REPORTS

OF

CASES DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

By JOHN SHEPLEY,
COUNSELLOR AT LAW.

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE PERIOD OF THESE REPORTS.

HON. NATHAN WESTON, LL. D. CHIEF JUSTICE.
HON. NICHOLAS EMERY, } JUSTICES.
HON. ETHER SHEPLEY, }

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OF CASES REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF CUMBERLAND, APRIL TERM, 1840.

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

GEORGE WILLIS *vs.* JAMES CRESEY *& al.*

If a negotiable note, indorsed in blank by the payee, be lost by the indorsee, and he afterwards assigns to another his right thereto, the assignee cannot maintain an action at law in his own name upon such lost note.

The thirty-third rule of Court, in relation to the denial of signatures in actions upon bills and notes, applies as well to those which are not produced at the trial, if there be a special count thereon, as to those produced.

ASSUMPSIT on a note of hand, alleged to have been signed by the defendants, for the sum of $769,11, payable to *Sewall Gilbert*, or order, in three years from date, and by him indorsed, and bearing date, *June* 30, 1835. The writ was dated *July* 2, 1838. The money counts were also inserted. The note became the property of *Solyman Heath* in the early part of the year 1836, having then upon it the blank indorsement of *Gilbert*, the payee. In the summer of the year 1837, the note with others, was stolen from *Heath's* office in *Belfast*. After the note was stolen, *August* 10, 1837, *Heath*, in writing, transferred the note and all right in the demand to the plaintiff in payment of a debt, of which the defendants had notice. There was evidence that *Cresey* signed the note, and promised to pay it to *Heath*, while it was in his posses-

sion; but there was no evidence that the other defendants had signed it.

The defendants' counsel contended, that the rule of Court requiring signers of notes to deny the signature, did not apply to notes not produced; and that the signatures of two of the defendants were not proved; that the plaintiff had not proved such a title and transfer as would enable him to maintain the action; and that no suit could at law be maintained upon a lost note. The case was taken from the jury, and submitted to the opinion of the Court, who were to order a nonsuit or default, as law and justice might require.

W. P. Fessenden, for the plaintiff, admitted, that the law in *England* was settled in *Hansard* v. *Robinson*, 7 *Barn. & Cr.* 90, to be against the maintenance of the action at law; and that the law was the same in *New-York*. The decisions in *England* in accordance with *Hansard* v. *Robinson*, are of modern origin, and are based upon the ground that courts of law cannot order an indemnity. 2 *Campb.* 211; 3 *Campb.* 324. Formerly in *England* actions at law were maintained on lost notes. 1 *Vesey*, 345; 2 *Vesey*, 38, 41; 1 *Story's Eq.* § 81, 97. It is manifest, that Judge *Story* considers, that an action at law is maintainable upon a lost note. The law in this country is in favor of sustaining such suit. *Anderson* v. *Robson*, 2 *Bay*, 495; *Mecker* v. *Jackson*, 3 *Yeates*, 443; *Peabody* v. *Denton*, 2 *Gallison*, 351; *Freeman* v. *Boynton*, 7 *Mass. R.* 483; *Fales* v. *Russell*, 16 *Pick.* 315; 2 *Wash. C. C. Rep.* 97, 172; 9 *Wheat.* 581; 5 *Peters*, 699. Several instances were adverted to in which the law is clearly settled in *Massachusetts* and *Maine*, as was contended, differently from that in *New-York*, and reasons assigned why it should be so in this case.

The suit can be maintained in the name of the assignee of a negotiable note, actually negotiated, although he never had the possession. The counsel gave a history of the decisions on which choses in actions have been held to be assignable, and adverted to the principles on which they were founded. The result was, that in point of fact, all choses in action are equally assignable, but the assignees are not in all cases in the same position with regard to the commencement of suits. For the benefit of trade, bills and

notes became not only assignable, but when on their face negotiable, an action might be brought in the name of the holder. In other cases the assignee must institute his suit in the name of the assignor. Even this rule is confined to legal proceedings. In equity, all assignees stand on the same footing with regard to the commencement of suits. 8 *T. R.* 595; *Lenox* v. *Roberts*, 2 *Wheat.* 373; *Story's Eq. Pleadings, Parties.* The paper on which the note is written, is only the recognized evidence of the thing in action. The thing in action is the debt. The loss of the note does not destroy any of the incidents of the thing; but that with all its incidents and privileges exists, and passes with its negotiable quality to the purchaser, who may well bring the suit in his own name.

Codman & Fox, for the defendants.

No action can at law be maintained on a lost note. *Chitty on Bills, (8th Ed.)* 291; *Davis* v. *Dodd*, 4 *Taunt.* 602; 3 *B. & B.* 295; 4 *Esp. R.* 159; 3 *Campb.* 324; 2 *ib.* 211; *Holt's N. P. Cas.* 144; *Bayley on Bills*, 416; *Hansard* v. *Robinson*, 7 *B. & Cres.* 90; 3 *M. & Selw.* 281; 4 *Price*, 186; 6 *Ves.* 812; 10 *Johns. R.* 104; 3 *Cowen*, 303; 3 *Wend.* 344; 8 *Conn. R.* 431. A court of law is incompetent to require a bond of indemnity. 1 *Story's Eq.* § 82. The party is entitled upon payment of such note to have it delivered up to him as a voucher for its payment and extinguishment. 1 *Story's Eq.* § 86. If the note thus lost comes into a *bona fide* holder's hands, he will sustain an action upon it. 1 *Burr.* 455; 3 *Burr.* 1516; 4 *Esp. R.* 56; *Dowl. & Ry.* 50.

The assignment of a negotiable note gives the assignee *only* an equitable interest in the note; the legal property still remains in the assignor, and the assignee cannot maintain an action in his own name. *Day* v. *Whitney*, 1 *Pick.* 502; *Mowry* v. *Todd*, 12 *Mass. R.* 284; *Skinner* v. *Somes*, 14 *Mass. R.* 107; *Jones* v. *Witter*, 13 *Mass. R.* 304; *Dunning* v. *Sayward*, 1 *Greenl.* 367; *Thomas* v. *Titcomb*, 5 *Greenl.* 282; *Bradford* v. *Bucknam*, 3 *Fairf.* 15; 9 *Conn. R.* 94; 7 *Cranch*, 273; 2 *Ham.* 56; 18 *Martin*, 15; 15 *Johns. R.* 247; *Taylor* v. *Binney*, 7 *Mass. R.* 479.

The opinion of the Court was by

EMERY J. — We apprehend that the rule of court, requiring signers of notes to deny the signature, does apply to notes not produced, when the action contains a count upon the particular note or notes alleged to be lost. No exception on account of the note being lost is contained in the rule, and we do not perceive that there ought to be. The defendant is supposed to know whether he gave the note or not, and should be held to make his election in season to admit or deny the signature, so that no surprize should be occasioned to the party seeking to recover.

The note in question was by the defendants given to *Sewall Gilbert*, or order, on the 30th of *June*, 1835, for $769,11, payable in three years from the date with interest, indorsed by *Sewall Gilbert* in blank, in the early part of the year 1836.

It was thus in a situation to pass to any one who came fairly to the possession of it for a valuable consideration.

But were the suit in *England* or *New-York* in the name even of *Heath*, the decision would be directly against *Heath's* claim, because upon a lost negotiable note *there* indorsed, not proved to be destroyed, an action is not to be sustained at law. Even in *England*, some redress seems attainable in such cases, in a Court of Equity, because there it is said, that Court has sufficient means whereby it can fix upon the extent of the indemnity which must be furnished from the plaintiff to the defendant against the eventual hazard to which he may be exposed on the call of a *bona fide* holder for valuable consideration of the lost negotiable security.

In *Massachusetts* it is well settled, that redress may be had at law. In *Freeman* v. *Boynton*, 7 *Mass. R.* 483, *Parker* Justice, says, where the security may be lost, a tender of sufficient indemnity would make the demand valid without producing the security. In *Peabody* v. *Denton & al.*, 2 *Gal.* 351, a recovery was permitted upon a note of which the plaintiff claimed to be indorsee, dated in 1797. The trial was in 1815. It was sustained before *Story*, Justice, and held, that after so great a lapse of time, it was incumbent *on the defendants* to show either that the note existed, or that it had been demanded of them; and that it must be presumed that no demand would now be made. Authority for the testimony of the plaintiff that the note was not in his possession or control, and

the like for that of the indorser of the writ, is found in *Donnelson* v. *Taylor*, 8 *Pick.* 390, and it was there said, that judgment would be rendered on filing sufficient bond of indemnity to save harmless from any future claim.

A more extended opinion was given on the subject in *Fales & al.* v. *Russell*, 16 *Pick.* 315. The suit was by the indorsees who were the holders of the two notes when they were stolen from them. The declaration contained only the general counts, none on the notes. But the case was before the Court on an agreed statement of facts, to this extent and more. The notes had never been paid or heard of by either plaintiff or defendant. Immediate notice was given to the defendants of the theft, with a request not to pay the notes to any person but the plaintiffs or to their order in writing separate from the notes. Notice of the theft was also given in the newspapers, with proper caution to all against buying them. The plaintiffs too had offered to indemnify the defendants, if they would pay to them the amount due on the notes.

The Court were of opinion, that on filing a sufficient bond of indemnity, with sureties, the plaintiff would be entitled to recover.

In this State the question has not before been directly presented to this Court.

In the masterly opinions of the *Lord Chancellor*, in the case of *Walmsley* v. *Child*, 1 *Vesey*, 345, and in *Gwin* v. *Bank of England*, 2 *Vesey*, 38, 41, there is a manifest preference, that the matter should be decided at law. The bill in the first case was dismissed for that reason. It was a goldsmith's note, payable to *Walmsley*, or bearer, and in *Gwin* v. *The Bank of England*, the *Lord Chancellor* proposed to retain the bill, in order to give an opportunity to try the matter at law. If that was declined, the bill was to be dismissed. It seemed to be considered, that as soon *as the affidavit of loss was received*, the jurisdiction was changed from the Court of law to the Court of Equity. The Courts of law here have allowed this preliminary step to be taken before themselves, " without usurping the powers of a Court of Equity." *Taylor* v. *Riggs*, 1 *Peters*, 591, and cases cited by *C. J. Marshall.* Without however deciding the point as to sustaining an action at law on a lost negotiable security generally, we proceed now to inquire, how shall we deal with the present case, in conformity

with what has already been settled? It is a rule that the plaintiff should make title to the negotiable security by having it delivered to him, or indorsed to him. It has been held, that an order on a different paper is not equivalent to an indorsement on the note. This note having been rightfully once indorsed in blank, was properly holden by *Heath.* He was the bearer of it when it was lost. But the present plaintiff never saw the note. It was never delivered to him. And not till after its loss does there commence any negotiation between him and *Heath.* *Heath* never had possession of it as agent or attorney for the plaintiff.

We believe to give countenance to the present suit, would be going so much further than decided cases warrant as to negotiable paper, lost before it is payable, and before any pretence of claim or interest set up by the plaintiff, that we think the plaintiff cannot recover. Thus far there is unanimity in our conclusions.

Plaintiff must be nonsuit.

Josiah Dow & *al.* *vs.* Arthur Plummer.

If one who has the title and right of entry into lands, make an actual entry upon the tenant in possession, who resists the entry, and persists in the occupation; this is a disseizin at the election of the owner, upon which a writ of entry may be maintained, although the tenant may show on the trial that he held by lease under one without title.

This was a writ of entry, demanding a small tract of land in *Portland.* The defendant pleaded the general issue, and by brief statement, alleged that he was not tenant of the freehold. The plaintiffs proved their title by deed from *James Neal,* dated *Feb.* 2, 1827. *Neal Dow,* called by the plaintiff, testified, that a shop was built last season covering the premises; that he spoke to the defendant and asked him if he did not know that his father had the title, and asked him from whom he got his title; that the defendant said from *Mr. Brewer;* that witness told him, *Mr. Brewer* had no title; and that the defendant said that he was able to de-

fend it, or words to that effect. *Thatcher York*, called by the plaintiff, testified that while he was at work on the shop for the defendant, *Josiah Dow*, one of the plaintiffs came there and asked the defendant by whose authority he was building there; that the defendant said, by *Mr. Brewer's;* that *Dow* said *Brewer* had no authority to put a building there, and said that he and *Owen*, the other plaintiff, owned the land; and forbid the defendant from going any further; that he did not hear the defendant's answer; and that after *Dow* turned away, the defendant told the workmen to go on with the building. The defendant introduced, at the trial, a lease from *Brewer*, leasing the premises for three years, and authorizing him to build a store on the same. From the testimony introduced by the defendant, it appeared that he did build the store. The counsel for the defendant contended, at the trial before SHEPLEY J. that upon this testimony the action could not be maintained, as the defendant did not claim any other title than under the lease. The jury were instructed, that if they believed the testimony, the plaintiffs were entitled to recover.

By request of counsel, two questions were put to the jury, which they were requested to answer. 1. Whether the defendant claimed any title to the land other than what he derived from the lease. To this the answer was, No. 2. Whether he made known, when inquired of as to his title, in what manner he claimed title under *Brewer*. The answer to this also was, No. The verdict for the plaintiffs was to be set aside, if the instructions were erroneous.

Haines argued for the defendant, contending, that the instructions were erroneous, and citing *Stearns on Real Actions*, 202; *Dewey* v. *Brown*, 5 *Pick.* 238; *Otis* v. *Warren*, 14 *Mass. R.* 239; *Ware* v. *Wadleigh*, 7 *Greenl.* 74.

W. P. Fessenden, for the plaintiff, cited 1 *Roll.* 659, *L.* 15; *Com. Dig. Disseizin, F.* 1; *Prop. No.* 6 v. *McFarland*, 12 *Mass. R.* 327; *Brigham* v. *Welch*, 6 *Greenl.* 378; *Stearns*, 7; *Ricard* v. *Williams*, 7 *Wheat.* 59.

Preble replied for the defendant.

The opinion of the Court was by

WESTON C. J. — The evidence adduced at the trial, proves the title in the demandants. It does not appear, that *Brewer* had any color of title. His lease to the tenant, could give him none whatever. The demandant, *Dow*, entered upon his own land, and required the tenant to desist from incumbering it, with his building. This was a requirement which the tenant could not lawfully resist. He did so at his peril. It has been proved, that he had no right. Persisting, as it appears he did, in the occupation of the land, was a wrong to the demandants, which he has not justified.

This was at their election, a disseizin. It was not for the tenant under the facts, to qualify his own wrong; to set the true owners at defiance, and to keep them out of possession, without rendering himself liable to this action. Upon this resistance, they had a right to treat him as a disseizor. The case of the *Proprietors of No.* 6 v. *McFarland*, 12 *Mass. R.* 325, is an authority directly in point for the demandants.

Judgment on the verdict.

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*GEORGE L. DRINKWATER *vs.* JOSHUA TEBBETTS.

If *notice* to the indorser of a negotiable note be expressly waived by him in writing, it does not dispense with the necessity of proving a *demand* upon the maker, or a waiver of such demand, to charge him; but parol evidence is admissible to prove the waiver.

Where such note was indorsed before it fell due, and it was then agreed between the indorser and indorsee, that the latter should forthwith inform the maker of the indorsement to him, and request that payment should be made when the note became due, and should wait six months after the time of payment before he should make costs upon the note, and it was done as agreed; this was held sufficient evidence of a waiver of demand.

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

* SHEPLEY J. took no part in the decision, being employed in criminal trials at the time of the argument.

Assumpsit against the defendant as indorser of a note of the following tenor. "For value received, I promise to pay to *Joshua Tebbetts* or bearer, one hundred and thirteen dollars $\frac{60}{100}$, with interest, within three months after date. *Lee, Jan.* 21, 1835. *Alvah Tebbetts.*" On the back of the note was indorsed. "Holden without notice. *Joshua Tebbetts.*" On the trial the plaintiff, as the evidence to support his action, offered the note and the deposition of one *Witham*, who had purchased the note of *J. Tebbetts* before it was due, and afterwards put it to the plaintiff. *Witham* deposed, that when he bought the note of the defendant, the agreement between them was, that the deponent should forthwith inform the promisor, that he had bought the note, and that it must be paid when it became due; and that if the note was not paid when it became due, the deponent was to wait until the next winter before he made costs on the note. He also stated, that he did forthwith give the information to *Alvah Tebbetts* as was agreed; that in *June*, 1835, he saw the defendant, and told him that he had written to *Alvah Tebbetts* according to agreement, and that the note had not been paid; and that the defendant then promised that he would write to *Alvah Tebbetts* immediately, and request him to pay the note, and thought that the money would come.

The counsel for the defendant objected, that the deposition did not prove a demand on the promisor after the note became due; and that inasmuch as the agreement made at the time the note was indorsed was reduced to writing, it was not competent for the plaintiff to introduce proof of a parol agreement to waive a demand on the promisor, or to enlarge, alter or change that written contract; and that if it were competent to introduce such proof, the deposition did not furnish sufficient legal and competent evidence of the fact. The Judge ruled, that evidence of waiver of demand might be given, and that the facts set forth in the deposition might be considered as amounting to a waiver, and that the plaintiff might thereupon recover. The verdict was for the plaintiff, and the defendant filed exceptions.

D. & W. Goodenow, for the defendant. A waiver of notice is not a waiver of demand. *Berkshire Bank* v. *Jones*, 6 *Mass. R.* 524. They are entirely distinct. A notice may be given through

the post-office, but a demand cannot be made in that way. *Whittier* v. *Graffam*, 3 *Greenl.* 82. Where the indorsement is filled up at the time it is made, no parol evidence is admissible to add to, change or alter it by showing what was said at that time. *Eaton* v. *Emerson*, 14 *Maine R.* 335. But if the parol evidence be admissible, it does not amount to a waiver of demand.

A. Haines, for the plaintiff. The liability of the indorser of a negotiable promissory note is conditional. 1. That a demand with the note in hand be made upon the maker on the day that the note falls due. 2. That notice of the demand, and of the maker's neglect to pay, be immediately given to the indorser. But these conditions, or either of them, may be waived by the indorser; and the waiver may be either express, or implied. *Jones* v. *Fales*, 4 *Mass. R.* 251; *Weld* v. *Gorham*, 10 *Mass. R.* 367; *Blanchard* v. *Hilliard*, 11 *Mass. R.* 88; *Boyd* v. *Cleveland*, 4 *Pick.* 525; *Taunton Bank* v. *Richardson*, 5 *Pick.* 436; *Gowan* v. *Jackson*, 20 *Johns. R.* 176; *Fuller* v. *M'Donald*, 8 *Greenl.* 213. The waiver of *notice* in the writing was the relinquishment of one of these conditions; and it is conceded, that it was not a waiver of the other. The conditions are independent of each other; one may be waived, and the other insisted upon; one may be waived at one time, and the other at another; one may be waived in writing, and the other by parol. The principle relied upon in defence is not applicable to this case. *Taunton Bank* v. *Richardson*, and *Fuller* v. *M'Donald*, before cited. The evidence contained in the deposition is sufficient to prove the waiver of a demand. 8 *Greenl.* 213; 4 *Pick.* 525; 5 *Pick.* 436, before cited; and *Martin* v. *Ingersoll*, 8 *Pick.* 1; *Pierson* v. *Hooker*, 3 *Johns. R.* 68.

The opinion of the Court was prepared by

Weston C. J. — An indorsement in blank fixes upon the indorser a conditional liability, the legal obligation of which is well settled and ascertained. But the conditions implied may be waived or modified, of which parol proof is legally admissible. *Boyd & al.* v. *Cleaveland*, 4 *Pick.* 525; *Taunton Bank & al.* v. *Richardson & al.*, 5 *Pick.* 437, and *Fuller* v. *M'Donald*, 8 *Greenl.* 213, are authorities in point.

There is in the case before us, an express waiver of notice in writing. This did not dispense with the necessity of a demand by the holder upon the maker, to charge the indorser. Upon the face of the indorsement, that condition remained in full force. If a waiver of both the conditions may be proved by parol, we are aware of no good reason why that kind of proof should be excluded, to show a waiver of one condition, where a waiver of the other is made a part of the indorsement itself. It produces no greater change in the legal obligation of the contract.

Upon examining the deposition of *Elnathan Witham*, which is made a part of the case, it is fairly deducible from it, that the defendant waived the condition of a legal demand upon the maker. It was matter of agreement, that the maker should be notified in a particular manner, which is proved to have been done.

Exceptions overruled.

Oliver Dennett *& ux. vs.* Josiah Dow.

The rule that a party cannot discredit his own witness by proving that he had made contradictory statements at other times, does not apply to those cases where the party is under the necessity of calling the subscribing witnesses to an instrument.

Where the party in favor of establishing a will, calls a subscribing witness to the execution thereof, who on examination expresses an opinion unfavorable to the soundness of mind of the testator, and testifies to facts tending to prove the same, the party calling him may prove that such subscribing witness had before expressed opinions and made statements contradicting the testimony then given, and that he had in the same case testified differently in a former hearing.

Motions for new trials on account of matter arising out of Court, should state the facts expected to be proved, and the names of the witnesses by whom the proof is expected to be made; but when it is not done, the Court may at any time before judgment, under the rule, "for good cause by special order, enlarge the time" for filing such motion.

This was an appeal from the Probate Court, approving the last will of *Stephen Neal*, in which *Dow* was named as executor. At

the trial before SHEPLEY J. the questions submitted to the jury were the sanity of the testator, and the due execution of the will. The subscribing witnesses to the will having been called and examined by the appellee, *Josiah Dow*, two of them expressed opinions unfavorable to the soundness of mind of the testator at the time he executed the will, and testified to certain facts tending to prove it. The counsel for the appellee proposed and offered to prove, that the same subscribing witnesses had before expressed opinions and made statements contradicting their testimony as now given; and that they had in the same case testified differently in a former hearing. This testimony the Judge refused to admit. If it should have been admitted, the verdict being in favor of the appellant, a new trial was to be granted.*

Preble and *Neal*, for *Dow*, argued, that the principle of law, that a party shall not discredit a witness called by himself, does not apply to a witness required by the provisions of the statute to be called in the first instance, before any other proof is made. They also contended, that the testimony offered and rejected was admissible, as proof of facts. It is well settled that facts may be proved in any case inconsistent with, or contradictory to the statement of the party's own witness. Here the subscribing witnesses to the will give their opinion respecting the sanity of the testator, and we offer evidence to prove as a fact, that the opinion of the witness

* In this case a motion for a new trial was filed by the counsel for the appellee within two days after the verdict, alleging among other things, that "certain individual jurymen" who returned the verdict, had "conversed with individuals not of the jury during the pendency of the cause, and on the subject of the cause and question pending before them." Neither the jurors, nor the persons with whom the conversation was said to have taken place, were named in the motion. When the case came on for hearing before the whole Court, the counsel for *Dennett*, for that cause, objected to the consideration of the motion, and cited *Warren* v. *Hope*, 6 *Greenl.* 479. The counsel for *Dow*, then moved to amend the motion, and also for an enlargement of the time for filing the motion, under the 26th rule of this Court.

BY THE COURT. — Motions for new trials on account of matter arising out of court, should state the facts expected to be proved, and the names of the witnesses by whom the proof is expected to be made. The Court however may under the rule, at any time before judgment, "for good cause by special order, enlarge the time," for filing such motion.

was not such as he stated. They cited 1 *Stark. Ev.* 147, 148, 330; *Goodtitle* v. *Clayton*, 4 *Burr.* 2224; *Roscoe on Ev.* 66; 7 *Taunt.* 251; 2 *Adams*, 245, 441; *Lowe* v. *Jolliffe*, 1 *Black. R.* 365; 1 *Phillips' Ev.* 90; *Buckminster* v. *Perry*, 4 *Mass. R.* 593; *Brown* v. *Bellows*, 4 *Pick.* 179; *Whitaker* v. *Salisbury*, 15 *Mass. R.* 544; *State* v. *Norris*, 1 *Hayw.* 429.

S. Fessenden and *W. P. Fessenden* argued for *Dennett*, that there was no distinction between this case, and that of a deed, a bond or a note, where the law requires the subscribing witness to be called before the paper can be read; that the rule of law is well established, that a party cannot discredit his own witness; that the utmost extent of any exception to the rule is, that the party is not estopped from proving the fact, by other witnesses after having called a witness who states it differently from his expectations. He may therefore prove the facts to be different from the statement of them by a witness he has called. Proving what his own witness has said at other times, does not establish the existence of any fact, but merely shows that the witness is unworthy of belief, because he has given different accounts of the same transaction. The appellee was under no necessity of inquiring as to the sanity of the testator of the subscribing witness, after proof of the signature, but might call other witnesses. There is not even the pretence, that he was compelled to ask these questions. 1 *Stark. Ev.* 147, 334; 1 *Phil. Ev.* 356, 378, 412; *Peake's Ev.* 8; *Powell on Dev.* 708; *Roberts on Dev.* 179, 187; *Ewer* v. *Ambrose*, 7 *Barn. & Cr.* 746; *Richardson* v. *Allan*, 2 *Stark. Cas.* 334.

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

WESTON C. J. — The party who would establish a will is bound by law to call the subscribing witnesses. By their attestation, they give credit to the will; and *Parsons C. J.* says, it is their duty to be satisfied of the sanity of the testator, before they subscribe the instrument. *Buckminster & al.* v. *Perry*, 4 *Mass. R.* 593. But they may disappoint the expectations of the party, who calls them. They may deny their attestation as witnesses, or they may testify, that the testator was not of sound disposing mind and memory.

The party however is not precluded from showing, that the testimony, thus unexpectedly given, is not true. Wills have been established, where the subscribing witnesses have denied their attestation. *Pike* v. *Badmering*, cited in 2 *Strange*, 1096; *Alexander* v. *Clayton*, 4 *Burrow*, 2224. In the latter case, *Lord Mansfield* said, it is of terrible consequence, that witnesses to wills should be tampered with to deny their own attestation; and *Mr. Justice Ashton* notices a fact bearing against their testimony, that every one of the witnesses had acknowledged their having attested the will. There must then have been evidence in the case, that they had made such acknowledgment. And this must have been elicited by the party, by whom they were called, and whose interest it was to establish the will. In *Lowe* v. *Jolliffe*, 1 *Bl. Rep.* 365, the three attesting witnesses to the will, and two to the codicil, testified against the capacity of the testator to make a will, yet they were suffered to be contradicted, and the will was established by other testimony. The same rule has been applied, where the subscribing witnesses to other instruments deny their attestation, or fail to prove their execution; although this was at one time doubted. *Abbott* v. *Plumb*, *Douglas*, 215.

The credit of the party's witness is thus, by necessary implication, impeached, by showing the falsity of his testimony. This may be done, by calling witnesses directly to contradict him. To prove that he has contradicted himself, is of the same character in principle. The question to be determined is, the truth or falsity of his testimony. A want of consistency, conflicting declarations, made at other times, whether under oath or not, are fairly calculated to throw light upon this question. And if excluded, the party who has no other alternative but to call the witness, is obliged by force of a technical rule, to submit to a perversion of truth, which he has it in his power to expose, from the declarations of the witness himself. The rule is intended to promote the cause of justice, by refusing to allow a party the advantage of impeaching his witness or not, according to the character of his testimony. And while limited to the case of a witness, whom he is at liberty to produce or not, the rule may be both reasonable and salutary, but when extended to one, without whom he cannot proceed in his case, it is carried farther than the reason of the rule would seem to

justify. And yet we are not aware, that a party has in any case been permitted to impeach the credit of his own witness, by showing that his general character for truth is not good. But when he is obliged to call a subscribing witness, if not in other cases, he may impeach his credit, by showing directly by the testimony of others, that what he has testified to is not true.

It has been found best to serve the cause of truth, that relevant testimony should be liberally received, for the consideration of the jury. Hence many objections are now held to go to the credibility of a witness, which were formerly regarded as affecting his competency. And while a direct impeachment of the credit of the party's own witness has been uniformly denied, an indirect impeachment has in certain cases been permitted. A direct impeachment affects general character, an indirect, brings into question the truth of the facts, to which the witness has testified. And a majority of the Court is of opinion, that in the class of cases, like the one under consideration, this may be done, by showing that the witness has made at other times contradictory statements. In *Brown* v. *Bellows*, 4 *Pick.* 179, this was expressly held not to be in conflict with the general rule, and upon that ground admitted. In *Whitaker* v. *Salisbury*, 15 *Pick.* 544, the court decide, that the party who calls a witness, shall not be permitted to impeach his general character, which they state was also decided in *Brown* v. *Bellows*. But in the latter case, proof of conflicting declarations as to the fact, to which the witness had sworn, was not regarded as impeaching his general character.

It is not easy to extract from the case of *Ewer* v. *Ambrose*, 3 *Barn. & Cres.* 746, any decided opinion, upon the point under consideration. *Bayley J.* notices that it is a case, where the witness was not forced upon the party, as he was here. He thought the party was not to be permitted to discredit his own witness, by producing an answer made by him in chancery, conflicting with his testimony. And he adds, "the present impression of my mind therefore is, that the answer ought not to have been received in evidence." *Holroyd J.* says, "it was certainly not admissible to prove generally, that the witness was not worthy of any credit. It might perhaps be admissible, if the effect of it were only to show that, as to the particular fact sworn to at the trial, the witness was

mistaken." *Littledale J.* says, "it may be a doubtful question, whether the answer in chancery was properly received to prove a different state of facts, from that which the witness had sworn to at the trial. At all events, it could only be admissible to contradict the particular fact, to which the witness had then sworn."

Such a limitation of the technical rule, as applied to witnesses, the party is obliged to call, as would admit the testimony rejected in this case, will lead to a more thorough investigation of the facts, upon which a jury may be called to pass, and will best promote the cause of truth. And the case before us very strongly illustrates the necessity of such a limitation. The subscribing witnesses must have been aware, that their attestation was desired to support the will. By becoming such, they are supposed to have satisfied themselves of the capacity of the testator. At the trial, they impeach the will upon this ground. If this may not be repelled, by showing that they have declared and testified differently, the whole weight of their judgment is thrown against the will, although it may be shown from their own mouths, either that their judgment, from want of consistency, is entitled to little weight, or that they have not truly stated the facts. It results, that competent and admissible testimony, in the opinion of a majority of the Court, having been rejected at the trial, the verdict must be set aside, and a new trial granted.

A dissenting opinion was drawn up by

SHEPLEY J.—The rules of evidence are the result of sound reasoning and of long experience, proving, that their general operation is to aid in the investigation of truth, while it may be from the imperfection of all human regulations, that they will not have that effect in every instance. The general good result is to be regarded rather than the particular inconvenience. And some general rules must be established, or it will be within the unregulated discretion of each Judge to admit such and only such testimony as may seem to him expedient. It is upon these and other considerations more immediately applicable to it, that the rule has been established, that no one shall be permitted to impeach the credibility of his own witness; while he is left at liberty to prove the facts to be different from the statement of them by the witness.

That the rule generally operates favorably in the investigation of truth, can hardly be questioned. Without it, a party might produce a witness upon whom he had operated, and if any better influence should induce him to abandon his purpose, or the cross examination should oblige him to do it, he might be prepared to destroy his credibility by having caused him to make statements out of court contradicting those, which might be drawn from him on the trial, and by proving them, prevent his being injurious to him, when he could not or would not be useful. It is insisted, that there is no such danger, where a party is obliged to call an attesting witness, for he does not elect, but is required by law to call him. But the law obliges him to call the witness, because he originally elected him, or consented to his selection, as a witness to that transaction. And the only difference is, that he agreed, that he should be a witness and judged him to be a proper and credible one at the time of the execution of the instrument, instead of doing it at the time of preparation for the trial. The same mischiefs may arise in the case of attesting witnesses as in other cases. The party wishing to obtain an improper advantage may prepare the witness for his purpose, and place him in a position by rehearsals before others, that he can destroy his credibility, if he does not aid him to carry out that purpose. It is true, that this reasoning does not apply to those cases, where the party calling the subscribing witness is not a party to the instrument. But in such cases holding under it, and undertaking to establish it, he may be fairly visited by the consequences, which result from the acts of the parties in executing it, unless protected from them because he stands in the relation to it of an innocent purchaser. And then he does not require any aid from the law of evidence to afford him that protection. The testimony offered in this case must therefore be regarded as excluded by the rule, that a party cannot be permitted to discredit his own witness. The exception to this rule, which is now to be established, is not known to have been admitted in any decided case. On the contrary there are in my judgment most respectable authorities opposed to it. The rule is stated by *Starkie* to be, that where a party is under the necessity of calling a witness to make the formal proof required by law, he is not precluded from calling other witnesses, who give contradictory testimony. 1 *Stark.*

Ev. 185, (*6th Amer. Ed.*) And this is the extent allowed by that treatise to the party obliged to produce a witness to affect his testimony. The cases of *Lowe* v. *Jolliffe*, 1 *Bl. R.* 365, and of *Pike* v. *Badmering*, 2 *Stra.* 1096, are not understood as authorizing the party calling the attesting witnesses to discredit them in any other mode. Whether the testimony offered tends to impeach the credibility of the witness, or whether it may not tend to prove a fact in the case respecting which the witness has testified, may in some cases admit of doubt. This doubt may usually be solved by the inquiry whether independent of other testimony it would be admissible to prove a fact in the case. If it would not, the effect is only to impeach the credibility of the witness. The case of *Ewer* v. *Ambrose*, 3 *B. & C.* 746, is an authority to shew that testimony to discredit a witness, which the party was not obliged to call, by proving that he had made a different statement cannot be admitted. In that case the party calling a witness to prove a partnership between himself and others, who denied it, was permitted to put in an answer made by the witness and another in chancery admitting it. On consideration before the full bench the only doubt about the necessity of excluding the answer appears to have been, whether it might not of itself be evidence to prove the partnership. *Bayley J.* says, "I think the defendant ought not to have been permitted to discredit his own witness." And he speaks of the cases where the witness is forced upon the party, explaining to what extent in such cases the party calling the witness is bound by his testimony, and does not intimate any different rule as to the right to discredit him. In *Jackson* v. *Varrick*, 7 *Cow.* 238, the defendants called the subscribing witness to a bond, who was interested against them, and who denied that he witnessed it; and the plaintiff was permitted, defendants objecting, to cross examine him to prove his own case. The Court say, he "was properly admitted to his cross examination as a competent witness for the plaintiff. He was introduced and sworn generally by the defendants, being as they contend interested to testify against them. They could not afterwards question his competency or credibility." The case of *Brown* v. *Bellows*, 4 *Pick.* 194, is not understood to be contradictory. The general rule, that a party is not to be allowed to discredit his own witness is recognized and affirmed. The subscrib-

ing witness in that case appears in other respects to have been in a position resembling that of the witness in the case of *Ewer* v. *Ambrose*. The plaintiff contended, that he was interested in the purchase with the defendant. The witness denied it. The plaintiff was permitted to prove his former declarations tending to prove it. The Court say, "the rule is by no means to extend so far as that a party may not call a witness to prove a fact, which a witness previously called by him has denied." And they conclude by saying, "we think the plaintiff was not bound by the answers, which *Lord* made on his cross examination, but might by another witness disprove the fact, which *Lord* had stated." The principle upon which *Lord's* former declarations were admitted is believed to have been, that they tended to prove the fact, that he was interested in the purchase. Whether the testimony was correctly admitted or not upon that principle is immaterial. That such was the ground of its admission, and that the Court intended to deny the right of a party calling a subscribing witness to impeach his credit in any other mode than by proving a fact to be different from his statement of it, is shewn by the case of *Whitaker* v. *Salisbury*, 15 *Pick.* 544. In that case the defendant was permitted to impeach the character of a subscribing witness, which he had been obliged to call; and the Court say, "the next question for consideration is, whether the defendant had a right to impeach the general character for truth of the witness, who was called for the defendant. This question was considered as settled by the case of *Brown* v. *Bellows*, 4 *Pick.* 194." Here then are two decisions against the right of a party to impeach the general character for truth of a subscribing witness, which he has been obliged to call. They do not distinctly decide, that his credibility may not be impeached by proving, that he has made contradictory statements, for that question did not arise. But the difference in principle between those cases and this is not perceived. And in discussing the question, that Court seems to regard it as the same question for they say, "the law will not suppose, that a party will do any such thing, but will hold the party calling the witness to have adopted and considered him as credible."

Upon principle and upon authority, the testimony appears to me to have been properly excluded. And to admit it in this case be-

cause the reasons upon which the rule has been established are not perceived to exist, would in my judgment have a tendency to unsettle the law of evidence by preferring the particular benefit to the general good.

JOHN E. PHILLIPS *vs.* JAMES MEGQUIER *& Tr.*

The disclosure of a trustee cannot be considered as an issue in law, or a case stated by the parties; and therefore the *stat.* of 1835, *c.* 165, prohibits an appeal from a judgment of the C. C. Pleas charging a trustee upon his disclosure, unless upon exceptions duly filed and allowed.

THIS action was commenced in the Court of Common Pleas, where the defendant was defaulted, and *Bird*, the trustee, made a disclosure, and was adjudged by the Court to be trustee. From this adjudication, the trustee appealed, and entered the action at the next term of the S. J. Court. The counsel for the plaintiff moved to dismiss the action, because no appeal was allowed by law.

Boyd, for the plaintiff, contended, that by the *stat.* 1835, *c.* 165, § 2, the right to appeal was taken away in all civil actions. The only remedy for the trustee, if aggrieved, is on exceptions duly taken. *Witherell* v. *Milliken*, 1 *Shepley*, 428; *Piper* v. *Willard*, 6 *Pick.* 461; *Morrill* v. *Brown*, 15 *Pick.* 173.

Haines, for the trustee.

The opinion of the Court was by

SHEPLEY J. — The *stat.* 1835, *c.* 165, § 2, provides, "that no appeal shall be had from the Court of Common Pleas in a civil action," except from an opinion or judgment appearing by exceptions, or rendered upon an issue in law, or on a case stated by the parties. The disclosure of a trustee cannot be considered an issue in law, or a case stated by the parties. Those terms have a well known meaning applicable to a class of cases, which they respectively designate. The statute has deprived the party of the right

of appeal in this case unless upon exceptions duly filed and allowed.

Appeal dismissed.

HEZEKIAH WINSLOW *vs.* ENOCH CROCKER *& Trustee.*

If shares of an incorporated bank stand in the name of the wife, the husband has power to transfer them by his own act.

Where the husband sells and transfers bank shares standing in the name of the wife, and the purchaser gives his negotiable note therefor running to the wife, and there is no fraud in the transaction; he cannot be holden as the trustee of the husband.

THE facts stated in the answer of *Ezekiel Day*, who was summoned as trustee, appear in the opinion of the Court.

Daveis, for the plaintiff, contended, that the bank shares, while standing in the name of *Mrs. Crocker*, were her husband's property, and subject to the payment of his debts. The transfer of the shares to *Day*, makes him liable to pay *Crocker* the value. The giving of the notes to *Mrs. Crocker*, is no payment to him; the debt remains due, and the trustee must be charged. 2 *Kent*, 137; *Schuyler* v. *Hoyle*, 5 *Johns. C. R.* 196; *Sturdivant* v. *Frothingham*, 1 *Fairf.* 100; *Bullard* v. *Briggs*, 7 *Pick.* 538; *Keith* v. *Woombell*, 8 *Pick.* 211; *Shuttlesworth* v. *Noyes*, 8 *Mass. R.* 229. So too if the transaction was fraudulent as to the creditors of *Crocker*, the giving of a negotiable note even to him would not destroy the liability of the trustee. *Gardiner Bank* v. *Hodgdon*, 2 *Shepley*, 453.

Adams, for the trustee, argued, that if the note to *Mrs. Crocker* survived to her, then the shares are paid for by the note and the trustee must be discharged. If the note is the property of the husband, giving the note to the wife is the same as giving it to him. The trustee cannot be charged in consequence of having given a negotiable note. *Stat.* 1821, *c.* 61, § 15. And the result is the same if the whole transaction be fraudulent against creditors. The

shares then remain the property of *Mrs. Crocker*, and may be attached and sold. 6 *Dane*, 494; *Chitty on Bills, (8th Ed.)* 108, 460; 1 *Dane*, 350, 386; 2 *Stark. on Ev.* 248; *Wood* v. *Bodwell*, 12 *Pick.* 268; *Kelley* v. *Bowman*, *ib.* 383; *Guild* v. *Holbrook*, 11 *Pick.* 101. In the case cited for the plaintiff, from 8 *Mass. R.* 229, the note was not negotiable. Here it is.

The opinion of the Court was by

EMERY J. — It has been strenuously insisted, that the trustee should be holden upon his disclosure. The facts by him stated are, that his son in law, the defendant, having made extensive purchases of valuable land, and having notes due to him to great amount, and having given notes which, as the trustee says, the said *Crocker* was anxious to meet, the supposed trustee purchased of him shares, which were his wife's, in some banks, and some real estate for which he paid the defendant at the time. For the bank shares he gave his negotiable promissory notes the 3d of *March*, 1837, excepting that for one of the shares in the Bank of *Portland* he had purchased and paid for long before the service of the trustee process.

And the trustee represents that he understood *Crocker* to say, he sold said bank stock for the purpose of meeting from the proceeds of sale the payment in whole or in part of certain land notes of said *Crocker*, which were to become due in *August*, previous to the time of the disclosure. The trustee represents, that *Crocker* knew that *Day* had bought and was buying at that time bank shares, and that *Crocker* applied to him to purchase his shares in the *Casco* and *Canal Bank*, for he wished out of them, to pay some land notes which he stated would become due in *August* before mentioned; and that at the time of the purchase, *Crocker* so far as the trustee knew, was solvent, and paid all his notes when payable, and presented for payment. And that *Crocker* informs the trustee, that if he, *Crocker*, could sell his property, he could pay his debts, and have a handsome estate left. And of this, *so far as the trustee knows, being his situation, the trustee does not doubt.*

The notes were made payable to *Ellen Crocker*, the said *Day's* daughter, or her order, and delivered to her husband, the defendant,

Crocker. Why the notes were given to *Ellen*, rather than to her husband, the supposed trustee professes not to know, unless it was done so, because the shares were hers. The trustee states, that he made the offer of the prices stated in the disclosure to *Crocker*, and after he had made endeavors to obtain more, and not succeeding, he accepted the offer.

It is urged, that here is a trust or credit in *Day's* hands for the benefit of *Mrs. Crocker*. That the original meaning of the legislature in discharging one of obligation as trustee, by reason of giving a negotiable note was not intended to protect a voluntary assignment by a husband of his wife's property; that there is no magic in a negotiable note; and refers to *Gardiner Bank* v. *Hodgdon*, 2 *Shepley*, 453. That was a bill in equity. Fraud was alleged, and satisfactorily proved as to the personal estate, which was left in the possession of the vendor.

But in the present case, we can only judge from the answers of the supposed trustee, and whatever may have induced the legislature to make the provision to relieve one from being holden in the character of trustee, when he has given a negotiable note, it would ill become the Court to attempt to repeal the act, by a decision directly in the face of the exemption. There is nothing in the disclosure to fix the belief that the case of this debtor deprived him of the right to sell the property in shares standing in his wife's name. At what time those shares were so placed in her name is not apparent, nor would it be material, because it is not a case of survivorship of the wife. And we cannot undertake to limit the marital rights in such choses in action. His transfers in the absence of fraud must be deemed effectual to all intents during the coverture. We are therefore irresistibly led to the conclusion, that upon this disclosure, the alleged trustee must be discharged.

HIRAM GOWELL *vs.* OTIS TRUE.

No citizen is required to appear at militia trainings or reviews, or to perform militia duty, until after the termination of six months from the time he was first legally enrolled.

The enrolment of a private in an independent company under an illegal enlistment, is a nullity, and his rights and liabilities remain unaffected thereby.

THIS was a writ of error to reverse a judgment rendered before a Justice of the Peace, *Jan.* 1, 1839, against *Gowell*, the plaintiff in error, in an action in favor of *True*, as clerk of a company of militia, brought to recover a fine for absence from a company training on *September* 11, 1838. One of the many errors assigned was, that *Gowell* had never been enrolled six months before the said eleventh day of *September*, 1838, and therefore was not liable to do military duty. *Gowell* became twenty-one years of age in *Feb.* 1838, and had resided within the limits of the company of which *True* was clerk since he was seventeen years of age. By the records of the enrolments in that company, it appeared that *Gowell* was never enrolled in the company before *August* 29, 1838. To show that *Gowell* had been previously enrolled, *True* proved an enlistment by *Gowell* in a rifle company, and that his name was upon the roll of the rifle company in *May*, 1837, and that he actually did duty in that company on the same 11th of *September*, 1838. It appeared however, that notice of the enlistment had never been given to the commander of the infantry company within which he resided at the time of the enlistment.

J. C. Woodman, for the plaintiff in error, contended, that by the militia acts of the *United States*, of 1792, § 1, and of 1803, § 2, *Gowell* was entitled to six months notice of his enrolment before he was obliged to do military duty. *Haynes* v. *Jenks*, 2 *Pick.* 172. It is not necessary here to show that the extra judicial remark in the case cited by *Parker J.* that the enrolment of a soldier may be presumed from his age and size, is not law. Here the facts appear, and the negative is proved. The power over this subject is expressly delegated to Congress by the Constitution of the *United States*, *art.* 1, § 8, 15. The provision in the militia act of this State of 1834, § 33, that the private shall be allowed but

six months after he becomes eighteen years of age is nugatory and void. If *Gowell* was legally enlisted and enrolled in the rifle company, then he was not bound to do duty in this company. If he was not, an illegal enrolment is no enrolment.

Dunn, for the original plaintiff, *True*, contended, that but six months after the private becomes eighteen years of age are allowed as an exemption from the performance of duty in the militia. *Stat.* 1834, *c.* 121, § 33. The object of the six months is to afford ample time to furnish himself with arms and equipments after he shall have been notified of his enrolment. But when he has been enrolled and has actually done duty, as in this case, no further time ought to be allowed.

The opinion of the Court was by

WESTON C. J. — The act of Congress of 1792, 2d Cong. 1st Sess. *c.* 33, to provide for the national defence, by establishing an uniform militia throughout the United States, required that every citizen, liable to be enrolled in the militia, should provide himself with the necessary arms and equipments, within six months after notice of his enrolment, and being so armed and equipped, he is liable to be called out, trained and exercised, at such times and places, as may by law be duly appointed.

