be proved. *Bean* v. *Simpson.* 49

2. Filing a brief statement of the special matter of defence to the action, under the *statute* of 1831, *c.* 514, "to abolish special pleading," is a substitute for special pleading at common law; and the party filing such statement is entitled to the same rights under it as he would have had at common law, before the statute, by pleading the same subject matter in a special plea, and no more. *Williams College* v. *Mallett.* 84

3. In a real action, where the general issue is pleaded, the demandant is holden to prove his seizin within the time upon which he has counted in his writ; and this may be repelled by the tenant, by showing that another was seized at the same time. But proof that the demandant had conveyed his title after the commencement of the suit, having no tendency to disprove the seizin of the demandant alleged in his writ, is not of that repelling character, and cannot be given in evidence under the general issue. *ib.*

4. Where the tenant in his disclaimer alleges, that he had conveyed all his title and interest to a particular individual named, proof that he had conveyed to a different individual is inadmissible. *ib.*

5. Where the tenant disclaims, and alleges that he had conveyed to another, who had become seized and possessed of the premises, the declarations of such other person, that he did not claim and never had claimed the premises under that conveyance, are admissible evidence in determining the truth or falsehood of those allegations in the disclaimer. *ib.*

6. The *stat.* of 21 *James* I, *c.* 12, requiring actions against magistrates for acts done under colour of their office to be brought in the county in which they live, is not in force here. *Campbell* v. *Thompson.* 117

7. Filing a brief statement of the special matter of defence to the action, under the *stat.* 1831, *c.* 514, "to abolish special pleading," is a substitute for special pleading at common law; and the party filing such statement is entitled to the same rights under it as he would have had by pleading the same subject matter in a special plea before the statute, and no more. Therefore, in an action on a bond, where the defendants pleaded the general issue, and filed a brief statement, alleging that the bond was obtained by duress, they were limited to the same grounds of defence as they would have been before the statute, had they pleaded the general issue, and pleaded specially, that the bond was obtained by duress. *Chase* v. *Fish.* 132

8. Under *stat.* 1831, *c.* 514, to abolish special pleading, the points in a brief statement, are equivalent to one or more special pleas in bar, under leave to plead double; and the final judgment depends upon what the law, as applied to the case, may require after the facts in controversy shall have been settled. *Potter J.* v. *Titcomb.* 423

9. Where the general issue is to be determined by the Court, by an inspection of the record, and facts are set up in defence by brief statement, to be properly settled only by a jury, the determination of them must be referred to the jury; and when their verdict thereon shall have been returned, it will be for the Court, on view of the whole case, to decide, whether the action has or has not been sustained. *ib.*

10. If there has been a joinder of the general issue, and the facts alleged in the brief statement have been directly controverted by a counter statement, no other formal joining of the issue can be required. *ib.*

POOR.

1. In the act incorporating a portion of an old town into a new one, it was provided, that those, who should afterwards become chargeable to the towns as paupers, should be considered as belonging to that town, "*on the territory of which, they had their settlement at the time of the passing of this act, and shall in future be chargeable to that town only;*" a pauper had gained a settlement in the old town at its incorporation, by residing therein on that part of it made into the new town, but when the new town was incorporated, had removed into a different part of the old town, and there remained until this territory was incorporated into a third town; the pauper, who had never gained any settlement unless by these acts of incorporation, was held to have a settlement in the second town, under the special provision in the act of in-