In the case of the *Commonwealth* v. *Annis*, 9 *Mass. R.* 31, it was decided, that the period of six months, allowed by this statute, was not taken away by the subsequent *stat.* of 1803, 7 Cong. 2 Sess. *c.* 68. And this decision was sustained in the case of *Haynes* v. *Jenks*, 2 *Pick.* 172. In the latter case it was held, that the citizen so enrolled was not required to appear at military trainings or reviews, until after the termination of the six months. It was however very strongly intimated, that this immunity is to be limited to the first, or original enrolment.

The case finds, that the plaintiff in error was first enrolled in the company of which the defendant in error was clerk, on the 29th of *August*, 1838, having lived within the bounds of that company over four years, from the age of seventeen. He did not appear at the military training, duly ordered on the eleventh of *September*, the next month following his enrolment, and for this alleged delinquency, he was adjudged liable to a penalty. This could not have

been incurred, until the lapse of six months from his enrolment, unless he had been previously enrolled. It is urged, that his enrolment in the rifle company, took away this immunity.

If that enrolment was in conformity with law, it would protect him from the penalty sought to be recovered, for it appears that he did duty in that company, on the very day when he was required to appear in the standing company. But the enrolment in the rifle company, not having been made in pursuance of law, was a nullity. His liability to be enrolled in the other company, and the duties consequent thereon, remained unaffected. As it gave him no rights, it impaired none, which he was entitled to claim. His first legal binding enrolment, not having been made six months before the training, at which he is alleged to have been delinquent, the penalty or forfeiture claimed, cannot legally be recovered.

Judgment reversed.

Savage Manufacturing Company *vs.* Alvin Armstrong.

Private corporations existing by the laws of other States have power to sue in their corporate name in this State, but their existence must be proved by satisfactory evidence, like any other material facts.

If the defendant in an action brought in the name of a corporation would deny its existence, he must do it by plea in abatement, as pleading to the merits admits the competency of the plaintiffs to sue in the name assumed.

Where the plaintiff in an action, declaring both on a special agreement to construct and furnish certain machines, and on an account annexed charging the labor and materials, in proving his case, shows that the machines were not completed at the time fixed in the special agreement, and also introduces testimony *tending to prove* that the defendant had waived performance at the time; whether there was or was not such waiver is for the decision of the jury, and the presiding Judge cannot order a nonsuit, even if the Court should be of opinion that the evidence of waiver would not warrant a verdict.

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

Assumpsit on a written agreement to make and furnish threshing machines for the defendant. There were also counts for machines sold and delivered, for labor and materials, and for money paid, and had and received. The plaintiffs offered in evidence the agreement, and certain evidence tending to prove the making of the machines, and the waiver by the defendant of performance at the time, and among the rest a letter of the defendant. Upon that testimony the plaintiffs contended, that they had made out their case, and were entitled to go to the jury, and that it was a question of fact for the jury, whether there had not been a waiver of the conditions of the original agreement on the part of the defendant, and that it was for the jury to settle whether damages had been sustained. The Judge ruled otherwise, and ordered a nonsuit. The plaintiffs filed exceptions.

W. P. Fessenden argued for the plaintiffs, and contended, that the question, whether the plaintiffs were a corporation, was not before the Court, as no such objection was made at the trial, and that it could be taken only in abatement; that in this respect there was no difference between a foreign corporation and one within the State; that the Court had no right to determine the credibility of testimony, this being entirely the province of the jury; that if there be any evidence of waiver for the jury to weigh, the case should be submitted to the jury; and that it was very doubtful whether the Court can order a nonsuit in any case without the consent of the plaintiff. 1 *Bibb*, 379; 2 *Bibb*, 207, 429, 464; 3 *Com. Dig.* 117; 6 *Petersd.* 241; 15 *Wend.* 586; 1 *Bay*, 235; *Brinley* v. *Tebbetts*, 7 *Greenl.* 70.

Codman, for the defendant. The plaintiffs did not prove themselves to be a corporation, and could not maintain the action. 10 *Mass. R.* 92; 5 *Mass. R.* 547; 3 *Mass. R.* 276; 12 *Mass. R.* 400. The Court has an undoubted right to order a nonsuit, where the evidence is not sufficient to support the action. *Perley* v. *Little*, 3 *Greenl.* 276; *Sanford* v. *Emery*, 2 *Greenl.* 5. The evidence, if any, contained in the letter was for the determination of the Court, and not the jury. If a verdict had been rendered upon this evidence, the Court would not have sustained it, but would have set it aside.

The opinion of the Court was by

EMERY J. — Had the writ in this case contained a claim only upon the written contract or memorandum of agreement, we should have found ourselves probably obliged to overrule the exceptions at once. But the declaration includes a count upon that agreement, general counts for money laid out and expended, a count for labor and materials furnished, and another on an account annexed to the writ.

It is insisted by the counsel for the defendant, that the plaintiffs do not show themselves a corporation, and that if the Court are satisfied, that if the verdict had been rendered for the plaintiff, it would be set aside, then this nonsuit is properly directed. The real question is, whether upon the testimony exhibited, the plaintiffs had made out a *prima facie* case, and were entitled to go to the jury, and whether there had been a waiver of the conditions of the original agreement on the part of the defendant. For it must be admitted, that if the case were suffered to be delivered to the charge of the jury, it must be for them to settle whether damages had been sustained. It is true, that as to private corporations which exist by the laws of any other State, these are to be proved, and satisfactory evidence will be required as of any other fact material in an issue to the country; but their powers to sue here are not restricted. *Portsmouth Livery Co.* v. *Watson & al.* 10 *Mass. R.* 92. But to prevent unnecessary delay and unreasonable embarrassment, certain rules have been established as to the mode in which, such evidence shall be brought into requisition, and the time in which it shall be expected to be called for. In 3 *Pick.* 232, in the case *First Parish in Sutton* v. *Cole*, at page 245, it is said by Chief Justice *Parker*, "it seems to be a well settled principle, that when a suit is brought in the name of a corporation, if it is intended to deny the existence of the corporation, this should be brought in question by a plea in abatement, and that pleading over to the merits admits the capacity of the plaintiffs in the character they have assumed to act under."

In this Court, in the case of the *Trustees of the Ministerial & School Fund in Dutton* v. *Kendrick*, 3 *Fairf.* 381, that case is cited with approbation, and is recognized to be the law and practice of this State. Though it seems it has been differently held in

New-York. It is true that it has been said, that a plea that there is no such corporation in existence as the plaintiffs is in bar. *The Mayor & Aldermen of Carlisle* v. *Blamire & Tyson*, 8 *East*, 487; *Doe* v. *Miller*, 1 *Barn. & Ald.* 699; *Mayor & Burgesses of Stafford* v. *Bolton*, 1 *Bos. & Pul.* 40. *Buller* said, "if the variance can be pleaded in abatement it cannot in bar. To make it pleadable in bar, it must appear that there is no such corporation. The Year Books are decisive. *Rooke J.* observed, "I think we ought not to be more strict than they were in the days of the Year Books." In 4 *Peters*, 480, *The Society for the propagation of the Gospel in Foreign parts* v. *The Town of Pawlet & al., Justice Story* says, "if the defendants meant to have insisted upon the want of a corporate capacity in the plaintiffs to sue, it should have been insisted upon by a special plea in abatement or bar. The general issue admits not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring." See also 1 *Peters*, 386, 450, *Conard* v. *The Atlantic Insurance Co.*

In this case, nothing but the general issue is pleaded. And no brief statement is made that this objection would be insisted on in bar, even if it could be done, after the case above cited, against *Kendrick*, from 3 *Fairf.* 381, has so distinctly stated the law to be different here. We do not propose to discuss the question at present whether there be no pretence that a verdict could have been for the plaintiff further than to say, that at least in our judgment, the case should have been consigned to the consideration of the jury to decide, whether there was in fact a waiver of the original conditions of the agreement on the part of the defendant. And we are not prepared to say that the letter of the 24th of *Oct.* 1833, had no tendency to shew such a waiver. We think it legally admissible. Its effect must be determined by a jury. The exceptions are therefore sustained, the nonsuit set aside, and a trial granted.

Moses Judkins *vs.* Seth Walker *& al. & Trustees.*

A contract of service entered into by an infant is not binding upon him.

If an infant enter into a special contract for his services for an agreed time, by which he is to be paid a certain sum for the whole term of service at the expiration thereof, and after having partially performed the contract, voluntarily leave the service without the consent or fault of his employer, the contract is avoided, and the parties stand in the same relation to each other as if the transactions had taken place without any contract; and the infant may recover on an implied promise the value of his services, taking into consideration any benefit received and any injury occasioned by him.

Sprague Keen summoned as the trustee of *Elbridge G. Snell*, one of the defendants, disclosed, that *Snell* came to live with him when he was about three years of age, and remained with him until he was about eighteen years of age, and was then about to leave unless there was some agreement, when it was agreed between them, that *Snell* should work with *Keen* until he should become twenty-one years of age, and was to receive a yoke of oxen, a cow, a yearling colt, two pairs of sheep, and two suits of clothes for his services until that time. The trustee stated, that four and an half months before his time was out, he left *Keen* and broke his agreement without the consent or approbation of *Keen*. The trustee stated, that he did not consider himself bound to pay *Snell* any thing, as he had broken his agreement. The trustee admitted, that if no agreement had been made, that a sum would have been justly due from him to *Snell* for his services. The father of *Snell* left the State when the boy was but a year old, and has not been here since, and *Elbridge* had acted for himself since that time.

J. C. Woodman, for the plaintiff, contended, that the trustee ought to be charged. *Snell* is entitled to recover the fair value of his earnings of the trustee. The special contract is no bar. *Moses* v. *Stevens*, 2 *Pick.* 332; *Freto* v. *Brown*, 4 *Mass. R.* 675; *Baker* v. *Lovett*, 6 *Mass. R.* 78; *Bac. Abr. Infancy, I* (3.) Where the principal can maintain an action for a debt due him, the trustee will be chargeable. 7 *Mass. R.* 438; 9 *Mass. R.* 537; 5 *Mass. R.* 214; 5 *Pick.* 178. The contract of an infant, except for necessaries, is absolutely void. 1 *Com. on Con.* 152; 9 *Cowen*, 626; 4 *Day*, 57; 4 *Conn. Rep.* 376. But if the contract was

voidable only, it was avoided by *Snell's* voluntarily leaving *Keen* before the time expired, and against his consent. 3 *Bac. Ab. Infancy, I* (5); 1 *Com. Con.* 2 & 8. The trustee must therefore be charged, as he admits his liability, if he cannot protect himself under the special agreement.

Dunn, for the trustee, contended, that the contract between the supposed trustee and *Snell* was definite and certain, that if *Snell* would work until the expiration of the time agreed, he would pay and deliver him a certain quantity of stock. As *Snell* left without cause before the time of service was completed, *Keen* is not bound to pay any thing.

The opinion of the Court was by

Shepley J. — It appears from the answers of the trustee, that the defendant, *Snell*, being a minor made a special contract to labor for him upon certain terms until he was of age, and that he broke his contract and left the service without cause. He admits, that if liable to pay on a *quantum meruit*, he might be charged, but resists payment on the ground, that he is not legally liable.

Whether an infant may avoid his contract, and recover back money paid, or on a *quantum meruit* for services performed under it, has occasioned a difference of opinion in judicial tribunals. In *Holmes* v. *Blogg*, 8 *Taunt.* 508, it was decided, that he could not recover back the money paid, where he had enjoyed any benefit from the payment of it.

In *M' Coy* v. *Huffman*, 8 *Cow.* 84, and in *Weeks* v. *Leighton*, 5 *N. H.* 343, it was decided, principally on the authority of *Holmes* v. *Blogg*, that under such circumstances the infant could not recover.

In *Moses* v. *Stevens*, 2 *Pick.* 332, it was decided, that he could recover on a *quantum meruit* for services performed under a special contract after he had avoided it.

In *Corpe* v. *Overton*, 10 *Bing.* 252, it was decided, that he might recover, when he had not received a benefit from the payment, and the general expressions to the contrary in *Holmes* v. *Blogg* were disregarded or overruled. It appears to have been admitted in all these cases, that the infant may avoid the special contract. And if he may and in fact does avoid it, it would seem,

that the parties then stand in the same relation to each other, as they would, if the transactions had taken place without any contract. And if no contract the infant might recover for what benefit he had conferred beyond any injury occasioned and benefit received. It is not perceived, that to allow an infant to recover upon these principles is justly liable to the objection, that it permits him to change one contract into another at his election; for the recovery is had upon the ground that there never was, and is not now, any legal or binding contract, except what the law supplies, none of the infant's making. Nor does it appear to arm the infant with an instrument of mischief, or to act unjustly upon the other party, for it secures to each what may be proved to be equitable and fair under all the circumstances.

In this case the infant having avoided the contract, and the trustee having admitted, that he derived a benefit from his services beyond any injury suffered and payments made, is to be considered as liable for such admitted balance.

Exceptions sustained and trustee charged.

NOTE by the Reporter. The opinion of the Court in *Lewis* v. *Littlefield*, 15 *Maine Rep.* (3 *Shepley*,) 233, was delivered when EMERY J. was not present, being then employed in holding the Court in another county. When the case was published, the Reporter had not known, or did not recollect, that the opinion had not the assent of all the Court. Since the publication of that volume, the Reporter has been favored with the following dissenting opinion by

EMERY J. — As an abstract proposition that an action of trover might be sustained against an infant, the instruction would be correct. But in my judgment, in this case as reported to us by the Chief Justice, the exceptions ought to be sustained. The very general instruction, that infancy is no bar to the maintenance of this suit, seems to me to draw with it consequences calculated to take from infants the protection which ought to be thrown around them. It is the case of a minor stakeholder, appointed by two persons of full age, of the sums of money, by those two persons placed in the hands of the infant, to be paid to the winner in a foot race. Did not this necessarily include and raise a promise on the minor's part to pay over those sums to the winner? And was it not received by the minor under the faith and expectation that these depositors

mutually promised and engaged to him that he should so act? And he paid it over agreeably to the original stipulation of the parties. The plaintiff however requested the minor not to pay over the money to the winner, before he did actually pay it over to him. And this action of trover is brought against the infant. Why is the action of trover adopted?

It was long ago decided, that if money be delivered to another to deliver to I. S. or to the use of I. S. there I. S. should not have action of debt, but account only. Where delivered to be paid to I. S. which is intended in satisfaction of a debt, there it is not countermandable, and he who is to receive it may upon this receipt have an action of debt or account. The bailor may have debt or account. *Harris* v. *Beevoir, Cro. Jac.* 687.

Where goods or money are deposited by A. with B. for the benefit of C., upon a precedent consideration, the deposit is not revocable, though in cases where the deposit is made, without a precedent consideration, *it is.* 2 *Leon.* 30, 31, *Clarke's Case; Dyer,* 49; 4 *Burr,* 2239, *Alderson* v. *Temple.*

Assumpsit lies against a bailee without reward. *Tracy & al.* v. *Word,* 3 *Mason,* 132. Paying bill in one's own wrong gives a right to recover in an action for money had and received. *Whitefield* v. *Savage,* 2 *Bos. & Pul.* 277.

It is evident then, that redress could have been effectually sought in debt, account or assumpsit, against the defendant, if he had not been a minor. See 4 *Camp.* 37, 157; 8 *B. & C.* 221; 1 *C. & M.* 797; 5 *T. R.* 405; 4 *Taunt.* 474.

Is this such a contract as the Court would uphold? Can it upon its face be for the benefit of the infant? Can justice be promoted by permitting the party who has led the infant into the predicament of a depository in a gambling transaction, to turn round, and by changing *the form of the action,* hold the infant responsible for a mistake of judgment as to his own liability to hand over the property on a contingency which happened in exact conformity to the first direction of the plaintiff?

In *Story on Bailments,* upon the subject of deposit, *page* 35, "He says, in respect to the persons by and between whom it may be made, it is not distinguishable from other contracts in this respect. Infants, married women, and other persons laboring under

personal disability, cannot be bound as depositers or depositaries; *though other persons may be so bound to them. If an infant receives a deposit, he is bound by the general principles of law to restore it, if it is in his possession or control;* but he is not responsible if he loses it. He may become responsible for any *wrong he does to it;* but he is not responsible upon the contract, unless it be a necessary contract, and manifestly for his benefit."

In *Tucker & al.* v. *Moreland*, 10 *Peters*, 77, in the course of the opinion delivered by Justice *Story*, he says, "in many cases, the disaffirmance of a deed made during infancy is a fraud upon the other party. But this has never been held sufficient to avoid the disaffirmance, for it would otherwise take away the very protection which the law intends to throw round him to guard him from the effects of his folly, rashness and misconduct. What is meant by the assertion, "that other persons may be bound to infants as depositaries?" Should it be to abstain from all suits against them in relation to the deposite, and in such a case as this to litigate only with the winner? In equity stakeholders are permitted to pay money into Court to obtain injunction. *Mitchel* v. *Wayne*, 2 *S. & S.* 63; *Yates* v. *Fairbrother*, 4 *Mod.* 239.

But the counsel for the plaintiff yields the point that the defendant is not to be holden on the contract. I am not informed that there is *a solitary case of an infant depositary being subjected to a suit in trover, for paying money over to a winner in a gambling transaction.* It is to be presumed that there will not be another.

The case of *Vasse* v. *Smith*, 6 *Cranch*, 226, was decided in 1810, and C. J. *Marshall* says, "should it be admitted that an infant is not chargeable with a conversion made by mistake, this testimony ought still to have been left to a jury."

This present seems to me precisely the case, in which it is *the duty of the Court to apply the protection to the infant, and save him from the consequences of his rashness and folly in yielding to the solicitations of older men to become their stakeholder; and not permit the form of action to bring him into trouble for a mistake as to his rights, duties, and seeming liabilities.*

For these reasons, it appears to me, that the exceptions should be sustained, the verdict set aside, and a new trial granted. If on that trial, nothing further should be shown than is now reported, I think the plaintiff should become nonsuit.

Thomas B. Reed *vs.* Daniel Woodman, Jr.

Where money has been tendered after the commencement of an action and before its entry in Court, under the provisions of the *stat.* of 1822, *c.* 60, "relative to the tender of money in suits at law," the defendant, to keep his tender good, must bring his money into Court on the first day of the term at which the entry is made.

Assumpsit for freight. The writ was served *July* 28, and the Court to which it was returnable was holden in *November*. The general issue only was pleaded. The freight amounted to $33,75. The question made, was one exclusively of costs. The defendant relied upon a tender made after the suit was brought. The writ and service amounted to $3,90. *R. A. L. Codman, Esq.* called by the defendant, testified, that some time in the month of *October* following the service of the writ, he was witness to a tender of forty dollars in gold, made by the defendant to *W. P. Fessenden, Esq.*, as counsel for the plaintiff; that the defendant made the tender under the direction of the witness; that said *Fessenden* declined to accept the money offered, and the witness wrapped it in a piece of paper, and gave it to the defendant with directions to retain it for the plaintiff in case he should call for it; that sometime during the *November Term*, the defendant returned the money to the witness who then deposited it with the clerk for the plaintiff's acceptance, if he chose to take it, and gave notice to said *Fessenden* that he had so deposited it; that he did not bring the money into court under the common rule, but under the statute, and left it with the clerk in pursuance of the tender before made, and as a convenient place to deposit the money in case the plaintiff chose to accept the tender; that he did not see the money from the time it was delivered by him to the defendant until he received it back since the commencement of the term, and could not say whether the defendant had kept it always ready for the plaintiff, or whether the money brought to him was the same with that originally tendered.

By the records of the clerk it appeared, that forty dollars in gold had been deposited with him by *R. A. L. Codman, Esq.* in this suit on the seventeenth day of the term.

Emery J. before whom the trial was had, instructed the jury, that they might deduct the amount of the writ and service, $3,90

from the sum of forty dollars tendered, and then if they found that the balance covered all that was due to the plaintiff from the defendant at that time, they would find that the defendant never promised the plaintiff, remarking that as the counsel for the plaintiff objected to the sufficiency of the tender as made, that question might be reserved for the consideration of the whole Court. The verdict was for the defendant, and if the Court should be of opinion upon the whole case, that the tender was sufficiently made and kept good, the defendant was to recover his costs; and if not, the plaintiff was to recover his debt and costs, deducting the forty dollars, which sum was to be taken out of court by him.

W. P. Fessenden, for the plaintiff, contended, that in order to keep his tender good, the defendant must bring his money into court *on the first day of the term*, that the plaintiff may accept it if he will; otherwise the plaintiff is obliged to go on with his action. He cannot know that the defendant will bring the money into court. This is not money brought into court on the common rule. No leave was obtained, and *Mr. Codman* so states. *Tidd's Pr.* 565, 566; *Rules of Court, S. J. C.* 32. He comes under the *stat.* 1822, *c.* 60, which gives the defendant the same rights by tender of the debt and costs after the commencement of the action and before its entry in court, "as now exists in regard to the tender of money before the commencement of a suit." We may ascertain what is necessary to preserve such tender from seeing what it was necessary to plead, and what it is necessary to prove. When the defendant pleads a tender he must always pay it into court on the first day. *Patten* v. *Shelton*, 1 *Strange*, 638; 6 *Bac. Ab.* 464; 6 *Com. Dig.* 391; 15 *Petersdorf*, 27. If the defendant pays money into court, and does not pay the plaintiff his costs up to that time, he may go on with his action. 2 *Strange*, 1220; 1 *Esp. N. P.* 160. If the defendant bring money into court on a plea of tender, the plaintiff may take it out, though he reply that the tender was not made before action brought. 15 *Petersd.* 22; 1 *Bos. & Pul.* 332; 6 *Bacon*, 465; 5 *Dane*, 501. The plea of tender without bringing the money into court is a nullity. 1 *Barnes*, 181; 15 *Petersd.* 27. The view most favorable to the defendant is, that if the money be not paid into court the first

day of the term, he must pay costs until it is paid in. The tender is not sufficient in amount for that purpose. The tender to the alleged attorney was not good. He did not indorse the writ, and had not appeared in court as the attorney of the plaintiff. That the writ is in his handwriting does not make him attorney for any other purpose, or authorize him to discharge the action. 4 *B & Cr.* 26; 5 *Dane*, 499.

Fox, for the defendant, contended, that all that was necessary to be done to make the tender good had been done. All the later authorities show, that where tender was made before suit brought, it is not necessary to bring the money into court. Our statute places both on the same ground, if enough is tendered to cover the costs then accrued. After a tender the burthen of proof is on the plaintiff to show a demand, or he cannot recover costs afterwards. But if necessary to bring the money into court, it was brought in soon enough. 5 *B. & A.* 630; 1 *Campb.* 181; 2 *Taunt.* 203; *ib.* 282; *Suffolk Bank* v. *Worcester Bank*, 5 *Pick.* 106; *Howe's Pr.* 407. The tender was made to the right person. He made the writ, and had power to settle the demand and receive the money. *Hoyt* v. *Byrnes*, 2 *Fairf.* 475.

The opinion of the Court was delivered by

Emery J. — This is a question exclusively of costs, but it has been argued as though it should be decided upon the strict doctrines applicable to the plea of tender, and the duty of a defendant as to bringing money into court in such cases.

The law respecting the pleading of a tender has been heretofore settled with some nice distinctions. If to debt on bond, the defendant pleaded that by a certain defeasance executed by the plaintiff, he agreed, that if the defendant would pay him 5 shillings on the pound for all that was due to the plaintiff, on or before a certain day, it should be a sufficient release to the defendant, and that the defendant tendered and offered to pay to the plaintiff on that day £10, in full of all that was due, but the plaintiff refused to accept it, to which there was a demurrer for causes, principally because the plea did not allege that he was always ready to pay that, nor did he bring the money into court. The plea was held to be good, because the defeasance was *collateral* to the bond, but

would not have been good, had it been contained in the bond, in that case it would be necessary to aver that he was always ready, and to bring the money into court. *Trevett* v. *Aggas, Willes' R.* 107; *Comyn's R.* 562.

In another case, *Habdeny* v. *Tuke, Willes' R.* 632, assumpsit, four counts, and in each £3, 18*s.* 10*d.* was demanded. As to the three last counts, non assumpsit, and as to the £3, 18*s.* 10*d.* in the first, a tender was pleaded in common form. The plaintiff replied a demand and refusal, before suing out the writ, rejoinder that before suing out the original writ, the defendant tendered, and offered to pay to the plaintiff the sum of £3, 18*s.* 10*d.* as by his plea he had alleged, traversing that the plaintiff at any time after the tender and before suing out the writ, the plaintiff requested him to pay. There was demurrer for cause, that by the rejoinder the defendant traversed matter not alleged in the replication, and that the rejoinder was no answer to the replication, but totally immaterial. The Court held, that the rejoinder was bad, that the defendant must say he was always ready to pay, as of the essence of a plea of tender. Ready from the time of the tender is insufficient. *Sweetland* v. *Squire, Salk.* 623. And judgment was rendered for the plaintiff. *Douglas* v. *Patrick*, 3 *Term. R.* 683; *French* v. *Watson*, 2 *Wils.* 74. But if the plaintiff reply a subsequent demand, it must be of the precise sum tendered. If he demand another sum than that tendered, the tender is not invalidated. *Fabian* v. *Winston, Cro. Eliz.* 209; 1 *Esp. R.* 115, 116; 1 *Campb.* 181. At common law a tender must be made before suit is commenced.

In *New-York*, a tender of rent takes away a right to distrain till a subsequent demand and refusal. But it does not take away the right to sue for the rent as a debt. It only saves interest and costs. *Hunter* v. *Le Conte*, 6 *Cowen*, 728.

Before the separation, if a defendant pleaded a tender with *tout temp prist*, and a profert in curia, where issue was joined on the tender, and found for the defendant, yet notwithstanding the verdict, judgment was rendered for the plaintiff, because it appeared, that the money tendered had not been brought into court. *Claflin* v. *Hawes*, 8 *Mass. R.* 261.

If the defendant bring the money into court on a plea of tender,

the plaintiff may take it out though he reply that the tender was not made before action brought. 1 *Bos. & Pul.* 332.

The principles of these decisions seems to be, that the effect of a tender is merely to discharge the debtor from subsequent interest and costs, if followed up. But after action has been brought, the defendant may pay the sum which he thinks he really owes into court, and let the plaintiff afterward proceed at his peril. The practice was introduced in *England* in the time of *Charles* II, to avoid the hazard and difficulty of pleading a tender, 2 *Archb. Practice*, 199; *Boyden* v. *Moore, Administrator*, 5 *Mass. R.* 365.

On bringing money into court on the common rule; if the plaintiff proceed in the action, that sum is struck out of the declaration, and paid out of court to the plaintiff or his attorney, and upon trial of the issue, the plaintiff is not permitted to give evidence for the same. And in case he proceed to trial, otherwise than for the non-payment of costs, and do not prove more to be due to him than the sum brought in, the plaintiff on the rule being produced, shall be nonsuited, or have a verdict against him, and pay costs to the defendant. When the plaintiff proceeds further, without going on to trial, he shall have his costs to the time of bringing the money into court, and the defendant shall be allowed his subsequent costs. 1 *Tidd's Prac.* 569, 570. Such were the difficulties in regard to defendants who were willing to pay something, but not all that was demanded, that courts deemed it right to establish such rules for their relief. But it was not a full relief. There is good reason to imagine that those who first started the measure of legalizing a tender after suit brought, might have intended to dispense with the necessity of bringing the money into court, unless some new demand were afterwards made. But unfortunately, if that were the design, the *stat. Jan.* 25, 1822, *c.* 172, provides only, that "every person who may be sued, shall have the same right to tender payment of the debt and legal costs, which may have arisen at the time of such tender, to the plaintiff or his attorney in the action, after its commencement and before the entry thereof in court, as now exists in regard to the tender of money before the commencement of a suit."

The law in respect to tender before action brought, it is manifest, requires that the money on the pleading of tender must be brought into court. And from the case of *Claflin* v. *Hawes*, 8

Mass. R. 261, it is apparent, that even if the tender be proved on trial; yet if this money be not brought into court, the creditor will have judgment notwithstanding the verdict. If the Legislature intended to dispense with the necessity of bringing the money into court, they have failed to use those terms, which could easily have expressed their views.

From the report, we have no doubt that *Mr. Fessenden* was the plaintiff's attorney, and that to him the defendant would be authorized to tender the money. It was deposited with the clerk afterwards. The record shows, that it was done on the 17th day of the term. This was evidently before the trial.

In *Philips* v. *Barker*, *Barne's notes*, 289; Rule absolute for leave to withdraw plea of general issue on payment of costs, pay £2, 2*s.* into court on common rule, and plead the same plea again; defendant taking notice of trial for the sitting after term in *Middlesex.* No delay has been occasioned to plaintiff by defendant omitting to bring money into court before plea pleaded.

In *Kene* v. *Mitchell*, *Barne's notes*, 284, money was paid into court upon the common rule, which plaintiff refused to accept and delivered an issue; but afterward changed his mind and applied to the court for leave to take the money out of court, with costs to the time of bringing it in, which was ordered, upon payment of subsequent costs for defendant.

In *Zeevin* v. *Cowell*, 2 *Taunt.* 203, after action commenced and before declaration, the defendant's attorney offered to the plaintiff's attorney the debt and costs which the plaintiff's attorney then declined to accept, and proceeded to deliver a declaration. The Court permitted the defendant to pay into court the debt and costs up to that time of his offer only. And in case the plaintiff should take the money out of court he should pay the costs of the motion.

In *Roberts* v. *Lambert*, 2 *Taunt.* 284, decided in *Feb.* 1810, a tender had been made on the 27th day of *Dec.* preceding to the plaintiff's attorney of £31 10*s.* after action commenced. The facts were, that the writ having been sued out, the defendant's attorney undertook to appear and afterward tendered the sum of 30 guineas and the costs of the action to that time, but the plaintiff's attorney refused to accept it, and afterwards delivered a declaration consisting of eight counts and a particular of his demand,

charging the 30 guineas for nine months wages, and a further sum of £68, 10*s.* damages for being improperly dismissed from service. The plaintiff's counsel endeavored to distinguish the case from *Zeevin* v. *Cowell*, and also insisted on the greater delay which had taken place here, about seven weeks having intervened since the tender.

But the Court made the rule absolute, that the defendant might be at liberty to pay into court on the five last counts of the plaintiff's declaration the sum of £31, 10*s.* And that if the plaintiff should accept thereof with costs up to the 27th of *December* last, he should pay the defendant all the costs incurred since that time; and if the plaintiff would not accept, that sum might be struck out of the declaration.

The truth is, that at one period the plea of tender was considered a dilatory plea and to be pleaded in four days. It was afterward more sensibly considered a fair, honest, and issuable plea in bar, and therefore all the Court would regard was, whether the money was truly in court in order for the plaintiff to receive.

In this case the just demand of the plaintiff was for twenty-five cents each for the freight of 135 stoves, which would amount to thirty-three dollars seventy-five cents, if to that sum be added fifty cents for interest from the 28th of *July*, the date of the writ, to the 16th of *October* following, the time of the tender, it would amount to thirty-four dollars twenty-five cents; increase that, by the addition of three dollars ninety-nine cents for costs, and it will amount to thirty-eight dollars twenty-four cents, and the defendant tendered forty dollars.

We know judicially that the term of this Court commenced on the second Tuesday of *Nov.* 1837; that on the 28th day of *Nov.* 1837, it was adjourned to Monday, the 4th day of *Dec.* 1837; and that this trial commenced on the 21st day of *Dec.* 1837.

We must therefore perceive, that ample time was given to the plaintiff to discover that the money was in the clerk's possession before the action was brought to trial.

But inasmuch as the defendant did not bring the money into court the first day of the term, *the majority of the Court* are of opinion, *in which I do not concur*, that the defendant's tender has not been kept good, and that the plaintiff is entitled to such costs as have not already been paid to him.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF YORK, APRIL TERM, 1840.

NOAH BURNHAM *vs.* EBENEZER WEBSTER.

A waiver by an indorser of a note of all right to *notice* does not excuse the holder from making a *demand* upon the maker.

The words "I hold myself accountable and waive all notice," written by the indorser of a note over his name, dispense with the necessity of notice to him, but do not excuse the omission of a demand upon the maker.

THE parties agreed to a statement of facts, from which it appeared that the action was assumpsit by the plaintiff as indorsee of a note, which was read to the jury, and of which a copy follows. "*Newbury Port, July* 10, 1835. Value received we promise to pay to the order of *Ebenezer Webster*, ten hundred and eighty dollars and fifty-nine cents in one year from date, with interest. $1080,59. "*William Palmer.*

"*Samuel Phillips.*"

On the back of the note was the following indorsement. "I hold myself accountable and waive all notice.

"*Ebenezer Webster.*

"*Daniel Burnham.*

"*David Webster.*"

The signatures were admitted. No demand was made on *Palmer* or *Phillips*, the makers of the note, and no notice of non-payment was given to the defendant. It was agreed, that if the

action could be maintained, the defendant was to be defaulted; and if not, the plaintiff was to become nonsuit.

Leland argued for the plaintiff. The Court will carry into effect the intentions of the parties when it can be discovered. *Willis* v. *Green*, 10 *Wend.* 516. The note was rightly given in evidence under the money counts. The intention here was, that the defendant should be accountable without demand or notice. 2 *Ld. Raymond*, 1396; *Josselyn* v. *Ames*, 3 *Mass. R.* 274; *Moies* v. *Bird*, 11 *Mass. R.* 438; *Sumner* v. *Gay*, 4 *Pick.* 311; *Hunt* v. *Adams*, 6 *Mass. R.* 519; *Cobb* v. *Little*, 2 *Greenl.* 261; 3 *Kent*, 75; *Baker* v. *Briggs*, 8 *Pick.* 122; *Ellsworth* v. *Brewer*, 11 *Pick.* 316; 7 *Wheat.* 35. "Eventually accountable," has been held to be a waiver of demand and notice. *McDonald* v. *Bailey*, 14 *Maine R.* 101.

J. Shepley, for the defendant. A waiver by an indorser of a note of all right to *notice* does not excuse the holder from making a *demand* upon the maker. *Bayley on Bills, (Ph. & S. Ed.)* 244, 245; *Berkshire Bank* v. *Jones*, 6 *Mass. R.* 524; *Backus* v. *Shepherd*, 11 *Wend.* 629; *Taunton Bank* v. *Richardson*, 1 *Pick.* 446. Nothing is waived but notice.

The opinion of the Court was by

SHEPLEY J.—The uniformity and certainty of the rules respecting the liability of parties on bills and notes are of such importance, that it is necessary to adhere to them, even when there may be doubts, whether the parties used language, to which the decided cases have attached a definite meaning, in the legal sense. The liability of an indorser being conditional only, the cases proceed upon the principle, that where the language qualifying the indorsement waives the whole of the conditions upon the performance of which the party is liable, the holder is excused from performing any part of them; but where a part of them only are waived, the courts will not presume, that the waiver was intended to extend to the whole; and the holder must prove performance of the part not expressly waived. Hence the words, "eventually accountable," and "holden," affording no indication, that a part only of the conditions were dispensed with, this Court has decided, that the indorser was liable without demand or notice. And it has long

been an established rule, that a waiver of all right to notice does not excuse the holder from making a presentment. *Bayley*, 244 and note. In this case there is a waiver of notice, but not of presentment, unless the words "I hold myself accountable," taken in connexion with the other words used, can be considered as dispensing with a presentment. The inquiry is suggested, how accountable? And the answer would seem necessarily to be, I waive all notice and hold myself accountable. This answer employs every word of the indorsement, only transposed, and gives to each its proper meaning. To give a different answer to the question and say, I hold myself accountable absolutely, would dispense with the words, "and waive all notice," giving to them no meaning. To answer, I waive all notice and demand, would be to give greater effect to the words, than the decided cases permit. The indorser may say, I did indeed waive all notice and held myself accountable, but I never did waive a presentment, and now insist upon it; and the Court cannot consistently with the decided cases, deprive him of the right to make such an answer.

According to the agreement, a nonsuit is to be entered.

Ezra Deane *vs.* David Coffin.

An award at common law cannot be impeached, except on the ground of corruption, partiality, or excess of power.

Where the parties to a suit pending in Court, entered into a written agreement, that the defendant should be defaulted, and that judgment should be entered for the amount found due by certain persons named as arbitrators whose decision should be conclusive, and that the defendant should be allowed for any claim in his favor which could have been filed in set-off; *it was held*, that the plaintiff was not entitled to recover a sum in addition to the amount awarded him, on proof that he had paid certain sums for the defendant which had not been taken into consideration by the arbitrators.

Deane had brought an action against *Coffin*, and during its pendency in the S. J. Court, the parties made the following agreement. "We agree to and with each other, that *S. S. S.*, *M. D.*,

and *J. W.*, may examine the claim made by *Ezra Deane* against *David Coffin*, and determine how much is due said *Deane*, and that said *Coffin* shall be defaulted in the suit now pending in the S. J. Court for *York* county, of *Dean* v. *Coffin*, and that judgment shall be entered for the sum thus found due, and the costs of reference, and costs of court. And we covenant to and with each other, that the determination of those gentlemen shall be conclusive and final between us in all matters. The said *Coffin* is permitted to file any account in offset as though he had filed the same in Court agreeably to law, and the report of them or a majority of them is to be made to the Court now sitting at *Alfred*. *Ezra Dean*. *David Coffin*." This agreement was returned into Court with the following thereon, signed by the arbitrators. "The subscribers within named having met the parties, and heard their several pleas and allegations do adjudge that the within named *Deane* recover judgment against the within named *Coffin*, the sum of three hundred forty-two dollars and ninety-five cents, together with costs of Court and costs of reference." The parties had no counsel, and each told his own story before the referees. The case was opened for trial before EMERY J. and the plaintiff was about to prove the payment of certain sums for the defendant, which were not taken into consideration by the referees; but the Judge was of opinion, that the agreement and report were final and conclusive between the parties. The action was defaulted. If this opinion be correct, judgment is to be entered for the amount found due by the referees; and if not the cause is to stand for trial.

A. G. Goodwin, for the plaintiff, contended, that the evidence offered was admissible, as the plaintiff was clearly entitled to recover at least, for such demands as were not before the referees. So too if the referees take into the award subjects not submitted, the testimony is admissible, for the whole award is void. He cited *Kyd on Awards*, 114; 7 *East*, 81; 8 *East*, 13; 14 *Johns. R.* 96; 16 *East*, 58; *Bean* v. *Farnam*, 6 *Pick.* 269; *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21. He contended, that the *decision* in the last case was in his favor. The report, or recommendation, of the gentlemen can be no more than *prima facie* evidence subject to be controlled by other evidence. *Jewett* v. *Cornforth*, 3 *Greenl.* 107; *Eaton* v. *Arnold*, 9 *Mass. R.* 519.

D. Goodenow, for the defendant, said, that the case shew that all demands were submitted, and the referees therefore could not exceed the authority given them. They chose their own tribunal, and managed their case in their own way, and should be bound by the decision. The award covered the whole matter submitted, and it is not pretended, that the referees were guilty of fraud or corruption. The Court cannot recommit the case to the referees for a new hearing; and if the award is good, as it is believed to be, it is entirely conclusive between the parties. It is enough however that each had the opportunity to present his claim to make it conclusive, and it was not proposed to prove that the plaintiff was prevented from doing it. *Tyler* v. *Dyer,* 13 *Maine R.* 41; 1 *Johns. Cas.* 436; 7 *T. R.* 269; *Emery* v. *Goodwin,* 13 *Maine R.* 24; 10 *Wend.* 589. There is no offer to prove, that there was any objection to each party telling his own story, and it must be presumed to have been by mutual consent. *Patten* v. *Hunnewell,* 8 *Greenl.* 21.

The opinion of the Court was by

Weston C. J. — The defendant positively agreed, by writing under his hand, to be defaulted in this action. No suggestion is made, that he was circumvented, or acted under any misapprehension, or that the agreement was not fairly entered into. That something was due from the defendant to the plaintiff, must be understood to have been distinctly admitted. The only matter to be decided by the arbitrators was, for what sum judgment should be rendered in favor of the plaintiff, in which the defendant was to have the benefit of an account in offset.

This not being a submission before a justice under the statute, or by a rule of Court, did not derive its validity from any judicial sanction, nor was it regularly to be submitted to the revision of the Court. The doctrine, deducible from the case of *North Yarmouth* v. *Cumberland,* 6 *Greenl.* 21, and of *Tyler* v. *Dyer,* 13 *Maine R.* 41, is, that an award at common law cannot be impeached, except on the ground of corruption, partiality or excess of power. Nothing of this sort being pretended, the default is to stand and judgment rendered for the amount, liquidated by the award.

Mem. SHEPLEY J. having been of counsel in this case, did not take part in the hearing or determination.

YORK BANK *vs.* JOHN W. APPLETON.

The attorney of record, in a suit against the maker of a note, has no authority from his employment as attorney, to execute a valid release to an indorser of the same note to render him a competent witness.

The indorsee of a promissory note has the right to claim and to hold as much collateral security as he can obtain, if he does nothing under color of this right to injure other creditors.

ASSUMPSIT on a promissory note, dated *January* 18, 1836, for the sum of $3900, payable to *Moses Emery*, or order, at said Bank, in sixty days and grace, and by him indorsed to the Bank on the day of its date, in renewal of a former note by the same parties. The notes were justly due from *Appleton* to *Emery*, and were discounted for the latter by the Bank.

The defence set up was, that the note in suit was paid to the Bank by substituting therefor another note for the same sum, dated *October* 26, 1836, signed by the defendant, indorsed by *Emery*, and guarantied by *William Cutter;* or by a note to the Bank for the same amount, dated *Oct.* 27, 1836, signed by said *Emery* and *Phinehas Pratt.*

The writ in this action was in the handwriting of said *Emery* and indorsed by *A. G. Thornton* who then kept the office occupied by said *Emery* while in practice, and was dated *June* 4, 1836. *Emery*, in *September* following, went into *Portland* and attended to the examination of a person summoned as trustee in that suit, under a written authority from the Bank. It did not appear that *Emery* had ever acted as attorney for the Bank, except in those instances. *J. & E. Shepley* were the general attorneys of the Bank, and entered this action, and they, or one of them, were the only attorneys of record, but were both out of town when the writ was made. *William Cutter*, called by the defendant, testified, that he purchased the land of *Appleton*, which was the consideration of the note in suit on a sale by *Emery* to *Appleton*, and agreed to assume and take up the note in suit, and supposing the Bank would not give up the names then upon the note, one was made to renew it signed by *Appleton*, indorsed by *Emery*, and

guarantied by him, dated *Oct.* 26, 1836, for $3900; that *Emery* agreed to take the note to the Bank, and endeavor to have it taken as a renewal of the note in suit; but that "it was suggested by said *Emery* that the bank might not be willing to give up the note in suit;" and that he sent similar notes to *Emery* for renewal, and supposed the Bank had taken them. *Henry S. Thatcher,* cashier of the Bank, was called by the defendant, and on notice produced the books of the Bank, and testified, that on the 27th of *October,* 1836, *Moses Emery, Esq.* paid the interest on the note in suit at the Bank, and at that time, *Emery* having previously been called upon by the Bank for additional security, left at the Bank as collateral security for the note in suit a note for the same amount, signed by *P. Pratt* and himself; that he then entered the same on his journal, and against and under it entered the note in suit with the words, "paid by the above note;" that the *Pratt* note had been several times renewed, and had been reduced in amount; that when the *Pratt* note was first left, that *Emery* offered to the President of the Bank the *Cutter* note of *Oct.* 26, 1836, for discount to take up the note in suit, and that the President refused to take the note; that *Emery* requested him, the cashier, without the knowledge of the President, to take the *Cutter* note and keep it in the Bank; that he did take that and afterwards another similar one, but not as notes discounted or as collateral, and at *Emery's* disposal, and filed them away with the *Pratt* note, and afterwards entered it by mistake as collateral to the *Pratt* note, but that it was done without the direction of any officer of the Bank; that the books were kept by him without any direction from the officers of the Bank, and he did not understand that one note was actually paid by the other, but that the amount of both the *Pratt* note and the note in suit should not appear to be due to the Bank on the books. He testified, that the note in suit had never been paid, or intended by the Bank to be paid, to his knowledge at any time; and that he was not a stockholder in the Bank, nor was said *Emery.* The testimony of the President of the Bank, by deposition taken by consent, was introduced by the *defendant,* but did not in substance, as to facts within his knowledge, vary from that of the cashier. In relation to the *Pratt* note he said, "our object in taking that note was in order that we might have something that

would be attended to, not relinquishing any other security that we had before."

Moses Emery, the indorser of the note in suit, was called as a witness by the plaintiffs and was objected to by the defendant in the suit, and was thereupon released by the plaintiffs' attorney of record in the suit. The objection was still renewed, because the attorney in the action, without express authority from the Bank, had no power to release the interest of the witness as indorser; but the objection was overruled. The witness gave a history of the transactions between the defendant, *Cutter* and himself, and said, that the note in suit ought long before it fell due to have been paid in cash by the defendant, but that he consented to try to get the Bank to take the *Cutter* note for this note which had already been put in suit, but expressed doubts whether it could be done; that he carried it to the Bank where he saw the President, and endeavored to make the arrangement, but he utterly refused; that he then proposed to have the note left as collateral security to the other, but that the President of the Bank declined, and would not take the note; that according to an arrangement then made he procured the *Pratt* note as collateral security for the note in suit, and not in payment of it; that he was never a stockholder or agent of the Bank, and never acted for the Bank excepting in making the writ in this case and getting it served at the request of the President, in the absence of *Mr. Shepley*, the attorney of the Bank, and afterwards at the request of the Bank, going to *Portland* to examine some trustees; and that soon after the refusal of the Bank to take the *Cutter* note, the defendant was informed thereof. Before the trial, *Pratt* had made an arrangement with the Bank, whereby the note signed by *Emery* and himself had been given up to him, and *Emery* was not liable on that note, or any renewal of it. *Emery* stated, that after the refusal of the President to take the *Cutter* note, he left it with *Mr. Thacher* to be kept for him as his private paper, to which he with some reluctance consented.

"The counsel for the defendant contended, that by the transactions on the 26th of *October*, 1836, between the defendant and *Emery* and *Cutter*, the note in suit was paid to *Emery*, and that the Bank had adopted and ratified the acts of *Emery*, and requested the Judge who presided at the trial to instruct the jury as follows:

"1. If the jury believe that *Moses Emery* was the agent of the Bank in the transaction of *Oct.* 26, 1836, and by that transaction the note in suit was paid to said *Emery*, or that it adopted his acts by receiving the note of defendant and *Cutter*, in that case the plaintiff ought not to recover.

"2. If the jury is satisfied that the suit is nominally prosecuted by the Bank, for the benefit in fact of *Moses Emery*, any defence which the defendant could set up against a suit in the name of *Emery*, may be set up in this case.

"3. If the jury is satisfied that by the transaction of *Oct.* 26, 1836, the note in suit was actually paid to *Moses Emery* by the defendant, and that the Bank acquiesced in the arrangement by taking the note of defendant guarantied by *William Cutter*, then the plaintiff ought not to recover.

"4. If the jury believe the Bank had good reason to believe that the note for $3900, signed by *J. W. Appleton* and guarantied by *Cutter*, was intended by said *Appleton* to be substituted for the note in suit, and the Bank received it, intending to regard it as a valid and operative note, the note in suit thereby became invalid and inoperative, and the plaintiffs' right to recover in this action thereby became extinguished.

"5. If the jury is satisfied that *Pratt & Emery's* note was on the 27th day of *October*, 1836, substituted for the note in suit by the consent of the *Bank*, and the last note was then placed in the Bank as collateral security of the former note, the defendant has the right to the same defence against the plaintiffs, which he might have against *Moses Emery*."

Emery J. presiding at the trial, instructed the jury, that as the books of the Bank had been exhibited by the Cashier, and the Cashier had been examined critically by both parties, and his explanation as to his mode of keeping accounts had been heard, if from the whole evidence they were satisfied, that the Bank did accept the note of the defendant and *Cutter* as a substitute for the note in suit, and in payment of it, the verdict should be for the defendant; otherwise the plaintiffs were entitled to recover. The Judge gave the instruction contained in the *third* request; and the *first* with this qualification; that the jury should be satisfied that said *Emery* was the agent of the Bank for this purpose, and that

the Bank did receive the note of the defendant and *Cutter* in payment of the note in suit, of which the jury from the whole evidence would judge. The second, fourth and fifth requests were denied.

The verdict for the plaintiffs was to be set aside, if there was error in the admission of the testimony objected to, in denying the requests for instruction, or in the instructions given.

N. D. Appleton argued for the defendant.

Emery was improperly admitted as a witness.

He was directly interested as indorser of the note in suit. *Barnes* v. *Ball*, 1 *Mass. R.* 73.

The release does not destroy the interest of the witness because it was executed without authority from the Bank. Corporations must act by their corporate seal, or by vote of the corporation, or in the manner authorized by the act of incorporation. 1 *Black. Com.* 475; *Head* v. *Prov. Ins. Co.* 2 *Cranch*, 127; *Monumoi Beach* v. *Rogers*, 1 *Mass. R.* 159; *Gray* v. *Portland Bank*, 3 *Mass. R.* 364; *New-York Slate Co.* v. *Osgood*, 11 *Mass. R.* 60; 9 *Coke*, 76. An attorney of record has no authority as such to execute a release of the interest in question. *Murray* v. *House*, 11 *Johns.* 464; *Lewis* v. *Gamage*, 1 *Pick.* 347; 8 *Johns. R.* 366; 6 *Johns. R.* 51; 6 *Cowen*, 585; 2 *Call*, 498; 2 *Hen. & M.* 268, 348; 1 *T. R.* 62; *Beardsley* v. *Root*, 11 *Johns. R.* 465; 2 *Stark. Cas.* 41; *Marshall* v. *Nazel*, 1 *Bailey's Rep.* 358; *Hart* v. *Waterhouse*, 1 *Mass. R.* 433; 7 *T. R.* 207; 2 *Caines*, 250; *Ford* v. *Clough*, 8 *Greenl.* 344; *Nelson* v. *Milford*, 7 *Pick.* 18; 1 *Blackford*, 252. But if the release is valid, it does not go far enough, as it merely releases *Mr. Emery* from all liability as indorser. He is still liable for the costs of this suit. *Emerson* v. *Newbury*, 13 *Pick.* 377.

The instructions *first requested* were definite and distinct, and such as the defendant had a right to expect should be given. By the qualification, the minds of the jury would be likely to be mislead and confused and withdrawn from the plain and distinct propositions presented to them. The qualification was erroneous. The Bank must ratify the acts of *Emery* in the whole or in no part. *Paley on Agency*, 145, 249; *Peters* v. *Ballister*, 3 *Pick.* 505.

The instruction secondly requested should have been given. It was contended before the jury that the suit was brought and prosecuted for the benefit of *Emery*. He was in fact the party in interest. *Towne* v. *Jaquith*, 6 *Mass. R.* 46; *Ayer* v. *Hutchins*, 4 *Mass. R.* 370; *Thurston* v. *McKown*, 6 *Mass. R.* 428; *Hemmingway* v. *Stone*, 7 *Mass. R.* 58; *Holland* v. *Makepeace*, 8 *Mass. R.* 418; *Clark* v. *Leach*, 10 *Mass. R.* 51.

He also contended, that the Judge erred in declining to give to the jury the fourth and fifth instructions requested.

J. Shepley for the plaintiff.

The preliminary and only real question in the case is, had the attorney of record in the suit, authority as such, to release to *Mr. Emery* any claim against him as indorser, that he might thus become a witness in a suit against the maker.

It is said that the attorney could not act for the Bank, without a written authority under the corporate seal, or a record of the vote of the corporation. The doctrine that a corporation can be bound only by instruments under seal or by vote, has long since been exploded. But here the authority of the attorney to act for the Bank in the action generally, is admitted, and the old authorities never required the acts of the attorney to be under seal. If so, he must put a seal to his joinder of the general issue. *Heard* v. *Lodge*, 20 *Pick.* 53.

When it is the bounden duty of the attorney to take that course in conducting a trial which in his opinion will best advance the interest of his client, and when he has secured the debt by attachment of the property of the maker of the note, and when he comes into court, unexpectedly finds a defence set up, and sees the indorser there who may have no ability to pay, but by whom he can prove his case if he can remove the nominal interest; there should be very strong authority to show that the attorney must stand by, and see the interests of his client sacrificed, and the debt lost, because he has no power to discharge the right to call upon such indorser if he should not get it of him who should pay it. This question was made in *Kendall* v. *White*, 13 *Maine R.* 245, in which the counsel for the plaintiffs relied on *Adams* v. *Robinson*, 1 *Pick.* 461, but the case was decided on other points. *Fling* v. *Trafton*, 13 *Maine R.* 295, extends the power of the attorney

farther than we claim, and is decisive in principle, as it allows of the absolute discharge of a party to the suit by the attorney of record. The contract was joint, and the attorney was held by this Court to have power to strike out one party and take judgment against the other only, thereby virtually releasing the other. In *Gordon* v. *Coolidge*, 1 *Sumner*, 537, it was held, that an attorney to whom a demand was sent for collection might release an attachment of property and assent to take a dividend, on an assignment, and bind his client in thus doing. This decision is sanctioned by Chancellor *Kent*. 2 *Com.* 620, *note*. The case of *Union Bank* v. *Geary*, 5 *Peters*, 99, is precisely in point. It was there held, that the attorney of a corporation had power to discharge an indorser of a note, and for no other object than thereby to obtain judgment a little sooner. The admission of the attorney of record that a verdict should be returned against his client was held to be binding. 2 *Stark. on Ev. (Last Ed. in 2 Vols.)* 84. A confession of judgment by an attorney, acting without authority, is binding on the party, though the attorney would be subject to an action for damages. *Denton* v. *Noyes*, 6 *Johns. R.* 296; *Jackson* v. *Steward*, *ibid.* 34. The case, *Gaillard* v. *Smart*, 6 *Cowen*, 385, cited for the defendant, is in favor of the plaintiffs. There the attorney of the plaintiff agreed to become nonsuit, and afterwards attempted to retract and proceed to trial, on the ground that it could not bind his client. The Court ordered a discontinuance to be entered. The case mainly relied on for the defendant, *Murray* v. *House*, 11 *Johns. R.* 464, turns wholly on the fact, that the person acting as attorney in that instance was not the attorney of record. It was held, that under such circumstances he could not discharge the interest which a witness had in the suit, implying that the attorney of record had the power. He had not seen the case cited from *Bailey*, but contended, that all the others cited had no bearing on the question.

But the testimony of *Mr. Emery* was wholly immaterial. *Cutter*, one of the defendant's witnesses, had no communication with the *Bank* or its officers. The other two called by the defendant deny that the note was ever paid, and they are the persons, who knew best whether it was or not. If *Emery's* testimony is thrown out of the case, it stands precisely as it does with it in.

He contended, that none of the instructions requested should have been given. All the law pertinent to the case had already been fully stated to the jury; and a party has no right to require the Judge to split hairs with him, or to give laws to the jury pertinent only to facts not in the case. He commented upon each one of them, and briefly contended, that they either were given in substance, or were properly withheld, independent of the general instructions.

The opinion of the Court was by

WESTON C. J. — *Moses Emery*, a witness, introduced by the plaintiffs, was undoubtedly interested in the event of the suit. He was liable as indorser of the note; and his interest is conceded by the plaintiffs' counsel. Being objected to, he was not legally admissible, unless his interest was removed. And in our opinion this has not been done. It does not appear, that *Mr. Shepley*, the plaintiffs' attorney in this suit, had any other authority from them, except what resulted from his being employed by them in this cause. That could not give him the right to release any other collateral security. It would have the effect to put the rights and interests of clients unnecessarily into the power of their attorneys. It cannot be regarded as an authority incident to their employment or retainer. No case directly in support of it has been cited, but several have been, which bear against it.

It may be questionable however, whether the plaintiffs' case required the testimony of the witness, *Emery*, and whether there is not enough to sustain the verdict without it. The note adduced at the trial, being evidence of the assumpsit declared on, the burthen of proof is upon the defendant to show it paid or discharged. Actual payment in money is not pretended; but it is insisted that the note has been paid, either by the note signed by *Pratt* and *Emery*, or by that of which *Cutter* became the guarantor. If either of these notes was received by the plaintiffs in payment, it would have that effect, and not otherwise. There is no testimony to establish this fact, except what results from the books of the bank, and the actual receipt of the notes. The state of the books was fully explained by the cashier, and the jury have passed upon that part of the testimony. Both the cashier and *King*, the Pres-

ident of the Bank, testify, that this note has not been paid, and that the other notes were not received in payment, but as additional security. The implication, arising from the receipt of these notes, is thus done away by this positive testimony. No witness testifies, that either was received by the Bank in payment, whatever might have been the understanding between *Emery* and *Cutter*, or between *Emery* and the defendant. This fact, being directly disproved by the positive testimony of two witnesses, who were the organs of the Bank, and in a condition to know, and who are not contradicted, we have hesitated whether the verdict ought to be set aside, because a third witness to the same effect may have been incompetent. The plaintiffs had a right to claim and to hold, as much collateral security as they could get, provided they did nothing, under color of this right, to injure other creditors.

The second instruction requested, is virtually involved in others, which were given. If the Bank held the note unpaid and uncancelled, which the jury must be understood to have found, under the first and third instruction requested, they could not be mere nominal holders, which is the hypothesis assumed in the second. If the plaintiffs took the *Cutter* note as collateral security, they might hold it as operative and binding, until the principal debt was paid, without thereby discharging the note they held for that debt. Both are binding as security, until the debt secured is paid; and the fourth requested instruction was therefore properly withheld. If the plaintiffs have neither made *Emery* their agent, nor adopted his acts, which the jury have negatived, any defence which might exist against *Emery*, could not conclude the Bank, so that there was no legal foundation for the fifth requested instruction.

Upon consideration, however, we cannot take it upon ourselves to say, in a question of fact submitted to the jury, that they could and ought to come to the same result, independent of the objectionable testimony. It covered the whole ground of inquiry, was given at much length, and was material in its bearing. As the interest of the witness was not legally removed, the verdict must be set aside, and a new trial granted.

JOHN M. DAVIS *vs.* JOSEPH EMERSON.

Where judgment has been recovered against an insolvent principal and his two sureties, and has been paid by one of them, he may recover of his co-surety one half of the costs as well as of the debt.

ASSUMPSIT for money paid, laid out and expended. The plaintiff and defendant had been sureties for one *Chadbourne*, and a suit had been brought against them, and judgment obtained against the three. This execution had been paid by the plaintiff, *Chadbourne* being insolvent, and he now claimed to recover one half the amount of execution, debt and costs. The defendant objected to the allowance of any part of the costs. EMERY J. instructed the jury, that the plaintiff had a right to contribution from the defendant for the costs so paid by him, as well as for the debt. The verdict was for the plaintiff and included one half the costs of suit. To this instruction of the Judge the defendant excepted.

N. D. Appleton, for the defendant.

Clifford, for the plaintiff, cited *Henderson* v. *McDuffie*, 5 *N. H. Rep.* 39; 8 *T. R.* 186; 11 *Johns. R.* 576; 8 *East*, 225; 2 *T. R.* 282.

The opinion of the Court was by

WESTON C. J. — A judgment was recovered against the plaintiff and the defendant, for which both were jointly and equally liable. The failure to pay, which occasioned the costs, was imputable to the defendant, as much as to the plaintiff. The plaintiff paid the execution, including the costs. As the defendant was liable for half the execution, to that extent, the plaintiff paid money for his use and benefit. The costs cannot be distinguished from the debt. Every equitable principle, which entitles the plaintiff to contribution for the one applies equally to the other.

Judgment on the verdict.

Oliver H. Emery *vs.* Moses N. Twombly.

Where the subscribing witnesses to an instrument *reside without the limits of the State*, although within thirty miles of the place of trial, it is not necessary to produce their testimony to prove the instrument.

This was a writ of entry. To make out his title, the demandant offered a deed of the land demanded, and introduced a witness who testified, that the subscribing witnesses to the deed resided in *Somersworth*, in the State of *New-Hampshire*, near the line of *Maine*, and within thirty miles of the place of trial, and were frequently within the county of *York*; that he was well acquainted with the handwriting of the subscribing witnesses and of the grantor, having seen them write, and believed the signatures to the deed to have been made by them respectively. This testimony was objected to by the tenant, but admitted by Emery J. presiding. The deed was acknowledged and recorded, and was produced by the demandant, but there was no testimony introduced to show its delivery. It was objected that a delivery of the deed could be only proved by the subscribing witnesses. This objection was overruled. The verdict was for the demandant, and the tenant filed exceptions.

N. D. Appleton and *Jordan*, for the tenant, contended, that there was no sufficient cause for dispensing with the testimony of the subscribing witnesses. By reasonable diligence it might have been had. Their depositions might have been taken, or they might have been summoned to attend Court, when within the State. They were necessary to prove the delivery. *Whittemore* v. *Brooks*, 1 *Greenl.* 57, and cases there cited; 5 *Cranch*, 13; 4 *Johns. R.* 461; 7 *T. R.* 265; *Maynard* v. *Maynard*, 10 *Mass. R.* 456.

N. Wells argued, that due diligence to procure the testimony of subscribing witnesses was only necessary when the witnesses were within the State. Where the witnesses reside without the limits of the State, the handwriting may be proved. It is immaterial whether the witness is one mile beyond the line, or one thousand. It is enough, that they are out of the jurisdiction. *Dudley* v. *Sumner*, 5 *Mass. R.* 462; *Homer* v. *Wallis*, 11 *Mass. R.* 309;

Russell v. *Coffin*, 8 *Pick.* 143; *Whitaker* v. *Salisbury*, 15 *Pick.* 534; *Whittemore* v. *Brooks*, 1 *Greenl.* 57; *Hewes* v. *Wiswell*, 8 *Greenl.* 94; *Montgomery* v. *Dorion*, 7 *N. H. Rep.* 475; 11 *Johns. R.* 64; 3 *Carr. & P.* 555; 1 *Moody & M.* 176; 7 *T. R.* 265; 1 *Phil. Ev.* 362; 1 *Stark. Ev.* 327; 12 *Johns. R.* 188.

Possession and production of the deed is sufficient evidence of a delivery. *Whitaker* v. *Salisbury*, before cited.

By the Court. — The authorities cited for the plaintiff, establish the point, that where the subscribing witnesses to an instrument are out of the jurisdiction of the Court, their testimony may be dispensed with. Such being the fact here, the evidence adduced by the plaintiff was legally admissible.

Judgment on the verdict.

John Gowen *vs.* Charles R. P. Wentworth.

If a negotiable note has been indorsed and transferred, *bona fide*, before its maturity, as collateral security for a demand short of its nominal value, payment afterwards by the maker to the payee cannot be given in evidence in an action thereon against the maker by the indorsee to reduce the amount of the judgment to the sum then actually due to him.

Assumpsit on a note from the defendant to *Ansel Gerrish* for $1500, payable in one year, and indorsed in blank to the plaintiff, *June* 24, 1835, as collateral security to indemnify him as surety for *Gerrish* to the *York Bank*. After the note was proved and read to the jury, the defendant proved by the Cashier of the *York Bank* that the note to that *Bank* had been paid, and that *Gowen* was then under no liability to the *Bank* for *Gerrish*, and that it appeared that *Gowen* had paid to the *Bank* as surety for *Gerrish*, *May* 1, 1837, $202,97, and no more. The defendant then proved, and offered in evidence, objection having been made thereto by the plaintiff, and having been overruled by Emery J. before whom the trial took place, a receipt from *Gerrish* to the defendant dated *August* 17, 1836, wherein he acknowledged that he had received of the defendant $1250, and all the interest due, to be in-

dorsed on the note. The witness who proved the receipt, on cross examination, stated that the receipt was given at *Gerrish's* house, but nothing was paid by the defendant therefor. He also introduced, with like objection made, a note from *Gerrish* to him, dated the same 17th of *August*, 1836, for $250. The plaintiff then offered to prove and did prove, although the defendant objected thereto, that after the indorsement of the note to him, he became surety for *Gerrish* to the *South Berwick Bank*, about *Aug.* 1835, for $500, and also to the *Rochester Bank*, about *September*, 1836, for the sum of $1000, neither of which sums have yet been paid. The plaintiff proved, that in a conversation had in *April*, 1837, *Gowen* said to *Wentworth*, "you know I told you I had the note, when I sold you my potash and store;" and *Wentworth* replied, "I don't care, I have a receipt." The sale of the potash and store took place *Oct.* 10, 1835.

The counsel for the defendant contended, that the plaintiff ought to recover in this suit only the sum of 202,97, and interest thereon; but the Judge ruled, that the plaintiff was entitled to recover the whole amount of the note. The defendant then consented to a default, which was to be taken off if the rulings of the Judge against him were erroneous.

N. D. Appleton, for the defendant, argued that the plaintiff ought not to recover but enough to secure him for the amount paid to the *Bank*. The note was indorsed to him for that specific purpose, and he can retain for that object alone. The surplus belonged to *Gerrish* and he had a right to release it to the defendant at any time. The plaintiff has paid nothing as surety for *Gerrish* beyond that amount, and if the whole amount of the note was now received by the plaintiff, he would be the trustee of *Gerrish* for the whole balance. There is no difficulty in rendering judgment for the amount justly due, and it avoids circuity of action. *Story on Bailments*, § 304; *Jarvis* v. *Rogers*, 15 *Mass. R.* 389; 4 *Burr.* 2214; 6 *T. R.* 258; 7 *East*, 224; *Lane* v. *Padelford*, 14 *Maine Rep.* 94; *Towne* v. *Jaquith*, 6 *Mass. R.* 46; *Stevens* v. *McIntire*, 14 *Maine R.* 14.

J. Shepley and *J. T. Paine*, for the plaintiff. The note was indorsed for a sufficient consideration before it fell due, and thereby the entire note became the property of the plaintiff, subject only to

be defeated on indemnifying the plaintiff. The payee had no more right to discharge a portion of the note, than to discharge the whole. The note belonged to another and not to him. Want of consideration could not be set up as a defence to the note or to any part of it, and much less can a voluntary payment after notice, have that effect. *Smith* v. *Hiscock*, 14 *Maine R.* 449; *Bayley on Bills, (Ph. & S. Ed.)* 551, *note* 19; *ib.* 466, *and note* 45; *ib.* 545; *Batchellor* v. *Priest*, 12 *Pick.* 399; *Pomeroy* v. *Smith*, 17 *Pick.* 86. The receipt is but a mere acknowledgment or confession of payment by *Gerrish*, and is inadmissible to prove payment after the note has been negotiated. *Hackett* v. *Martin*, 8 *Greenl.* 77. The receipt is wholly invalid, not being under seal, as the case shows nothing was paid. The note introduced by the defendant is subject to the same objections, and to another sufficient one, that it was not filed in set-off. After the plaintiff had proved the note to have been indorsed to him before it was due, the other testimony offered by him was immaterial. It was however rightly admitted. Evidence that nothing was paid, and that *Gerrish* was insolvent, was proper for the consideration of the jury, to show a fraud upon the plaintiff. The testimony, that the plaintiff afterwards became a surety for *Gerrish* to others, was admissible, to enable the jury to draw the inference, that *Gerrish* agreed that the note should be retained for security generally, and because the law would allow him to retain the note to indemnify him against all loss by becoming surety while the note was in his hands. *Story on Bailments*, § 321.

The opinion of the Court was by

Weston C. J. — The note in question, having been negotiated to the plaintiff, *bona fide*, before its maturity, as collateral security, he was the holder for value, and as such entitled to be protected from any defence, which might have been available against the indorser, the original payee. *Smith* v. *Hiscock*, 14 *Maine R.* 449. It was not necessary that the defendant, the maker, should have had notice of the transfer. He knew that the note might be negotiated, and he should have taken care to pay only to the holder. There is proof however in the case, tending to show, that the de-

fendant had notice of the fact, that the plaintiff had the note, prior to the date of the receipt, upon which he relies.

Having reference only to the liability, as collateral security for which the note was originally negotiated to the plaintiff, so long as that continued, neither the payee nor the maker had a right to do any thing to impair the value of the pledge. The payee was not entitled to receive any payments, until he reclaimed the note. And the maker was not justified in making payment to him. Notwithstanding the note, pledged as collateral security, was of greater value than the amount of the liability first assumed, the plaintiff has a right to recover and receive in his own name the amount of the note. *Story on Bailments,* § 321. And he is not limited to the sum, for which it was pledged. *Pomeroy* v. *Smith,* 17 *Pick.* 86.

The payment, real or pretended, by the maker to the payee, was in contravention of the rights of the plaintiff, and cannot therefore be received in defence, the amount paid by the plaintiff upon his original liability, not having yet been refunded to him. Until that is done, he has a right to hold the pledge unimpaired. And this sufficiently sustains the ruling of the presiding Judge. It is unnecessary therefore to decide, whether the plaintiff is not entitled to hold the pledge also, on account of further liabilities assumed. *Story* says, § 304, of the work before cited, other debts may be attached to the pledge, if it has been so agreed, expressly or tacitly. He adds, that the mere existence of prior debts, will not justify such a presumption. If the pledge when made, did not embrace such prior debts, it may well be presumed, that they were intended to be excluded. But subsequent debts or liabilities stand upon a different principle. The credit given or liability assumed, may well be understood to have been based upon the security of the pledge. If the plaintiff would not assume the first liability, without security, it is fair to presume, that in such as he subsequently took upon himself, he depended on the same security, still remaining in his hands.

Judgment for plaintiff.

JOSEPH WENTWORTH *vs.* GEORGE YOUNG.

By the *stat.* of 1830, *c.* 478, where the debtor has three swine, of which but one exceeds the weight of one hundred pounds, the one last mentioned "is exempted from attachment, execution, and distress."

The necessity of making an election by the debtor of which he will retain, exists only where he has two swine, each exceeding the weight of one hundred pounds.

TRESPASS against the defendant, a deputy-sheriff, for taking and carrying away one swine, the property of the plaintiff, and converting the same to his own use. The case was submitted on a statement of facts, from which it appeared, that the plaintiff, at the time of the alleged taking, was the owner of three swine, and only three; that two of said swine weighed less than one hundred pounds each, and that the other, the one taken by the defendant, a deputy-sheriff, on an execution against the plaintiff, was one which had been wintered over, and weighed between two and three hundred pounds, and was taken without the consent of the plaintiff; that he was from home at the time of the taking, and had not an opportunity of making an election which of the swine he claimed to have exempted from attachment and execution; and that the swine taken, and for the taking of which this action was brought, was of the value of twenty-five dollars. The Court were to render such judgment as should be consonant to law.

The arguments are noticed in the opinion of the Court.

D. Goodenow & N. E. Paine for the plaintiff.

J. T. Paine for the defendant.

The opinion of the Court was by

EMERY J. — This action comes before us on an agreed statement of facts, and we are to render thereon such judgment as in law ought to be rendered on that statement. The question intended to be raised is on the *statute ch.* 478, passed *March* 17th 1830. By that statute, "two swine, one of which shall not exceed the weight of one hundred pounds, belonging to any debtor in this State, shall be exempt from attachment, execution and distress; and when any debtor shall own two swine each exceeding the weight

of one hundred pounds, such debtor, by himself or agent, may elect either of the swine to be exempt as aforesaid."

It is contended by the plaintiff, "that this statute should be so construed as to suppress the mischief of detaching the means of supporting life from the poor, and advancing the remedy for their security; that though the plaintiff was not to have two fat hogs, yet he had a right to elect in this case, and that as he was absent from home at the time of taking, that there was an implied election of the larger hog, and it was incumbent on the officer not to take it."

The defendant replies, that "there should be some sympathy for poor creditors as well as for poor debtors, because he suggests that the exemptions now in favor of the poor debtor, have been advancing by legislation till the exemption may leave the debtor about 1000 dollars, with which his poorer creditor cannot intermeddle. That here the officer was in the due exercise of his duty, and in this case the plaintiff could not elect." It has been said that "the policy of our law between creditor and debtor is, as long as the debtor lives, to give preference to the most cautious and vigilant creditor. To effectuate this principle, the system of attachment by an original process has been adopted. *Grovesnor, Adm'r* v. *Gold*, 9 *Mass. R.* 209." In a question what tools, necessary for ones trade and occupation were exempted from attachment, under the *Mass. stat.* 1805, *ch.* 100, it was held, "that types, printing press, and cases commonly used in the exercise of the art of printing, were considered *not to be exempted*, the special verdict *not finding them to be necessary.* The court said that this statute, *as it is in derogation of the common rights of creditors to secure their debts out of the property of their debtors, ought to have a strict construction;* according to the true intent and meaning of the legislature, if that can be ascertained. And the Chief Justice observed, that by the laws of *Massachusetts* then existing, in 1816, the imprisonment of a debtor was merely nominal. He might sleep in his own bed, eat at his own table, and carry on business at his usual place, notwithstanding he was legally in jail. If to these privileges be added the right of securing a fortune, under the name of tools of a trade, the situation of the debtor will be often preferable to that of a creditor. *Buckingham* v. *Billings*, 13 *Mass. R.* 82."

Two years after this decision, a question was raised in the same court upon another portion of the same statute, whether "a swine which had been butchered, but not cut up, the only one the debtor owned, was exempt from attachment and execution. It was insisted that pork, when killed and dressed, is no longer a swine." This strict construction was not adopted by the court, "as it would be to convert the intended benefit into an injury; for the swine would be protected until it became fit for food; and then be at the mercy of the creditor." "As to cases of difficulty, such as the debtor having one swine alive, another just killed, and perhaps a third in his barrel, when these should arise, the Chief Justice remarked, they would be determined according to their merits, and care he hoped would be taken *that frauds may not be successfully practised* under a statute designed for benevolent purposes." *Gibson* v. *Jenney*, 15 *Mass. R.* 205.

From this historical statement of *the rigid right resulting from the law of attachment*, as it was in our parent state before 1805, by which, "*for months or years a pining destitution might be brought upon a household*" by the grasp of a creditor, if we turn to the progressive amelioration of this law, by legislative enactment, and by judicial exposition, before our separation from *Massachusetts;* we certainly *cannot condemn the bolder steps in Maine, in the scheme of exemption.* In legislatures elected by almost universal suffrage, we ought not to be surprized that the wants of all the members of the body politic should come, more immediately, under consideration, and may we not conclude that those additional exemptions, which have been *here* introduced, are adopted upon the wise theory of diminishing the ills of life, by endeavors to furnish all with the means of subsistence? And is there not good ground to expect, as a consequence, that a greater stimulus to industry and economy would be created, from the consciousness that *the objects of the owner's care and cultivation would be protected*, the means of comfort be generally extended, fewer temptations excited to obtain credit, or to give it, *a pride of character for justice and punctuality roused and disseminated, the cause of temperance promoted*, and a universal satisfaction with our laws and government pervade the community?

For the regulation of an enlightened, moral and religious people, the devising of such legal provisions would naturally seem to evince an enlarged, wisely directing, and benevolent intelligence for the advancement of the best interests of society. At any rate, it would at least seem intended to accomplish a great moral reformation. We do not hesitate to declare our belief, that we can trace in this course of legislation, a beneficent combination of such arrangements as must tend to the general happiness of the citizens, and to lessen the necessity of resort to the benefits of the laws for the support of the poor.

In the present case, the debtor was the owner of only three swine. Two of them weighed less than one hundred pounds each. The other, which was taken, had been wintered over, and weighed between two and three hundred pounds. The plaintiff was absent from home at the time of the taking, not having an opportunity of making an election, which of said swine he claimed to have exempted from attachment and execution.

The right of the plaintiff to the exemption of this swine, which was taken, is clear and explicit, by the terms of the statute. It was the only hog exceeding the weight of one hundred pounds, which he then owned. *The law rendered the possession of this animal sacred in his favor*, unless he, understandingly, waived his claim, and voluntarily delivered the swine to be subjected to the execution. *The election of the debtor is called for, only, when he owns two swine, each exceeding the weight of one hundred pounds.*

We consider therefore that agreeably to the principles of law applicable to this subject our judgment should be, as it is, that the defendant is guilty, and that the plaintiff recover against him twenty-five dollars damages and costs.

JEREMIAH GOODWIN *vs.* SELDEN HUNTINGTON *& als.*

If a debtor be arrested on mesne process, and give bond to his creditor to procure his release, pursuant to the provisions of the *stat.* 1835, *c.* 195, for the relief of poor debtors, such bond is subject to chancery, and upon breach thereof, execution is to issue for such amount only as is found to have been actually sustained, according to equity and good conscience; the amount of the judgment in the process on which the arrest is made, being but *prima facie* evidence of the amount of damages.

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

The plaintiff commenced an action against *Huntington* for the *May Term* of the C. C. Pleas, 1837, in this county, and his body was arrested upon the writ, and he gave the bond declared on, dated *March* 15, 1837, to procure his release from arrest. The bond was in the form required by the poor debtor acts of 1835 and 1836. At the *October Term*, 1837, the plaintiff recovered judgment against *Huntington* for the sum of $4133,75, damage, and 10,39, costs of suit. At the trial the defendants attempted to show that the condition of the bond had been performed, but the ruling of the Judge was that the facts did not show a performance. They then offered evidence tending to prove that at the time the bond was given, and ever since, *Huntington* was wholly insolvent and unable to pay his debts.

The plaintiff contended, that the measure of damages was the amount of his judgment against *Huntington.* The defendants contended, that if there was a breach of the condition of the bond, the plaintiff was entitled to recover only the damages he had sustained, to be ascertained by the jury.

The Judge ruled, that the judgment was not conclusively the measure of damages; and that the burthen of proof was upon the plaintiff in the first instance, to show the amount of his damages; and that the judgment was *prima facie* evidence of his damages. But that the defendants had a right to show that the actual damages were less; and that the jury were not bound to return their verdict for any more damages than it should appear that the plaintiff had actually sustained. The jury returned a verdict for the plaintiff, and assessed the damages at one dollar. The plaintiff filed exceptions to the instructions.

A. G. Goodwin, for the plaintiff, argued, that the true measure of damages was the amount of the judgment in favor of the plaintiff in the suit in which the bond was taken. The bond was taken strictly according to the statute, and in such case, the damages are never reduced below the debt, costs, and interest. He cited *Stat.* 1784, *c.* 41, § 9; *Clapp* v. *Cofran*, 7 *Mass. R.* 98; *Freeman* v. *Davis*, *ib.* 200; *Burroughs* v. *Lowder*, 8 *Mass. R.* 373; *Call* v. *Hagger*, *ib.* 423; *Smith* v. *Stockbridge*, 9 *Mass. R.* 221; *Whiting* v. *Putnam*, 17 *Mass. R.* 175; *Whitehead* v. *Varnum*, 14 *Pick.* 523; *Stat.* 1824, *c.* 281; *Baker* v. *Haley*, 5 *Greenl.* 240; *Kavanagh* v. *Saunders*, 8 *Greenl.* 422; *Stat.* 1822, *c.* 209, § 4; *Stat.* 1831, *c.* 520; *Stat.* 1835, *c.* 195, § 7; *Stat.* 1836, *c.* 244, § 4; *Cordis* v. *Sager*, 2 *Shepl.* 475. The last case was supposed to be decisive of this, and had not been seen until after the argument had been prepared.

N. D. Appleton, for the defendants, insisted, that the instructions of the Judge were strictly according to law and justice. To show the principles and rules by which the Court should be governed in giving a construction to statutes, he cited *Gore* v. *Brazier*, 3 *Mass. R.* 540; *Richardson* v. *Daggett*, 4 *Mass. R.* 534; *Gibson* v. *Jenney*, 15 *Mass. R.* 205; *Pearce* v. *Atwood*, 13 *Mass. R.* 324; *Butler* v. *Ricker*, 6 *Greenl.* 268. There is a distinction between bonds taken when the body is arrested on mesne process and on execution. In the former, it is subject to chancery, and the creditor is entitled only to the damages actually sustained. *Stat.* 1830, *c.* 463, § 1; *stat.* 1821, *c.* 50; 6 *Dane*, *c.* 196, *art.* 1, § 12; *ib. c.* 176, *art.* 5, § 2, 19; *Winthrop* v. *Dockendorff*, 3 *Greenl.* 156; *Wilson* v. *Gillis*, 3 *Shep.* 55.

The opinion of the Court was prepared by

Weston C. J. — The amount for which judgment should be rendered, and execution issue, upon jail bonds, under the laws of *Massachusetts*, was regulated by statute. So it is also upon bail bonds, in virtue of the act, regulating bail in civil actions. *Stat.* of 1821, *c.* 67. And the *stat.* 1835, *c.* 195, for the relief of poor debtors, § 8, when the debtor gives bond, upon being arrested or imprisoned on execution, provides expressly for what sum judgment shall be rendered and execution shall issue.

The bond in question was taken on mesne process, in virtue of the seventh section of the same statute. It does not provide, upon forfeiture, for what sum the obligors shall be liable to be charged in execution. It is incident to bonds, with penalties, conditioned for the payment of money, or the performance of any other stipulations or agreements, to be subject to chancery, where execution is to issue for what is found to be due, according to equity and good conscience. This is provided for by statute of 1821, *c.* 50.

We are aware of no exception, unless in certain cases, where the law prescribes a special mode of liquidation. Upon the question raised, the section of the statute of 1835, under which this bond was taken, corresponds exactly in principle with the statute of 1831, *c.* 520, § 12, and it has been decided, that a bond taken upon *mesne process*, under the twelfth section of that statute, is subject to chancery. *Wilson* v. *Gillis & al.*, 15 *Maine R.* 55.

Cordis & al. v. *Sager & als.* 14 *Maine R.* 475, cited for the plaintiff, was debt upon a bond, under the 12th section of the *stat.* of 1831. It turned altogether upon other points, there brought into controversy. No evidence was adduced to extenuate the damages sustained, nor was it urged, that they ought to be reduced below the amount of the original judgment against the principal. That was *prima facie* the sum, to which the plaintiffs were there entitled; and it was adjudged accordingly. And so the Judge ruled in the case before us. *Exceptions overruled.*

Job Emery *vs.* Jeremiah Goodwin.

In this State, since the militia act of 1834, the company roll and the record thereof, without the production of the orderly book, are competent and sufficient evidence to prove that the company had mustered, and that a soldier was absent on a given day.

This is a writ of error to reverse a judgment recovered before a Justice of the Peace, in an action brought by *Goodwin* as clerk of a company of militia for the amount of a fine alleged to have been incurred by *Emery* by reason of his absence from the annual company training and inspection on the first day of *May*, 1838.

The errors assigned in addition to the general error, were: —

1. Because the said Justice admitted the testimony of the clerk to prove the mustering of said company, the calling of the roll, and the absence of said *Emery* on said first day of *May*, 1838.

2. Because the said Justice admitted the book of enrolment as evidence of the mustering of said company on said first day of *May*, 1838, and the calling of the roll, and the absence of said *Emery*.

3. Because it did not appear from the orderly book of said company, that said company was mustered on said first day of *May*, or that the roll was called, or that said *Emery* was absent on that day.

4. Because the orderly book aforesaid contained no record of the proceedings of said company on said first day of *May*.

In pursuance of an order from the commanding officer of the company to the clerk to warn the company, he duly warned *Emery* to appear at the usual place of parade at a specified hour on said first day of *May*. This order to the clerk, with his return thereon showing the notice to the original defendant, was duly recorded on the *orderly book* of the company; but there was not upon that book any record, that there was any mustering of the company on the first Tuesday of *May*, 1838, or that the roll was called, or that the defendant was absent, or any entry of record whatever in relation to any thing done on that day. Evidence was introduced by *Goodwin*, which was seasonably objected to by *Emery*, and admitted by the Justice, from which it appeared by the *company roll* used at a training of the company at the time and place mentioned in the order, and by *the record of the roll*, both which were produced duly certified by the clerk of the company, that in the column headed "*Absent*," "the usual straight mark" was set against the names of certain persons, among whom was the defendant, and that in the column headed "*Present*," a similar mark was set against the names of certain other members of the company, among whom were the captain and clerk, and the deficiences of members were noted in the proper column upon the roll and recorded in the record of the roll. The roll was duly corrected on the first Tuesday of *May*, and so certified by the clerk. The clerk of the company was called as a witness, and testified,

that the company met at the time and place appointed on that day, that the roll was duly called, and that *Emery* was absent.

J. Hubbard, for the plaintiff in error. The only question presented in the several errors assigned is, whether the absence of the original defendant was proved by competent and sufficient evidence.

1. The testimony of the clerk was inadmissible to prove the mustering of the company, the calling of the roll, and the absence of *Emery*. He is not made a competent witness to prove his own case by testifying to these facts, by any provisions of the statutes. The design was merely to remove any incompetency by reason of the interest of the clerk, or from his being the party, but not to change or subvert the established rules of evidence nor to substitute evidence, in its nature inferior, for that of a superior kind. The principle, if carried out, would dispense with the necessity of any documentary evidence. *Sawtell* v. *Davis*, 5 *Greenl.* 438; *Tripp* v. *Garey*, 7 *Greenl.* 266. The statute relaxing one of the most beneficial rules of evidence, ought to be construed strictly.

2. The book of enrolment was incompetent evidence to prove the facts for which it was admitted. It does not necessarily appear from any thing thereon, that the company was mustered on the first day of *May*, or that the roll was called; it is only matter of inference. It is not an original record, but a mere copy of the roll used on the field. It is not in its nature, so high a kind of evidence as the orderly book, where the fact of a member's absence is distinctly recorded. It did not prove the fact for which it was admitted. It did not appear from it, that *Emery* was absent on the day specified. *Commonwealth* v. *Pierce*, 15 *Pick.* 170. Were the clerk competent to explain the marks, he did not do it in this case.

3. The orderly book was the best evidence of the fact of the mustering of the company, without which there could not have been any delinquency, and also of the calling of the roll, and absence of the defendant. *Cobb* v. *Lucas*, 15 *Pick.* 1, and 7. The *Militia Statue of* 1834, *c.* 121, § 12, provides, that it shall be the duty of the clerk "to register all orders and proceedings of the company in the orderly book."

Hayes & Cogswell, for *Goodwin*, argued, that the records here were made up by the clerk in the mode required by law, and were the best evidence for the purposes for which they were introduced.

The orderly book is the book on which should be entered the proceedings of the commissioned officers of the company. Here were entered the order from the captain to the clerk, to warn the company to appear at the time and place, and the return thereon, that the order had been obeyed. It is the duty of the *clerk*, to see whether all the members of the company are present, and "to note all delinquencies." His doings are not to be entered on the orderly book, but upon the roll where he is "to note all delinquencies." The roll should be recorded, and it was done, and both the original and the record are produced. The law does not require this to be entered on the orderly book, and it would be useless to do it. The roll does show the meeting of the company, and who met and who did not meet. The blanks furnished by the *Adjutant General*, and used here, have distinct columns for those present, and those absent, and every member of the company was marked, "or noted" one way or the other.

The admission of the testimony of the clerk does not vitiate the proceedings, if the facts in the case were fully made out without his testimony. *Farrar* v. *Merrill*, 1 *Greenl.* 17; *Cobb* v. *Lucas*, 15 *Pick.* 1.

The opinion of the Court was by

Weston C. J. — No question is raised in this case, except as to the competency of the proof before the Justice, that the company was mustered, and the plaintiff in error absent, on the day, when he is alleged to have been delinquent. His counsel insists, that this could be legally proved only by the orderly book.

In *Cobb* v. *Lucas*, 15 *Pick.* 1, *Morton J.* says, that the orderly book is the best evidence of the meeting of the company, and of the absence of the soldier. But the term best, there used, is in reference to the same facts, proved by the testimony of the clerk. Compared with this, the orderly book was the best evidence, and his testimony therefore legally inadmissible. But it is not to be understood from that opinion, that the orderly book is the best evidence absolutely, compared with any and all other evidence. In another case between the same parties, 15 *Pick.* 7, the same Judge says, the orderly book is competent and sufficient evidence of these facts. In the *Commonwealth* v. *Pierce*, 15 *Pick.* 170, a roll of the company, with arbitrary pencil marks, indicating the

absence of members of the company, as explained by the clerk, was held insufficient, because by the law of *Massachusetts*, the clerk was not a competent witness to give such explanation. It is not deducible from these cases, that in *Massachusetts* the roll of a company, or the record of the roll, is not competent evidence, that the company had mustered, and that a soldier was absent on a given day.

But whatever may be the law of *Massachusetts*, we are of opinion, that in this State, the roll and the record of the roll is sufficient and competent evidence of these facts. By the act in relation to the militia, *stat.* of 1834, *c.* 121, § 50, the Adjutant General is authorized to issue blank forms, for the use of the officers, to be uniform throughout the State. In *Sawtell* v. *Davis*, 5 *Greenl.* 438, it was held, that the forms furnished by the Adjutant General, in conformity with law, have the same binding force, as if contained in the act itself.

The statute provides, § 12, that the clerk shall keep a fair and exact roll of the company, which roll he shall annually revise on the first Tuesday of *May*. In the forms furnished by the Adjutant General, there is a column to designate the presence, and another the absence of the officers and soldiers. The roll, being a public document, made in pursuance of law, and following the form prescribed by competent authority, is evidence of the mustering of the company and of the absence of delinquents. The order for the muster of the company is proved by testimony, which is undisputed. The roll shows, as the case finds, "by the usual strait mark," in the proper column, that the captain, clerk and certain of the company did appear, and that the plaintiff in error did not appear. It would seem, that these facts are sufficiently apparent from the roll itself, without explanation. But if explanation is necessary, the clerk is by the *stat.* of 1837, *c.* 276, § 8, made a competent witness, to testify to all or any facts within his knowledge. The course adopted is liable to no objection. It appears to have been usual; and if the clerk has a better knowledge than others of the meaning of his marks, and no higher evidence exists, his testimony is made by law admissible. In the *Commonwealth* v. *Pierce*, the clerk was not a legal witness. In the opinion of the Court, none of the errors are well assigned.

Judgment affirmed.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF OXFORD, MAY TERM, 1840.

DANIEL FLETCHER *vs. Inhabitants of* BUCKFIELD.

The *statute of* 1838, *c.* 311, entitled "An additional act concerning the public money apportioned to the State of *Maine*," empowers the respective towns to distribute the amount of the money received under the act of 1837, *c.* 265, among the inhabitants of the town, *per capita*, whatever appropriation or disposition thereof had been previously made by the town under the act of 1837.

ASSUMPSIT on a town order of which the following is a copy.

"No. 2. *Buckfield, May* 21, 1838. To *Jonas Spaulding*, Treasurer, or his successor, Pay *Daniel Fletcher* nineteen dollars and eighty cents, it being his proportion of the surplus money, proportioned to said town by the State of *Maine*, payable at the Treasurer's office in said *Buckfield*.

"*Noah Prince*, } Selectmen of
"$19,80 "*Henry Decoster*, } *Buckfield*."

On the same day the order was presented to the treasurer of the town for acceptance and payment, and he refused to accept or to pay the same. The facts were agreed by the parties, and from them it appears, that the town voted to purchase a farm for the support of the poor and to pay therefor out of the money received from the State, called surplus revenue money; and that a farm was purchased by the town for the sum of 2888,70, and paid for with

that money, and the residue thereof, 347,31, was expended by the Selectmen without vote of the town for such purposes as the town has a legal right to raise money to discharge, by taxation. This was prior to 1838. On the thirtieth day of *April*, 1838, at a legal meeting of the town, called by a warrant wherein were articles "to see if the town will vote to distribute the whole of the town's share of the surplus revenue money, so called, all that was received of the State, agreeably to the census as taken by the Selectmen of said *Buckfield, March* 1, 1837; to see if the town will authorize the Selectmen to draw orders on the treasurer of said town for each person respectively entitled to a share of said surplus money according to said census;" it was "voted to distribute the whole of the surplus revenue money;" voted to instruct the Selectmen to grant to each individual, orders on the treasurer for their share of the surplus money agreeable to the census of *March*, 1837." Previously to passing this vote, on the 24th of *March*, 1838, the town at a legal meeting, one article in the warrant being "to see if the town will vote to distribute *per capita* the surplus revenue which they received from the State of *Maine*," "voted to distribute the surplus revenue *per capita* which we received from the State."

The case was argued in writing by *L. Whitman*, for the plaintiff, and by *S. F. Brown*, for the defendants.

For the plaintiff it was said, after stating the facts, that payment was resisted by the defendants on the ground, that they had, under the act of 1837, *c.* 265, appropriated for town purposes all their proportion of the money previously to the passing of the act of 1838, *c.* 311.

This cannot prevent the town from disposing of the money in the manner provided in the *statute* of 1838, distributing the same among the inhabitants of the town according to numbers. This money, when received by the defendants, was received as a deposit merely. The faith of the State was pledged to the *United States* for the safe keeping and repayment, and the town was pledged to pay the amount received into the treasury of the State, whenever required so to do, to meet the demand of the Secretary of the Treasury upon the State. The towns under this law had a right to use the money in the manner pointed out in the statute,

but they had no power to change its character. They could by no vote of theirs make the money their own. It was not a bequest but a loan; and the town might, under this law, use the money, but they must account with the Legislature for it, whenever lawfully required so to do. Before the law of 1838, the right of property in the surplus revenue, as between the towns and the State, remained with the State, the right of safe keeping and use only having been yielded to the towns.

Under the act of 1838 the towns are exonerated from all liability imposed on them by the act of 1837, and are authorized to distribute the same *per capita*. The character by this last act is changed from a loan or deposit to a donation, and the towns have full authority to dispose of it finally by dividing the money among the inhabitants according to numbers.

The act of 1838 is not unconstitutional, as impairing the obligation of contracts. It cannot be a violation of contract on the part of the State to relinquish a clear right of property in the money, and to authorize the other party to dispose of it. The money, under the first act, did not become the property of the town, and the State might recal it at any time, and if so, might authorize the town to dispose of it in any mode whatever.

For the defendants it was contended, that they are not holden on the order, having been drawn on a particular fund which the plaintiff, at the time, well knew had no existence. If the transaction supposed any indebtedness, it was in the fund and not in the drawers. The order is therefore void, as to any obligation on the drawers, no consideration having passed from the plaintiff to the defendants.

By the *stat.* 1837, *c.* 265, towns are authorized to appropriate their proportion of the surplus revenue or any portion thereof, to the same purposes that they have a right to appropriate moneys accruing in their treasuries, by taxation. With this legal authority the defendants appropriated their portion of that revenue to purposes recognized in that statute. The town had a right by law to raise money by taxation for the purpose of purchasing a farm for the support of the poor. The money had been appropriated before the act of 1838, and the town had no power under that act to appropriate it anew. The appropriation to purchase a poor

farm is as much a disposition of the money, as the division of it *per capita*. If one legal disposal be no bar to another, and the people can be taxed to bring money into the treasury of the town to be thus divided, the same may be repeated, and one distribution *per capita* may be followed by another, and another, till the majority are surfeited, and the minority stript of all their property. The defendants insist that the power given by the law of 1838 to distribute *per capita*, is limited to cases where the money remained on hand or had been loaned out, and does not authorize the raising of money to distribute *per capita*, where the surplus money had been before appropriated for the purposes allowed by the act of 1837.

If this be not the true construction of the act of 1838, then it is unconstitutional and void. It is both *ex post facto* in its operation, and impairs the obligation of contracts. The town received and appropriated the money under the law of 1837, and paid it away. But for the law of 1838 the money was legally disposed of, and no power, but one acting retrospectively, can reclaim it for a new appropriation. All money legally expended under the law of 1837 lost the character forever of "surplus revenue" money. To resume the power over it, brands the act with that character which the constitution most emphatically condemns.

By the Court. — We are of opinion that according to the agreement of the parties, a default should be entered, and that judgment be rendered for the plaintiff for the whole amount sued for, and refer for the reasons, which have led to this conclusion, to the opinion of the court in the case of *Davis* v. *the Inhabitants of Bath*, in the county of *Lincoln*, in which a similar question was presented.

WILLIAM L. HOWE *vs.* CUSHING MITCHELL *& al.*

The defendants agreed to sell to the plaintiff a township of land at a certain price for the timber thereon, to be determined by a person designated for that purpose, and the plaintiff agreed to pay therefor one fourth part in current bank bills on the delivery of the deed, and the remainder in notes payable at different times secured by a mortgage of the land; and it was agreed, that ten days next after the price should be ascertained, should be allowed to the defendants to procure a deed of the land, "to be left with the cashier of the *Canal Bank* in *Portland*, with whom also the plaintiff is to leave the money for the first payment and notes for the remainder, within ten days, till the bargain can be fully completed;" and that on failure of performance, the party delinquent should pay to the other a certain sum; the plaintiff did not tender the money or notes or deposit the same in the Bank, and the defendant did not tender or deposit the deed, or procure the same; *it was held*, that no action could be maintained.

ASSUMPSIT on a contract signed by the defendants, on the first part, and by the plaintiff, on the second part, dated *Dec.* 18, 1835, wherein it was agreed, that the defendants should sell to the plaintiff a township of land in the county of *Oxford*, "on the following terms and conditions, namely, at the rate of one dollar per thousand feet, board measure, for all the merchantable pine timber now standing on said township suitable for making boards, one fourth part of the purchase money to be paid in current bank bills on the delivery of the deed, and the remainder in equal instalments of one, two and three years, with interest annually from this date, and payment secured by mortgage on the premises. And it is further agreed, that J. A. shall explore said township, and estimate the quantity of pine timber thereon standing of the quality aforesaid, according to the best of his judgment, and make report accordingly in writing within ninety days from this date at most, and as much sooner as practicable, and ten days thereafter shall be allowed the parties of the first part to go to *Oxford* and procure a warranty deed of the land executed and to be left with the cashier of the *Canal Bank* in *Portland*, with whom also the said *Howe* is to leave the money for the first payment, and notes for the remainder, within ten days, till the bargain can be fully completed. And it is also further agreed, that the expenses of exploring shall be equally paid by and between the parties, and also, that if either party shall neglect or refuse to fulfil and perform his part of the

contract, such party so refusing or neglecting, shall pay to the other party the sum of two thousand dollars, and all expenses of exploring, and no more." The plaintiff, in his declaration, claimed the two thousand dollars, and the expenses incurred by him in exploring the township.

At the trial before WESTON C. J. it was shown, that J. A. explored the township, and *Jan.* 22, 1836, made his report in writing of the quantity of timber thereon, and on the same day gave copies thereof to the parties. On the 10th of *Feb.* 1836, the plaintiff in conversation with *S. L. Mitchell*, one of the defendants, in *Boston*, declared his readiness to fulfil the contract on his part, and called upon *Mitchell* for a fulfilment on the part of the defendants, but the plaintiff made no tender of money or securities, nor did he leave either at any time with the cashier of the *Canal Bank*. The defendants had taken no steps towards a fulfilment on their part.

It was insisted by the counsel for the defendants, that proof that the plaintiff had deposited the money and securities with the cashier of the Bank was indispensable, as a condition precedent, to the maintenance of the action. It was then agreed, that the case should be taken from the jury, and submitted to the opinion of the Court; and that if the Court should be of opinion that such proof was essential to the maintenance of the action, the plaintiff should become nonsuit.

D. Goodenow and *Eastman* argued for the plaintiff, and contended, that as the law was well settled, that where one party has disqualified himself from performing, that performance by the other party is unnecessary; so here by the terms of the contract the defendants were to proceed and do certain things to enable them to perform, and the plaintiff cannot be held to be in fault until the defendants were ready to convey. The defendants did not go to *Oxford* and obtain the title, and the plaintiff was under no obligation to pay his money, or part with his securities until he could have a title to the land. By the true construction of the contract the defendants were to have ten days next after notice of the completion of the exploration to obtain the deed; and then the plaintiff was to have ten days more to examine the title, and deposit the money

and securities. The defendants were to move first in performance, and therefore the stipulations are independent of each other. The law does not require the deposit of the money and securities in the Bank merely to take them back again. The defendants could not take them, as they never had the title to convey. They cited *Newcomb* v. *Bracket*, 16 *Mass. R.* 161; *Brown* v. *Gammon*, 14 *Maine Rep.* 276; *Rawson* v. *Johnson*, 1 *East*, 203; *Tinney* v. *Ashley*, 15 *Pick.* 546.

S. Fessenden and *L. Whitman* argued for the defendants, and insisted, that the stipulations of the parties were dependant, and therefore neither can maintain an action against the other, without showing performance on his part. It is urged, that the plaintiff is under no necessity of parting with his money without having the land. The argument might be offered with greater justice by the defendants, that they were not to part with their land, without their money, their securities and their mortgage. It is enough, that the action cannot be maintained, as the case shows, that the plaintiff did not perform on his part. They cited *Goodison* v. *Nunn*, 4 *T. R.* 761; *Chitty on Pl.* 309, 325; 1 *Saund.* 320, *note*; 2 *Saund.* 102; *ib.* 352, *note* 3; *Johnson* v. *Reed*, 9 *Mass. R.* 78; *Tileston* v. *Newell*, 13 *Mass. R.* 406; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Howland* v. *Leach*, 11 *Pick.* 151; *Kane* v. *Hood*, 13 *Pick.* 281; *Hunt* v. *Livermore*, 5 *Mass. R.* 395; *Couch* v. *Ingersoll*, 2 *Pick.* 291; *Dana* v. *King*, *ib.* 155; *Porter* v. *Noyes*, 2 *Greenl.* 22; *Brown* v. *Gammon*, 14 *Maine Rep.* 276; *Howe* v. *Huntington*, 15 *Maine Rep.* 350. The first and last cases cited were relied on as decisive of this action.

The opinion of the Court was drawn up by

SHEPLEY J. — There can be no doubt of the intention of the parties, that the title was to be conveyed, and payment made and security given at the same time. For the contract provides, that one fourth of the purchase money should be paid on delivery of the deed, and that security should be made for the remainder by notes and a mortgage of the premises. The provision, that the deed, money, and notes should be deposited in the *Canal Bank* in *Portland*, does not change the rights or duties of the parties in this respect, for they would remain there subject to the control of the

party making the deposit, until a delivery should take place. There is no provision for a deposit of a mortgage by the plaintiff, which would clearly shew, if it were not otherwise apparent, that other acts must take place after the deposit before the title could pass or the contract be completed. And the parties understood this, for the contract provides for the money and notes to be left there "till the bargain can be fully finished and completed."

There being no change of the rights of the parties on this point by the provision for a deposit, it still remained the duty of the one, who would exact performance of the other, to prove, that he was ready and willing and would have performed, if the other party had. It is not therefore necessary to decide, whether a true construction of the contract would have required the plaintiff to deposit the money and notes within the same ten days allowed to the defendants, or within ten days thereafter, as the report states, that he did not at any time make such a deposit. And without this he could not shew a readiness on his own part to perform in the manner provided for in the contract. And this Court has repeatedly decided, that such proof is indispensable to enable him to recover against the defendants.

Plaintiff nonsuit.

STEPHEN CHASE *vs.* JOHN BRADLEY *& Trustees.*

If an order be drawn and accepted, on condition that when paid, the amount should be indorsed upon a note, then in the hands of the payee, on which the drawers were liable, the payee is not entitled to receive payment of such order, after he has assigned over and indorsed such order to a third person; and therefore if the acceptor of the order be summoned in a trustee process, as the trustee of the payee, after he has transferred the note to another, and incapacitated himself from complying with the condition, the trustee must be discharged.

One summoned as trustee, may make the affidavit of another person a part of his answer, if he is willing to swear that he believes it to be true.

And in determining whether the trustee shall be charged or discharged, his answer must be taken to be true.

If one contracts to pay a certain sum per thousand for timber, "to be scaled according to the usual *Kennebec* survey" by a person to be appointed by the seller, whose survey was to be conclusive as to the amount; such survey will not be conclusive, unless it be made in conformity with the *Kennebec* survey.

THE writ was served upon the alleged trustees, *William Weston*, *Richard Clay*, *Henry Jewell*, and *Bradbury F. Dinsmore*, on *June* 23, 1838. From their disclosures and the papers annexed as part of their answers, it appeared that *John Bradley*, the defendant, *January* 14, 1835, conveyed a township of land, called the *Attian Pond Township*, to *Underwood*, *Davis* and *Colby*, and as part consideration therefor took their note dated that day, payable to him or his order, *June* 1, 1837, for $13750, with a mortgage of the same premises to secure the note. Soon afterwards an association of individuals acting in the name of the *Attian Land Association*, purchased of *Underwood*, *Davis* and *Colby* the same township, and engaged with them to pay and take up that note to *Bradley*. The *Attian Association*, on the first day of *December*, 1835, entered into a contract with *William Weston*, who is summoned as trustee of *Bradley*, wherein it was agreed that in the winter following *Weston* should cut timber from the township at three dollars per thousand feet, board measure, the timber to be scaled on the tract or at the landing, according to the usual *Kennebec* survey, by a person to be appointed by the association, who should render a true account of the number of feet in each log,

and his account should be conclusive as to the amount of stumpage. The stumpage for all the timber cut under the permit was to be paid for, one half in thirty days, and the residue in sixty days after the timber shall have run to the booms, and the whole to be paid for when seven eighths thereof had come to the booms. The *Association* were to have a lien upon the timber for payment of the stumpage. Of the timber thus cut, at the time of the service of the writ, *Weston* says, that about fifteen hundred thousand feet had come to the several booms. He states, that the whole amount of timber cut, *according to the Kennebec survey*, was three millions and two thirds of a million feet, and admits that *Samuel F. Weston*, appointed by the *Association*, made a much larger amount, but says that *S. F. Weston* was an incompetent person to make the survey and was wholly unacquainted with the usual *Kennebec* survey, and estimated the timber at a much greater amount than the *Kennebec* survey would warrant, and that he did not consider himself bound by the survey of *S. F. Weston*. On *March* 14, 1836, *William Weston* made an agreement with *Clay* and *Jewell*, who are also summoned as trustees, by which the latter were to purchase the logs, and were to pay to the *Association* the amount due for the stumpage of the logs according to the agreement with *Weston*, and to remove the lien upon the timber, and were to pay the balance to *Weston*. *Dinsmore*, also summoned as trustee, afterwards came in, by an agreement with *Clay* and *Jewell*, as their associate.

The *Attian Association*, on the 18th of *April*, 1837, drew an order on *Weston*, directing him to pay to *John Bradley*, out of the proceeds of the logs cut on the *Attian Township*, fifteen thousand dollars, and take his receipt for the same, with this condition at the close — "provided however, you shall see that whatever sums you shall pay said *Bradley*, and take his receipt therefor, shall be indorsed upon a certain note of hand for thirteen thousand seven hundred and fifty dollars, signed by *Benjamin Underwood*, *Amos Davis* and *Abraham Colby*, and payable to said *John Bradley* on the first day of *June*, 1837." On the 28th of *August*, 1837, this order was presented to *Weston*, and by him accepted in this manner. "Accepted to be paid the within named *Bradley*, provided the sum within mentioned shall be due the *Attian Land Associa-*

tion for logs cut on the *Attian Pond Township* agreeably to the terms of the contract made by me with them." *Weston* gave notice to *Clay* and *Jewell* of the drawing and acceptance of this order, and directed them to make payment accordingly. On the third of *August*, 1837, the *Attian Association* drew another order on *Weston* in favor of *Bradley*, for the sum of $1573, "being the balance above the former order to said *Bradley* of $15,000, due for stumpage of timber cut by you on the *Attian Township*." This was accepted by *Weston*, *August* 28, 1837, "to be paid to the above named *Bradley*, provided the sum mentioned shall be due on the contract with the *Attian Land Associates* after paying an order this day accepted for fifteen thousand dollars according to the terms of said acceptance drawn on me by the *Attian Land Associates* in favor of said *Bradley*, dated *April* 18, 1837." On *May* 28, 1838, *Clay* and *Jewell* paid *Bradley* $377,04, and took his receipt therefor. The alleged trustees disclosed, that on the day on which they made their answer, *Feb.* 19, 1839, *Messrs. Fessenden & Deblois* shew them the note from *Underwood, Davis* and *Colby* to *Bradley*, before mentioned, on which note were the following indorsements. "*John Bradley*." "Pay *J. C. Brewer, Esq.* or order. *Geo. F. Cook*, Cashier." "Pay *C. Chute*, Cashier, or order. *J. C. Brewer*, Cashier." A pen had been drawn across the names of *Cook* and *Brewer*. At the same time *Messrs. Fessenden & Deblois*, counsellors at law, exhibited their affidavit to the supposed trustees, which the trustees aver they believe is true, stating that they received that note from the President, Directors and Company of the *Oriental Bank* for collection, as the property of the Bank, long before the fifteenth day of *June*, 1838, and had ever since retained the note in their possession as the property of the *Oriental Bank*.

If the alleged trustees are to pay for the timber cut according to the survey of *S. F. Weston* on the land where it was cut, if the same should never reach the boom, the sum due is sufficient to pay both orders. But if they are only to pay for the quantity of timber, estimated according to the true *Kennebec* survey, as they aver; or if they are held to pay only for the timber which had actually come to the booms at the time when the service was made upon them, by either survey, they were not liable to any one for a sufficient amount to pay the order for fifteen thousand dollars.

H. B. Osgood, for the plaintiff, contended, that the trustees should be charged. Drawing the orders on *Weston* by the *Attian Association* for the whole amount due in favor of the defendant, was an equitable assignment thereof to him. *Robbins* v. *Bacon*, 3 *Greenl.* 346. A trustee process is like a bill in equity. 1 *Gallison*, 367. The proviso in the first order is merely directory, and is not an essential part of the contract, so as to discharge the trustees. The notice to the trustees by the affidavit is no sufficient evidence of any assignment of the note by *Bradley*. But if it can be considered as such, it was made long after it was due. The service of the trustee process is equivalent to a payment at that time to *Bradley*, and would be good against the holders of the note. The payment therefore on this process pays the debt of the *Association* to *Bradley*, and they cannot be injured, and it pays *Bradley's* debt to the plaintiff. If the note has been indorsed, the indorsees may collect it of the makers or indorser, and so justice be done to all parties. If *Bradley* had indorsed the note, he had deprived himself of the ability to comply with the proviso in the first order, and the fund therefore could not go to the payment of that note, and must be holden to pay the second order, which was drawn without condition. In any view of the first order, the trustees must be holden on the second order, drawn without condition, because they had funds to pay both. They are bound by the survey of the scaler, appointed by the Association, made where the timber was cut, by the express terms of the contract. They are to pay stumpage for the amount of timber cut there, if it never reached the booms. Reaching the booms only fixed the time of payment. The transfer of the note to the *Oriental Bank*, if it is to be considered as made, does not in any manner transfer the order, or the amount mentioned therein; and therefore the trustees are to be charged in the same manner as if *Bradley* now held the note. *Whitaker* v. *Sumner*, 20 *Pick.* 399. But it is not necessary now to determine the amount for which they are to be charged. They are to be charged generally, if held for any thing. *Winchester* v. *Titcomb*, 17 *Pick.* 435.

Fessenden & Deblois argued for the trustees, and contended, that they ought to be discharged. The assignment of the note by *Bradley* to the *Oriental Bank*, carries with it in equity the pro-

perty pledged or mortgaged to the amount of the note. 2 *Burrow*, 969; *Green* v. *Hart*, 1 *Johns. R.* 580; *Powell on Mort.* 1115; 17 *Serg. & R.* 400; *Willard* v. *Harvey*, 5 *N. H. Rep.* 252; *Jackson ex dem. Barclay* v. *Blodgett*, 5 *Cowen*, 202; *Pattison* v. *Hull*, 9 *Cowen*, 747; *Cutler* v. *Haven*, 8 *Pick.* 490; *Crane* v. *March*, 4 *Pick.* 131. Therefore when *Bradley* indorsed the note to the Bank, he parted with the stumpage to the Bank, to the amount of the note. The order was conditional, that *Weston* should see the amount paid indorsed on this note. It was accepted on no other terms. *Bradley* was not entitled to the money from the *Attian Association*, but by indorsing it on this note, and thereby freeing them from their obligation to the makers of the note to take it up. To hold the money by this process, would be to make the Association pay *Bradley's* debt to *Chase*, without discharging their liability to *Underwood*, *Davis* and *Colby*, or the liability of the latter to pay the note themselves. Even if the money had gone into *Bradley's* hands, equity would compel him to pay it to the Bank. The condition upon which the stumpage was to be paid to *Bradley*, its indorsement upon the note, has not even yet been complied with, nor can it be by him, as the note is not in his hands, and the supposed trustees must be discharged. *Davis* v. *Ham*, 3 *Mass. R.* 33; *Frothingham* v. *Haley*, *ib.* 68; *Willard* v. *Sheafe*, 4 *Mass. R.* 238. They cannot be holden in consequence of the second order, because by the true *Kennebec* survey, the stumpage, where cut, did not amount to enough to pay the first; and because but a small portion of enough to pay the first order, had come to the booms, when the process was served. Until it had come to the booms, or until at least seven eighths of it had come there, it was wholly contingent whether they would ever have to pay for it. And while it remains contingent, whether any thing is to be paid at any time, the same cases show, that the trustees cannot be holden. The supposed trustees may make the affidavit of another person a part of their answers, if they are willing to swear that they believe it is true. *Kelly* v. *Bowman*, 12 *Pick.* 383. *Clay*, *Jewell* and *Dinsmore*, are but contractors under *Weston* in relation to the timber, and are not accountable to the *Association*, or to *Bradley*. But it is enough, that if *Weston* is not holden, they cannot be.

The opinion of the Court was by

WESTON C. J. — The question submitted to our consideration is, whether the supposed trustees, or either of them, at the time of the service of the plaintiff's writ upon them, had in their hands and possession any goods, effects or credits of the principal debtor. And this must be determined upon the respective disclosures, and the documents referred to and copied therein.

The plaintiff claims to charge them, upon the contract made by *William Weston*, with the trustees or directors of the *Attian Land Association*, his operations under it, and the assignment of the sums to which they were entitled to *John Bradley*, the principal debtor. If there was no assignment, or none, the benefit of which *Bradley* was entitled to receive, at the time of the service of the writ, the trustees are entitled to be discharged.

An assignment from that association is disclosed; but it is manifestly and on its face, a conditional one, and as such was adopted and accepted. The evidence of the assignment is an order, drawn on the eighteenth of *April*, 1837, in behalf of the association, on *Weston*, directing him to pay to *Bradley*, fifteen thousand dollars, out of the proceeds of the logs, cut under the contract, provided however, he shall see that whatever sums, he shall pay said *Bradley*, and take a receipt therefor, are indorsed upon a certain note described. *Weston* accepted the order, upon the terms prescribed. The company might have very good reasons for requiring the condition upon which they insisted. It might be necessary for their protection. It qualified the assignment, and was made essential to its validity. It determined the condition upon which alone *Weston* was authorized to pay *Bradley*, or *Bradley* was entitled to receive payment.

From the affidavit of *Messrs. Fessenden & Deblois*, which is adopted and made part of the disclosures, it appears, that before the service of the plaintiff's writ, *Bradley* had negotiated the note described in the order, and that it passed to, and became the property of the *Oriental Bank*, and was in the hands of *Fessenden & Deblois*, as their attorneys. By the protest of the notary, it appears to have been negotiated before its maturity. But that fact is not essential. If it ceased to be *Bradley's* property before the service of the writ, he was no longer entitled to receive the

money under the order, not being able to comply with the condition it contained. It results, that the right of *Bradley*, in virtue of the order, was gone, when he negotiated the note. Whether the indorsees of the note are entitled to the benefit of the order, as an attendant or accompanying security, is a question, which need not be decided. It is sufficient to defeat the plaintiff's attachment of their debtor's credits, in the hands of the supposed trustees, if, when it was made, their debtor had none, which could be made available.

It is however insisted, that the trustees ought to be charged, in virtue of orders subsequently drawn on *Weston*, in behalf of the association.

Weston discloses a further order drawn upon him by them, requiring him to pay to *Bradley*, without condition, the further sum of $1573, being the balance assumed to be due from *Weston*, beyond the amount of the former order of fifteen thousand dollars. And he states, that no other order or orders from them in favor of *Bradley*, have ever been presented to, or accepted by him. The disclosure of *Bradbury T. Dinsmore* refers to another order in the possession of *Bradley*, which had not been presented or accepted, and which therefore could create no liability on the part of *Weston*.

Weston in his disclosure, denies, that under the contract, any balance could arise against him, beyond the fifteen thousand dollars, upon which the second order could operate. There might be a balance, according to the survey made by *Samuel F. Weston*. That survey, *Weston*, the supposed trustee, insists is erroneous, the surveyor being ignorant and unskilful, and not conforming to the *Kennebec* survey, which the contract adopts. *Samuel F. Weston's* survey was not conclusive upon the trustee, unless made according to the *Kennebec* survey. The trustee is bound at his peril to state the facts truly, and upon the question before us, the disclosure must be taken to be true. Upon a trial between the *Attian Land Association* and *William Weston*, the jury might be of opinion, that *Samuel F. Weston* did conform to the *Kennebec* survey; and if so, his estimate was to be conclusive. Unless this was the fact, the supposed trustee was not under the contract bound by his survey. He undertakes to state in his disclosure that the fact was otherwise, and as has been before stated, the truth of the disclosure must be assumed, as the basis of our decision. It is not therefore shown,

that *Bradley* had any rights or credits under the second order, subject to the plaintiff's attachment. And upon the whole it does not appear to us, that either of the trustees had, at the time of the service of the writ, any goods, effects or credits, subject to the plaintiff's attachment.

Trustees discharged.

Asa Hanson *vs.* Thomas Dyer *& al.*

If the preliminary proceedings, under the *statute* of 1835, *c.* 195, for the relief of poor debtors, have all been regular, and the Justices have jurisdiction of the question, and they proceed to examine the notification to the creditor and the return of service thereon, and duly certify that the creditor was notified according to law, of the intention of the debtor to take the oath; their adjudication, until reversed, is conclusive upon the parties.

The service of such notification by *reading* the same to the creditor, instead of leaving a copy, is insufficient.

The facts were agreed, and from them it appeared that the plaintiff obtained judgment and execution against *Dyer*, and that he was duly committed to jail on *January* 24, 1838, and on that day gave the bond now in suit to obtain his release from imprisonment, in common form. *July* 5, 1838, *Dyer* took the poor debtor's oath before two Justices of the Peace and of the quorum. The Justices in their certificate state, "that said *Thomas Dyer* hath caused *Asa Hanson*, the creditor at whose suit he was so committed, to be notified according to law, of his, the said *Thomas Dyer's*, desire of taking the benefit of the act," &c. A citation was duly issued to the creditor by a Justice of the Peace, on the application of the keeper of the jail, on which the following return was made. "*Cumberland ss. June* 19, 1838. I have this day served the above notification upon the abovenamed *Asa Hanson* by *reading* the above citation in his presence and hearing.

"*William Cousens*, Deputy-Sheriff."

It was agreed, that if open to inquiry, *Hanson* was notified in no other way. All the other proceedings were according to law.

Dyer at the time of giving the bond, and ever since, was wholly destitute of property, and has ever since remained at his usual place of abode in the *County* of *Oxford*, and the creditor in fact sustained no loss by having the service made by reading instead of a copy. The creditor did not attend at the time and place appointed for administering the oath. A nonsuit or default was to be entered according to the opinion of the Court.

Dunn, for the plaintiff, contended, that the *statute* of 1835, *c.* 195, § 9, expressly required that the service of the notice to the creditor should be made by leaving a copy, and not by reading. The alleged service in this case is a nullity. Nor is the plaintiff precluded from showing the truth by the certificate of the Justices. The case of *Agry* v. *Betts*, 3 *Fairfield*, 415, has been overruled by the case of *Knight* v. *Norton*, 3 *Shepl.* 337.

S. Emery, for the defendants, said, that the record of the Justices shew, that they adjudged that the plaintiff had been notified according to law. This is conclusive. *Agry* v. *Betts*, 3 *Fairf.* 415. This case is not like *Knight* v. *Norton*, for here the application came from the jailer, and the Justices had jurisdiction.

But if the plaintiff is entitled to recover, his damages can be but nominal. It is within the letter and spirit of the *stat.* of 1839, *c.* 366, for the relief of sureties on poor debtors' bonds.

The opinion of the Court was by

SHEPLEY J. — It appears by the agreed statement of facts, that the debtor took the oath before two Justices of the Peace and of the quorum, as required by the statute, and was discharged; and that all the proceedings were regular and in due form except the service of the citation. The debtor must therefore have made a written complaint to the keeper of the jail, and the keeper to a Justice of the Peace, who must have made out a notification to the creditor as required by the ninth section of the act of 1835, *c.* 195. These preliminary proceedings being all regular the Justices had jurisdiction of the question, and as required by the tenth section, they proceeded to examine the notification and return of service, and decided, that they were regular and in due form, and they administered the oath, " and made out a certificate thereof in the

form therein prescribed," that is, in the form prescribed in the tenth section of the act, and in it among other things the Justices certify, that the prisoner "hath caused *Asa Hanson*, the creditor at whose suit he was so committed, to be duly notified according to law." They erred in judgment in deciding that the service, which is now produced, was according to law; but they did so decide upon a matter over which they had jurisdiction; and the decision of a tribunal having jurisdiction of the subject matter, is conclusive until reversed. And it was upon this principle that the case of *Agry* v. *Betts*, 3 *Fairf.* 415, was decided.

But it is alleged in the argument, and the like position has been taken in another county, that the decision in *Agry* v. *Betts* has been varied or overruled by the case of *Knight* v. *Norton*, 15 *Maine R.* 337.

It has been with no little surprise, that the court has perceived, that such an opinion has to some extent prevailed. In the case of *Knight* v. *Norton*, no one of the preliminary proceedings had been in conformity to the provisions of the statute. The Justices had no legal papers before them to act upon. They had in contemplation of law nothing before them; and of course had no jurisdiction of the subject matter upon which they proceeded to act. And this was the ground of that decision, and it was so stated in the opinion, which says, "the preliminary proceedings must be in conformity to the provisions of the statute to give the Justices jurisdiction and authorize them to act." That the judgment of a tribunal which has no jurisdiction, is wholly inoperative and void, was supposed to be so unquestionable and so well understood, that it was not deemed necessary so to state for the purpose of distinguishing it from the case of *Agry* v. *Betts*, where the Justices had jurisdiction. The two cases were decided upon facts and principles wholly different, and it is not now perceived how a decision could have been differently made in either case consistent with the first principles of jurisprudence.

It has been supposed also, that the words, "may cite the creditor," contained in the fifth section of the act of 1836, made all the provision, which was intended by the legislature respecting the person by whom, and the manner and form in which, the citation should be issued; and that the words, "in other respects complying

with the ninth and tenth sections of the act to which this is supplementary," refer only to the time and manner of serving the notice or citation and to the after proceedings before the Justices.

Every previous act of the legislature of *Massachusetts* before the separation, and of this State since, providing for the discharge of the debtor in execution, from imprisonment by taking the oath, had provided to whom the debtor should apply for a citation, and that he should state, that he had no estate to support himself and that the citation should be under the hand and seal of the Justice. And it would be a most extraordinary construction, that should from the use of such language infer, that the legislature, after legislation had existed upon it so carefully for more than fifty years, designed to omit all legislative provision upon the subject; and to place it in the power of the debtor by such authority or the want of it, and in such form, as he pleased to make out the citation. It would allow him to dispense with the allegation, that he had no estate; to select an unsuitable time, or place, and one known to be inconvenient for the creditor; and to dispense with all official character upon which the creditor might rely that it came from competent authority. And such a construction is to be made too, when it was equally if not more apparent from the language itself, that the legislative control was designed to be continued over it by the reference to another statute.

In the present case upon principle and upon authority, the judgment of the Justices having jurisdiction was conclusive.

Plaintiff nonsuit.

JOHN DEANE *vs.* LUTHER WASHBURN.

A town may legally choose a *collector of taxes*, and a *constable*, under an article in the warrant calling the annual meeting, "to choose overseers of the poor and all other town officers for the year ensuing."

The return of a collector of taxes upon his warrant of his proceedings on the distraining and sale of chattels for the payment of taxes, is *prima facie* evidence of his having tendered to the former owner the overplus arising from such sale beyond the amount of the tax and charges.

The vote of a town, at the annual meeting, under authority therefor in the warrant, "to set off" certain inhabitants named, "together with their estates, into a separate school district," defines the limits sufficiently to create a legal district.

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

Trespass for taking and carrying away a pair of oxen of the plaintiff. The defendant, with the general issue, filed a brief statement, justifying the taking of the oxen by him as collector of taxes of the town of *Paris*, for the year 1837, and a sale of them by virtue of a warrant from the assessors, and alleging, that he tendered the balance to the plaintiff. To show that he was a legal officer, the defendant produced a record of the town of *Paris*, by which it appeared, that in the warrant for calling the annual town meeting in *March*, 1837, there were articles for choosing a moderator, town clerk, selectmen, and assessors, and then followed article fifth in these words. "To chose overseers of the poor, and all other town officers for the year ensuing." Under the fifth article in the warrant was this entry on the town records. "Chose *Luther Washburn*, collector of taxes and constable." It was objected by the plaintiff, that *Washburn* was not legally chosen constable or collector, because there was no article in the warrant for that purpose, but the objection was overruled by the Judge. The defendant produced a warrant from the selectmen of *Paris*, in due form, directed to the defendant as collector of taxes for that town, directing him to collect the taxes on a certain list committed to him with the warrant. The tax was assessed on the polls and estate of the inhabitants of school district No. 17, pursuant to a vote of that district. In the warrant for the annual *March* meeting, 1836, *art.* 12, was this. "To see if the town will set off *Sullivan An-*

drews, John Deane," and ten others named, " together with their estates into a separate school district." Under this article, the town " voted to set off the inhabitants named in the twelfth article of the foregoing warrant, together with their estates, into a separate school district." It was objected, that this was insufficient to show the creation of a legal school district. The objection was overruled. The defendant made return upon the warrant, under date of *May* 27, 1837, that he seized the steers on the 24th, and after stating particularly the notice and sale, concludes thus: " from which sum ($37,50,) I deducted twelve dollars and forty-six cents, being the amount of said tax, and one dollar for charges of sale, and discharged said tax against said *Deane* in said bills, and afterwards on the same day, at said *Paris,* offered and tendered to said *Deane* twenty-four dollars and four cents, the overplus arising from said sale, besides said tax and the necessary charges of sale to said *Dean,* who then and there refused to receive the same. I therefore return the tax assessed in said bills against said *Deane* fully paid and satisfied. *Luther Washburn,* collector of taxes for the town of *Paris.*"

The other evidence in relation to the sale and offer to return the balance of money arising from the sale, above the amount of the taxes, appears in the opinion of the Court. It was objected, that no sufficient evidence had been given to show that the defendant had complied with the law in returning the money thus in the hands of the collector belonging to the plaintiff. This objection was also overruled. There were several other objections made, which were not insisted on at the argument. The verdict was for the defendant, and the plaintiff filed exceptions.

H. B. Osgood, for the plaintiff, argued in support of the objections above-mentioned; and cited *stat.* 1821, *c.* 114; *stat.* 1821, *c.* 116, § 26; *stat.* 1821, *c.* 117, § 9; *stat.* 1834, *c.* 129, § 9; *Hoyt* v. *Byrnes,* 2 *Fairf.* 475; *Nelson* v. *Merriam,* 4 *Pick.* 229; *Bradley* v. *Davis,* 2 *Shep.* 44; *Pierce* v. *Benjamin,* 14 *Pick.* 356; *Van Brunt* v. *Schenck,* 13 *Johns. R.* 414; *stat.* 1834, *c.* 129, § 6; *Withington* v. *Eveleth,* 7 *Pick.* 106; *Perry* v. *Dover,* 12 *Pick.* 206; *Johnson* v. *Dole,* 4 *N. H. Rep.* 478; *Suydam* v. *Keys,* 13 *Johns. R.* 444; *Sch. Dis. No.* 1, in *Greene* v. *Bailey,* 3 *Fairf.* 254; *Little* v. *Merrill,* 10 *Pick.* 543.

Codman argued for the defendant, and cited *Hoyt* v. *Byrnes*, 2 *Fairf.* 475; *Colman* v. *Anderson*, 10 *Mass. R.* 105; *Stetson* v. *Kempton*, 13 *Mass. R.* 272; *Little* v. *Merrill*, 10 *Pick.* 543.

The opinion of the Court was drawn up by

WESTON C. J. — The fifth article in the warrant for the town meeting in *Paris*, under which the defendant was chosen constable, was, "to choose overseers of the poor, and all other town officers, for the year ensuing." It is urged, that this did not warrant the choice of a constable. The act regulating town meetings, and the choice of town officers, *stat.* 1821, *c.* 114, § 1, authorizes the election of certain officers described, in which constables are not included, and then provides for "other usual town officers." Upon this point, the warrant is not more general than the statute. A constable is an ancient town officer, not only usually, but universally elected; and in our judgment, the warrant did authorize the election of a constable, in the case before us.

The justification, upon which the defendant relies, is controverted upon the ground, that what remained, after satisfying his legal demand upon the plaintiff, was not paid or tendered to him. If proof of such payment or tender was necessary in defence, it has been sufficiently made out. In the return of the defendant upon his warrant, which is *prima facie* evidence, according to the case of *Kendall & al.* v. *White & al.*, 13 *Maine R.* 245, it is stated, that the overplus was tendered to the plaintiff on the day of the sale. As further proof of the fact a witness testified, that he saw the defendant on that day tender to the plaintiff a sum of money in bank bills, as the overplus in his hands, beyond the amount of the tax and charges. The tender, not being accepted, must be taken to have been refused, which the return expressly states. But no objection was made as to the amount tendered, or the kind of money. It has been long settled, that a tender in bank bills is good, if not objected to on that ground. *Hoyt* v. *Byrnes*, 2 *Fairf.* 479, and the cases there cited. So where a tender is refused, it will be deemed sufficient, although a greater sum is offered, and change required in return. 3 *Stark. Ev.* 1395. The witness did not count the money, nor did he see any change tendered; but what he did see, with the constable's return, is evi-

dence that enough was tendered; especially as it was not accepted, and no objection made, on the ground of any alleged deficiency. A paper was offered to the plaintiff at the time of the tender, which the jury might well understand to have been an account in writing of the sale and charges.

It is objected, that no sufficient evidence was adduced, that the school district was legally created. It appears that certain persons named, with their estates, were set off into a separate school district. Had the persons only been named, the limits of the district would not have been defined. But they are defined by their estates. If this had been done, in the district in question, in *Withington* v. *Eveleth*, 7 *Pick.* 106, cited for the plaintiff, it is fairly deducible from that case, that it would have been held sufficient. There is no proof that the estates were not contiguous, or that the limits were uncertain. Other exceptions, equally untenable, taken at the trial, have not been pressed for the plaintiff in argument.

Exceptions overruled.

The State *vs.* Hiram Andrews.

By the *stat.* of 1836, *c.* 241, in addition to the act for the punishment of felonious assaults, &c., the grand jury in their discretion may charge in one count of an indictment, found in the Supreme Judicial Court, an offence exclusively cognizable in that Court, and in another count an offence of the same class of a less aggravated character, dependant upon the same facts, of which the Court of Common Pleas has jurisdiction; and if on the trial thereof, the jury should find the accused not guilty of the higher offence, and guilty of the lesser, still judgment may be rendered on the verdict.

The defendant was indicted in the Supreme Judicial Court, the indictment containing five counts. The first count charged *Andrews* with having in his possession ten counterfeit bills of a bank in this State, knowing them to be such, with the intent to pass them as true. The second count charged him, in the same manner, with having four counterfeit bills of a bank of this State with the intent to pass them as genuine. The other three counts charged him with having the bills in his possession knowing them to be

counterfeit, and with having offered and tendered them in payment to certain individuals with intent to defraud them. The verdict was, not guilty, on the first count, and guilty on all the others. *Andrews* moved in arrest of judgment, because at the time of the finding of the indictment and of the verdict, the offences of which he was found guilty were cognizable only in the Court of Common Pleas, and not in the Supreme Judicial Court.

Stowell, for *Andrews*, argued, that the *stat.* 1836, *c.* 196, § 1, gives to the C. C. Pleas exclusive jurisdiction of crimes where that court had concurrent jurisdiction with the Supreme Judicial Court. The C. C. Pleas, by *stat.* 1823, *c.* 233, had concurrent jurisdiction of the offences charged in all the counts in the indictment except the first, on which there was an acquital. At the time the indictment was presented and since, the C. C. Pleas had exclusive jurisdiction of the offences of which *Andrews* was found guilty. The Court has authority to arrest the judgment for want of jurisdiction. 5 *Dane*, 230, § 20. He contended, that neither the *stat.* 1829, *c.* 433, nor that of 1836, *c.* 241, cited by the Attorney General, was intended to give the Court authority to render judgment or pass sentence where they had no jurisdiction. The prosecuting officer has no power, by putting into an indictment a count charging a higher offence, to give to this Court, jurisdiction over an offence expressly taken away by statute.

Emery, Attorney General, for the State. This Court has exclusive jurisdiction over the offence charged in the first count, by the express words of the *stat.* 1821, *c.* 11, and this jurisdiction yet remains unchanged. Concurrent jurisdiction is given to the C. C. Pleas, by *stat.* 1823, *c.* 233, with certain exceptions, including the offence set forth in the first count. In a case like this, the S. J. Court has power, by the *stat.* 1829, *c.* 433, and by the *stat.* 1836, *c.* 241, to award sentence on the verdict, although there is an acquittal on the first count.

The opinion of the Court was by

Weston C. J. — The Supreme Judicial Court had jurisdiction formerly of crimes and misdemeanors generally. And the C. C. Pleas had concurrent jurisdiction of certain offences, not of a high and aggravated character. By the *statute* of 1823, *c.* 233, the

concurrent jurisdiction of that court was enlarged, but that of the Supreme Court was not restricted. But by the *stat.* of 1836, *c.* 196, the jurisdiction of the Common Pleas, where it was before concurrent, was made exclusive. The count in the indictment, upon which the defendant was acquitted, was exclusively cognizable in the Supreme Court; and the other counts, upon which he was convicted, were exclusively cognizable in the Common Pleas.

By a subsequent *stat.* of 1836, *c.* 241, § 4, it was provided, that for all offences, exclusively cognizable in the Supreme Judicial Court, the grand jury might, in their discretion, insert in the indictment one or more counts for any less offence, dependent upon the same facts, and if the accused shall be convicted upon either count in such indictment such verdict may be accepted and recorded in the court, where such trial shall be, and every such offender shall be sentenced and punished accordingly. As the trial in such case could only be in the Supreme Court, it appears to us, that no other sensible construction can be given to this provision, than that it has the effect to invest this Court, in this incidental manner, with jurisdiction over these less offences, thus charged, although generally, and by the former law, unless combined with other charges of a more aggravated nature, they might have been made exclusively cognizable in the Common Pleas. It is manifestly the intention of the legislature, that the sentence and punishment, which is to follow the conviction, should be adjudged and imposed by the court receiving and recording the verdict.

In this predicament stands the indictment under consideration. In the first count the grand jury charge an offence, exclusively cognizable in this Court. In the other counts, upon which the conviction followed, offences of the same class, but of a less aggravated character, are charged. The gravamen in the first count consists in being possessed of ten counterfeit bills, of the *Kenduskeag Bank*, knowing them to be such, with intent to utter them as true. No conviction upon this count could legally follow, unless it was proved that he was possessed, with the criminal intent charged, of as many as ten such bills. There being a failure of proof to this extent, the defendant was acquitted upon this count. But he was convicted upon the other counts, which taken together, charge

that he was, at the time averred in the first count, possessed of seven such counterfeit bills, with the same criminal intent, consummated by actually uttering and passing some of them as genuine. We are of opinion, that it may be well intended, that these seven bills were part of the ten, set forth in the first count; and therefore that the other counts were dependent upon the same facts, upon which the first was based. And the motion in arrest of judgment is accordingly overruled.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF LINCOLN, MAY TERM, 1840.

JOSEPH PILLSBURY *vs.* SAMUEL PILLSBURY.

If one undertakes to procure a deed of land for another, who pays the consideration therefor in accordance with a previous agreement, but fraudulently takes the conveyance to himself, such agent may be compelled by bill in equity to convey the land to him who made the contract and paid the consideration.

The creditor may be a witness for the plaintiff in a cause, when a recovery will increase the property of his debtor.

THIS was a bill in equity, and was originally argued at the *May Term* in this county, 1838, on bill, answer and proof. An opinion was delivered orally at the same term, and on the then existing state of facts, it was considered that the deed of the land was fraudulently taken by the defendant to himself, when it should have been taken to the plaintiff, and a decree was entered that the defendant should convey the premises to the plaintiff. At the *June Term* following, in *Kennebec*, the defendant moved for a rehearing, because he had been prevented from exhibiting the whole of his testimony, and because he had discovered new evidence to show, that some testimony introduced at the trial was untrue. Notice was ordered returnable at the *July Term*, in *Waldo*, when leave was given to the plaintiff to amend his bill, and to the defendant to have the case opened for a new hearing. At the *May*

Term, in this county, 1839, the case was continued to be argued in writing on the bill, answer and proof.

The bill as amended, alleges, that the plaintiff and *John Pillsbury*, brother of both the plaintiff and defendant, about *July*, 1833, contracted with *Silas Penniman* and wife, for the purchase of a piece of land in *Thomaston;* that *Penniman* and *John* and *Joseph Pillsbury* were to meet by agreement at the house of *T. Wellman, Esq.* to take the deed on the 30th of *July*, 1833; that on that day, *Penniman* called on them for the purpose of making the conveyance, and in consequence of their engagements, *John* and *Joseph* procured their brother *Samuel*, the defendant, to go for them; that *Samuel* went for them, but fraudulently represented to *Penniman* and *Wellman*, that the deed was to be made to him, and procured it so to be done; that on the same day the deed was delivered to *John Pillsbury*, and he and the plaintiff, believing the deed to have been made to them as had been agreed, did not examine it, and paid the consideration, $400,00, to *Penniman;* that the deed was kept by *John* until the following spring when he went to sea; that during his absence, *Samuel*, by false and fraudulent representations that it was her husband's desire, induced the wife of *John* to deliver the deed to him, *Samuel;* that *Samuel* caused the deed to be recorded, *April* 12, 1834, and now claims the land; and that the plaintiff, having no knowledge of the fraudulent transactions of *Samuel*, purchased of his brother, *John*, who had been his partner in business, his interest in the land, who conveyed the same to the plaintiff, by deed of quitclaim, *August* 14, 1834.

The answer of the defendant avers, that he is entirely ignorant of any contract for the land between *Joseph* and *John Pillsbury* and *Penniman;* that he in his own right and for himself contracted with *Penniman* for the land, and never was employed by *John* or *Joseph* to purchase the land, nor undertook to act for them; that he was at work for *Penniman*, when he made the purchase, and never heard of any agreement to meet at *Wellman's;* that he did go to *Wellman's* with *Penniman*, but not at the request of *John* or *Joseph*, to have a deed made of the land to him; that the deed was there made and delivered to him, and was acknowledged, and has been recorded; that *Joseph* and *John* did not furnish him with four hundred dollars, or any other sum, to appropriate to the pur-

chase of this land, but that in fact he had previously from time to time loaned to *John* and *Joseph*, who were co-partners, several sums of money amounting at this time to not less than three hundred and fifty dollars; that on the day of the purchase he called on *Joseph* for repayment, and received of him one hundred and twenty-five dollars in part payment, and called on *John*, and received of him in part payment two hundred dollars, for both which sums he was to account; that he had on hand of his own seventy-five dollars, and with these sums paid *Penniman* four hundred dollars for the land on his own account, without any understanding or agreement that the land was purchased for the use or benefit of *Joseph* or *John*; that he being frequently in the store of *Joseph* and *John*, "and having no family of his own, by accident left the deed on the writing desk of said *Joseph* and *John*; that when said *Samuel* on the same evening called to take the deed, he was told by said *Joseph* that *John*, he being then absent from the store, had carried it home; said *Samuel* having no immediate occasion for it did not then go for it, but supposing it would be safe, suffered it to remain until he wished to have it recorded, when he called at the house of said *John*, and took said deed, and sent it to the register, and had it recorded, as he lawfully might do." He states, "that he informed the said *John* and verily believes the said *Joseph* had full knowledge that said land was conveyed to said *Samuel* in his own right, and that he well knew that said *John* had no interest in said premises at the time when he says he took a deed of release from him, the said *John*, and that he was no way deceived in that respect."

The plaintiff filed the general replication, and testimony was taken by both parties. But a small portion of the testimony was taken by the counsel arguing the case. The facts necessary for the proper understanding of the matter in controversy, will be found in the opinion of the Court.

Ruggles and *J. S. Abbott* argued for the plaintiff, and cited *Seaver* v. *Bradley*, 6 *Greenl.* 60; *Ulmer* v. *Hills*, 8 *Greenl.* 326; 2 *Story's Eq.* 744; 2 *Atk.* 235; 1 *Meri.* 244; 2 *Rose*, 271; 2 *Mad.* 443; *Story's Eq. Pl.* 655.

F. Allen argued for the defendant.

The opinion of the Court was drawn up by

SHEPLEY J. — A rehearing was granted in this case upon the petition of the defendant, it appearing that he had been prevented from exhibiting the whole of his testimony. As now exhibited, the testimony is overloaded and incumbered with a mass which is illegal and irrelative; and if those taking testimony in equity cases cannot refrain from such a course, it will become necessary to change the rule and require the testimony to be taken by interrogatories in their absence. It would occasion a prolonged discussion, and one of very little value, to separate the legal from the illegal testimony, and give the reasons for it. The legal testimony only will be regarded.

The allegations of the bill are fully proved by the testimony of *Penniman* and of *John Pillsbury* and his wife. And if their testimony be competent and credible, the defendant must have obtained the title by a deliberate fraud, and cannot retain it. However strange it may appear, that he should have caused the deed to be fraudulently made to himself, knowing that it would be exhibited to *John* and *Joseph* before payment was made; yet if this testimony is to be relied upon, he must from his knowledge of their careless habits, or their confidence in *Wellman*, or from a combination of these and other causes, have expected, that he should be successful, or that if not, the attempt would be attended by little danger.

Is the credit of *Penniman* materially impaired by the opposing testimony? *Daniel Cowing* says in substance, that he was present when the money was paid, and that when *John* had counted out $200, he handed it to *Samuel* to count over, and which handed it to *Penniman* he cannot say, and he went directly out; that *John* took the deed in his hand and said he did not know, but that the deed ought to have been made in his name, as he had paid most of the money; that the land was not worth over $100, and *Samuel* had given too much for it; and that when a store was about to be moved on to the land, *Samuel* forbid *Joseph* to put it on, and *John* said the land belonged to *Samnel*, and that he let or loaned him the money to pay for it. There is nothing in these statements in direct conflict with the testimony of *Penniman*, and yet it would be expected, that he should recollect something of

them, if they did take place. Are they in themselves probable and credible, being in accordance with what would have been expected from the allegations of either party respecting the transaction? They are introduced because they are not to be reconciled with the plaintiff's account of it. And if *Samuel* was the real purchaser, and was receiving a debt or borrowing money of *John* and *Joseph*, why should *John* take and examine the deed, and say that it ought to be in his name because he had paid most of the money, and do this when it is not pretended, that he paid more than half the money? And why should *John* hesitate about paying the money, and say it was not worth more than a $100, if he had no interest in it? *Cowing* does not profess to have been present during the whole of the transaction, and these considerations, combined with the time and manner of first introducing the testimony, prevent its affecting materially the credit of *Penniman*. *Rice Rowell* states the opinion expressed by *Penniman* respecting the title to the land, but it does not appear that he made any contradictory statement respecting the facts. *Oliver White* says he told him, that he had deeded the lot to *Samuel*, and he supposed the *Pillsburys* had bought it together. *James Crockett* says he understood him to say that he had sold the land to *Samuel*. Having made the deed to *Samuel*, he might speak of it as sold to him, or he might have said as he did to *White*, that he deeded it, instead of sold it, and *Crockett* not remember the word used. This is the substance of their testimony; and it is little, if at all inconsistent with *Penniman's* own account of the business, and the combined effect of all the opposing testimony does not materially injure his credit.

Is *John Pillsbury* a competent witness? Whatever interest he acquired in the property by the assignment has been released. The partnership formerly existing between him and *Joseph* was dissolved several years ago; and *John* released his interest in this land and the other partnership property to *Joseph*, who bound himself to pay all the debts. One remains unpaid. *John* is equally liable to pay that debt, whether *Joseph* prevails in this case or not. *Joseph* may be more able to pay it, if he succeeds, and more able to pay *John* if he is obliged to pay it; but that does not prove such an interest in *John* as to exclude him. The creditor may be a

witness in a cause when a recovery will increase the property of his debtor. The land cannot be levied upon as the estate of the partners, for they never had any legal title to it. The interest is too remote and contingent to exclude him.

The defendant introduces the testimony of *Dunning*, *Cowing*, *Berry* and *Dudley*, to impair or destroy his credit. The substance of their testimony may be briefly stated. *Dunning* says, that *John* told him that *Samuel* owned the land, that he let him have the money to pay for it, and was to get it back by means of a debt, which the firm owed him. *Cowing's* has been already stated. *Berry* says, that *John* admitted, that *Samuel* paid $75 towards the land, and that he came to him at his vessel to get some money to pay for it, and he let him have it; and he speaks of the same conversation related by *Dunning*. *Dudley* says, that he said *Joseph* should not complain of *Samuel* for forbidding him to dig a cellar on it for he "calculated the land belonged to *Samuel*," and yet he says, "he did not say whether the land belonged to *Samuel* or not." The testimony of these witnesses might be considered as substantially overthrowing the testimony of *John*, if their own credibility was not impaired by their manner of testifying as it is exhibited in their depositions. The statement respecting *Samuel's* going to the vessel after the money, is inconsistent with any account of what actually took place. There are other facts and circumstances in the case clearly proved, sufficient to corroborate the testimony of *John* and render it credible.

The bill charges that *Samuel* obtained the deed from the wife of *John*, in his absence, by falsely and fraudulently representing to her, that her husband wished him to get it, and have it recorded. To such a charge he was specially called upon by every consideration affecting his character, to give a definite and direct answer.

The only answer to this, except the general denial of all matters is, that by accident he left the deed on the desk, was informed that *John* had carried it home, and supposing it would be safe he suffered it to remain till he wished to record it, and then called at the house of *John* and took it. The probability, that he should not ask for the deed under such circumstances for several months, as well as the rest of the statement, is not great; and the allegations of the bill on this point are not met by the answer; and

are clearly proved by the testimony of the wife. Her testimony is not attempted to be impaired; and if true, as it must be taken to be, it strongly corroborates and fortifies that of her husband; for it is inconceivable, that one should so conduct, who had a fair and good title to both the deed and the land conveyed by it; while it might be expected from him, if *John's* testimony be true. Another fact of importance is, that *Joseph* has always remained in possession, and has taken the rents without any claim upon him, or interference, by *Samuel*, except the forbidding to dig the cellar. The want of proof of any debt due from the firm to *Samuel*, and of any receipt or note given for the money, alleged to have been obtained by him, impairs one's confidence in the statement, that it was so received, and tends to confirm the statements made by *John* and *Penniman;* and their testimony, taken in connexion with these circumstances, is sufficient to prove the material allegations of the bill. And if *John's* testimony be laid out of the case, there is sufficient remaining upon equitable principles to destroy all confidence in the answer.

The former decree is affirmed with costs.

Jeremiah Tarr *vs.* Rogers Northey.

If a person, who is not the execution creditor, request an officer to take and sell goods on an execution, and promise verbally to indemnify him for so doing, such promise is not void, as made without consideration, or because it is not in writing.

And if the execution creditor, after such promise was made, and after the goods were taken, enter into an agreement under seal to indemnify the officer, such covenant does not cancel and supersede the first promise.

Assumpsit upon a promise by the defendant to indemnify the plaintiff, who was a constable of *Whitefield*, for any damage he might sustain for taking a horse and three tons of hay upon an execution in his hands in favor of *Hosea Northey*, son of the defendant, against one *O'Brien*. The horse and hay were claimed by persons other than the execution debtor. The defendant directed the plaintiff to take the property, which he was unwilling to do

without indemnity. He was not satisfied that *Hosea* was able to indemnify him, and thereupon the defendant promised the plaintiff verbally, that he would indemnify him for taking the property. The counsel for the defendant objected, first, that the defendant not being the execution creditor, the promise was without consideration; secondly, that such a promise, and especially as it was not in writing, could not be enforced at law. The trial was before WESTON, C. J. who overruled both objections. After the promise was made by the defendant, and after the plaintiff had seized the property, *Hosea Northey*, by an instrument under his hand and seal, covenanted that he would indemnify the plaintiff from any damage which might arise to him in consequence of taking the property. The defendant stated, that the reason why he did not sign that instrument was, that he wanted to be a witness. He afterwards admitted his liability to the plaintiff and his promise of indemnity. The counsel for the defendant insisted, that the execution of the covenant had the effect to cancel and supersede the verbal promise made by the defendant. This objection was overruled. If the ruling was erroneous, the verdict for the plaintiff was to be set aside.

F. Allen, for the defendant, contended:—

1. The first request should have been complied with. The promise relied on was without consideration. It could be no benefit to him to have the articles taken, as he was a mere stranger. And if it proved a prejudice to the plaintiff, it does not fall within the principle of its being a sufficient consideration. The plaintiff parted with nothing valuable. But if the promise would have been binding on the execution creditor, yet made as this was by parol, it could not be binding on the defendant. It was void by the statute of frauds. *Mills* v. *Wyman*, 3 *Pick.* 207.

2. Taking the separate bond of the creditor was an extinguishment of the verbal promise of the defendant, who was a mere surety. 1 *Peters' Cond. R.* 290, *note*; 3 *Wash. C. C. R.* 508; *Banorgee* v. *Hovey*, 5 *Mass. R.* 24; 1 *Mason*, 506; 3 *B. & P.* 249

J. Bowman, for the plaintiff, contended that the instructions given at the trial were correct. A contract with an officer to indemnify him for serving civil process, where the service thereof in the mode pointed out has made, or may make him a trespasser, is legal,

and binding on the party making it. *Marshall* v. *Hosmer*, 4 *Mass. R.* 63; *Marsh* v. *Gold*, 2 *Pick.* 285; *Train* v. *Gold*, 5 *Pick.* 380. It is not necessary that such promise should be in writing. *Marsh* v. *Gold*, 2 *Pick.* 285; 12 *Wend.* 449. It is an original promise, and not a collateral undertaking. The consideration was sufficient. It need not be a benefit to the person making the promise. Any prejudice or trouble to the party to whom the promise is made will constitute a sufficient consideration. 15 *Mass. R.* 94; 17 *Mass. R.* 129; 5 *Pick.* 380.

If a man indebted by simple contract enter into a bond or obligation under seal to the same person to pay the same debt, it extinguishes the debt; but if a third person give the bond, the original contract remains in force. One is not substituted for the other, but both are liable. 6 *T. R.* 276; *Powell on Contracts*, 423, *and note*; 2 *Bac. Ab.* 452.

The opinion of the Court was drawn up by

Emery J. — The defendant insists, that he is not liable to the plaintiff, the officer, who was induced to take the horse and hay upon an execution in favor of the defendant's son, by the direction of the defendant, and his promise verbally that he would indemnify the plaintiff for any damage that might arise to him for so doing. Reliance is placed upon the fact, that as the defendant was not the execution creditor, the promise was without consideration, and because not in writing, cannot be enforced in law.

It must often be extremely difficult for an officer accurately to distinguish the extent of the interest which a man may have in an execution, in which he may not be the nominal creditor, but nevertheless undertakes to give directions as to the mode in which it shall be served; and that too, as may fairly be inferred, with the assent or approbation, in this case, of the nominal creditor. And here too the relationship, by consanguinity, of the execution creditor, to the defendant, might well reconcile the officer to the conviction, that the defendant had good and legal grounds for interposing and urging the plaintiff to go on under the indemnity promised by the defendant. We consider that there was a sufficient consideration for the engagement, that it was a direct original contract on the part of the defendant, and need not be in writing.

But the defence is further attempted to be supported on the principle of a release from the obligation of the contract, if good, implied by law, from the subsequent act of the plaintiff in receiving an instrument under seal from *Hosea Northey*, the execution creditor, by which he covenanted that he would indemnify the plaintiff from any damage which might arise to him in consequence of his taking the property aforesaid.

It is apparent from the report, that the plaintiff was unwilling to take the property, and was not satisfied that *Hosea* was able to indemnify him. And therefore the defendant assumed the direction as to the proceedings to be adopted, and quieted the plaintiff by the promise, which is the subject of this suit. It was not a joint contract, on the part of *Hosea* and the defendant with the plaintiff, but a several one in the first instance on the part of the defendant.

Now we do not discover from the report that this covenant was given and accepted by the plaintiff in payment and satisfaction, or in discharge, of the defendant's promise. And it never has produced the indemnify which the plaintiff is seeking. The excuse which the defendant made for not signing the instrument, that he wanted to be a witness, is evidence that he did not intend to involve himself in a joint undertaking with his son. And the idea that he then intended a trick, to evade responsibility, is irreconcilable with the fact, that he subsequently admitted his liability and his promise to indemnify the plaintiff.

We are bound therefore to give to the whole matter such a construction as will uphold the liability of the defendant, preserve the consistency of his professions, and the honor of his character, by considering the covenant by *Hosea*, as a mere collateral engagement, not understood by any of the parties as an extinguishment of the plaintiff's right to seek redress from the defendant. There must therefore be

Judgment on the verdict.

Inhabitants of THOMASTON *vs. Inhabitants of* ST. GEORGE.

If a woman resides in a town with her husband for two years, when he dies, and she continues to reside therein for the three succeeding years, unmarried, she gains no settlement in the town by such residence.

In determining whether a pauper has gained a settlement by a residence of five years together in one town, *it was held*, that the jury are to gather the intentions of the pauper, as to a change of domicil, from his declarations, which are not conclusive evidence on that point, and from his acts, all taken in connection.

Dix Island is included within the limits of the town of *St. George*.

EXCEPTIONS from the C. C. Pleas, REDINGTON J. presiding.

Assumpsit for supplies furnished to one *Eunice Allen*, a pauper, whose legal settlement was alleged to be in the town of *St. George*. The question at issue was, where was the settlement of the pauper? The defendants introduced evidence to prove that the pauper and her husband, *John Allen*, since deceased, lived and had their home on *Dix Island* on the 21st of *March*, 1821. They also contended, that *Dix Island* was within the town of *Thomaston* at that time and since; and the plaintiffs insisted that the island was within the town of *St. George*. The facts bearing on this question are sufficiently stated in the opinion of the Court.

The defendants also contended, that if *Dix Island* was not a part of *Thomaston*, but belonged to *St. George*, still the pauper had acquired a settlement in *Thomaston* by five years continued residence there, since the *stat. March* 21, 1821. It appeared from the testimony given in the bill of exceptions, that the pauper with her husband came to reside within the acknowledged limits of *Thomaston* in the latter part of the year 1829, and both continually resided there until the death of the husband in *February*, 1832. There was no evidence to show a continued residence of five years in *Thomaston* by the pauper after the death of the husband. The plaintiffs contended, that even if the time she lived in *Thomaston* as a married woman was to be included as part of the five years, but which they insisted should not be, still she had not resided there five years together. On this point it was testified, that within five years from her first living in *Thomaston* with her husband,

and after his death, in *May*, 1833, "she again left *Thomaston*, taking her bed with her, and leaving no effects behind, for one of the islands where her son resided, declaring that she never intended to return there again; that she remained on said island until *July*, 1835, when she again came to *Thomaston*, and then remained there sometime, and afterwards spent some time at the islands."

The rulings and instructions of the Judge of the C. C. Pleas are given in the opinion of the Court. The jury returned a verdict for the defendants, and found that *Dix Island* was not within *the town of St. George*, and that the pauper acquired a new settlement in *Thomaston* by five years residence successively, *commencing in the fall of* 1829. The plaintiffs excepted to the rulings and instructions of the Judge.

F. Allen, and *H. C. Lowell*, argued for the plaintiffs, and contended that *Dix Island* was not within the limits of *Thomaston*, but was a part of *St. George;* that as the line between *Thomaston* and *St. George*, extended out to sea, would leave *Dix Island* on the *St. George* side; and as the island was within three miles of the main land, it was included within the limits of *St. George.* The fact therefore that the island is nearer some point of the main land of *Thomaston*, than to any one in *St. George*, is wholly immaterial. The Judge erred in refusing to give the first instruction requested. On this point they cited the act incorporating the county of *Lincoln* in 1760; that incorporating *Thomaston* in 1777; that incorporating *Cushing* in 1789; that incorporating *St. George* in 1803; *Case of the Ann*, 1 *Gallison*, 62, to show the meaning of the word *adjacent* in the acts of incorporation; *Church* v. *Hubbart*, 2 *Cranch*, 187; *Vattel*, 191.

The instruction on the subject of gaining a settlement by five years continued residence was wrong. During the life of her husband, the pauper could gain no rights by residence, and could have a settlement only derivatively from her husband. *Shirley* v. *Watertown*, 3 *Mass. R.* 322; *Winchendon* v. *Hatfield*, 4 *Mass. R.* 123; *Hallowell* v. *Gardiner*, 1 *Greenl.* 101; *Biddeford* v. *Saco*, 7 *Greenl.* 270; *Athol v. New Salem*, 7 *Pick.* 42.

J. Holmes argued for the defendants, and on the first point urged that *Dix Island* could not belong to *St. George* unless included

under the term of *islands adjacent;* that it could not be considered *as adjacent* to *St. George,* because it was nearer the main land of *Thomaston;* that this was not a question for the decision of the Judge, but of the jury; that the jury had decided the question rightly, but whether they were right or wrong, could not be the subject of inquiry now, on a case coming up on exceptions.

The pauper acquired a settlement in *Thomaston,* be *Dix Island* in what town it may, by five years continued residence in that town, commencing in the fall of 1829. She had a home there, and when once acquired, the home is not lost, until another is obtained. Hence declarations of an intention of abandonment, accompanied with the act of removal, is imperfect until another domicil is acquired. *Jennison* v. *Hapgood,* 10 *Pick.* 72, 100; *Wells* v. *Kennebunk,* 8 *Greenl.* 200; *Waterborough* v. *Newfield,* 8 *Greenl.* 203; *St. George* v. *Deer Isle,* 3 *Greenl.* 390. She in fact returned to *Thomaston* as her home, and she never lost it by her temporary absence. While with her son, she was but a visiter. It was his home, not hers.

Nor does the fact that she had a husband during a portion of the time living with her there, prevent her from gaining a settlement in *Thomaston.* She comes within the words of the act, and completely within its meaning. She was twenty-one years of age, and resided there five years. He commented on the several cases cited for the plaintiffs, and contended they had no application here. Not only was this the home of the wife, but her only home; and she is not like the slave, without will of her own, and it is peculiarly the province of the wife to fix upon a home. Besides, she can elect, after her husband's death, to continue that her home, and then her election is retroactive, and extends back to her first coming there.

The opinion of the Court was drawn up by

Emery J. — The Judge was requested to instruct the jury, "if they should find *Dix Island* was within three miles of the main land, that it was in that case embraced within the limits of the town of *St. George,* although it might be nearer to some point in *Thomaston.*" This he declined, but did instruct them, "that by the act incorporating *St. George,* the islands adjacent thereto were

made a part of that town; that whether *Dix Island* was within the meaning of that act, adjacent to *St. George*, and therefore a part of that town, they should judge from all the evidence adduced."

It is true, that there is presented a mixed question of law and fact. "The town of *Thomaston* was formed from a part of the *St. George* plantation, *including all islands within three miles of the main land, and* WITHIN THE DIRECTION OF THE LINES THAT RUN TO THE SEA." The act incorporating the town of *Cushing*, passed on *Jan.* 28, 1789, declares, that the plantation heretofore called *St. George's*, in the county of *Lincoln*, as described in the following boundaries, beginning at the mouth of *Meduncook River*, running up said river to the head of the tide, then north by east to *Waldoborough* line, then along said line to the southwest corner of *Warren*, then running easterly by *Warren* line to *St. George's River*, then crossing said river to the southwest corner of *Thomaston*, then east-southeast by *Thomaston* line to the sea shore to *Herringut*, thence running northwesterly, crossing *St. George's River*, to the first mentioned bounds, with the adjacent islands, together with the inhabitants, are incorporated into a town, by the name of *Cushing*. *Thomaston* it seems, had previously been incorporated.

The statute passed *Feb.* 7, 1803, enacts, that all that part of the town of *Cushing*, which lies to the eastward of a line, drawn from the southwest corner of *Thomaston*, and passing southwesterly through the middle of *St. George's River* by the westerly channel to the sea, be and hereby is incorporated into a separate town by the name of *St. George*. Of course the *Dix Island* was once a part of the town of *Cushing*.

The ship channel for vessels bound to and from *Penobscot* bay and river is between *Dix* island and the main land of *Thomaston*, and the main land of *St. George*. Had nothing been said in either of the acts of incorporation of the three towns of *Thomaston*, *Cushing* or *St. George*, leading to the adoption of a mode of ascertaining the intentions of the legislature, as to islands to appertain to each in the use of the term *adjacent*, it would not be an unnatural one, to carry out the line of the town of *Thomaston* from its southwest corner into the ocean, in order to ascertain what were the adjacent islands, which should be attached to *St. George*. Considering that

Thomaston includes all islands within three miles of the main land, *and within the direction of the lines that run to the sea,* thus making not only distance from the main land, but direction of lines of the town, essential to ascertain its islands, and the law detaching *St. George* from *Cushing*, says, that all that part of the town of *Cushing* which lies east of the line running from the southwest corner of *Thomaston*, with the islands adjacent, shall constitute the town of *St. George*, and by the plan exhibited, this *Dix Island* is eastward of the territory or main land of *St. George*, and within the line so extended, it appears to us, that the finding of the jury, that *Dix Island* is not within the town of *St. George*, is manifestly opposed to the law.

Though *Dix Island* may be nearer to the main land of *Thomaston*, than to the main land of *St. George*, yet it is nearer to the line so extended, *and without the direction of the lines of Thomaston that run to the sea,* and may fairly, even necessarily, be adjudged to be *adjacent* to *St. George*, within the meaning of the act incorporating *St. George*. Entertaining this opinion, we apprehend that the first requested instruction might well have been given.

We perceive no error in the direction of the Judge, that the jury "were to gather the intentions of the pauper, as to a change of domicil, from her declarations, which were not conclusive evidence on that point, and from her acts, all taken in connection." The subject was placed precisely as it should be for the contemplation of the jury. The declaration might have been the result of some hasty feelings, or impressions, and even though accompanied by the removal of her bed, her all, still, there might well be indulged to her the liberty of more calm deliberation. It was left open for the mature weighing by the jury of all the circumstances in evidence.

It has been gallantly said, that "it is peculiarly the wife's province to fix upon a home." Doubtless she may have wonderful influence in rendering the place of her selection a pleasant home, and her advice as to the choice is seldom to be disregarded. In a peculiar case, under the law of the Commonwealth of *Massachusetts*, as it was in 1794, and for some time after, there was some ground for the suggestion of the defendants' counsel. If a woman, having a settlement in that Commonwealth, married a man having

no such settlement, hers, by law, was not lost or suspended by marrying, and in case the wife were removed to her settlement, the husband, if he needed support, was to receive it in the town where his wife had her settlement, at the expense of the Commonwealth. She would in such a concurrence of events "fix the home." *Feb.* 11, 1794, *stat. c.* 34.

It is also insisted, "that she can elect after her husband's death to continue the residence, and then her election is retroactive," and strong cases of illustration of the justness of this reasoning drawn from highly wrought sentiments or reminiscences of affection, have been adduced, and eloquently urged upon us, with persuasive and interesting effect. But the law seems not to have been framed exactly upon those considerations, nor has it been so expounded. It was long ago held, that a wife was incapable of gaining a settlement in her own right. Her will is subjected to the husband's judgment. She will follow and have the settlement of her husband, as it was at his death. But she is not permitted to tack the portion of her *residence with her husband* in a town, which had not been long enough to fix his settlement there, to additional time of her own residence there, after his decease, to procure a settlement for herself. In legal construction, while united to her husband, she had no volition, by which she could make an election of her home. As death severs the connexion, she is left to abide by what his settlement was, with the leave of beginning to find another for herself. And in the case of the inhabitants of *Richmond* against the inhabitants of *Lisbon*, this Court so decided. 15 *Maine R.* 434.

The presumption of law does not arise in favor of the continued residence and home "until it should be shewn that she acquired a new residence and home in some other place." Because upon the husband's *failing* to gain a settlement in *Thomaston*, by five years continued residence and having *his home* there, his wife or widow, on the instant of his death is, as it were remitted* to the original settlement, which she had derivatively from her husband, and that settlement, in this instance, was in *St. George*.

* A remitter is as an entry in law. There may be a remitter, *nolens volens*, for the benefit of third persons. *Duncombe* v. *Wingfield*, *Hobart*, 254.

The instruction therefore, that, "if it was not shewn, that she did obtain such a new residence and home within five years from the time when the residence commenced in *Thomaston*, in the fall of 1829, her settlement was in *Thomaston*" was erroneous, and for this also the exceptions must be sustained. The verdict must be set aside and a new trial granted.

GEORGE SEIDENSPARGER *& al. vs.* ROBERT SPEAR, JR.

In a complaint against the owner of a mill-dam for flowing land of the complainant, proof of the uninterrupted flowing for any term of time by the respondent and his grantors, claiming the right, is not sufficient evidence for the jury to presume the existence of a permanent right to flow the land without the payment of damages.

The right to overflow the land of the complainant without paying damages, cannot be established by proof of a parol agreement or license made with his grantors.

In the trial of a complaint for flowing, if the respondent denies the title of the complainant to the land alleged to have been damaged by the flowing, or claims the right to flow without payment of damages or for an agreed composition, and it is proved that the land of the complainant is overflowed by the mill-dam, some damages are to be presumed; and the jury or committee to be afterwards appointed are to estimate the amount of damage, or to ascertain whether damage had or had not in fact been sustained.

Where boundaries, length of lines and points of compass are all given in a deed, and the first named monument cannot be found, but the others are ascertained; the first monument may be ascertained, in the absence of all other testimony, by beginning at the second monument and running back the number of rods mentioned in the deed in the direction there given.

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

This was a complaint for flowing the land of the complainants. By brief statement, the defendant denied the title of the complainants to the land flowed, and alleged that the defendant, and those under whom he claimed, had a license to flow without paying damage, and that the title to the land flowed was in the defendant.

The complainants derived title from *John Seidensparger*, by deed, of which the substance is given in the opinion of the Court. The defendant proved by parol, that *Prior*, the grantor of *Henry Fogler*, and also *Fogler*, the grantor of *John Seidensparger*, during the time they owned the land, severally acknowledged that the grantors of the defendant had a right to flow without paying damages; that the defendant and his grantors claimed the right to flow without payment of damages; that when *Fogler* conveyed to *John Seidensparger*, he reserved by parol the right of the grantors of the defendant to flow the land without the payment of damages. There was however evidence tending to disprove the parol reservation. The defendant offered to prove, that for more than fifty years, the defendant and those under whom he claimed, had maintained the dam, which caused the flowing, at its present height, and claimed the right to flow and had flowed without paying damages, as evidence for the jury to presume a license to flow without paying damages. He also offered to prove that the complainants sustained no damage by the flowing. The other facts sufficiently appear in the opinion of the Court. The Judge ruled, that the uninterrupted flowing for any length of time, with the claim of the right, was not evidence sufficient for the jury to presume a license to flow without paying damages. He also overruled the motion to prove that the flowing was no damage, and ruled, that if the land of the complainants was proved to have been flowed by the defendants' mill-dam, some damages would be presumed, and the jury or committee to be afterwards appointed, were to estimate the amount of damages, or to ascertain whether in fact there were any or not. The Judge also ruled, that a right to overflow the complainants' land, derived from the complainants' grantors, could not be established by proving a parol agreement, so as to affect the title of the present complainants. With respect to the deed of *Fogler* to *Seidensparger*, the Judge instructed the jury, that if there was no known monument at the place of beginning, that then they might go to the end of the first line and at the monument of the line at the end of the same, and beginning at that monument they might run back the number of rods mentioned in the deed, and thus determine the place of beginning; and that in the absence of all other testimony that then the length of the line would be the best evidence to ascertain the

boundary, and would show where the same was. The jury returned a verdict for the complainants, and that they found the length of the first line mentioned in the deed by beginning at the second boundary mentioned and running back the number of rods given in the deed to find the boundary first mentioned. The respondent filed exceptions.

Bulfinch, for the respondent, argued in support of the five objections stated in the commencement of the opinion of the Court; and cited *Dane's Ab. c.* 109, *art.* 10, § 11; *Lapish* v. *Wells*, 6 *Greenl.* 175; *Schwartz* v. *Kuhn*, 1 *Fairf.* 274; 3 *Johns. R.* 383; *Dane, c.* 101, *art.* 5, § 24, 27; 16 *Johns. R.* 172; *Davis* v. *Rainsford*, 17 *Mass. R.* 207; *Hathorne* v. *Stinson*, 1 *Fairf.* 224; *same case*, 3 *Fairf.* 183.

M. H. Smith, for the complainants, contended: —

1. That the uninterrupted flowing for any length of time by the respondent and his grantors, and their claiming the right, was not evidence sufficient for the jury to presume a license to flow from the complainants and their grantors, without paying damage, so as to give the respondent a permanent right. *Tinkham* v. *Arnold*, 3 *Greenl.* 120. The cases *Hathorne* v. *Stinson*, 1 and 3 *Fairf.* were examined by the counsel, and the conclusion drawn, that they were not intended to overrule or impeach the case of *Tinkham* v. *Arnold.*

2. That the right to overflow the land of the complainants without paying damages, could not be established by proving a parol agreement made with the complainants' grantors. *Angell on Water Courses, c.* 4 & 6, and cases there cited; *Cook* v. *Stearns*, 11 *Mass. R.* 537; *Ricker* v. *Kelley*, 1 *Greenl.* 117; 4 *East*, 107; *Stowell* v. *Flagg*, 11 *Mass. R.* 364; *Clement* v. *Durgin*, 5 *Greenl.* 9; 6 *East*, 602; 2 *Rolle*, 152; 3 *Kent*, 452; 2 *Saund.* 175, *note;* 7 *Taunt.* 374; 4 *Johns. R.* 81; 6 *Mod.* 171; *Angell on W. C.* 43; *Jacob's Law Dic. License;* 2 *Nelson's Abr.* 1123; *Popham's Rep.* 151; *Wood* v. *Lake, Sayer*, 3. At the close of the argument on this point, it was insisted, that the following grounds were established. 1. A permanent right to flow the land of another without payment of damage, can be created only by deed or instrument in writing. 2. A parol license of this kind is revocable. 3. The transfer of the land by deed without reserva-

tion is a revocation. 4. The license is not assignable. 5. It is a parol license not to be performed within the space of one year. 6. There was no consideration shown.

3. That the flowing of the cultivated land of the complainants by the respondent's mill-dam, was evidence sufficient for the jury to presume some damage; and witnesses should not be admitted to prove that in their opinion, there was no damage. *Prov. St. Mills* of 1713; *Mass. stat.* on the same subject, 1795 & 1798; *Sullivan on Land Titles*, 277; *Lowell* v. *Spring*, 6 *Mass. R.* 398; *stat.* 1821, *c.* 45; *stat.* 1824, *c.* 261; *Axtell* v. *Coombs*, 4 *Greenl.* 322; 6 *Modern*, 89; 6 *Cowen*, 35; 3 *Fairf.* 346. The respondent cannot set up any defence not embraced in the brief statement, unless it can be given in evidence under the general issue.

4. The instructions of the Judge to the jury, relative to the mode of ascertaining the extent and position of the boundaries described in the deed were correct.

The opinion of the Court, after several continuances, was by

Emery J. — The defendant professes to be dissatisfied, because the attention of the jury was drawn by the Judge in his instructions to one line only in the deed, and not to the entire deed, and not to the intentions of the parties to the deed under which the complainants claim. Because the instructions invaded the province of the jury in directing them how to find the place of beginning, when that fact should have been exclusively submitted to them, and of which they were the sole and independent judges. Because if the flowing was no damage, then this process does not lie. Because if there has been an uninterrupted flowing and damage for fifty years, it was evidence, which should have been submitted to the jury, as evidence of a license to flow without paying damages. And that it would be absurd to suppose that a grant of a license to flow, when the flowing was a continued damage for fifty years without interruption, is not to be submitted to the jury, when a possession of the land for a much shorter time would be evidence of a grant of the land itself.

We do not discover any good cause for the defendant's dissatisfaction with the instruction of the Judge as to the construction of

the deed of *Fogler* to *Seidensparger*. If we admit the justice of the remark by the defendant's counsel, that in some sense, "one line in a deed is as important as another, and as good evidence as another," yet it does become peculiarly the duty of the Court to suggest to juries such legal modes for ascertaining boundaries in deeds, as have met the approbation of judicial tribunals. The deed, which was dated *April* 13, 1801, described the land in *Warren*, beginning at a stake and stones on the land of *Robert Spear*, thence running westerly one hundred and ten poles to a stake and stones, thence running southerly thirty-six poles to a stake and stones, thence running easterly, one hundred poles to the first mentioned bounds, containing ten acres, be the same more or less. It is a deed with general warranty. The Judge said, if there was no known monument at the place of beginning, that then they might go to the end of the first line, which we infer to be in the line of *Spear's* land, and at the monument of the line at the end of the same, and beginning at that monument, they might run back the number of rods mentioned in the deed and thus determine the place of beginning. And in the absence of all other testimony, that then the length of the line would be the best evidence to ascertain the boundary, and would show where the same was. We see no danger of the jurors being led to a wrong conclusion by this suggestion of the Judge. It was a very natural and judicious one, and was as well calculated to elicit the truth as the nature of the subject would admit. There was no invasion of the province of the jury. It was merely presenting to their contemplation the means by which their province could be best evinced, to settle the true extent of the line, as the first stake and stones on *Robert Spear's* land were not then to be found by any testimony in the case, but the next monument named was well known. From that, they were directed to measure back the one hundred and ten poles, and we do not think that they or the Judge erred in resorting to this expedient.

The Judge ruled, that the uninterrupted flowing for any length of time, and the defendant and his grantors claiming the right, was not evidence sufficient for the jury to presume a license to flow by the defendant without paying damages.

In the year 1824 the case of *Tinkham* v. *Arnold* was decided; and it was held that the omission to claim damages furnished no presumptive evidence of a grant of the easement in question, when by law such grant was not necessary, and when the conduct of all concerned was explainable on legal ground without such presumption. This warrants the ruling of the Judge in this particular. He also ruled, that a right to overflow the complainants' land, derived from the complainants' grantors, could not be established by proving a parol agreement so as to affect the present title of the complainants. After a lapse of nearly eleven years from the decision of *Tinkham* v. *Arnold*, in the case of *Hathorne* v. *Stinson & al.* 3 *Fairf.* 183, it was said, "generally when one encroaches upon the inheritance of another, the law gives a right of action, and even if no actual damages are found, the action will be sustained, and nominal damages recovered, because unless that could be done, the encroachments acquiesced in, might ripen into legal right, and the trespasser, by a continuance of his encroachments, acquire a perfect title." "But in the case of flowing, the owner of the land flowed can maintain no process, unless he has sustained damages in his lands by their being flowed. The common law remedy is taken away and the only remedy for redress is by this process of complaint. The owner's hands are tied. The flowing may continue without license, till damage is suffered."

Under these circumstances it would seem to be imperiously required of courts of justice not to relax the rules of law as to the effect of licenses by parol, or as to the extent of presumptions against the lawful owner's right. It is so easy a thing for one, who would secure a right to flow another's land, to obtain a deed conveying that right for such length of time, and to such height and extent as may be agreed upon, that it may be regretted that any dispensation with such a requisition should in any degree, be tolerated, considering the temptations to misrepresent, or to forget what transpired in years gone by, when the whole rests merely in recollection, without being reduced to writing.

It appears, that there was conflicting evidence as to the parol reservation. But admitting that there was something amounting to a license, when the land was sold by deed to the complainants' grantor, and afterward by that grantor to the complainants, the con-

veyance was a revocation of the license. In *Cook* v. *Stearns*, 11 *Mass. R.* 533, it was held, that if the allegations of a license from former owners were held to be a bar to the action, all the mischiefs and uncertainties which the legislature intended to avoid, requiring such bargains to be put in writing, would be revived, and purchasers of estates would be without the means of knowing whether incumbrances existed or not in the land which they purchase. *Fatiman* v. *Smith*, 4 *East*, 107.

The case of *Clement* v. *Durgin*, 5 *Greenl.* 9, is different from the present. That was between the original parties. No conveyance had been made. We do not think that the decision in *Clement* v. *Durgin* should be construed to go further than to settle the rights between those parties as to the payment of damages, and to persons similarly situated. And by any parol agreement of the complainants' grantors, we are satisfied that the present title of the complainant is not affected.

The Judge also overruled the motion to prove that the flowing was no damage, and that if the land of complainants was proved to have been flowed by defendant's mill-dam, some damages would be presumed, and the jury or committee to be afterwards appointed were to estimate the amount of damage, or to ascertain whether in fact there were any or not.

In this case no damage was sustained till 1835. When the complainants' grantor purchased in 1801, the land was wild and uncultivated; afterward it was fenced and grass cut a number of years. It may be that for some cause the flowing was not till latterly continued through the summer. The meadow of the complainants in *August*, 1835, was overflowed by means of the respondent's mill-dam, as high as it was in *November*. This fact presented a *prima facie* presumption of damage. But it was not requisite to go into this inquiry as it is more particularly to be investigated by the actual inspection of the commissioners to be appointed after the decision of the Court upon the first verdict, if that can be sustained upon the questions now under consideration.

By the *stat.* of 1824, *c.* 261, "if any owner or occupant of a mill, appearing, shall not shew sufficient cause, the court may appoint three or more disinterested freeholders of the same county to make true and faithful appraisement under oath, of the yearly dam-

ages, if any, done to the complainant by flowing his lands, and how far the same may be necessary, and to ascertain and make report what portion of the year such lands ought not to be so flowed. *This report shall*, under the direction of the court, *be given in evidence* to the jury who shall, at the request of either party, be empannelled to try such cause at the bar of said court, subject however to be impeached by evidence from either party. And if neither party request *a trial of such cause by a jury*, at the bar of said Court *for the purpose of impeaching such report*, then said report being accepted by said Court, judgment shall be rendered thereon according to the same. And the verdict of such jury, or the report of said commissioners, in case neither party shall request a trial by jury as aforesaid, shall be a sufficient bar to any action to be brought for such damages; and shall in no manner authorize such owner or occupant to flow such lands during any portion of the period in which said commissioners or jury shall determine that the same ought not to be flowed."

This provision of the statute shews in the clearest manner, that the construction of the Judge was perfectly correct. The design of the statutes on this subject was to authorize the party flowing to avail himself of a denial of the complainants' title to the lands said to be damaged by flowing, or a claim of *right* to flow such lands without payment of damages, or for an *agreed composition*, to be tried by a jury, unless there be an issue in law which the Court shall determine. All this is to be finished before the appointment of commissioners. And none would be appointed, if the complainant failed to establish his title to the land flowed, or if the defendant proved a right to flow without payment of damages or for an agreed composition. *Cowell* v. *The Great Falls Manufacturing Co.*, 6 *Greenl.* 282.

The exceptions are overruled.

NOTE WITH THE OPINION. It is said, that there is a case *Liggins* v. *Inge*, in 5 *Moore & Payne*, 712, decided I suppose in the Exchequer, in 1827, that a parol license, after it is executed at the expense of the grantee, is not countermandable by the grantor. Where therefore the plaintiff's father gave the defendants leave, by parol, to lower the bank of a river and erect a weir, whereby a part of the water which before flowed to the plaintiff's mill, was diverted: — *Held*, that his son could not maintain an action against the de-

fendants for continuing the weir, although his father, a few years after the license was given, had required them to raise up the bank and pull down the weir.

It has not been in my power to see the case at large. But it does not appear to me to justify a departure from the construction in *Fatiman* v. *Smith*, 4 *East*, 107. The case of the weir was not between a purchaser for a valuable consideration and the person erecting the weir, but between him and the son of the licenser, and the son probably took by descent.

JACOB ROBINSON *vs.* GEORGES INSURANCE COMPANY.

Where it is provided, that any dispute arising upon a policy of insurance shall be referred to arbitrators to be mutually chosen by the parties, an action may be sustained upon the policy without any offer to refer.

Where a vessel has been stranded on a sand bar, within the *United States*, and within an hundred miles of the place of holding a Court of the *United States* for the district, and has been put afloat and repaired by salvors, the master has no power to refer the claim for salvage without the assent of the owners.

And if upon such reference, the arbitrators award more than fifty per cent. of the value of the vessel to the salvors for salvage, and the Master of the vessel sell her to pay the salvors, an action cannot be maintained against the insurers for a total loss, without an express abandonment.

ASSUMPSIT on a policy of insurance.

There was in the policy the usual clause, providing for a reference in case of disputes arising under it. There was no evidence of any offer to refer before the commencement of the suit. The counsel for the defendants requested WESTON C. J. presiding at the trial, to direct a nonsuit, because no offer to refer had been made. This was declined by the Chief Justice.

The plaintiff claimed as for a total loss. It was proved, that the vessel insured was stranded on a sand bar at the mouth of the *St. John's River*, in *Florida;* that she was abandoned by the master and crew; that she was subsequently found and got afloat by the master and crew of a steamboat, aided by steam power; that there was no Judicial Court which could be resorted to nearer than *St. Augustine;* and that the master of the vessel and of the

steamboat referred the question of salvage, and the award was ninety per cent. for salvage, leaving but $95 for the owners, on sale of the vessel by the master. The time when the vessel was stranded does not appear in the case, but it does appear, that a protest was made at *Charleston,* in *South Carolina, Dec.* 7, 1836, and that this, and a former protest and other documents, were forwarded to the owner in the county of *Lincoln* in this State, and that he abandoned to the defendants on the twentieth of the same *December.* It appears from the rulings and instruction of the Judge, that other material facts were proved at the trial, but they are not found in the report of the case.

The jury were instructed, that they might find as for a total loss, although in the hands of the purchaser, the vessel was afloat, and susceptible of being repaired, and was repaired for less than half her value, even without abandonment; that if there were no means of making the necessary repairs at the port where the vessel was, and if from the troubled state of the country, and the smallness of the port of *Jacksonville,* near which the vessel was, the master could not raise the necessary funds, and if the claim of the salvors amounted to the greater part in value of the vessel, the master was justified in causing her to be sold. The jury found a verdict, as for a total loss, deducting the $95 received. If the nonsuit should have been ordered, or the verdict cannot be sustained under those instructions, a new trial was to be granted.

Holmes, for the defendants, contended: —

1. That an offer should have been made by the plaintiff to refer. The defendants claim nothing, and they cannot make the offer. The policy declared on is express, that any dispute respecting claims under the policy should be referred to arbitrators.

2. The instruction to the jury in relation to abandonment was erroneous. Unless there is an absolute destruction of the property, there can be no recovery for a total loss, without a legal abandonment. There is but one exception, the sale by the master in case of extreme necessity. The extreme necessity is an affirmative to be made out by the insured. Here no such extreme necessity is proved. In the act of abandonment, the master can never be the agent of the insurers. He becomes so only when the abandon-

ment is rightly made. It was not made in season, and therefore the defendants, if liable, are liable only for the damage. The cases cited, were *Murray* v. *Hatch*, 6 *Mass. R.* 465; *Mitchell* v. *Edie*, 1 *T. R.* 608; *Bryant* v. *Com. Ins. Co.*, 6 *Pick.* 131; 3 *Kent*, 300; 15 *East*, 13; *Gordon* v. *Mass. F. & M. Ins. Co.*, 2 *Pick.* 249; *Robinson* v. *Jones*, 8 *Mass. R.* 536.

3. The counsel insisted, that the defendants were not liable for any thing, and went into an extended argument in support of the position. The instruction was wrong, that the master might refer the question of salvage without consulting the owners. The insurers are not liable for the incapacity of the master. 3 *Kent*, 300. The owners are liable for the acts of the master, until they discharge themselves by a legal abandonment. *Emerigon*, 67, 102. And the master was bound to do all he could. *Bryant* v. *Com. Ins. Co.*, 6 *Pick.* 131. There was no proof, that the repairs could not have been made where the misfortune happened. The instruction that the jury might infer it, was therefore wrong. The instruction was wrong, that where a loss was constructively total, there was no need of an abandonment. The very reason for requiring it, is, that the owners may interpose and prevent a total loss. *Gordon* v. *Bowne*, 2 *Johns. R.* 150.

Randall, for the plaintiff.

1. The provision to refer all disputes under the policy is wholly unavailing, as it requires a further mutual agreement to give it any effect. It is entirely immaterial, whether this clause is in the policy, or out of it. 1 *Phil. on Ins.* 8, and cases there cited.

2. A proper sale for expenses is a total loss without abandonment. *Patapsco Ins. Co.* v. *Southgate*, 5 *Peters*, 604; *Gordon* v. *Mass. F. & M. Ins.* 2 *Pick.* 249.

3. The master had the power to refer the question of salvage, under the circumstances of the case. *Hall* v. *Franklin Ins. Co.* 9 *Pick.* 466; 1 *Phillips on Ins.* 461.

4. The right of the master to make sale of the vessel to pay salvage, though once questioned, is now admitted in extraordinary cases. 2 *Burr.* 683; 1 *Doug.* 231; 2 *Pick.* 249; 2 *B. & A.* 518; 3 *Atk.* 195; *Sewall* v. *U. S. Ins. Co.* 10 *Pick.* 90; *Patapsco Ins. Co.* v. *Southgate*, 5 *Peters*, 604; 7 *Cowen*, 564; 12 *Peters*, 378.

The opinion of the Court was drawn up by

EMERY J. — On reviewing the report in this case, we consider that the Chief Justice would not have been warranted to direct a nonsuit. The clause in the policy providing for a reference, if disputes arise, has long been practically ranked among the unimportant provisions of the policy. On whom is the obligation to make the first offer? We see nothing in the provision that indicates it. It is treated in the *English* authorities as of little consequence, because it ought not to be holden sufficient to oust the courts of law or equity of jurisdiction. *Kill* v. *Hollister*, 1 *Wilson*, 129; *Street* v. *Rigby*, 6 *Ves., Jr.* 815. Yet *there* it seems to be conceded that a clause might be introduced, by which an offer to refer might become essential, provided the stipulations were that no suit at law or in equity should be instituted till an offer of reference had been made and refused. And in such case a nonsuit might become highly proper, if the precedent condition were not complied with; unless as in 2 *C. & P.* 550, *Goldstone et al.* v. *Osborne et al.*, the insurer denied the general right of the assured to recover anything. *Here* there is no such preliminary requisition. In its best form, it may be somewhat difficult to execute fully, because of the case with which one party might be taking exceptions to the referees to be named by the other, either on the alleged or fancied ground of incompetence, prejudice, interest, want of firmness, patience, intelligence, integrity, or many other causes, which might incline one of the parties rather to distrust whomsoever might be designated by the other, and in *Phillips on Insurance*, it is described as altogether unnoticed, as of binding efficacy in the *United States.* 1 *Phil. on Ins.* 8, *and cases there cited.* A graver question is presented in a further examination of the proceedings at the trial on the instruction to the jury "that they might find as for a total loss, although in the hands of the purchaser, the vessel was afloat, and susceptible of being repaired and was repaired for less than half her value, even without abandonment."

On misfortune arising in the course of a voyage, if the master, acting under extreme necessity, and in the exercise of prudent discretion, for the benefit of all concerned, sell the property, and thereby put an end to the adventure, the assured may treat the loss as total and abandon. As if from the nature of the place, at which

the damage happens, it is impossible to procure repairs there, or to proceed to another port for that purpose, or where goods are so damaged that they cannot be sent on to market, no means of transhipment exist, or from their nature, they are unfit to be kept for the purpose of being forwarded to their destination. 5 *M. & S.* 447. *Roux* v. *Salvador*, 32 *Eng. Com. Law R.* 110.

We do not say that abandonment is absolutely necessary in the case of the legal transfer of the property by a necessary and justifiable sale. There would seem to be a species of incongruity in requiring it. Because if the sale be good and justifiable, there is nothing to be abandoned. The right of property is perfectly changed. 2 *Pick.* 261, 265; *Patapsco Ins. Co.* v. *Southgate & al.* 5 *Peters*, 604, *at p* 623.

In 2 *Starkie's Rep.* in 1819, *page* 501, *Robertson* v. *Caruthers*, *Abbott C. J.* remarks, that the question is not whether by possibility, if a different conduct had been pursued by the master, the ship might not eventually have been saved, but whether exercising the best discretion he could upon the subject matter, he was not justified in abandoning the ship without entering into a nice and minute calculation. He certainly must not act hastily and at random. He must exercise the same judgment and discretion as if the ship had been uninsured. See *Dacosta* v. *Newnham*, 2 *T. R.* 408; 1 *Camp.* 541; *Thompson* v. *Rowcroft*, 4 *East*, 34; *Leatham & al. Exrs.* v. *Terry*, 3 *B. & P.* 479; *McArthy* v. *Abel*, 5 *East*, 388; *Everth* v. *Smith*, 2 *Maule & Selw.* 278. There were further instructions to the jury, that the master might refer the question of salvage, unless his so doing under the facts, was evidence of fraud or negligence on his part, and that if there were no means of making the necessary repairs at the port where the vessel was, and if from the troubled state of the country and the smallness of the port of Jacksonville, near where the vessel was, the master could not raise necessary funds, and if the claim of salvors amounted to the greater part in value of the vessel, the master was justified in causing her to be sold.

Notwithstanding our desire to make all just allowances for the difficulty of deciding absolutely right by masters of vessels, in embarrassing cases, occurring in foreign countries, we consider that the authority of the master to put in peril the interests of the owner

in the ports of the *United States, must be narrowly watched.* We readily admit, that salvors have a lien on the property saved. But upon what is disclosed by the report, we do not perceive what was the special purpose for entering into a reference as to the salvage, without consulting his owners. The vessel was removed from the bar; the lien of the salvors remained. The mails went regularly. Communications could have been made to the owners. The tribunals of justice were open for ascertaining the amount of salvage, which should have been allowed upon something like legal principles. The salvors could libel the vessel for compensation. *St. Augustine* is not more than 100 miles from *Jacksonville.* To *St. Augustine* resort might have been had to the District Court, to which properly appertains jurisdiction in cases of this nature. Had the owners been consulted, and authorized the reference, though the amount awarded by the referees or arbitrators would not be conclusive on the underwriters, yet the fair expenditure of a just compensation for salvage might go to shew that the damage sustained exceeded fifty per cent. of the value of the vessel, and in that way constitute a constructive total loss.

But considering the very great danger there would be to the interests of commerce, if facilities should be extended for depriving owners of their vessels under imaginary necessity, indulged by a master, without consulting the owners, for resorting to referees to settle questions of salvage, when our own judicial tribunals could be applied to, and at so short a distance as *St. Augustine* was from the place of injury, we are all of opinion that, under the circumstances of this case, we cannot sustain the instruction, "that the master might refer the question of salvage, unless his so doing under the facts was evidence of fraud or negligence on his part."

The right of the master to sell is implied from the nature of the case, when the injury to the vessel is so great, and the necessity so urgent, as to justify this extraordinary measure. *It is a power,* as held by the Supreme Court of the *United States,* in the case cited from 5 *Peters,* 604, *to be exercised with great caution and only in extreme cases,* and it is said there, that the difficulty in all these cases consists, principally, in the application of the rule to a given case, and not in determining what the rule is. The professional skill, the due and proper diligence of the master, his opinion of the ne-

cessity, and the benefit that would result from the sale to all concerned, would not justify the sale, unless the *circumstances under which the vessel was placed rendered the sale necessary in the opinion of the jury.* Still the objections against the sale in this case are decisive. They arise from the hasty assent of the master to the reference, which we cannot approve, and to meet the expenses of the salvage awarded on that submission, by the sale, without any advice or consultation of the owners. The vessel was afloat and repaired. From the view which we have taken of the case, it is not necessary to consider now the question of abandonment. We think it highly proper, that the verdict be set aside and a new trial granted.

NATHANIEL GROTON, *Judge, &c. vs.* JOHN RUGGLES *& al.*

If a legacy be given in trust, and there be no special designation in the will of the executor, or any other person, as trustee, it belongs to the executor as such, to administer the estate according to the provisions of the will.

But if the person named as executor, is also in the will appointed trustee, he is required by law to give a separate bond in his character of trustee.

And it is his duty to give the bond as trustee without being notified or cited thereto; and his neglecting or refusing so to do, is to be considered as declining the acceptance of the trust, and another trustee is to be appointed by the Judge of Probate in his stead.

When an executor is also appointed a trustee under the will, he remains such until by reason of his refusal to give the bond required by law, he shall be considered and adjudged by the Judge of Probate to have declined the trust.

DEBT on a bond, given by the defendants, *Ruggles, Ludwig* and *Paine,* as executors of the last will and testament of *Daniel Rose,* deceased, with their sureties, to the Judge of Probate for the county of *Lincoln,* in form prescribed by law, conditioned to return an inventory, and to administer the estate according to the will. The will was approved *Nov.* 7, 1833, and the bond dated

the same day. By the terms of the will, the persons named as executors were to act not only in that capacity, but also in some respects in the capacity of trustees.

The estate was given to the widow and children "with the provisions and subject to the conditions and exceptions hereinafter provided for, and subject to the discretion and direction in all things of the executors and trustees hereinafter appointed." After appointing *Ruggles*, *Ludwig*, and *Paine* executors, the will says, "And I do hereby further constitute, choose and appoint the said *Ruggles*, *Ludwig* and *Paine*, and do hereby make them trustees of all my estate, real and personal," with certain exceptions, "in trust and as a trust estate for the benefit of my children." "I do hereby give and grant to my said executors full power over the said trust estate hereby bequeathed, to manage, dispose of and distribute said trust estate according to their own judgment and discretion in all things." "That they should divide the property entrusted to their use, equally amongst all my children, upon their arriving at the age of twenty-one, if in their opinion, it shall be proper so to do, and for the benefit of all or either of them." And gives power and authority "to dispose of the share of either of my said children in any other way or manner than is herein provided, if they shall have good or sufficient cause for so doing, and in such manner as they shall believe will best promote the interest and well-being of my said children." "I give and grant to my said trustees full powers and authority and all that may be necessary for the execution of all trusts herein created." The will also provides, that if either of the three should refuse to act or should decease, those remaining "shall in any manner they may see proper appoint other fit person or persons to be trustees in the place and stead of him or them not acting."

The report of the case states, that at the trial before WESTON C. J., the defendants contended, that by the will the executors had a right to retain certain property which belonged to the estate, as trustees, to be disposed of as prescribed by the will. The duties and liabilities of the defendants depending much upon the question, whether the executors sustain the character of trustees or not, the cause was taken from the jury for the purpose of submitting certain points to the decision of the whole Court. It appeared that

the executors had given no other bond, than the one in suit. Questions were raised:

1. Whether the executors are bound by law to give a separate bond in their character of trustees.

2. Whether they are bound to do so, the Judge of Probate having passed no order, requiring such bond, or determining for what sum it shall be given.

3. Whether the executors, holding themselves in readiness to give a separate bond as trustees, whenever thereto required by the Judge of Probate, and notified of the amount for which it is to be given, have a right to act as trustees under the will.

4. Whether having failed, without such requisition or order, to give such bond, is to be considered as having declined the acceptance of the trust specially confided to them by the will.

5. Whether in such case, their character as trustees under the will may be revived, whenever they may give a separate bond as such, to the acceptance of the Judge of Probate.

The case was strenuously argued by *Preble* for the heirs at law and legatees of *Rose*, who instituted the suit in the name of the Judge of Probate, and by *Ruggles*, *pro se*, and for the other defendants, and by *Holmes* for some of them.

Each of the counsel cited and commented upon the statute of 1821, *c.* 51, to regulate the jurisdiction and proceedings of Courts of Probate.

Ruggles, in his argument, remarked, that there were serious obstacles to the maintenance of the action, not referred to among the matters reserved for the consideration of the Court, but that he should confine himself to such as were presented. He cited in his argument 9 *Petersdorf*, 285, *n*; 3 *Bac. Ab. Ex'or C*; *Toller on Ex'rs* 351, 361; 1 *Ves. Jr.* 63; 1 *Har. Chan.* 524; 3 *Atk.* 96; 1 *Cox*, 134; *Dorr* v. *Wainwright*, 13 *Pick.* 328; *Hall* v. *Cushing*, 9 *Pick.* 395; *Towne* v. *Ammidown*, 20 *Pick.* 535; *Saunderson* v. *Stearns*, 6 *Mass. R.* 37; 8 *Cranch*, 9; 10 *Peters*, 592; 1 *Paige*, 509; *Mucklow* v. *Fuller*, *Jacob*, 198; *Williams on Ex'rs and Adm'rs* 1104; 3 *Bac. Ab. tit. Ex. E* 14; 6 *Madd.* 15; 1 *Madd.* 578.

The opinion of the Court was prepared by

WESTON C. J. — The first question presented is, whether by the will of *Daniel Rose* deceased, his executors, as such, are invested with the character of trustees under the will, so that the bond, given by them as executors, is all the security for the faithful performance of the duties confided to them, which they are required by law to give.

There can be no question but the office of executor is in its nature a trust, in the discharge of which he acts as trustee. And where there is no other special designation of the executor, or any other person, as trustee, it belongs to the executor, as such, to administer the estate, according to the provisions of the will. Such was the decision of the Court in *Dorr* v. *Wainwright & al.*, 13 *Pick.* 328, upon the ground, that no trustee was expressly named. But in the will under consideration, the executors are also distinctly appointed to act as trustees. And this designation is so often repeated, as to manifest a clear and plain intention, on the part of the testator, to invest them with the double capacity of executors and trustees. In one of the latter clauses of the will, he speaks of them as trustees, and expressly clothes them with all the powers, necessary to the fulfilment of the trust. And if any doubt upon this point could be raised, the last clause is altogether decisive, which provides, that in case of the death, the neglect or refusal, or incapacity of either of the trustees, his place shall be supplied by the appointment of the survivors.

If the persons named as executors, were also appointed trustees, they are required by law to give a bond as such, the testator not having relieved them from this obligation. Nor is this requirement of law useless and unnecessary in this case; although the faithful discharge of their duties under the will may have also been secured by the bond, given by them as executors. One of the conditions of the bond, required to be given by trustees is, that they shall annually render an account to the Judge of Probate, of the annual income and profit of the estate held in trust. *Stat.* of 1821, *c.* 51, § 58. This special duty, thus imposed by law, is not provided for by the executor's bond.

The section last cited, requires affirmatively, that trustees under a will should give the bond therein prescribed, and this duty is not

made to depend upon their being notified or cited so to do. They should present themselves to give the bond required, in such sum, as may be ordered by the Judge. Neglecting or refusing to do so, by the fifty-ninth section of the same statute, they shall be considered as having declined the acceptance of the trust. And in that case, other trustees are to be appointed by the Judge of Probate. Jurisdiction of the subject matter belongs to the Judge of that Court, of which this Court has no other supervision, than what is appellate. The Judge of Probate must decide when the exigency exists, which requires his interposition to make a further appointment. As this is founded upon the neglect or refusal of the trustee or trustees to give the requisite bond, it must be found or adjudged by the competent authority, and they thereupon be held or considered, as the statute prescribes, to have declined the trust. This has not been done by the Court below, and cannot be done by this Court, except in the exercise of its appellate jurisdiction.

It results, that the executors, being also appointed trustees under the will, remain such until by their neglect or refusal to give the bond required by law, they shall be considered by the Judge of Probate to have declined the trust.

SAMUEL DAVIS *vs. Inhabitants of* BATH.

The *stat.* of 1838, *c.* 311, entitled "An additional act concerning the public money apportioned to the State of *Maine*," empowers the respective towns to distribute the amount of the money received under the act of 1837, *c.* 265, among the inhabitants of the town *per capita*, whatever appropriation or disposition thereof had been previously made by the town under the act of 1837.

IN this case the parties agreed on a statement of facts, and also agreed to waive any objections to the form of the process and mode of proceeding, and that judgment should be rendered according to the rights of the parties.

Davis, with his family, consisting of twelve persons including himself, were inhabitants of *Bath*, at the beginning of the year 1837, and long before, and have so remained since, and were enumerated as inhabitants of that town in the census taken that year. In *March*, 1837, the inhabitants of the town voted to receive their share of the *surplus revenue*, under the provisions of the *stat.* 1837, *c.* 265, and in the months of *April* and *June* following, did receive thereof their proportion, being $9046. The inhabitants of the town, at their annual meeting, *March* 27, 1837, voted to appropriate $4000 of this money for building a townhouse, $3000 for enlarging the almshouse, and appropriated sums towards a bridge and a ferry. These sums were expended according to the votes of the town, during the year 1837, excepting the sum of $1000, which was loaned out on security. At the annual meeting holden on the second day of *April*, 1838, the inhabitants of the town "voted to distribute *per capita* the surplus money belonging to the town." An article in the warrant for calling this meeting was, "to see how the town will dispose of the surplus money belonging to the town, according to an act of the legislature of 1838."

Tallman, for the plaintiff, argued in support of these propositions.

That as by the statute of 1837, *c.* 265, only the use of the money was given to the towns, it remained under their control and government, and they could at pleasure change the use to any legal purpose.

That the statute of 1838, *c.* 311, being accepted by the town of *Bath*, was an alteration of the original contract, and gave to that town the same money by a new grant, with new powers, which they became authorized to execute.

That the statute of 1838, conferred on the town, with its consent, authority and power to distribute among the inhabitants thereof a sum of money equal to their proportion of the surplus revenue; and therefore the particular use to which the defendants had applied this money becomes immaterial.

That in equity and good conscience, as well as in law, the plaintiff is entitled to recover.

And that the defendants may be considered as having the money still in their possession, notwithstanding the first appropriation.

The counsel commented upon the case, *Hooper* v. *Emery*, 14 *Maine R.* 375, and contended, that there was nothing in that case inconsistent with the support of the present action.

Randall and *Groton*, for the defendants, contended, that the money was legally appropriated by the town for purposes authorized by the act of 1837, under which it was received, and actually paid out for the objects for which it was appropriated before the act of 1838 was passed. Under the first act, there could be no division among the inhabitants *per capita*. *Hooper* v. *Emery*, 14 *Maine R.* 375. The act of 1838 only adds an additional mode of appropriating any money not before expended, but remaining on hand in cash or in securities. The statute of 1838 is additional to that of 1837, and both acts are to be construed together. The act of 1838 gives no authority to the towns to raise money to distribute *per capita*, and where the money has been legally appropriated and expended under the first act, there is nothing to appropriate by distribution, *per capita*, under the second. By the act of 1837, the money belonged to the towns unless called for, and the release by the State of the right to call for it, cannot have any influence in determining the mode of appropriation. The towns have no power to raise money to distribute, and a vote to raise it for that purpose would be void, and any tax assessed under it illegal. If such be the law, a vote of the town to give the money to the plainuff, would not enable him to sustain the suit. The vote of the town is only "to distribute, *per capita*, the money belonging to the town," and does not apply to the money expended in building a townhouse and a poorhouse. The money actually paid away, under the authority of the law, cannot be said to belong to the town.

The opinion of the Court was drawn up by

WESTON C. J. — The act of 1837, *c.* 265, provides, that the portion of the public money of the *United States*, which might be received of the Treasurer of the State, should be deposited with the several cities, towns and plantations, upon the terms and conditions therein prescribed. It was subject to be reclaimed, for which adequate provision was made; but in the mean time the use of the money was to remain with the towns. It was not a special de-

posit for safe keeping merely, but it was a general deposit, imposing on the towns the obligation of returning an equal amount.

It was however deemed proper that the use of the money should be subject to public regulation. Accordingly the towns were empowered, either to loan the money, on safe and ample security, or to appropriate it for the same purposes, for which they have a right to raise money by taxation. In either case, they remained liable to the State. It still existed, in the eye of the law, and was represented by the security given by individuals, or by the obligation of the towns to replace the money in the treasury by taxation, from which they may have been relieved for a time, by the appropriation of that, which had been furnished by the public.

Under the act of 1837, the action of the towns was limited to the use of the money, and could not affect the principal. That had not become their property, or subject to their final disposition. Then came the act of 1838, *c.* 311, which relieved the several cities, towns and plantations from all obligation to refund the money, which had been deposited with them respectively. And this last act authorized them to make a definitive disposition of it. They were to distribute it *per capita*, or to appropriate it to any other purpose, for which it might be lawful for them to raise money by taxation. Under the first act, the towns received it as a deposit, under the second, they were entitled to retain it as a gratuity.

It was competent for the legislature, to determine in what manner their bounty should be enjoyed. It might be shared by all in common, or it might be appropriated to any lawful municipal purpose. In pursuance of this authority, the inhabitants of the town of *Bath*, at a legal meeting, duly called to act upon the subject matter, voted to distribute, *per capita*, the surplus money belonging to the town, under the act of 1838. The article itself, as well as the vote founded upon it, embraces the whole surplus money, received by the town. Upon this vote in our judgment, the town were bound to distribute the amount received, whatever disposition they had previously made of the use of the fund, to which alone their power previously extended. According to the agreement of the parties, by which all formal objections are waived, the plaintiff is to have judgment for his just proportion of the whole fund.

CHARLES PRAY *vs.* PETER GARCELON.

A mere general admission, by the party sought to be charged, *that something was due*, without reference to the particular claim in question between the parties, is not sufficient to take the demand out of the operation of the statute of limitations.

In an action of assumpsit, if the jury would not be authorized, from the evidence introduced by the plaintiff, to infer a promise to pay the demand in suit, the presiding Judge may, according to our practice, direct a nonsuit.

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

Assumpsit on an account annexed to the writ. Neither the time of the alleged delivery of the articles charged, nor the quantity, nor the description of them, nor the time when the action was commenced, can be ascertained from the exceptions. From the pleadings, ruling of the Judge, and arguments of counsel, it would seem that more than six years had elapsed between the delivery of the articles and the commencement of the suit. The general issue was pleaded, with a brief statement, that the defendant did not promise within six years. The plaintiff replied, that the defendant did promise within six years.

On the trial, the defendant objected, that the account was barred by the statute of limitations. The plaintiff then introduced a witness, who testified, "that about three years ago he heard the defendant state, that he was owing the plaintiff something, and it ought to be settled, but did not state how much or what for." The exceptions then state, that "a nonsuit was ordered on the ground that this was not sufficient evidence to take the case out of the statute; and the Judge ruled, that it was necessary for the plaintiff to prove an acknowledgment of the particular debt which was the subject of this controversy, and that a general acknowledgment of indebtedness was not sufficient for this purpose." The plaintiff filed exceptions.

The case was submitted on the briefs of counsel.

J. S. Abbott and *Moody*, for the plaintiff.

1. A general acknowledgment of indebtedness is sufficient, when, as in this case, sundry and diverse demands do not exist between the parties. In the cases cited by the defendants' counsel, it will

be found that when the general acknowledgment of indebtedness was made, there were other demands subsisting between the parties, and that it could not be determined to what the acknowledgment was intended to apply. Here is but one transaction, and there is nothing to which the acknowledgment could be applied, except the demand in suit.

2. It was contended, that the question should have been left to the jury to say, whether the acknowledgment did not apply to this account. There was no evidence that the plaintiff had any other claim against the defendant.

Codman & Fox, for the defendant.

The acknowledgment must refer to the very debt in question between the parties. In this case there is no promise to pay, no acknowledgment that any particular sum is due, and no reference to any demand, by the proof of which, the amount of indebtedness may be ascertained. This is not sufficient to take the case out of the operation of the statute of limitations. 3 *Bingham*, 329; 4 *Car. & P.* 173; 8 *Bingh.* 38; *Peebles* v. *Mason*, 2 *Dever.* 367; *Stafford* v. *Bryan*, 3 *Wend.* 532; *Clark* v. *Dutcher*, 9 *Cowen*, 674; *Bell* v. *Morrison*, 1 *Peters*, 366; *Bangs* v. *Hall*, 2 *Pick.* 368; *Porter* v. *Hill*, 4 *Greenl.* 41; *Moore* v. *Bank of Columbia*, 6 *Peters*, 91; *Hancock* v. *Bliss*, 7 *Wend.* 267; *Perley* v. *Little*, 3 *Greenl.* 97; *Thayer* v. *Mills*, 2 *Shepl.* 302.

The opinion of the Court was drawn up by

Shepley J. — This is not a promise to settle and pay whatever is due, or may be found to be due on an unsettled account. It is only an admission by the defendant "that he was owing plaintiff something and it ought to be settled." An acknowledgment of present indebtedness is evidence from which a promise to pay, may be implied; but when it does not refer to any particular claim, and none is at that time produced, no promise can be implied to settle or pay any particular demand. And it would not authorize a jury to imply a promise to pay whatever the plaintiff might prove to be due on all the dealings, which had ever existed between the parties. The effect of such an acknowledgment was considered in the case of *Bell* v. *Morrison*, 1 *Peters*, 365. One of the points

decided is thus stated, "whether the admission of a party of the existence of an unliquidated account on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the parties understood the balance to be, is sufficient to take the case out of the statute, and let in the plaintiff to prove *aliunde* any balance however large it might be;" and the decision upon it was, that "it would not establish any particular subsisting debt, and therefore be destitute of any reasonable certainty to raise an implied promise."

As the jury in this case would not be authorized to infer a promise to pay the demand in suit, the presiding Judge might, according to our practice, direct a nonsuit.

Exceptions overruled.

JOSEPH HEWETT *vs.* CHARLES BUCK *& als.*

The master may bind the owners by his contracts in relation to the usual employment of the vessel in the carriage of goods, but has no power as such to purchase a cargo on their account.

If the owners of a vessel have permitted the master to purchase on their account, or have ratified such acts when known to them, and thus held him out as their agent authorized to purchase, they will be bound by his acts.

The usage of a particular place that the master of a vessel as such has power to purchase a cargo on account of the owners, without authority from them, is not valid, and cannot bind the owners.

The ships husband or managing owner may bind the other owners for the outfit, care and employment of the vessel, but he has no power to purchase a cargo on their credit, without authority from them.

Where a paper has been read in evidence to the jury without objection, it is no cause of complaint that they are permitted to receive it as testimony in the case.

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

This was an action of assumpsit against *Charles Buck*, *Cornelius Kidder*, *Paul R. Barker*, *Freeman Weeks* and *Otis Small*,

for four hundred and twenty-five casks of lime. The two first named defendants were copartners, doing business under the firm of *Buck & Kidder*, the third and fourth named defendants were copartners under the firm of *Barker & Weeks*, and with *Small* were joint owners of the sloop *Cæsar*. *Buck & Kidder* were ships husband, or the owners managing for themselves and the other owners. *Jeremiah Witham* at the time of purchasing the lime was, and for two years prior thereto, had been master of the sloop. *Witham*, who was introduced as a witness and released by the plaintiff, testified, that by his agreement with the defendants, he was to man, victual and sail the vessel; that the defendants retained the right to terminate the arrangement at their pleasure; that while the arrangement continued, they had a right to direct in what business the vessel should be employed; that for his compensation, he was to have $\frac{55}{100}$ of her earnings. The vessel was employed in summers chiefly in freighting granite; but had carried three loads of lime from *Thomaston* to *Boston*, within the time of *Witham's* command. The last of said cargoes is the one now in question. The master purchased this lime of the plaintiff at *Thomaston*, as and for a cargo for said sloop to be carried to *Boston* and there sold. He represented to the plaintiff that he had authority to purchase it upon the credit and for the account of the defendants, and the plaintiff sold it upon their credit and account, relying upon them for payment. There was testimony in the case, which if believed by the jury, did prove that the defendants had authorized the master to purchase the cargo on their credit; and that *Buck & Kidder*, acting as ships husband, had authorized the master to make the purchase on the account of the defendants. There was evidence also which tended to discredit that testimony, and from which the defendants' counsel argued that it ought not to be believed.

One witness called by the plaintiff, testified, that it was within the usual employment of such vessels at *Thomaston*, when no cargo could be obtained on freight, for the masters to purchase cargoes on the credit of the owners, and that he believed it to be in accordance with the general usage at *Thomaston* for the last twenty years, during which he was acquainted with the lime dealing business; and that he had never known an instance of the sellers of

lime at *Thomaston* to require any other evidence of the master's authority to bind the owners for the price of the cargoes so purchased, than the fact that the vessel was employed in the lime-coasting business at *Thomaston*. The plaintiff refused to send the lime as freight.

The question presented for the consideration of the jury was, whether the master in this case had authority to purchase the lime on the credit of the defendants.

The plaintiff's counsel requested the Judge to instruct the jury,

1. That by law, the owners of a ship are generally liable on all contracts made by the master, even without their knowledge, relative to the usual employment of the ship; and for all his acts and undertakings with third persons, of which his character and situation afforded the presumption of authority, *even though he should contravene the orders received from the owners,* unless the party with whom he contracted, were acquainted with the orders by which his authority was restrained.

2. That if they find by the evidence in the case, that the defendants were at the time owners of sloop *Cæsar*, that *Witham* was master of their said vessel, and in his capacity as such, bought the lime of the plaintiff on the credit of the owners, representing himself to the plaintiff as having authority so to do; that the plaintiff parted with his lime in good faith upon their credit, and delivered the same on board their said sloop to the master as their agent; and that it was within the usual employment at *Thomaston* of vessels of the class and capacity of the *Cæsar*, for the master, when no cargo could be obtained on freight, to purchase lime on the credit of the owners of the vessel, in order to give her employment by transporting the same to *Boston* or elsewhere for market; then the master's purchase in this instance, was clearly an act of which his character and situation as master afforded presumption of authority; and that the plaintiff has made out his case, and is entitled to their verdict in his favor, unless the defendants have succeeded in satisfying them, that they as general owners had relinquished to the master their right to the control, direction and management of the *Cæsar*, so as to constitute him the owner for the time being, clothed with their authority over the vessel, and subjecting him to their liabilities.

3. That to constitute the master owner of said sloop, so as to relieve the defendants and render him liable to the plaintiff for the lime, it is incumbent on the defendants to satisfy them not only that the master had taken the sloop on shares, that he was to victual and man her at his own expense, and was to have a portion of her net earnings as his compensation, but they must go still further, *and show that the master had the entire control and direction of the vessel, so that the general owners for the time being had no right to interfere with her management.*

4. That if in weighing the testimony, they should find that these defendants have exercised acts of continued ownership over the sloop and of authority over the master, requiring him to transport their own granite whenever and so long as they chose; sending him to *Thomaston* with lumber at their pleasure, and directing him what to do with the sloop, then the legal presumption arising from such facts will be, that the master had not had such entire control of the vessel as to constitute him owner for the time being, and the liability of the general owners has continued, and they are chargeable in this action.

5. That if they are satisfied, that the owners of the sloop *Cæsar* or a part of those owners, being the managing owners and ships husband, instructed *Witham*, when he left *Bangor*, to go to *Thomaston* and there to purchase cargoes on the credit of the owners, and that *Witham* thus instructed, did purchase the lime in question on the credit of the owners, then the defendants are liable without regard to the question whether the sloop was sailed on shares or not.

The Judge instructed the jury that the relation in which *Witham* stood to the defendants, as master of their vessel, did not of itself confer upon him the authority to purchase the lime on their credit; that the relation in which *Buck & Kidder* stood to the other owners of the vessel as ships husband, did not of itself confer upon them the power to authorize the master to purchase the lime on the credit of all the defendants; that the plaintiff could not recover unless the jury should be satisfied from the evidence that the purchase had been authorized by all the defendants; that if the other three defendants had authorized *Buck & Kidder* to cause the cargo to be purchased on the joint credit of all the owners and *Buck & Kidder* had authorized the master to make the purchase on the

credit of all the owners; or if all the owners had in any other way given the authority to the master to make the purchase, the plaintiff was entitled to a verdict; that the giving of such authority might be proved by acts or declarations of the defendants, from which the jury could infer that such authority had been previously given or subsequently ratified. The defendants' counsel in the course of the examination received from the witness, *Witham*, the release which the plaintiff had given to qualify him for a witness, and read it to the jury as evidence of a consideration paid to the plaintiff by *Witham*, the release containing an acknowledgment of a valuable consideration received. It was read without objection by plaintiff's counsel. When the jury was about to retire, the plaintiff's counsel objected to that release going with the papers to the jury. The Judge decided that it might be handed to the jury, it having been read without objection.

The jury returned a verdict for the defendants. To the directions, refusals and instructions of the Judge, the plaintiff excepted.

H. C. Lowell for the plaintiff.

1. Whenever the owners direct the employment of their vessel, and appoint the master, they thereby hold him forth to the public as a person worthy of trust and confidence, and he is thereupon regarded in law as their accredited servant and confidential agent; and as such he has an implied authority, while that relation continues, to bind his principals, the general owners, by his contracts made with third persons in relation to that employment. *Story's Abbott on Shipping*, 91, 92, 93 and *notes*; 3 *Kent*, 161, 163 and *notes*; *Reynolds* v. *Toppan*, 15 *Mass. R.* 370; *Long on Sales, (Rand's Ed.,)* 413.

2. It was material to a fair trial of the merits, that the jury should have been informed of the legal effect of the usage proved, not merely as corroborating the direct testimony, but being of itself a binding part of all contracts made in reference to it. The defendants by putting their vessel into the lime business, subjected themselves to the legal liabilities established by the usage of that trade at *Thomaston*. *Newhall* v. *Dunlap*, 14 *Maine R.* 183; *Emery* v. *Hersey*, 4 *Greenl.* 407; *Hathorn* v. *Curtis*, 8 *Greenl.* 356; 11 *Johns. R.* 107; *Williams* v. *Gilman*, 3 *Greenl.* 276; 9 *Wheat.* 581; 2 *Stark. Ev.* 258; *Loring* v. *Gurney*, 5 *Pick.*

15; 3 *Conn. R.* 9; 4 *Bing. N. S.* 134. While thus employed, the master had power to bind the owners not only with respect to the usual employment of the vessel, but also with respect to the means of employing her. 2 *Stark. Ev.* 22, *note M.*; 3 *Kent*, 163; *Abbott*, 91.

3. To constitute the master owner for the voyage, it is sufficient that he had the entire control and management of the vessel, so that the general owners could have no right for the time, to interfere with her employment. *Emery* v. *Hersey*, 4 *Greenl.* 407; *Abbott*, 22.

4. The fourth request for instruction should have been granted. 2 *Cowen*, 479; *Barney* v. *Norton*, 2 *Fairf.* 353; *Hathorn* v. *Stinson*, 1 *Fair.* 224; *Page* v. *Pattee*, 6 *Mass. R.* 459; *Howe's Pr.* 412.

5. *Buck & Kidder*, who were managing owners, for themselves and the others, had sufficient power to purchase the lime, or to direct it to be done. *Hathorn* v. *Curtis*, 8 *Greenl.* 356; *Collyer on Part.* 681; *Abbott*, 76, and *notes*; *Muldon* v. *Whitlock*, 1 *Cowen*, 290; *Wheat. Selw. N. P.* 82; *Leigh's N. P.* 97.

6. The release was improperly sent to the jury. It was introduced solely for the consideration of the Court. *Rich* v. *Penfield*, 1 *Wend.* 380; *Benson* v. *Fish*, 6 *Greenl.* 141; *Whitney* v. *Whitman*, 5 *Mass. R.* 405.

J. S. Abbott, for the defendants, contended, that the master of the vessel, as such, had no authority to purchase a cargo upon credit. 3 *Kent*, 163. *Buck & Kidder*, as managing owners, had not authority to bind the other owners to pay for a cargo for the vessel, taken up on credit. Joint owners of a vessel are not partners. *Harding* v. *Foxcroft*, 6 *Greenl.* 76. The instructions to the jury by the Judge, gave the plaintiff all the advantages to which he was entitled. Under them, the verdict shows that no authority was given by a part of the owners to purchase a cargo on credit either to the master or managing owners. *Thompson* v. *Snow*, 4 *Greenl.* 264. The usage set up was not proved. But a single person testifies of it, and he may be the only one who knew of it. If there was such usage, it was unknown to the defendants, and for that cause they are not bound by it. *Loring* v. *Gurney*, 5 *Pick.* 15. If proved, and brought to the knowledge

of the defendants, it is bad because it is against the general principles of law. *Homer* v. *Dorr*, 10 *Mass. R.* 26; *Bryant* v. *Com. Ins. Co.* 6 *Pick.* 131; *Waters* v. *Lilly*, 4 *Pick.* 145. The requests founded on the supposition that all the owners exercised a control over the vessel while *Witham* was master, are irrelative, for the verdict, under the instructions, shows that they did not. Where a paper is read to the jury without objection, it is a paper in evidence in the case, and should go to the jury. In this case the paper was admissible in evidence, had objection been made. It was a paper under the hand and seal of the plaintiff.

The opinion of the Court was by

SHEPLEY J.—The master may bind the owners by his contracts relating to the usual employment of the vessel in the carriage of goods, but has no power as such to purchase a cargo on their account. 4 *Greenl.* 264; 8 *Greenl.* 356; 14 *Maine R.* 183.

If the owners have permitted the master to purchase on their account, or have ratified such acts, when they became known to them, they would by such a course of dealing hold him out as their agent authorized to purchase, and they would be bound by his acts. But the shopkeepers in a village might as well undertake to set up a usage to trust every man's servant to contract debts for his master without authority, as the dealers in lime, or any other article in a particular place, a usage to sell to masters of vessels without authority from the owners and thereby bind them. The cases referred to by the counsel for the plaintiff do not authorize the proof of mercantile usage, or the course of business in a particular place, for such a purpose.

The ships husband, or managing owner, may bind the owners for the outfit, care and employment of the vessel, but he has no power to purchase a cargo on the credit of the owners. *Bell* v. *Humphries*, 2 *Stark. R.* 286.

The plaintiff was permitted to prove any authority given to the master, or to the managing owners, either by the acts or declarations of those to be charged by them; and such testimony being submitted to the jury, failed to satisfy them, that any authority, other than such as the law imparted to the master or managing owners, was given. It is not necessary to consider whether the

defendants were relieved from their liability as owners on the ground that the vessel was taken on shares by the master, as the case was not presented to the consideration of the jury in such a manner as to relieve them from liability for that cause.

When counsel has read and made use of a paper to the jury without objection, he cannot complain, that they are permitted to receive it as testimony in the case.

The instructions requested ought not therefore to have been given, and those, which were given, were correct.

Exceptions overruled.

The STATE *vs.* BENJAMIN STINSON.

By the *stat.* 1823, *c.* 233, additional to the act establishing the Court of Common Pleas, and the *stat.* 1836, *c.* 196, to alter and define the criminal jurisdiction of the Judicial Courts, the Court of Common Pleas, now the District Court, has general criminal jurisdiction of all crimes and offences whatever, with certain exceptions mentioned in those statutes, of which the Supreme Judicial Court has exclusive jurisdiction.

The Court of Common Pleas, succeeded by the District Court, has criminal jurisdiction of the offence of being a common retailer without license, and of all other offences, prosecuted by indictment, committed against the provisions of the *stat.* 1834, *c.* 141, for the regulation of innholders, &c. and of the additional *stat.* 1835, *c.* 193.

An indictment under those statutes should be in the name of the State.

It is not necessary to set forth in the indictment what penalty or forfeiture is incurred, or to what uses applied, as these depend upon the law.

If the indictment allege, that the offender "did take upon himself and presume to be" a common retailer of wine, &c. without license, and "did then and there, as aforesaid, sell and cause to be sold to divers persons, to the jurors unknown, divers quantities of said strong liquors," &c., but one offence is charged.

In order to avoid unnecessary prolixity in the indictment, general averments of divers sales to divers persons of divers quantities of strong liquors, from a specified day to the finding of the indictment, are a sufficient specification of the offence, which consists in being a common retailer without license.

The *stat.* 1834, *c.* 141, *is not itself repealed* by the last section of the act.

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

At the Court of Common Pleas, *December Term*, 1838, an indictment was found against *Stinson*, wherein the jurors presented, "that *Benjamin Stinson* of *Bath*, &c., on the first day of *May* last passed, and on divers other days since that time, and up to the present time, at *Bath aforesaid*, did take upon himself and presume to be a common seller of wine, brandy, rum and strong liquors by retail, and in less quantity than twenty-eight gallons, at one and the same time delivered and carried away, illegally and without license therefor, and did then and there as aforesaid sell and cause to be sold to divers persons, to the jurors unknown, divers quantities of said strong liquors in less quantity than twenty-eight gallons by retail as aforesaid, against the peace and dignity of the State, and contrary to the form of the statute in such case made and provided."

After a verdict of guilty had been returned, *Stinson* moved in arrest of judgment, and assigned the following causes.

1. Because said indictment does not specify any fine, penalty, or forfeiture incurred by the defendant.

2. Because said indictment is double, charging two distinct and different offences to which different penalties are affixed.

3. Because no time is specified in said indictment when said supposed offence was committed.

4. Because said offence is charged with a *continuando*.

5. Because it is not alleged in the indictment that the defendant *was* a common seller of wine, brandy, rum and strong liquors by retail without license; but that he *took upon himself and presumed to be* such common seller by retail without license.

6. Because the indictment alleges, that the defendant took upon and presumed to be a common seller of wine, brandy, rum and strong liquors, and specifies that the defendant sold strong liquors only.

7. Because the *stat. of March* 24, 1835, authorizing the penalty to be recovered by complaint or indictment, prescribes that the prosecution for said penalty may be by any person or persons, or in the name of the inhabitants of any town, or plantation, or city, where the offence was committed.

8. Because the indictment is found in the name of the State, which is a course not prescribed by the statute.

9. Because the indictment does not show any appropriation of the penalty.

10. Because it is not prescribed in the statute, to what use the penalty shall go.

11. Because if judgment should go against the defendant, there is no person entitled to receive the penalty, nor can it be lawfully claimed by the State.

12. Because the jurisdiction of this offence pertains not to the Court of Common Pleas, but to the Supreme Judicial Court.

13. Because the indictment does not charge any facts, which constitute an offence against any law of the State.

14. Because the indictment is informal, defective, and unconformable to the statute, so that no judgment can lawfully pass thereon.

The motion was overruled, and *Stinson* filed exceptions.

Groton, for *Stinson*, argued in support of the causes assigned in the motion in arrest of judgment. In aid of the fifth objection, he cited *Commonwealth* v. *Maxwell*, 2 *Pick.* 139. And in support of the twelfth, *Parcher's case*, 2 *Greenl.* 321.

Emery, Attorney General, for the State, contended, that although the indictment might not have been drawn with much technical accuracy, still it was good. He replied to the objections principally relied on against the indictment; and cited *stat.* 1823, *c.* 233; *stat.* 1836, *c.* 196; *Commonwealth* v. *Eaton*, 15 *Pick.* 273; 1 *Chitty's Cr. Law*, 218; *Commonwealth* v. *Horton*, 9 *Pick.* 206; 1 *Chitty's Cr. Law*, 809; *Commonwealth* v. *White*, 8 *Pick.* 453.

The opinion of the Court was by

WESTON C. J. — Without finding it necessary to investigate the question of the jurisdiction of the Common Pleas, in respect to offences of this class, at a former period, we are of opinion, that that Court and its successor, the District Court, has jurisdiction of the offence charged, in virtue of the *stat.* 1823, *c.* 233. That statute gives to the Court of Common Pleas, in general terms, concurrent jurisdiction with the Supreme Judicial Court, of all crimes, offences and misdemeanors, with certain exceptions, not embracing the case before us. This grant of power is not limited to offences, made such by laws then existing. It is prospective in

its operation, creating the Common Pleas, with certain specific exceptions, a court of general criminal jurisdiction. The act, establishing the Supreme Judicial Court, *stat.* 1820, *c.* 54, § 1, gave that court cognizance of all offences and misdemeanors of a public nature, and of every crime whatsoever, that is against the public good. It cannot be doubted, that whenever the legislative power might by subsequent enactment, declare a certain act an offence, and prescribe a punishment for its commission, upon conviction, the power of the Supreme Court, to take cognizance of it, would thereupon attach. It would be a narrow construction, and a most inconvenient restriction of the judicial power, to limit their jurisdiction to such offences only as were declared such, before the passage of the act, conferring the jurisdiction. It would enable offenders in many instances, to set the law at defiance. The Court of Common Pleas, by the *stat.* 1823, before cited, are expressly invested with all the criminal powers of the Supreme Court, with certain well defined exceptions. And it has become more important to sustain the general jurisdiction of the Common Pleas, now the District Court, as by the *stat.* 1836, *c.* 196, the criminal jurisdiction, which they before held, concurrently with the Supreme Court, is made exclusive.

The *stat.* 1835, *c.* 193, having provided, that the penalties incurred under the act of 1834, *c.* 141, to which that was additional, might be recovered by indictment, it is necessarily implied, that it must be in the name of the State. What penalty or forfeiture is incurred, and to what uses applied, depends upon the law, and need not be set forth in the indictment. There is but one offence charged against the defendant, and that is, his being a common retailer, without license. This it is expressly averred, he did take it upon himself to be. In order to avoid unnecessary prolixity, general averments of divers sales to divers persons, of divers quantities of said strong liquors, from a specified day to the finding of the indictment, have been received as a sufficient specification of the offence, which consists in being a common retailer, without license.

The last section of the *stat.* of 1834, provides, that the act shall take effect from the first Monday of *Sept.* following its enactment, and declares all acts and parts of acts, relating to the subject matter, repealed, "from and after the time aforesaid." This must be

intended to mean all other acts. It would be absurd to hold the act repealed, at the very moment when it was in express terms to take effect. In the subsequent *stat.* of 1835, *c.* 193, that of 1834 is treated as a subsisting act, and further provision is made for its enforcement. The exceptions are overruled, and the case remitted to the District Court.

Denny McCobb *vs.* Halsey Healy.

Where the principal obligor in a bond to the *United States* for duties gave to the Collector, who took the bond, a draft for the amount; and where a suit had been brought on the bond in the *United States* Court, and also a suit in the name of the collector, upon the draft in a State Court, and the defendant and the collector agreed that there should be judgment by default upon the bond, the seals on which had been torn off by mistake, and that no further proceedings should be had on the draft; and where the judgment on the draft remained unsatisfied, and the collector, who had paid the amount to the *United States*, brought another action on the draft; *it was held*, that it was competent for the plaintiff to repel any presumption, arising from such agreement, that the draft had been paid or cancelled, by proof that the defendant had afterwards admitted that the draft was justly due and unpaid.

Exceptions from the C. C. Pleas, Redington J. presiding.

The action was assumpsit, the writ bearing date *Nov.* 23, 1836, on a draft dated *Jan.* 17, 1830, for $1000, drawn by the defendant on *John Thompson*, payable in *Boston* in 60 days, to the order of *James D. Wheaton*, accepted by *Thompson*, and indorsed by *Wheaton*. With the general issue the statute of limitations was pleaded by brief statement. The execution of the draft, due presentment, demand and notice to charge all the parties, were proved. A witness testified that the draft grew out of a custom-house bond given by *Healy*, the amount of which had been paid to the *United States* by the plaintiff, by whom it had been taken as Collector, and that the bond was cancelled, or the names torn off, when the draft was made. The plaintiff proved, that *Nov.* 22, 1836, in a conversation between the plaintiff and defendant with

respect to this draft, that *Healy* said, the draft was justly due from him to *McCobb*, and that he would take no advantage of the statute of limitations, and would pay it, if he could. It was stated in defence, that the draft was given for the amount due upon the bond, and that thereupon the bond was cancelled by tearing off the names of the obligors, that suits were brought upon the draft and also upon the bond, and that the plaintiff agreed with the defendant, that the latter should be defaulted upon the bond, and no further proceedings be had upon the draft. The defendant offered a copy of the bond and of a judgment rendered thereon, the writ being dated *Jan.* 23, 1830, in the *U. S. District Court*, in *June*, 1830, and of an execution issued thereon, and of a return on the execution by which it appeared, that the defendant had been arrested on the execution and committed to the jail in *Wiscasset*, in *Sept.* 1830. These were objected to by the plaintiff as irrelevant, but by permission of the Judge were read to the jury. The defendant also offered the copy certified by the clerk, of an agreement as made upon the back of the bond, but the execution was not proved, nor the original produced. The alleged agreement was: "*Thomaston, May* 12, 1830: I hereby agree to be defaulted in the action *United States* v. me, on the within bond now pending in the District Court, my signature to the within having been torn off by mistake. *Halsey Healey.*" The plaintiff objected to the admission of this copy, and the Judge excluded it. The defendant also offered a certified copy from the docket of the clerk of the Court, at *April Term*, 1830, the contents of which are not given. This was excluded by the Judge. All that appears in the exceptions, and the testimony of a witness, in relation to the entry, will be found in the opinion of the Court. The defendant requested the Judge to instruct the jury, that if they were satisfied from the evidence, that the draft was given for the bond, and that an agreement was made to be defaulted on the bond, in consideration that no further proceedings should be had upon the draft, that the action cannot be sustained. The Judge declined thus to instruct the jury, there being no evidence in the case requiring it; and did instruct them, that if they believed that the draft was given for the bond, then the draft and bond were to be considered as collateral, one to the other, or at least were co-existing securities for the same

debt; that when the one was paid the other could not be enforced; that the commitment of *Healey*, while it continued, precluded the creditor from maintaining a suit against the same defendant even upon a collateral obligation; that if *Healey* had paid said judgment, or was still in jail under the commitment on the execution from the *U. States* Court, the action cannot be maintained; but if the jury were satisfied from the evidence offered them, that *Healy* had not paid the debt, and was free from confinement on said judgment, when this suit was commenced, then this suit might be maintained and for the full amount of the draft, interest, costs of protest, and three per cent. interest on the amount for which the draft was drawn, as damages. The verdict was for the plaintiff, and the defendant filed exceptions.

J. S. Abbott argued for the defendant, and among other grounds contended, that the draft was given in payment of the bond, and that in accordance with the arrangement, the seals were torn off, and the bond cancelled, and no action could have been maintained upon it; and then the parties made a different arrangement whereby the defendant agreed to be defaulted in the action on the bond, and the plaintiff to give up the claim upon the draft. This they had a right to do, and this they did do by the agreement to dismiss the action on the draft. This agreement was sufficiently proved. The Attorney entering and having the care of the action, had authority to make the agreement. It was also proved by the witness, *Farley*. The bond was to be revived, and the draft extinguished. This was a matter of fact, which should have been decided by the jury, and not by the Court. Besides, the plaintiff paid nothing for the draft, and the action should be in favor of the *United States*, if any can be maintained.

M. H. Smith, for the plaintiff, argued in support of the ruling of the Judge of the C. C. Pleas. To show that the minutes on the docket were not evidence, had they been produced instead of a copy, he cited *Southgate* v. *Burnham*, 1 *Greenl.* 369. The paper was a mere agreement in another action, and is wholly irrelevant in this. It neither is or professes to be, if proved, a payment of the draft, but merely an engagement not to pursue that action further. But the statement of the defendant, as late as *November*,

1836, shows that the draft was due, and that it was not considered by the parties as paid. There is however no authority produced, authorizing the attorney in the action, to take from the plaintiff the right to maintain another action on the draft. If he had any special authority he might have been called to prove it.

The opinion of the Court was drawn up by

SHEPLEY J. — The bill appears to have been drawn by the defendant in favor of *Wheaton*, who indorsed it, and to have been delivered to the plaintiff, who was then collector of the customs for the district of *Waldoborough*, the consideration being the amount of a bond for duties due from the defendant to the *United States*. It was taken either in payment of the bond, or as security for it; and it is not perceived, that the rights of the parties to this suit would be varied whether it was taken for one purpose or the other; for if the bond was paid and extinguished, the bill would remain to be paid, and the same would be the result if taken as security. If the bond had been paid by it, the defendant might have successfully resisted the suit upon it, and the fact, that he admitted the bond to have been cancelled by mistake is very satisfactory proof, that he did not consider it paid. There is then no objection to the maintenance of this suit, unless it arises out of what took place after a former suit had been commenced upon the same bill.

It appears from the testimony of *Mr. Farley*, that *Cleland* brought a suit upon it, and while it was pending, took a written agreement signed by the defendant, which is not produced, but which is stated in the bill of exceptions to be, "that plaintiff agreed with defendant, that defendant should be defaulted on the bond and no farther proceedings be had on the draft." And the action was no further prosecuted. This agreement, signed by the defendant, was excluded because it did not appear that *Cleland* was authorized by the plaintiff to make such an agreement, and it does not appear that *Cleland's* testimony might not have been obtained to prove his authority, and that would have been the best evidence. But if the attorney commencing and prosecuting the suit should be regarded as having sufficient authority to make such an agreement, it could only be evidence in connexion with other testimony from

which an inference might be drawn, that the parties intended to cancel and discharge the bill; and any such inference would be repelled by the testimony of *Mr. Prince*, that in *November*, 1836, the defendant called upon him "to witness that said draft was justly due from him to *McCobb*, and that he would take no advantage of the statute of limitations."

It cannot be material to determine, whether the copy of the memorandum upon the docket was properly excluded or not for the testimony of *Mr. Farley*, admitted afterward, fully proved all that appeared upon the docket.

Exceptions overruled.

Newell W. Ludwig *vs.* Peter Fuller.

The general rule of law is, that the payment of the price of an article is sufficient to complete the sale between the seller and purchaser; but as it respects a second purchaser or creditor, a delivery is necessary.

But there are exceptions to the general rule, of which this is one: — if a party claiming title under the seller, either as attaching creditor or purchaser, had notice of the prior sale before his rights accrued, he cannot allege any defect in the sale *for want of a* delivery.

And in an action by a purchaser against an officer for seizing the property on execution after the sale, but before the delivery, *the want of a delivery* furnishes no defence to the *officer*, if the execution *creditor* had notice of the sale before the property was taken on the execution.

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

Trespass for taking and selling the plaintiff's moiety of the schooner *Joseph & William*. The defendant filed a brief statement, alleging, that the defendant was sheriff of the county, and that one of his deputies took and sold the property on an execution in favor of *Moses Call* against *Albert S. Clark*, whose property it was alleged to have been at the time of the sale. The plaintiff claimed title under *Clark*, by a bill of sale prior to its hav-

ing been taken on the execution. *Clark* owned an undivided half of the vessel, the other half being owned by a third person.

There was no actual delivery of the vessel, which was in port at the time of the sale to the plaintiff, *Clark*, the seller, agreeing to take care of it, and see to it for him. The other part owner had no care of the vessel for the plaintiff, and did not know of the sale. It did not appear, that either part owner had any exclusive possession of the vessel before or after the sale. The additional facts of the case will be sufficiently understood from the opinion of the Court.

The counsel for the plaintiff requested, that the jury might be instructed, that the delivery of the bill of sale by *Clark*, a part owner, he not being in the actual possession, would carry with it the part of the vessel sold. This was declined by the Judge. The counsel for the plaintiff also requested, that the jury might be instructed, that if the plaintiff constituted *Clark* his agent, for managing said vessel, and that *Clark* accepted said agency, the possession of *Clark* would after that time, be the possession of the plaintiff; and that notice to *Call*, the creditor, of the transfer of the vessel to the plaintiff would be tantamount to notice to the officer, and that *Clark's* disclosure gave such notice to *Call*.

The Judge instructed the jury, that as there never was any delivery of the vessel, or any part of it to the plaintiff, the sale to the plaintiff was not good and effectual to pass said moiety, as against *Call*, one of *Clark's* creditors, unless the plaintiff, or some one other than *Clark*, acting for the plaintiff, had obtained actual possession of said moiety prior to the attachment, as the vessel was at the place where *Clark* lived at the time of the sale and frequently afterwards; and that *Clark*, being the vender, without having delivered the property, could not take or hold such possession for the plaintiff, as was necessary in order to sustain this action.

The verdict was for the defendant, and the plaintiff filed exceptions to the ruling of the Judge.

F. Allen and *Reed*, for the plaintiff, remarked, that whether the plaintiff had taken and continued the actual possession or not, was wholly immaterial, as the want of possession was merely evidence from which fraud might be inferred; and the jury have decided, that there was no fraud. The only inquiry then is, was the Judge

justifiable in withholding the instructions requested, respecting a delivery, under the circumstances of the case; and whether the instructions given were correct? It was contended, that there was error in both particulars.

No delivery was necessary, because the seller owned but a moiety of the vessel, and could not take her from the other part owner and deliver her over to the plaintiff. The deposit of the bill of sale in the custom-house was sufficient to render the sale valid. A constructive or symbolical delivery only is necessary. *Haskell* v. *Greely*, 3 *Greenl.* 425; *Abbott on Shipping*, 11, 13; *Buffington* v. *Curtis*, 15 *Mass. R.* 528; *Bixby* v. *Franklin Ins. Co.* 8 *Pick.* 86.

The purchaser may well appoint the seller his agent to receive the delivery, and take charge of the property, as well as any other person. A delivery to the agent is a delivery to the principal. This is very common in cases of assignments for the benefit of creditors.

The creditor, on whose execution the plaintiff's property was taken by a deputy of the defendant, was notified of the sale to the plaintiff long before the taking by the deputy. This is equivalent to a formal delivery, and dispenses with the necessity of it. *Tuxworth* v. *Moore*, 9 *Pick.* 347; *Haskell* v. *Greely*, 3 *Greenl.* 425.

E. Smith, for the defendant, contended, that a sale of a chattel is not perfected, as against the attachment of a creditor of the vender, unless when it is possible, actual delivery is made to, or possession taken by the purchaser previous to the attachment. *Gardner* v. *Howland*, 2 *Pick.* 599; *Butterfield* v. *Baker*, 5 *Pick.* 522; *Flagg* v. *Dryden*, 7 *Pick.* 52; *Bartlett* v. *Williams*, 1 *Pick.* 288; *Lanfear* v. *Sumner*, 17 *Mass. R.* 110; *Shumway* v. *Rutter*, 7 *Pick.* 56; *Carrington* v. *Smith*, 8 *Pick.* 419.

The fact that there was another part owner in this case can make no difference. It is only when the other owner has the exclusive possession, and chooses to retain it, that a symbolical delivery is sufficient. There is no difference in this respect between a vessel and any other chattel. It is only when an actual delivery is impossible, that it can be dispensed with. And if the vessel is at sea at the time of the sale, possession must be taken within a

reasonable time after her return, to perfect the sale. The authorities already cited are conclusive on this point. Here the seller had the charge of the vessel, and she lay in port where the delivery could have been made without objection. There was no evidence that the possession was retained by the other part owner.

The continued possession of *Clark* after the sale is no delivery to the plaintiff. This circumstance has often been relied on, and as often decided not to amount to a delivery. Several instances will be found in the cases cited. Where the vender continues in possession after the sale, where there has been no delivery, the sale is absolutely void as against creditors.

It is of no consequence in this case whether *Call*, the attaching creditor, had notice of the sale before the attachment or not. It does not appear that the attachment was made under his direction, although it was for his benefit, or that he agreed to indemnify the defendant or his deputy. He took it on his own responsibility and is answerable for the consequences. The mere statement of *Clark*, that he had sold to the plaintiff, is no evidence that the consideration had been paid, or that the proper measures had been taken to perfect the sale.

But if both the creditor and the officer knew the whole proceedings, both had the right to avail themselves of the defect of title to secure the debt. Here were two sets of creditors proceeding in different modes to obtain payment of their debt from the same property. If the execution had been put into the hands of the officer, with orders to take the vessel before the bill of sale was made, of which fact the purchaser had knowledge, and then took his bill of sale, and obtained the possession first, there would have been as good ground to contend that the execution creditor had the priority, as there is to say that the plaintiff has now. It has always been held that one creditor may avail himself of any defect of a levy on real estate, although he knew of it before his subsequent levy. So too, where one officer makes an attachment of goods, and suffers them to go back into the possession of the debtor, they may be held under a subsequent attachment, although both creditor and officer knew of the first attachment. *Bagley* v. *White*, 4 *Pick.* 395; *McGregor* v. *Brown*, 5 *Pick.* 170; *Cushing* v. *Hurd*, 4 *Pick.* 253.

The opinion of the Court was drawn up by

SHEPLEY J. — The general rule of law is, that the payment of the price is sufficient to complete the sale between the seller and purchaser; but, as it respects a second purchaser or creditor having no notice, a delivery is necessary. *Edwards* v. *Harben*, 2 *T. R.* 587; *Mair* v. *Glennie*, 4 *M. & S.* 240; *Lanfear* v. *Sumner*, 17 *Mass. R.* 117; *Shumway* v. *Rutter*, 7 *Pick.* 56; *Cobb* v. *Haskell*, 14 *Maine R.* 303. The question what constitutes a delivery is still left open, and it is often of difficult solution.

Where the goods are so situated, that a delivery cannot be made at the time of sale, as a vessel at sea, a delivery of such evidence of title, as the seller possesses, is sufficient until the purchaser can obtain possession. *Lempriere* v. *Pasley*, 2 *T. R.* 485; *Gardner* v. *Howland*, 2 *Pick.* 603.

And where goods, though not at sea, are not in the actual, but in the constructive, possession of the seller, as goods in another's warehouse, or logs in a river; and where it would be very difficult on account of the weight or bulk, as a vessel on the stocks, and in other cases of a peculiar character, what is denominated a symbolical delivery is sufficient, and this requires the performance of such an act as shews, without any other act to be performed, that the purchaser has a right to take possession, and that the right of the seller to control the property has terminated. *Harman* v. *Anderson*, 2 *Camp.* 243; *Manton* v. *Moore*, 7 *T. R.* 67; *Hollingsworth* v. *Napier*, 3 *Caines' R.* 182; *Wilkes* v. *Ferris*, 5 *Johns. R.* 335; *Jewett* v. *Warren*, 12 *Mass. R.* 300; *Badlam* v. *Tucker*, 1 *Pick.* 389; *Holmes* v. *Crane*, 2 *Pick.* 607.

The reason why a sale, when the price is paid, is not good as respects other parties without a delivery is, that the law regards the purchaser as in fault, and as acting unfairly and fraudulently in allowing the seller, by retaining the possession, to hold out the apparent evidence of ownership, and thereby induce others to purchase or to credit him to their injury. *Twyne's case*, 3 *Co.* 80; *Lingam* v. *Briggs*, 1 *B. & P.* 87. Hence if a third party claiming title, had notice of such sale before his rights accrued, he cannot allege any defect in the sale for want of a delivery, because he was not injured by it. *Steel* v. *Brown*, 1 *Taunt.* 381; *Wooderman* v. *Baldock*, 8 *Taunt.* 676; *Robinson* v. *McDonnell*, 2 *B. & A.* 134.

It must be admitted that the strength of the reasoning upon which the rule rests, that there must be a delivery as respects other parties, has been greatly impaired in this and other States, where the common law has been so modified as to allow the purchaser to prove, that the sale was not fraudulent, where possession did not accompany and follow it. What will amount to proof of delivery, has been the subject of much discussion; and it is rendered more difficult, and would probably be found impracticable to state any general rule applicable to all cases, especially in those States, where the law has been so modified as not to require an actual and permanent change of possession; and where delivery is therefore rather nominal and symbolical than actual. But because the reasoning upon which the rule of law was established does not operate as formerly, and the rule itself is less convenient in practice, that does not authorize a court of law, contrary to a uniform course of decisions, to declare that the rule no longer exists. However one may regret, that a modification of one rule of law should be found to impair the reason upon which another rule was established, it may afford a lesson, that when one is dealing with the common law, *stare decicis* is judicial wisdom. And if experience has taught, that this modification has been productive of litigation, and afforded greater facilities for the commission of frauds, it would lead to a like conclusion. It will be perceived, that these remarks do not apply to cases arising under the statute of frauds, where an attempt is made to establish a title between the parties to the contract, by proof of delivery, without any memorandum in writing, or payment of the price.

The seller in this case, in making a disclosure of his affairs under oath, stated in the presence of his creditor for whose benefit the defendant's deputy seized the property, that he had sold his half of the vessel to the plaintiff. This was as early as the third of *May*, and the property was not seized until the twenty-first of *August* following. The creditor having before known that the vessel had been sold to the plaintiff, cannot object to the title on account of the want of delivery. The case certainly exhibits strong indications of fraud, and for such a purpose the fact, that the seller continued to possess and control the property may be proved and considered; but as the case is now presented the jury have found,

that the sale was not fraudulent, and the creditor, thus affected with knowledge, is not entitled to defeat a *bona fide* sale for want of delivery. The cases referred to by the counsel for the defendant, to shew that the creditor is not precluded from taking advantage of that defect, only decide, that attaching creditors, who are not supposed to know whether any judgment will be obtained or title acquired, are not affected by a knowledge of each other's proceedings; and that one may attach, when he knows that his debtor is about making a sale, having no knowledge that the title has actually passed from him. It is also insisted, that the officer, not appearing to have been instructed or indemnified, is not to be affected by the knowledge of the creditor. The officer acts only for the benefit of the creditor, and if he should proceed without an indemnity and suffer by it, the loss must be imputed to his own neglect to take security. He is not more favorably situated, than the creditor. *Wooderman* v. *Baldock*, 8 *Taunt.* 676; *Parsons* v. *Dickenson*, 11 *Pick.* 352.

For these reasons it is not necessary to consider the testimony tending to prove either an actual or constructive delivery.

Exceptions sustained and a new trial granted.

HARVEY PREBLE *vs.* SAMUEL REED, 2*d.* *&* *al.*

If an easement in land held in common, be granted by vote of the proprietors, and the grantee enter into possession of the easement, his title will be good against subsequent purchasers, without recording the grant in the registry of deeds.

Where referees, appointed by rule of the Court of Common Pleas, make a final report, without submitting any question of law to the consideration of the Court, and the Court, upon inquiry into the facts, accepts or declines to accept the report, the judgment of that Court is final.

But where the referees report a statement of facts, and expressly refer the law arising thereon, to the determination of the Court, the acceptance or rejection of the report is not an act of discretion, but a decision of the law which is subject to revision in this Court by exceptions.

When a question of law, arising upon a report of referees, is in this Court on exceptions from the Court of Common Pleas, this Court has power to recommit the report to the referees.

When a question of law comes before this Court by exceptions from the Court of Common Pleas, the facts stated in the bill, or referred to as making a part of the case, must alone be the ground of decision.

Where the owner of land flowed by a mill dam, *sells the mills and dam*, and retains the land, the right to flow the land, to the extent to which it was then flowed, without payment of damages passes by the grant; but where the owner *sells the land flowed*, and retains the mills and dam, without reserving the right to flow, he is not protected from the payment of damages.

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

This was a complaint under the statute, wherein damages were claimed for flowing the land of the complainant by a dam erected and kept up by the defendants for the purpose of raising a head of water to carry their mills at the foot of *Neguasset* pond in *Woolwich*. The case was referred, by rule from the Court of Common Pleas, to three referees. The referees state in their award, that they met and heard the parties, and viewed the premises, and then state, that "we do finally award that the said *Samuel Reed, 2d.* and others are not guilty in manner and form as the complainant has alleged against them," and that the respondents recover their costs. "And by request of the parties the referees do hereunto annex a statement of the facts in the case as the same have been proved to them, and do submit the same for the consid-

eration of the Court." The report is then signed by the referees, and they also make a statement of facts, referring to the statement of facts in the case, *Myers Reed*, complainant, against the same respondents, before the same referees, as part of this, and concluding thus. "If upon these facts the defendants are liable for flowing the complainant's premises, the referees will estimate and report the damages." This statement is also signed by the referees. The material facts, disclosed in the report of the referees, are given in the opinion of the Court.

The report of the referees was returned to the Court of Common Pleas, and there the counsel for the complainant contended, that the general award and report of the referees ought not to be accepted; and that on the special report, and the facts and matters set forth in the same, the Court ought to adjudge that the said defendants were liable for flowing the complainant's premises, in order that the referees might proceed to estimate and report the damages. The Judge was of opinion that the general award and report be accepted, notwithstanding the facts and matter set forth in the special report of said referees, and the grounds assumed by the complainant; and ordered that the report be accepted. Exceptions were filed by the counsel for the complainant.

Preble and *Randall*, for the complainant, contended, that exceptions in this case were properly made from the decision of the Court of Common Pleas. Because the statute of flowing takes away the right to appeal, and try the facts again, this does not prevent a party from filing his exceptions, and having the law revised. The Court of Common Pleas act, *stat.* 1822, *c.* 193, § 5, is sufficiently broad to include this. Nor do the referees undertake to decide both law and fact, and thus preclude a revision in either Court. They report the facts in reference to the right to recover, and expressly refer the law to the decision of the Court. When this is done, the decision is to be made in the same manner as any other question of law decided in the Court of Common Pleas. If either party believes the decision of that court to be erroneous, he may file exceptions and have the law revised in this Court. This is not an act of discretion in the Judge of the Common Pleas, but a determination of the law. If this were a mere question of expediency, whether to recommit the report, or refuse to do it, on

evidence brought forward by the parties, the case, *Walker* v. *Sanborn*, 8 *Greenl.* 288, might apply; but it does not here. This Court has power to do all that is necessary to carry into effect the principles of law and equity, and of course have power to recommit the report to the referees.

They also contended that, upon the facts reported by the referees, the complainant was by law entitled to damages; and cited *Hathorn* v. *Stinson*, 3 *Fairf.* 183; and same case, 1 *Fairf.* 224.

F. Allen and *Tallman*, for the respondents, contended, that exceptions would not lie in this case. The *stat.* of 1822, *c.* 193, § 5, does not extend to complaints for flowing. They are not *actions.* Nor can the Court grant a new trial as provided in that statute. By the statute of flowing the Court of Common Pleas has final jurisdiction, except where there has been a verdict. The acceptance of the report of referees, or the refusal to accept it, is an act of discretion merely in the Court of Common Pleas, and is not subject to revision here. Exceptions do not lie to the exercise of such an act. The referees have power to decide both law and fact, and they have done it. Their award is final for the defendants. Their statement of facts in the other paper, was made at the request of the parties to show the grounds of their opinion, not to submit any question of law. But if a question is submitted, it is only to the decision of the Court of Common Pleas. *Walker* v. *Sanborn*, 8 *Greenl.* 288; *Smith* v. *Thorndike*, *ib.* 119; 3 *B. & Ald.* 237; *Watson on Awards*, 167; *Kleine* v. *Catara*, 2 *Gallison*, 70.

They also contended, that the defendants had a clear right to flow the land, as related in the statement of facts, without the payment of damages. They cited *Bliss* v. *Rice*, 17 *Pick.* 23.

The opinion of the Court was drawn up by

Shepley J. — The first question for consideration is, whether this Court will entertain this bill of exceptions, taken to an order of the Court of Common Pleas accepting the report of referees. The provision of the *stat.* 1821, *c.* 78, § 5, is, that "wherein it is agreed at the time of entering into the rule, that the report of said referees shall be final, the judgment of said Circuit Court of Common Pleas shall be final accordingly." And the statute providing for the filing of exceptions, *c.* 193, § 5, declares, "that either par-

ty aggrieved by any opinion, direction or judgment of said Court of Common Pleas, in any action originally commenced in said court, in any matter of law may allege exceptions to the same." Where referees make a final report without submitting any question of law to the consideration of the Court, their decision will be conclusive subject to the action of the Court, to which it is properly presented upon it; and if that Court upon inquiry into the facts accepts, or declines to accept it, its judgment is final. It is then in the exercise of a discretionary power entrusted to it, and it judges rather upon facts, than upon any question of law; and in such case, no exception can be alleged, as was decided in *Walker* v. *Sanborn*, 8 *Greenl.* 288. It appears to have been the intention to allow the party to except to any opinion of a Judge of the Common Pleas on matter of law, in whatever form it might arise; and where it distinctly appears, that the decision was not made in the exercise of a discretion entrusted to him by law, but upon a question of law, it comes within the letter and spirit of the last named statute, and the former must be regarded as modified by it. The clause giving this Court power to consider and determine in the same manner, as it would in actions originally commenced here, confers an authority sufficiently comprehensive to enable it to accept, recommit, or reject a report of referees; and the provision, that the Court may render judgment or grant a new trial, was not designed to limit or abridge such power, but rather to explain or enlarge it. If the referees had in this case made a final decision upon the law as well as the facts, this Court would no more undertake to reverse that decision upon the law than upon the fact. Instead of doing this, the Court must understand them as making a statement of the facts, and a formal decision in favor of one party; for they say, that they "submit the same for the consideration of the Court;" and further, that "if upon these facts the defendants are liable for flowing the complainant's premises, the referees will estimate and report the damages." Such language is not indicative of an intention to make a final and conclusive decision upon the whole rights of the parties.

This case coming before this Court by exceptions, the facts stated in the bill, or referred to as making a part of the case, must alone be the ground of decision; and the Court cannot, even by

consent of parties, look into other cases of flowing by the same dam as reported; or into the records of the proprietors of *Neguasset.* This would be to decide the law upon a state of facts different from that, which is submitted by the referees, and on which the legal judgment submitted for revision was rendered. And the facts in relation to the mills, dam, and titles, are different, in some degree, as stated in the cases reported in 1 *Fairf.* 224; 3 *Fairf.* 183, and in this case.

The referees have stated the facts only, as they understand them to have been established by the testimony, but not the testimony introduced for this purpose; and it may be important to notice this, as explanatory of the language used in the report. And reference is made to their report, in the case of *Myers Reed* v. *Samuel Reed, 2d,* and others, and certain facts there stated are to make a part of this report.

It appears from their report, that the proprietors of *Neguasset,* granted one thousand acres of land to *Cadwallader Ford,* which were located in the year 1761. As it is stated, that *Ford* was their clerk and agent, and that there was a warrant for calling a meeting, and an article to be acted upon, and that lots were drawn, this Court must understand, that they acted as a proprietary. The land flowed is a part of the thousand acres thus granted to *Ford.* The report also states, that "prior to 1751, and while said premises alleged to be flowed and said mill sites, pond, privileges, and stream, were so owned by said proprietors, they permitted mills to be erected, where the defendants' mills now are, called *Pain's* mills, with a dam, which raised the water high enough to carry said mills." How was this permission given, by deed, by written contract, by vote of the proprietary, or by parol? As they acted as a proprietary, and their acts as such are referred to in the report, it is most probable, that the referees intended to be understood as stating it to have been by vote of the proprietary. However that may be, nothing appearing to the contrary, this Court must understand it to have been in some legal mode to give the right to build the dam and mill; while it cannot be regarded as conveying the land upon which they were built. A person permitted to do an act may do any thing without which that act cannot be done. The dam being rightfully built, the flowing of the water to a suffi-

cient height to carry the mill would be authorized, and as no complaint or interruption appears, the conclusion is, that it was authorized to such height as the dam then actually flowed.

The finding of the referees for the reasons before stated, is considered as equivalent to their finding the grant of an easement by a vote of the proprietors, and the grantees having entered into possession, their title will be good against subsequent purchasers.

The referees find, that the mills and dam thus built, have been continued to the present time. The grantors of the defendants thus acquired a right to flow the lands of the proprietors by their own consent to such height as the dam then flowed; and the proprietors could not afterward convey their lands free from such right. The thousand acres were granted after the right to flow had been acquired, and neither their grantee, *Ford*, nor the complainant, claiming under him, can have a better right to complain than the proprietors had before the grant. And so far as *Pain's* mills flowed, the defendants upon this report, appear to have a right to flow without the payment of damages. How high that dam flowed the water is not stated, while it is stated, that *Farnham's* dam in 1766, "raised the water as high as does the defendants' dam;" and the conclusion must be, that *Pain's* dam did not flow as high as *Farnham's*.

John Carleton, who had purchased a fourth part of *Neguasset* from *Daniel Eames* and *Cadwallader Ford*, conveyed in 1745, to *Daniel Farnham* one sixth "and all his right to the stream to set up mills;" and in 1746 *Farnham* and others, under that title, built mills where the defendants' now are, and these mills appear to have been rebuilt in 1766, and to have been thus continued to the present day. The conveyance by *Ford* as well as by *Carleton* was of an undivided part; and the words used by the latter, conveying all his right to the stream to set up mills, would not increase the estate, or convey other than an undivided right in the lands and streams. The title by which the *Farnham* dam and mills were built appears to have been that of a tenant in common, who entered upon a portion of the common estate, and built a dam and mills upon it, and occupied, perhaps exclusively, such portion of the common estate. He could not rightfully change the character of the estate, or do an injury to other portions of it. He would acquire

no right as against his co-tenants to flow. And even if he had acquired a right to flow, being one of the proprietors, on the ground, that the mill had become the property of all the proprietors, and that he was but their agent; the situation of the parties would then be, that of the proprietors flowing their own lands, and afterwards while thus flowed, granting the thousand acres to *Ford* without reserving the right to continue to flow. And upon such a supposed state of facts, an instruction was given in the case of *Hathorn* v. *Stinson*, 1 *Fairf.* 224, which seems to have met the approbation of the whole court, that "if no such right is reserved he purchases it with the right to recover damages for such flowing." It is where the owner sells the dam and mills retaining the lands, that he conveys as an essential part of them the right to flow, not where he retains the mills and chooses to sell the land without reserving the right. *Farnham's* flowing not being legal, as against the owner of the thousand acres or his grantees, the defendants are no further protected than they can be by the flowing of *Paine's* dam, as it existed before the grant of the thousand acres; and to that extent they will be protected. The result is, that the report must be recommitted to the referees to assess the damages upon these principles; and if the Court has in any degree misapprehended their finding upon the facts, they will have an opportunity to state them more clearly, or to make a final report upon the whole matter of law and fact, without referring it to the Court.

JAMES D. CLARK *vs.* EZEKIEL PERRY.

The admission of the book and suppletory oath of the plaintiff to prove this item in his account — "To 60 lime casks, at 24 cents per cask" — *was held*, not to be a sufficient cause for setting aside a verdict for the plaintiff.

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

Clark *v.* Perry.

This was an action of assumpsit on the following account, annexed to the writ.

July 28, 1837.	*Ezekiel Perry* to *J. D. Clark.*	*Dr.*
	To 60 lime casks, at 23 cents per cask,	$13,80
Aug. 7.	To 60 lime casks, at 24 cents per cask,	14,40
	To 600 of hay,	6,00
		34,20
	Cr. by cash,	13,80
		$20,40

The defendant filed an account in set-off, but the exceptions do not show, that any evidence was given in reference to it.

The plaintiff produced his book of account, containing the several articles charged, and offered the same with his suppletory oath in support of the action. The defendant objected, that the articles were so large and bulky, that they, as was contended, could not have been sold and delivered without the assistance and knowledge of some other person or persons, who should be called as witnesses. The Judge overruled the objection, and permitted the plaintiff to prove his demand by his book and his own oath. The plaintiff testified that he hauled his casks in two loads with a two-horse team, and that he usually took one day to go down, and another day to return from *Thomaston.* The plaintiff proved, that the defendant admitted that he had bought the hay of the plaintiff, and had not paid for it. The plaintiff's attorney proposed to prove the value and price of the casks by the plaintiff himself. This was objected to by the defendant, but the objection was overruled by the Court, and the plaintiff was permitted to swear, " that the prices at which he had charged his casks were fair prices." The defendant introduced testimony tending to disprove the plaintiff's case. The jury returned a verdict for the plaintiff for two dollars. The verdict was returned on the sixth day of the term. No inquiry was then made of the jury as to the grounds of their verdict; but on the fifteenth day of the term, when it was understood that exceptions were to be filed, the Judge inquired of the jury, and they replied, that they were not satisfied, that the defendant ever had the casks, and that their verdict was for the value of the hay only. The defendant filed exceptions.

H. C. Lowell argued for the defendant.

1. To the great standing rule of the law of evidence, that no man shall be permitted to be a witness in his own cause, there is but one exception, and that obtains only when from the nature of the transaction, it must be presumed that the material facts could not have been known to other persons; and then the party is admitted himself to prevent a total failure of justice. Whenever the necessity of the case does not clearly appear, the exception fails. *Dunn* v. *Whitney*, 1 *Fairf.* 9. Sixty lime casks in a load make a larger bulk than a ton of hay, and are not the subject of proof by the oath of the party. The plaintiff was improperly admitted as a witness for any purpose in this case. *Leighton* v. *Manson*, 14 *Maine R.* 208.

2. But if the plaintiff could be a witness for any purpose, he was improperly permitted to testify as to the value of the casks. That could have been as easily proved by witnesses from the place of delivery, as the value of any one article whatever.

3. The testimony thus improperly admitted was not immaterial, but the very foundation of the claim of the plaintiff.

4. The natural import of the verdict returned and affirmed in Court, cannot be altered by any answers of the jury, or some of them, after they had separated for more than a week, to inquiries put by the Judge. 9 *Pick.* 426.

Bulfinch, for the plaintiff, said that the complaint of the defendant was against the finding of the jury, and not against the law as delivered by the Court. The plaintiff did not recover any thing for his casks, but merely for his hay. The proof of the delivery of the hay was full without the oath of the plaintiff. The book and oath of the plaintiff, were properly admitted to prove the charge for the casks. But if they were not admissible, the "bane and antidote" are both here, as the casks were not allowed by the jury. The inquiry was made with the assent of the plaintiff, or certainly without objection, and it is too late now to complain.

The opinion of the Court was by

WESTON C. J.—Two parcels of lime casks are charged, delivered at different times, sixty at each time. That number, in the aggregate, is very bulky, but singly, easily managed by one individual.

It seems they constituted two loads. It might require two to load them conveniently; but it does not appear that they were sold, until they arrived in *Thomaston*, the residence of the defendant. In unloading there, the aid of two persons would be convenient, if not necessary; but this might be easily accomplished by the plaintiff and the defendant, the seller and the purchaser. The intervention of any other person was not necessarily required.

The *statute* of 1833, *c.* 83, requires, that each cask shall be branded with the name of the manufacturer. This being done, they may be sold and transferred from one person to another, at pleasure. The plaintiff may not have been the manufacturer. Nor is the use of the cask evidence, that he, who uses them, bought them of the individual, whose name is branded upon them. In the admission of this kind of testimony, in its application to any given article, it has been found necessary to leave a discretion in the presiding Judge. *Leighton & al.* v. *Manson*, 14 *Maine R.* 208. We cannot say, that upon this point it has been transcended.

In admitting the plaintiff to testify, that the price charged was a fair one, a greater latitude may have been indulged, than the necessity of the case required; but the article itself, so extensively used in the towns furnishing lime, must have had a regular market price. It does not appear to us, that justice requires, that the verdict should be disturbed upon this objection.

Exceptions overruled.

JOSEPH DUNTON, JR. *vs.* FREEMAN REED.

When beasts are impounded under the *stat.* of 1834, *c.* 137, taken up within the inclosure of the person impounding them, they are to be restrained until the damages, and the charges for impounding and keeping them, and all fees are paid; and the expenses are but an incident to the remedy, which is based upon the damages; and where no damage is claimed, and there is no averment in the libel that damage was done, the libel cannot be sustained.

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

This was a libel filed by the plaintiff, praying for a decree of forfeiture of a pair of oxen, under the *stat.* 1834, *c.* 137, concerning pounds. *Freeman Reed* appeared in defence, and put in his claim for the oxen. The libel states, that the oxen were impounded in the town pound of the town of *New-Castle*, "taken up in the enclosure of *John Somes*." No other cause is alleged in the libel for the impounding, and there is no averment that any damages were claimed at any time, or now demanded. The same *John Somes* was then called as a witness by the plaintiff, and objected to by the defendant as interested. In the language of the exceptions, "but it not appearing, that he claimed any damages, but the contrary, he was admitted." Other objections were made to the proceedings which were not considered by this Court. The Judge of the Common Pleas instructed the jury, to return a verdict for the defendant, considering the objections made to be such, that the plaintiff could not sustain his libel. A verdict was returned for the defendant, and the plaintiff filed exceptions.

F. Allen, for the plaintiff, contended, that it was not necessary that the plaintiff should have claimed damages. It did appear, that the cattle were impounded, *damage feasant*, and that was sufficient. The pound keeper received them, and the defendant had less to pay to obtain his property. He had only to pay the costs of impounding. If the cattle were actually doing damage, the party injured may waive his damages, and they may be detained and sold to pay the expenses.

Foote was prepared to argue for the defendant, but was stopped by the Court.

The opinion of the Court was drawn up by

Weston C. J.—By the *stat.* of 1834, *c.* 137, concerning pounds, beasts impounded and stray beasts, strays, beasts going at large, without a keeper, in the highways or commons of the town, or doing damage on improved lands, enclosed with a sufficient fence, may be impounded. If these proceedings can be sustained, it must be upon the latter ground. It is a civil remedy, to recover damage sustained, to which the party injured may resort, or to an action at his election, as is provided by the third section of that statute.

All the proceedings are remedial, for the purpose of giving an indemnity for the injury. When beasts are thus impounded, they are to be restrained, until the damages, and the charges for impounding and keeping them, and all fees are paid. The expenses are incident to the remedy, which is based upon the damages sustained. Here no damage is claimed. The very ground which justifies and upholds the remedy, is waived and abandoned. The libel does not even aver, that any damage was done. We are very clear, that as the case is presented, the libel is not sustained by the statute.

Exceptions overruled.

Amos Barrett *vs.* John Swann *& als.*

If four persons, by an greement in writing, enter into an association for the manufacture of paper, providing for the purchase of stock and the sale of paper indefinitely, they are partners in the business; although there is no express stipulation to share profit and loss, as that is an incident to the prosecution of their joint business.

If a note be given by an individual partner in the name of the partnership, although it be limited to a particular branch of business, it is *prima facie evidence* that the note was given on the partnership account.

Exceptions from the District Court, for the Middle District, Redington J. presiding.

Assumpsit against *John Swann, John Woodcock, B. T. Pierce* and *Daniel F. Harding*, on a note of the following tenor.

"*Camden*, 20 *August*, 1829. For value received we promise to pay *Amos Barrett*, or order, fifty-four dollars and fifty-one cents within sixty days, with interest. *Swann, Woodcock & Co.*"

Swann, Woodcock and *Pierce* were defaulted, but *Harding* denied that he was one of that company, and also denied that the note was signed by him, or with authority from him. It was proved by the plaintiff that the business of making paper was carried on by *Swann* and some others, under the name of *Swann, Woodcock & Co.* To prove that *Harding* was one of the partners, the plain-

tiff read in evidence a paper signed by the four defendants only, of which a copy follows. "The subscribers, owners of the paper mill, for the purpose of economy, adopt the following arrangement, until they shall think it best to adopt other arrangements. *John Woodcock* is to be sole manager and foreman, and keep the accounts, at one dollar and twenty-five cents per day, and board himself. *Mr. Swann* is to have one dollar per day for his labor in the mill, and board himself. *E. H. Barrett* is to be engineer three months, at eighteen dollars per month, and board himself. *Mr. Pierce* is to collect stock and market the paper, at one dollar per day, and expenses paid. *Camden, Aug.* 20, 1829."

Amos Barrett, Sen. and *Swann* owned the papermill, when *Barrett* died, *Jan.* 25, 1829. The plaintiff was appointed executor of the will of *A. Barrett, Sen.* and took some agency in the management of the mill until the next *May*, when he resigned as executor. *April* 3, 1829, the plaintiff and *E. H. Barrett*, and also *Henry True* and the defendant *Harding*, with their wives, being the heirs of the deceased, and *Swann* conveyed to *Woodcock* and *Pierce* one undivided half of the papermill. *Harding* was appointed administrator on the estate with the will annexed. A witness introduced by the defendant testified, that he heard a conversation between *A. Barrett, Sen.* and the plaintiff, and from that conversation he considered the plaintiff interested in the papermill.

The defendant requested the Judge to instruct the jury, that if they found that the plaintiff was jointly interested with *Swann, Woodcock & Co.* in manufacturing paper, at the time when the note was given, as a partner, that the action could not be maintained. This instruction was given. He also requested, that the jury be instructed, that the defendant, *Harding*, would not be accountable in this action, unless he was a copartner in the firm of *Swann, Woodcock & Co.* at the date of the note. This was given as an instruction. He also requested an instruction, that this action could not be maintained, unless the note was given for something appertaining to the manufacturing of paper; and that the burden of proof was on the plaintiff to show for what the note was given. The Judge instructed the jury, that the note could not be recovered unless given in the way of the business of the firm,

but that it would be presumed to be so given, unless the defendant should repel that presumption by proving that it was given for some other consideration. The jury were instructed that the paper, signed by the four defendants, was *prima facie* evidence that *Harding* was one of the partners in said firm, but that it was competent for the defendant to repel that presumption by proof. The defendant then requested that the jury should be instructed, that this presumption was sufficiently repelled by the fact, that *Harding* was administrator of the estate of *A. Barrett, Sen.* at the time the note was given. This was not given.

The verdict being for the plaintiff, the defendant filed exceptions.

Harding, *pro se*, contended, that the instruction of the Judge, that the jury might presume that this note was given for a partnership debt, unless the presumption was repelled by the defendant, was wrong. *Man. & Mec. Bank* v. *Winship*, 5 *Pick.* 11. Although it has been decided, that as between the signers and the world, this agreement makes them partners, yet it does not, as between them and the plaintiff, one of the heirs and an owner in the mill. As between them, there must be a participation in profits and loss. This paper was intended to prevent its being considered a partnership, not to make it one. The presumption that the note was given for a partnership debt was sufficiently repelled by proof, that the defendant was administrator. There was another company using the same partnership name, and the presumption is stronger, that it was intended for that, than this.

J. S. Abbott argued for the plaintiff, and cited *Doak* v. *Swann*, 8 *Greenl.* 170; *Gow on Part.* 79, 211; *Parker* v. *Merrill*, 6 *Greenl.* 41; *Odiorne* v. *Maxcy*, 13 *Mass. R.* 178; 5 *Pick.* 11, cited for the defendant.

The opinion of the Court was by

Weston C. J. — The defendants, on the day of the date of the note in question, by a writing under their hands, entered into an association for the manufacture of paper. To three of them were assigned distinct departments of duty. The purchase of stock, and the sale of paper indefinitely was provided for. No stipu-

lation was expressly made to share profit and loss; but this results as incident to the prosecution of their joint business. Why this does not constitute a partnership, even between themselves, it may not be easy to perceive. The case *Doak* v. *Swann & al.*, 8 *Greenl.* 170, is exactly in point; and the decision there was made upon the same instrument.

The defendants describe themselves as the owners of the paper-mill, but it appears that there were other owners. They did not become partners, by reason of their being owners of the mill. The case cited, negatives that ground. It was because they entered into a joint association for the manufacture of paper. To this the plaintiff was no party. He was a stranger to the partnership; and so the jury must be taken to have found, under the direction of the Judge. This does away any ground of distinction, raised in argument, upon the assumption that the plaintiff had a joint interest in the concern.

The partnership was limited to a particular branch of business; but the note is given in the name of the firm, and it is neither suggested nor proved, that it was a fraud upon them. In such cases the liability of the firm is presumed, unless shown to have been given on some other account. In the *Manuf. and Mechanics Bank* v. *Winship & al.* 5 *Pick.* 11, the defendants were partners in the business of making soap and candles, which was not, any more than this, a general partnership. The reason why the plaintiffs were there held to prove, that the note was given on partnership account was, that this was not indicated by the signature. Had this been the fact, as it was here, it was in that case held, that it would have been *prima facie* evidence of a partnership transaction.

The note bears the same date with the instrument, signed by all the defendants. They might have made purchases and incurred liabilities, on partnership account, on that day. And in the absence of all opposing testimony, this is fairly to be presumed. It has been urged for the defendant, *Harding*, that there was a company, using the same partnership name, of which he was not a member. Had this appeared in the exceptions, and been made a point in the case, proof might well have been required, that the note was given on account of the business of his firm. But this is matter of mere

suggestion, which cannot be received to affect the case, as certified by the court below.

Exceptions overruled.

WILLIAM H. P. MCLELLAN *vs.* SAMUEL ALLBEE *& al.*

A conditional promise to pay a specified demand, where the other party refuses to accede to the condition annexed, is not sufficient to take the demand out of the operation of the statute of limitations, either as a promise to pay or as an admission of present indebtedness.

Where the principal in a note, on being requested to pay it, said, "he could not pay it then," and on being told that the surety would be called upon for the note, replied, "that he did not want to have the surety called upon for it, as the surety had signed the note to oblige him;" and where in another conversation with the agent of the payee, the principal "proposed to pay a part of it, if he could have time on the balance," and the agent replied, that he "was not authorized to take a part of it;" *it was held by the Court*, that the demand was not taken out of the operation of the statute of limitations.

EXCEPTIONS from the District Court, for the Middle District, REDINGTON J. presiding.

Assumpsit on a note, dated *July* 7, 1832, given by *Allbee*, as principal, and by *Keith*, the other defendant, as surety, for $20, payable to *William McLellan*, or order, on demand with interest, and by him indorsed. The general issue was pleaded, and the statute of limitations relied on in a brief statement. The writ was dated *July* 7, 1838.

After the note was read to the jury, the plaintiff introduced the deposition of *Thomas McLellan*, who testified that in the year 1837, the note "was handed to me by my brother, *William McLellan*, to collect for him of the payers. I called on *Mr. Allbee* soon after, to pay said note; he said he could not pay it then. I told him I must call on *Mr. Keith* for said note, if he did not pay. He told me, he did not want me to call on *Mr. Keith* for it, as *Keith* had signed the note to oblige him. I saw *Mr. Allbee* after-

wards, and he then proposed to pay a part of it, if he could have time on the balance. I told him I was not authorized to take a part of it."

The Judge ruled, that the deposition, if believed, furnished evidence of an acknowledgment of indebtedness on the part of the defendants sufficient to take the case out of the statute of limitations, and that therefore the action is not barred by that statute. To this the defendants excepted.

J. S. Abbott argued for the defendants.

1. If no new promise be proved, the action is barred by the statute of limitations. *Presbrey* v. *Williams*, 15 *Mass. R.* 193; *Little* v. *Blunt*, 9 *Pick.* 488.

2. The expressions made use of by *Allbee*, as stated in the deposition, are not sufficient to take the case out of the statute of limitations.

To take a demand out of the operation of the statute of limitations, there must be either an absolute promise to pay the debt; or a conditional promise, accompanied by proof of the performance of the condition; or an unambiguous acknowledgment of the debt, as still existing and due. *Perley* v. *Little*, 3 *Greenl.* 97; *Porter* v. *Hill*, 4 *Greenl.* 41; *Deshon* v. *Eaton*, *ib.* 413; *Thayer* v. *Mills*, 14 *Maine R.* 300; *Bangs* v. *Hall*, 2 *Pick.* 368; *Whitney* v. *Bigelow*, 4 *Pick.* 110; *Robbins* v. *Otis*, 3 *Pick.* 4; *Sigourney* v. *Drury*, 14 *Pick.* 387. Here was neither an assent to the conditional proposition, nor proof of the performance of the condition.

Chandler, for the plaintiff, admitted that the case, *Presbrey* v. *Williams*, 15 *Mass. R.* 193, was conclusive, that the action was not brought within six years from the time the cause of action accrued.

The proof in this case, shows an acknowledgment of the existence of the debt sued for; and that is sufficient to take the case out of the statute. *Perham* v. *Raynal*, 9 *English Com. L. Rep.* 415; *Dean* v. *Hewitt*, 5 *Wend.* 257; *Pinkerton* v. *Bailey*, 8 *Wend.* 600; *Whitney* v. *Bigelow*, 4 *Pick.* 110. And this promise is available to the plaintiff, though made to a stranger. *Peters* v. *Brown*, 4 *Esp. R.* 46; *Whitney* v. *Bigelow*, 4 *Pick.* 110.

There is no distinction between a promise and acknowledgment made before the statute attached, and one made after. 1 *Wheat. Selw. N. P.* 140; *Angell on Lim.* 251. The acknowledgment of the principal in a joint and several note will take the case out of the statute of limitations as to one who signs that note as a surety. 2 *Doug.* 652; 9 *English Com. L. R.* 415; 8 *Bing.* 309; *Angell on Lim.* 272; 2 *Pick.* 581; 3 *Pick.* 291; 4 *Pick.* 382; 14 *Pick.* 387. Upon a general acknowledgment, a general promise to pay may and ought to be implied. 1 *Wheat. Selw. N. P.* 140; 3 *Conn. R.* 370. The acknowledgment must relate to the identical debt. 9 *Cowen*, 674. In the present case the note in suit is specially referred to. In the cases cited in the defence, there was something said to show, that the party making the acknowledgment did not intend to pay the demand. Here was an express admission of indebtedness, and nothing to repel the implied promise to pay. Although the plaintiff's agent did not promise to wait, yet he did in fact wait, and this is a sufficient performance of the condition on his part.

Holmes argued on the same side.

The opinion of the Court was drawn up by

SHEPLEY J. — The argument for the plaintiff admits, that the action was not commenced in season to prevent the operation of the statute of limitations. The language proved to have been used by the defendant, *Allbee*, may be equivalent to a conditional promise to pay, but the other party did not accede to the condition annexed. It is contended, that though not for that reason effectual as a promise, an admission of present indebtedness may be inferred from it.

An acknowledgment of present indebtedness being only evidence from which a promise may be implied, an unconditional promise cannot be implied from testimony exhibiting the condition attached to it; so that any implied promise would be as liable to the objection, that it was conditional as the express one.

In the case of *Routledge* v. *Ramsay*, 3 *Nev. & Peng.* 319, the language used was, "I give the above accounts to you, so you must collect them, and pay yourself and you and I will be clear," and it was decided, that although this was an acknowledgment of

the debt, yet as it contained merely a promise to pay in a particular manner, no general promise to pay could be implied from it, and that it was not sufficient to take the case out of the statute.

To avoid the statute in this case it would be necessary to infer an acknowledgment, that the debt was due from a conditional promise to pay it; and then to substitute an implied unconditional promise for an express conditional one. And it would require the law to admit an implied promise to be raised, when an express one exists and inconsistent with it.

Exceptions sustained and judgment for defendants.

JOSIAH HILLS *vs.* JAMES RICE.

Where beasts are impounded under the *stat.* 1834, *c.* 137, and replevied, the action may be rightly brought against the person who signs the certificate left with the pound keeper, claiming payment for the impounding.

That statute repeals the provision in the *stat.* 1821, respecting the impounding of beasts, *c.* 128, which authorizes and requires towns to choose field-drivers.

Since the act of 1834 took effect, if a field driver be chosen by a town, he has no authority, *as field-driver*, to impound beasts; and cannot protect himself for so doing as a town officer, under the *stat.* 1831, *c.* 518, § 5.

EXCEPTIONS from the District Court, for the Middle District, REDINGTON J. presiding.

Replevin for ten cattle. The defendant proved, that the cattle mentioned in the writ were found on land of *D. F. Harding, Esq.*, and that by *Harding's* request the witness called on the defendant, and desired him to drive the cattle to the pound, and that the defendant did, at the request of *Harding*, drive them to the pound. At the time of the impounding, the following certificate was left with the pound keeper. "*Union, May* 14, 1835. By the order of *Daniel F. Harding*, I have taken from his field, ten head of cattle, and put them into your pound. I demand of the owner of the cattle, twenty-five cents per head for my trouble. *D. F. Harding* demands for his damage that the said cattle have

done, ten dollars. *James Rice*, Field Driver." On the next day, *May* 15, the cattle were advertized by the pound keeper, and then replevied by the plaintiff. *Rice* was chosen by the town, field driver.

Harding, for the defendant, contended, that the *stat.* 1834, *c.* 137, respecting pounds, did not repeal the *stat.* 1821, *c.* 128, entirely, absolutely and wholly, but only such parts as are inconsistent with it. 6 *Dane's Ab. c.* 196, *art.* 2, § 8; *American Common Law Reports, Abridged*, 1304. The office of field driver is not abolished, as being inconsistent with *stat.* 1834. The legislature did not so intend. Aged and infirm persons, women and children must impound by others, and the law has provided field drivers to do this duty, and it is indispensible. Towns are empowered to choose field drivers among the "other usual town officers." *Stat.* 1821, *c.* 114. As the office of field driver is not abolished, the action cannot be maintained against the defendant, because he is protected by *stat.* 1831, *c.* 518, § 5. Any person may legally commit to pound, cattle doing damage by the aid of a field driver. The action should not be brought against the person putting the cattle into the pound, but against the person ordering them to be impounded. *Stat.* 1834, *c.* 137, § 8. The certificate delivered to the pound keeper in its purport, is such as is required by the *stat.* 1834, and is sufficient, although signed by the agent or field driver.

J. S. Abbott, for the plaintiff, after remarking, that the principal question was settled by the case, *Eastman* v. *Rice*, 14 *Maine R.* 419, contended, that the action was brought against the right person. He was the person putting them in pound, and he signed the certificate. The statute requires, that the action shall be brought against the impounder, but it also requires a certificate to be left, signed by the impounder. The certificate was not only signed by the defendant, but he demanded damages on his own account, as well as for a third person. *Rice* was not a field driver, and therefore was not protected, as a town officer by the *stat.* 1831, *c.* 518, § 5. The statute providing for the choice of field drivers was repealed by the statute of 1834, and being chosen by the town as such, does not make him one.

The opinion of the Court was by

SHEPLEY J. — It is provided by *stat.* 1834, *c.* 137, § 8, that the action of replevin shall be brought against the impounder, and not against the pound keeper. The fifth section provides, that "the impounder shall send or deliver to the pound keeper a certificate," the form of which is prescribed. The twelfth section provides, that "the party impounding such beast or delivering the same to the pound keeper shall receive a reasonable compensation for his trouble to be determined by the pound keeper," subject to the limitation, that it is not to exceed one half of the forfeitures mentioned in the second section. The defendant filed a certificate, though it may be a defective one, and signed it as field driver, and claimed the compensation for his trouble allowed by the statute. The person who delivers the certificate and claims the pay for impounding, appears to be the one, to whom the statute refers as the impounder; and the action is rightfully brought against him, unless he is protected by the fifth section of the act of *March* 31, 1831, *c.* 518, which provides, "that in no case shall any town or plantation officer incur a penalty, or be made to suffer in damages by reason of his official acts or neglects, unless the same shall be unreasonable, corrupt or wilfully oppressive." Provision was made by *stat. c.* 128, § 1, act of *March* 20, 1821, for the choice of field drivers annually. The thirteenth section of the act of *March* 12, 1834, repeals all acts and parts of acts inconsistent with its provisions, "particularly an act respecting pounds and impounding beasts going at large or damage feasant, passed *March* 20, 1821." It is contended, that the whole act is not repealed, but such parts only as are inconsistent with the provisions of the act of 1834. The obvious meaning of the language is, that the act of *March* 20, 1821, in particular is repealed, and all other inconsistent acts and parts of acts. That this was the intention is more clearly apparent from the last part of the same clause repealing "an act respecting lost goods and stray beasts, passed *January* 27, 1821, so far as it regards stray beasts," and shewing, that when the intention was not to repeal the whole of the act named, there is found a restriction or qualification of the general language. The duty of choosing field drivers, is no longer imposed upon the towns; nor are there any duties imposed upon such officers, or oaths required

of them, or authority given to them to impound. If such officers may now exist, they must be chosen by virtue of the provision in *c.* 114, § 1, which requires towns to choose annually certain enumerated officers "and other usual town officers." Whether that phrase can be understood to refer to any other than the usual town officers provided for by law, need not now be decided, because the act of 1831 does not protect any officers, if any such there may be, from any but "official acts or neglects;" and there properly can be no official act, where it is neither authorized nor required by law. It is said, that such a construction must operate hardly upon a class of the community, who by reason of age, infirmity, or other cause, cannot personally protect their own property by impounding; but the statute makes provision, that the certificate may be sent to the pound keeper, and all the other necessary acts may as well be performed by a private agent, as by one provided by the public.

The act of 1834 does not require any act to be performed by a field driver, or recognize the existence of such an officer, and this affords additional evidence of the intention of the legislature to repeal entirely the act of 1821. The action appears to have been correctly brought against the defendant as the impounder; and the act of impounding being neither authorized nor required by law, the defendant can find no protection under the act of 1831, from suffering the consequences, which may arise out of it.

Exceptions overruled, and judgment for the plaintiff.

Azor Merrill *vs.* Winslow Gatchell.

No title is acquired by purchase on a sheriff's sale, made under a precept from a Justice of the Peace, ordering the sale, and directing the proceeds to be paid to a pound keeper, where there is no judgment or decree of forfeiture of the property sold.

The mere recital in the precept from a Justice of the Peace to the officer, wherein the sale is ordered, that a decree for the sale of the property had been obtained before the Justice as appears of record whereof execution remains to be done, is not sufficient evidence that a judgment or decree of forfeiture under the *stat.* 1834, *c.* 137, respecting the impounding of beasts, had been rendered.

The judgment or decree of forfeiture by a Justice of the Peace under that act, should show that the prior proceedings had been such, as to give him jurisdiction.

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

Trover for a heifer. The plaintiff proved property in himself, that the heifer was found in the possession of the defendant, that the plaintiff demanded the property, and that the defendant refused to deliver it. The defendant claims the heifer under a sale at auction by a deputy sheriff, under a decree of sale made by a Justice of the Peace for the county of *Lincoln.* To prove his title, the defendant introduced the copy of a libel, wherein it was alleged, that the heifer was impounded by one *Rogers,* "taken for doing damage in the inclosure of *Winslow Gatchell,* in said *Bowdoin,*" and advertised according to law, and that no owner appeared. The copy of an order of notice by a Justice of the Peace on the libel, returnable before himself, with a return of service thereon. And the copy of an order of sale, under the hand and seal of the Justice, directed to the sheriff, &c., of the following purport. "Whereas, *James M. Rogers* of &c. on the 12th day of *November,* 1835, by the consideration of our Justice Court holden by *W. S., Esq.,* one of the Justices, &c. obtained a decree for the sale of the following beast, (describing the heifer,) with costs taxed at $2,78, as to us appears of record, whereof execution remains to be done. We command you therefore, to make sale of the same in manner prescribed by law for the sale of goods and chattels in satisfaction of executions, and after deducting your

lawful fees, you will pay over the residue to the pound keeper and take his receipt therefor. Hereof fail not, &c." On this was a copy of the proceedings of a deputy sheriff in making sale of the heifer. No other evidence was produced to show the legality of the sale. The Judge ruled that no defence was made out.

The case was submitted by *May*, for the plaintiff, on his brief, and by *E. B. Bowman*, for the defendant, without argument.

May's positions were: —

The verdict ought to stand, because the defendant offered no legal evidence of any decree for the sale of the heifer. The recital of that fact in a paper cannot be higher evidence than an execution would be of the rendition of a judgment. A copy of the record of the judgment, if such there was, should have been produced. 4 *Mass. R.* 402; 16 *Wend.* 562; 2 *Johns. R.* 280; 11 *Pick.* 28. But if the paper reciting the decree is evidence of the judgment, it does not show the necessary facts to give the Justice jurisdiction. No one of the requirements of the statute have been complied with. Not even the appraisement to show that the heifer did not exceed twenty dollars in value, without which the Justice cannot act. The record should find affirmatively, all the facts which are essential to give jurisdiction in the case; for nothing can be presumed in favor of the jurisdiction of an inferior tribunal. 4 *Mass. R.* 641; 2 *Fairf.* 344. There is one fact stated in the libel, which shows that the Justice had no jurisdiction in the case; that the heifer was impounded by *Rogers* for doing damage in the inclosure of *Gatchell*. No one but the owner can impound cattle damage feasant. *Stat.* 1834, *c.* 137, § 3.

The opinion of the Court was drawn up by

Shepley J. — The plaintiff is entitled to recover unless the defendant has acquired a title to the property by virtue of the sale by the officer. The animal was taken damage feasant and impounded, and afterward sold at auction; and the defendant's title depends upon the evidence introduced to prove the legality of these proceedings.

It is provided by *stat.* 1834, *c.* 137, § 5, that the impounder shall send or deliver to the pound keeper a certificate of the purport recited in the statute; and that if no claimant appear, the

pound keeper within ten days after the impounding, shall issue a warrant to two disinterested freeholders to appraise the damage done.

And the pound keeper, by section 7, is required on commitment of the beast to the pound, forthwith to advertise the same in the manner therein prescribed; and if the owner shall not appear, within twenty days after advertising, and claim the beasts, and pay what is lawfully demandable, the pound keeper within the succeeding twenty days is to libel the beasts in the name of the impounder. And the Court before which such libel is pending, after notice as required, has power for the causes in the act mentioned, to render a judgment or decree of sale.

In this case a copy of the libel, order and service of notice, and a copy of the precept ordering the sale, and of the officer's return upon it, make part of the case; but no copy of any judgment, or decree of forfeiture was produced; and that is the only legal authority for all the subsequent proceedings. And in the case of an inferior magistrate, it should appear in such judgment or decree, that the prior proceedings had been such as to give him jurisdiction.

There does not appear to have been a compliance with the provisions of the statute in filing the certificate with the pound keeper, or by his causing the damages to be appraised, or by advertising, as required.

Exceptions overruled.

The STATE *vs.* DAVID T. DOUGLAS.

If goods are stolen in one county, and carried by the thief into another and there sold, he may be indicted and convicted of the larceny in either county.

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

The indictment alleged, that *Douglas*, on *Sept.* 28, 1838, at *Topsham* in the county of *Lincoln*, took, stole and converted to

his own use a pair of oxen, the property of one *Chick*. The proof was, that *Douglas* took the oxen from *Chick*, the owner, in *Litchfield* in the county of *Kennebec*, and drove them to *Topsham*, and there sold them. The circumstances were such as left no doubt of his guilt. His counsel requested the Judge to instruct the jury, that if they found that the taking and stealing by *Douglas* was originally at *Chick's* in *Litchfield*, that being within the county of *Kennebec*, that in such case the indictment which alleged a taking in the county of *Lincoln*, would not be maintained. The Judge declined giving that instruction, and did instruct them, that if they found that the original taking was in *Kennebec*, still if he transported the oxen into the county of *Lincoln*, and there disposed of them, that they might in that case find the offence was committed as charged in the indictment, in the county of *Lincoln*. The verdict was guilty, and the jury in answer to a specific inquiry, propounded to them before they left the court room, said, that they found that *Douglas* committed the larceny in *Kennebec*, and kept and continued in possession of the oxen, with the same felonious intent, until he had driven them to *Topsham*, and there disposed of them. Exceptions were filed by *Douglas*.

F. Allen argued for *Douglas*, and contended, that the case, *Commonwealth* v. *Andrews*, 2 *Mass. R.* 14, was not conclusive of the present. There the property was taken in another State, and the offender could not be convicted, unless the taking was considered as commencing when he first came within the State. The offence was perfect here in the county of *Kennebec*, and a judgment here would be no bar to an indictment and conviction there. Besides, if there is any ground for a conviction in this county on the evidence, the indictment should have been framed according to the truth, and the taking should have been stated to have been in *Litchfield*, and the conversion in *Topsham*.

Emery, Attorney General, for the State.

The law is well settled, both here and in *England*, that the offence is committed in every county into which the thief carries the stolen property. *Com.* v. *Cullins*, 1 *Mass. R.* 116; *Com.* v. *Andrews*, 2 *Mass. R.* 14; *Com.* v. *Dewitt*, 10 *Mass. R.* 154; cases cited in 1 *Harrison's Dig.* 760.

The opinion of the Court was by

WESTON C. J. — It has long been an established principle of law, that if goods are stolen in one county, and carried by the guilty party into another, he may be indicted for the larceny in either county. This was recognized by the Court, in the *Com.* v. *Andrews*, 2 *Mass. R.* 17. It was there however insisted, that the rule did not apply where the goods were first stolen in another State, but this distinction was overruled. And in the *Com.* v. *Cullins*, 1 *Mass. R.* 116, *Sedgwick J.* says, stealing in one county, and bringing the stolen goods into another, was always holden to be felony in both counties. The case of the *Com.* v. *Dewitt*, 10 *Mass. R.* 154, is a direct decision to the same effect.

The exceptions are overruled, and the case remitted to the Court below.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF KENNEBEC, JUNE TERM, 1840.

HOWARD PHILBROOK *& al. vs. Inhabitants of the County of* KENNEBEC.

An assessment of a tax by the Court of Sessions, under the *stat.* 1821, *c.* 118, § 24, upon unincorporated land, for the purpose of making and opening a road over the same, where no road has been laid out according to law, is illegal and void.

If the agent appointed by the Court of Sessions contracts for making a road over unincorporated land, where no legal road exists, and *accepts* the same when made, and no money has been received by the County wherein the land lies on that account, the County is not liable to pay the expenses of making the road.

THE parties agreed to a statement of facts in this case, with the exception of that fact, whether the owners of the land taxed had or had not paid the taxes into the treasury of the county. This was submitted to the decision of a jury, and they returned their verdict that the money had not been received by the county. The facts agreed are stated in the opinion of the Court. In the papers referred to in the statement, there was no record of any location of a road where the work was done. The paper called a tax commences thus: "Tax assessed by the Court of Sessions, *December Term*, 1829, in the County of *Kennebec*, on a gore of land between *Clinton* and *Unity*, in said County, from the north line of *Albion*, near the south line of M 1 to the north line of K 2, to make and repair the County road laid out over said gore by *Levi Libbey's*. Tax, four cents on an acre — amount of tax assessed $320."

Then follow names of persons, or description of lots, with sums set against each, amounting in the whole to $322,80. It ends as follows. "At a Court of Sessions in and for the County of *Kennebec, December Term,* 1829, ordered, that the foregoing tax of $322,88 be collected agreeably to the statute in such cases made and provided." This was signed by the three Sessions Justices, one of whom was *Charles Hayden.* On the back of the original paper was this indorsement. "*Charles Hayden* app'td to expend."

This case was argued at the *May Term,* 1837, the opinion was delivered at the *Nov. Term,* in *Cumberland,* 1839, was received by the Reporter, *May* 1, 1840, and was accidentally omitted in the last volume.

D. Williams argued for the plaintiffs, and cited *Hampshire* v. *Franklin,* 16 *Mass. R.* 76; *stat.* 1821, *c.* 118, § 24; *Hayden* v. *Madison,* 7 *Greenl.* 76; *Abbott* v. *Hermon, ib.* 118.

R. Goodenow, formerly County Attorney, argued for the defendants, and cited *Commonwealth* v. *Merrick,* 2 *Mass. R.* 529; *Todd* v. *Rome,* 2 *Greenl.* 55; *stat.* 1821, *c.* 118, § 24; *Joy* v. *Oxford,* 3 *Greenl.* 134; *Harlow* v. *Pike,* 3 *Greenl.* 438; *Estes* v. *Troy,* 5 *Greenl.* 368; *Emerson* v. *Washington County,* 9 *Greenl.* 98.

The opinion of the Court was drawn up by

EMERY J. — The plaintiffs claim against the defendants compensation for making a road on a gore of land between *Clinton* and *Unity,* from the north line of M 1, to the north line of K 2, by *Levi Libbey's,* under the direction of *Charles Hayden, Esq.* agent of the County of *Kennebec.* A tax was assessed on that gore by the Court of Sessions for the County of *Kennebec, Dec. Term,* 1829, when said *Charles Hayden, Esq.* one of the justices of said court, was appointed by said court to superintend the expenditure of the amount of the tax upon said road. The plaintiffs performed the making and repair of the road to the acceptance of said agent.

The defendants deny the legality of the assessment of the tax, and the existence of any road, which the County were to repair.

If no legal location of the road was made, of which no sufficient

record appears, the assessment of the tax for the purpose of making the road cannot be justified, so as to render the inhabitants of the County responsible.

It is insisted, that the county are bound by the doings of the Court of Sessions and the proceedings of the agent. To this as a mere general proposition, strictly true in all cases, we cannot accede. The right of the Court of Sessions to take any step on this subject is founded on the statute *c.* 118, § 23, 24. As we have not the evidence of the legal laying out of the road, agreeably to the provisions of the statute, the subsequent doings under the agent cannot justly subject the inhabitants of the county to the suit of the plaintiffs. For it is a fact, by the report of the Judge to be added to the case agreed by the parties, that the *jury have settled the point that the county have not received the money claimed by the plaintiffs in this case.*

In the case cited by plaintiff's counsel, *Emerson* v. *The Inhabitants of the County of Washington*, 9 *Greenl.* 94, no objection was made to the legality of the location. Yet the action was not sustained, the Court of Sessions having exceeded its jurisdiction in assessing the tax, and the contractor having exceeded his instructions.

The case of *Joy* v. *The Inhabitants of the County of Oxford*, 3 *Greenl.* 134, which has been urged on our consideration was totally different from the present. There the money had been received by the county treasurer. But that case is full to show that if the road was not legally laid out by the Court of General Sessions of the Peace, "the Court having no jurisdiction, the assessment was a perfect nullity" as *C. J. Mellen* says, "not merely voidable, but absolutely void."

Even if the road, in the present case, had been legally located, there is a deficiency of evidence as to the requisite preliminary steps by petition or application, and notice, and an adjudication that the proprietors had failed to shew to the satisfaction of the Court, that the highway ought not to be made or amended at the expense of the proprietors, previous to the assessment of the tax.

There is no contract proved, express or implied, which can charge the defendants. The circumstance that the supposed agent accepted the road, constitutes no estoppel of defendants to aver against the legal existence of the highway, or to deny their responsibility to the plaintiffs.

According to the report of the Judge, and the state of facts agreed, the verdict must be set aside, and the plaintiffs become nonsuit.

ELISHA P. BARSTOW *vs. Inhabitants of* AUGUSTA.

Where the Selectmen of a town, being the only surveyors of highways therein, contracted with one man to repair a certain part of a highway, and requested another person to keep in repair, at the expense of the town, the highway from place to place, including that in relation to which the contract was made, who had made repairs and had been paid therefor by the town, and also requested him to open a road at a distance from the highway, with the verbal permission of the owner of the land, in order to avoid defects and obstructions, and where damage is sustained by the person thus requested to repair the highway, occasioned by defects and obstructions on that part of the way with respect to which the contract was made, he is not precluded by these acts from recovering the amount of his damages against the town.

THE plaintiff claimed damages of the inhabitants of *Augusta*, for an injury done to his stage coach, sustained, as he alleged, in consequence of defects suffered to remain in the highway within the town. The claim was submitted to a referee. The award of the referee is stated in the opinion of the Court. The exceptions were by the defendants.

The arguments were in writing, by *Boutelle* and *Child*, for the plaintiff, and by *Emmons*, for the defendants.

For the defendants, it was contended:

1. That knowing, as the plaintiff did, the condition of that part of the road where the accident happened, it was an act of imprudence, rashness and carelessness on his part to pass with his coach over the highway at the time and under the circumstances he did. He did not exercise ordinary care, and should himself sustain the loss occasioned by the accident. *Smith* v. *Smith*, 2 *Pick.* 624; *Thompson* v. *Bridgwater*, 7 *Pick.* 190; *Farnum* v. *Concord*, 2 *N. H. Rep.* 392.

2. The plaintiff having been guilty of an omission and neglect of duty in regard to that portion of the road where the injury oc-

curred for which he was liable to the defendants, he cannot maintain an action against them for damages which he has sustained arising from defects or obstructions in that part of the highway. The plaintiff performed the duty of highway surveyor under the authority of the town, and the reason is as strong against his recovering, as if he had been actually appointed such. It is not necessary that his limits should be assigned in writing. *Callender* v. *Marsh*, 1 *Pick.* 426; *Wood* v. *Waterville*, 5 *Mass. R.* 292.

For the plaintiff, it was argued, that the facts stated in the report of the referee afforded no defence for the town.

The plaintiff was not a highway surveyor, not having been made such in any mode permitted by law. He had not the power or authority of a surveyor, and was in no way liable to the town or to others for any neglect to keep the road in repair. There was no assignment in writing of his limits as the law requires. The town did not expect the plaintiff to repair the road where the accident happened. That was to be done by the commissioner of public buildings. But if the plaintiff can be considered as a surveyor, he had no right to expend money except on the proper highways. *Austin* v. *Carter*, 1 *Mass. R.* 231. Nor had the town any right to expend the money on the place where it was proposed. When the road is not safe, they have power only to go on the adjoining land. 2 *Doug.* 749. The referee does not state any facts showing carelessness in the plaintiff, and the Court cannot presume what does not appear. *Bigelow* v. *Weston*, 3 *Pick.* 267. Our statute is different from that in *Massachusetts*, and the case of *Wood* v. *Waterville*, does not apply. *Haskell* v. *Knox*, 3 *Greenl.* 445; *Moor* v. *Corneville*, 13 *Maine R.* 293.

The opinion of the Court was by

Emery J. — This is an alternative award presented to the Court for obtaining their judgment upon such facts as are detailed in the award. On the presentment of the report of the referee, it was accepted, and judgment given by one Judge in favor of the plaintiff. Exception was taken to this decision. It was made formally for the very purpose of affording an opportunity more maturely to review that decision. We perceive that the referee ascertained that the highway was deficient in the requisite repairs, and that

injury arose to the plaintiff by reason of the obstruction or want of proper repairs, because he determines that the plaintiff recover $120 damages and costs, *if, in the opinion of the Court, the facts set forth by the referee do not constitute a legal defence to the action.*

But the defendants insist, that their defence is made out in consequence of the fact that one of the selectmen had at some period previous to the injury to the plaintiff, employed him to make and superintend all necessary repairs upon the roads where the injury arose and to the north line of *Hallowell*, and prior to the injury, told him to expend so much money as was necessary; and from the circumstance that the plaintiff's account of repairs upon the highways within the limits assigned him, was presented, allowed and paid by the town. The plaintiff was not a surveyor. No surveyors were appointed in writing for the year. The selectmen became such for the year. In behalf of the town of *Augusta*, one of the selectmen for 1832, made a contract with the commissioner of public buildings, for the erection of a back wall and raising the road in front of the State House. This work was in progress at the time the damage was done to the plaintiff, while passing on this part of the highway. A passage was left of about twenty-five feet, through and over which, before, at the time, and for several days after the accident, the public passed without injury. But prior to the injury to the plaintiff, and while the road in front of the State House was in progress of repair, the said selectman, in behalf of the town, requested the plaintiff to reopen the old road, in rear of the State House, the verbal consent of the owner of the land having been obtained therefor, and render the same safe and convenient for travelling, and authorized him to expend so much as should be necessary for that purpose. That a day or two before the accident the witness called on the plaintiff a second time, informing him of the interruption to the work upon the road, as well as the danger to the public by the travel over it, and again urged him forthwith to make the *old road* safe and convenient for travellers, as he was apprehensive accidents might occur on the new road, if the public travel should continue over it.

This action only was referred. Where right and fact only are referred, the decision strictly should be according to law. If a

question of law be referred, the decision is binding though not according to law. As it is such law as the Judge selected by the parties may choose to dispense, courts of law do not interfere to alter it. In this case, the referee has invoked the judgment of the Court upon the legality of the defence to the plaintiff's action.

The facts exhibit a solicitude on the part of the municipal authorities to afford accommodation, repair the highways, and protect against accidents. And it is urged, that the plaintiff should be regarded as a surveyor, with all the consequences attached to that character, as if legally chosen and sworn into that office, and that had he been such surveyor, he could not have sustained the suit. However analogous in principle his situation may be, as he did not sustain the legal character of a surveyor, we cannot say, that in point of law, he was brought within the incapacity which would have attended him, had he been such officer. It is apparent, that the town had put this part of the highway under the direction of the commissioner of public buildings, which would strongly indicate *an excuse to the plaintiff for not interfering there.* The road was not stopped, but a passage of about twenty-five feet kept open for the public to pass.

The right to go on adjacent land, with the assent of the owner, while the highway was repairing, might prevent a suit against those who should pass over it. *But we do not discover the evidence of any binding contract on the part of the plaintiff to perform the work on another man's land, which should exempt the defendants from responsibility as to this lawful highway* which was kept open. Nothing in writing from the owner of the land on the old road, authorizing the step of opening it, was exhibited to the plaintiff, and it might be exposing him to great inconvenience to make out the proof of the license, should he proceed to subvert the land and make repairs on it for a highway, if the owner of the land became dissatisfied and commenced a prosecution.

In our judgment the exceptions must be overruled.

William Vance *vs.* Charity Vance.

Where a libel for divorce for the cause of adultery, alleging that the offence was committed with divers persons, some of whom are named and some are said to be unknown, within a specified time, has been tried, and thereupon judgment has been duly rendered that the libel was not sustained; such judgment, while it remains in force, is a bar to any after libel for offences committed within the period alleged in the first libel.

But if the last libel alleges that the offences were committed within a certain period, including time prior and subsequent to the filing of the first, and it does not appear that the causes of complaint were the same in both, the judgment is no bar to such offences as may be proved to have been committed after the filing of the first libel.

The Reporter has received no copies or papers in this case other than the opinion of the Court, and can only state the facts as he finds them on his minutes, made while the papers were read. This was a libel filed by *William Vance*, praying for a divorce from the respondent for the cause of adultery, committed at various times and with different persons, of whom some were said to be unknown, commencing sometime prior to *June*, 1836, and ending at the time of filing the present libel, *April* 5, 1838. To this libel the respondent pleaded, that on *June* 20, 1836, *William Vance* had filed a libel for a divorce in which was contained every allegation of misconduct set forth in the present libel; and that the parties were heard at the *May Term* of this Court, 1837; and that an adjudication was made thereon that the libel was not supported. The libellant demurred to this plea. Exceptions were filed to the ruling of the Judge holding the Court, at the *October Term*.

R. Williams and *Boutelle* argued for *William Vance;* and to the points that it was necessary that the plea should make a profert of a copy of the former judgment, and should aver that the alleged causes of divorce set forth in the former libel and in the present were the same, cited *Jones* v. *Fales*, 4 *Mass. R.* 255; *New-England Bank* v. *Lewis*, 8 *Pick.* 113; 1 *Saund.* 91; *Commonwealth* v. *Churchill*, 5 *Mass. R.* 174; 6 *T. R.* 607; *Bridge* v. *Gray*, 14 *Pick.* 55.

Wells, for *Charity Vance*, objected, that as the petition recited a trial at *May Term*, 1837, and contained an allegation of a dis-

covery of new and material evidence, it was to be considered as a petition for a new trial, which could not be granted. Or if this was not the right view of it, that it was both a petition for a new trial and a libel for divorce, and contained two distinct and separate causes of grievance, and therefore was bad. If it is a libel for a divorce, then every specification of misconduct alleged is prior to the filing of the last libel, and the judgment is a complete bar. If the present libel did not fall within the old one, the libellant should not have demurred to the plea, but should have replied and assigned anew. *Leland* v. *Marsh*, 16 *Mass. R.* 389.

The opinion of the Court was drawn up by

EMERY J. — The strict rules of pleading applicable to common law cases have not been followed in libels for divorce. We apprehend that it may become important to adopt a practice of greater particularity, in the allegations in cases of adultery, in order to prevent surprize, and to enable a respondent to prepare for trial.

Where the allegation in a libel is made with the intention to include a chance for establishing delinquency on a certain day, on which the offence is alleged to be committed, and also alleging repetition of the crime between that day and the time of filing the libel, the party prosecuting must be intended to come prepared with every proof properly to be received, bearing on the subjects of complaint. And after a full hearing and trial thereon, followed by a decree of divorce, or dismissal, it must be deemed as conclusive between the parties, as to the allegations. And, like all other judgments, must bind them until reversed.

It would be worse than useless if any other conclusion should result from long and painful investigation, pressing heavily on the characters of all concerned. As a consequence, the attempt to call up the investigation again, under the pretence that there was some instance omitted within the periods alleged, cannot be entertained, so far as to receive evidence of transactions between the times which have passed into judgment.

But in this case we have come to the opinion that the new libel covers time between the filing of the former libel and the filing of the last.

To so much, the brief statement, or plea of the respondent, does not, by shewing the former judgment, furnish an adequate bar. It is not in the plea averred that the second libel is for the same cause of complaint as the first. And therefore we cannot absolutely conclude that it is so. And the demurrer must be regarded as admitting no more than is alleged.

We do not consider that this is a petition for a new trial of the former libel. Nothing of the kind is asked. The statement that new evidence is discovered, appears to be alleged rather by way of apology for introducing into the second libel, offences, supposed to be committed within the time, which before had been in contestation. There is not such a representation of the newly discovered evidence in particularly describing the witnesses by name, and what they are expected to testify, and the grounds of belief that they will so testify, and when the petitioner became informed of the testimony, as is requisite in order that the Court should entertain it as a petition for a new trial.

The respondent has therefore not presented a bar to the libel, and the exceptions must be sustained. To the allegation of the offence between the 20th of *June*, 1836, and the 5th day of *April*, 1838, the respondent must answer.

Richard Robinson *vs.* Edward S. Folger.

In an action to recover a fine under the militia act of 1834, *c.* 121, the clerk of a company has power to amend his process, both as to matters of form and substance, at any time before the rendition of judgment.

If the captain of a company be commissioned as major, although not qualified, the lieutenant, or next officer in rank, is commander of the company until there shall be a captain.

It is the duty of the clerk of a company, without orders from the commanding officer, to enrol the non-commissioned officers and privates within the limits thereof.

When it does not appear that the private, in a suit against him for neglect to appear at a company training, was a minor, or that he was then enrolled for the first time, it cannot be assumed that he was entitled to six months, within which to procure equipments.

If an order to a private to warn all the non-commissioned officers and soldiers within certain limits, within the bounds of the company, be signed by the commanding officer, and delivered to the private, it gives him sufficient authority to warn those within his limits, although their names be not inserted in the order.

If an order to warn the company be made out by the commanding officer, and signed by him, omitting the name of the person directed to give the warning, and the name be afterwards inserted by the clerk, under the direction of the commanding officer, it is sufficient.

The company roll, although not recorded on the company orderly book, is competent and sufficient evidence of the facts therein stated, to prove that the company had mustered, and that a soldier was absent on a given day.

Where the records of the company have a list of the names of the members thereof, and opposite thereto have distinct and separate columns ruled off, headed respectively "present," and "absent," and against each name in one of the columns is found a mark, thus —, and against the name of the private alleged to have been absent, there is found *the mark* in the column headed *absent;* this appears to be sufficient proof of the absence; but if explanation be necessary to show the meaning of the marks in the records, the clerk is a competent witness to give it.

Error, to reverse a judgment of a justice of the peace rendered against *Robinson*, the plaintiff in error, for the penalty for absence from a company training on *Sept.* 23, 1837. *Folger* brought the suit as clerk of the company commanded by *Marlborough P. Faught.* No writ of error, or assignment of errors, is found in the case, but merely the exceptions before the justice. From these it appears that the declaration originally did not set forth the day on

which the alleged neglect took place, nor did it aver that the defendant unnecessarily neglected to appear. The plaintiff under leave of the justice amended his writ in these respects, which was objected to by the defendant. To prove the organization of the company, several commissions to officers were produced, and among the rest one to *Faught*, as lieutenant. This was objected to as insufficient, but the objection was overruled. To show that *Faught* was commanding officer, it was shown that he was commissioned as lieutenant, *Sept.* 22, 1836, and qualified *Sept.* 9, 1837, having previously been ensign; and that *Bartlett*, the last captain, had been commissioned as major, *August* 22, 1837, and was qualified as such, *October* 4, 1837. To prove the enrolment of *Robinson* in the company, the plaintiff produced a roll in the form provided by the Adjutant General, with a printed caption, thus: "Roll of the first company of infantry in the 2d Regiment, 1st Brigade, 2d Division, under the command of *Marlborough P. Faught*, as corrected on the first *Tuesday* of *May*, 1837." The roll was attested, "A true roll of the company. Attest, *Ed. S. Folger*, Clerk — *M. P. Faught*, Lieutenant." On this were the names of *Faught* as lieutenant, and of a large number of persons as privates, and among them of *Richard Robinson, Jr.* Against the names of all the privates in the column of "additional enrolments since *May*," the date *August* 19, was carried out. A company book of records was produced, but this roll was not recorded thereon, nor was any other book of enrolment produced. *Folger*, the clerk, testified, objection being made by the defendant, that this roll was made out by lieutenant *Faught* and himself on the 19th of *August*, according to the date. There was no evidence of the age of *Robinson*, nor was any evidence introduced to show that he was under the age of eighteen years, nor was it proved that he had ever before been enrolled in the militia. The counsel for *Robinson* contended, that there was no sufficient evidence of an enrolment, there being no such company as described in the caption; and that *Faught* was not commanding officer either in *May* or *August*; and that the defendant was not liable to do duty until the expiration of six months from the time of notice to the defendant of his enrolment. The exceptions state, "no notice was proved except verbal warning to the company training, for not attending which, this suit was

brought." To prove that the plaintiff was clerk, he produced a warrant, dated *Sept.* 3, 1836, appointing *Edward Folger* as sergeant, signed by *Daniel Paine*, as major and commanding officer, and a certificate from the Adjutant General, that *Paine* was at the time commanding officer of the regiment; and on the back of the warrant was a certificate, dated also *Sept.* 3, 1836, signed by *Bartlett*, as captain, that he appointed *Edward Folger*, clerk, and that he took the oath on the 19th of the same *September*. It was objected by the counsel for the defendant, that this was not a valid appointment of the plaintiff, *Edward S. Folger*, and that he could maintain no action. The plaintiff then amended his writ, by leave, which was objected to, by inserting after the plaintiff's name, "otherwise called *Edward Folger*." The plaintiff testified, that he was commonly called "*Ned Folger*." The justice ruled, that the action could be maintained by the plaintiff. The exceptions also state, that a verbal warning to attend a company training on *Sept.* 23, was proved to have been given by one *Nash*, who had received a warrant signed by *Faught*, as commanding officer, to notify all the non-commissioned officers and privates, living within certain limits, and that it was proved that *Robinson* resided within those limits, and that they were within the limits of the company, but no names were in the warrant, or appended to it, or delivered to *Nash*. The warrant to *Nash* was signed by *Faught* before it was filled up, or any name inserted, but the name was put in by the clerk, in the presence of *Faught*, being agreed upon by them. The counsel for the defendant contended, that this was not a sufficient warning of the defendant, *Nash* having no authority to warn him by name, and not being rightfully appointed to give the warnings. The justice ruled otherwise. To prove the alleged absence, the book of records was produced. A list of names was inserted on page 11, with parallel columns which were filled up with marks under the captions of the columns severally. In the margin was a certificate as follows. "Names of the privates that appeared armed and equipped, at the company training on *Saturday, Sept.* 23, 1837. A true copy, attest, *Marlborough P. Faught*, Lieutenant;" and also, "Roll of the first Company of Infantry, 2 Reg. 1 Brig. 2 Division." And at the bottom of the page was written, "carried over to the 17th page." The intervening pages were

filled up with records of company orders. The 17th page contained a list of names, with columns ruled off parallel, with a caption to each, " present," " absent," &c. There was no certificate, nor caption, nor explanation on this page, showing what it was the record of, but was certified at the bottom, " A true roll of the company as inspected, Attest, *Edward S. Folger*, Clerk." And against the name of *Robinson*, in the column headed " absent," was a mark thus —. The clerk testified that the names and marks on those two pages were placed there by *Faught* and himself, but that subsequently he compared the same with a roll hereafter described, and found the same correctly copied. The roll from which the copy was made was then produced by the clerk, and was entitled " Roll of the first company of infantry, in the 2d Regiment, 1st Brigade, 2 division under the command of *Marlboro' P. Faught*, as corrected on the first *Tuesday* of *May*, 1837." There was no other date to it, and no other description of what it was intended to be, nor any signature or certificate. The clerk testified, being objected to, that this was a roll of the company on the 23d of *September;* that he kept it in pencil on that day, and afterwards filled it up with ink, and that it was subsequently given to *Faught*, by whom it was carried on to the company records, as above described. The defendant's counsel contended, that there was no sufficient evidence that the defendant was absent on the day of training, but the justice ruled otherwise, and ruled that on the proof introduced, the action was maintainable, and that the defendant was liable to pay the penalty demanded. To which several rulings and decisions the defendant excepted.

Evans argued in support of the objections made at the trial before the justice, and cited *Commonwealth* v. *Perkins*, 1 *Pick.* 388; *Commonwealth* v. *Hall*, 3 *Pick.* 262; *Heald* v. *Weston*, 2 *Greenl.* 348; *Avery* v. *Butters*, 2 *Fairf.* 404; *Gould* v. *Hutchins*, 1 *Fairf.* 145; *Whitmore* v. *Sanborn*, 8 *Greenl.* 310; *Haynes* v. *Jenks*, 2 *Pick.* 172; *Sawtel* v. *Davis*, 5 *Greenl.* 438; *Commonwealth* v. *Annis*, 9 *Mass. R.* 31.

Vose argued for the defendant in error. The militia act of 1834, § 45, expressly authorizes the clerk to amend his process in any stage of the proceedings before the rendition of judgment.

This provision applies to matters of substance as well as of form. The limits of the company were proved by the record, and the exceptions extend only to the organization of the company, and that was proved in the mode provided by the statute, the production of the commission. *Robinson* was enrolled on the nineteenth of *August*, when the lieutenant commanded the company. But if the enrolment is to be considered as made on the first *Tuesday* of *May*, before the captain was promoted, the name of the commander of the company may be rejected as mere surplusage, the company having been before sufficiently described. The name of *Robinson* was on the roll, which was attested and recorded, and all done by the right person. The burthen of proof was on *Robinson* and not on the clerk, to show his age, or that he had not been previously enrolled. The justice might presume it from his age and appearance. *Nash* had proper authority to warn the defendant. He was resident within the limits prescribed in the order, and that is sufficient without naming him. By our statute the clerk is competent to testify to the absence of a private, and to any other facts, and the case cited from *Massachusetts* does not apply. The marks however were sufficiently understood without any other explanation than what was found upon the roll. He cited *Green* v. *Lowell*, 3 *Greenl.* 373; *Sherman* v. *Prop. Conn. R. Bridge*, 11 *Mass. R.* 338; *Tripp* v. *Garey*, 7 *Greenl.* 266.

The opinion of the Court was by

Weston C. J. — The amendments objected to, we think the justice had authority to allow. It does not appear from the exceptions, that parol proof was received of the limits of the company. At the time of the enrolment of the plaintiff in error, *Marlborough P. Faught* was in fact the commander of the company, the captain having been promoted. And the clerk was authorized, and it was his duty, to enrol the plaintiff in error; and it appears to have been regularly done and attested by him. *Stat. of* 1834, § 12.

As it does not appear, that the plaintiff in error was a minor, or that he was then enrolled for the first time, it cannot be assumed, that he was entitled to six months, within which to procure equipments. We think the warrant to *Nash* was properly filled up, under the direction of the commanding officer of the company; and

that it was sufficient to authorize him to warn the plaintiff in error, he being a member of the company, within the limits described. And we are of opinion, that his absence on the day, on which he is charged with being delinquent, is sufficiently proved by the company records; but that if any explanation was necessary, as to the meaning of the marks in the record, under the proper column, the clerk was a competent witness to give it. *Emery* v. *Goodwin, ante p.* 76.

Judgment affirmed.

The STATE *vs.* REUEL MILLS.

Where an indictment for cheating by false pretences alleges that the goods were obtained by several specified false pretences, it is not necessary to prove the whole of the pretences charged; but proof of part thereof, and that the goods were obtained thereby is sufficient.

Where it was proved on the trial of such indictment, that the owner of a horse represented to another, that his horse, which he offered in exchange for property of the other, was called the *Charley*, when he knew that it was not the horse called by that name, and that by such false representation he obtained the property of the other person in exchange; *it was held*, that the indictment was sustained, although the horse said to be the *Charley* was equal in value to the property received in exchange, and as good a horse as the *Charley*.

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

The indictment charges, in the language of the exceptions, "that the said *Mills* on, &c. contriving and intending, knowingly and designedly, by false pretences to cheat and defraud one *John Loring* of his money, goods, wares and merchandize, and other things, did, knowingly and designedly, falsely pretend to said *Loring*, that a certain horse, which he, the said *Mills*, then wished and offered to exchange with said *Loring* for a certain colt and five dollars in money, was then and there a sound horse, and was the horse called the *Charley*, the said horse called the *Charley* being well known to said *Loring* by true and correct representations which he had received, although he had not seen said horse called the *Charley*, &c.

by which false pretences said *Mills* then and there induced the said *Loring* to exchange with and deliver to said *Mills* his said colt and five dollars in money for said horse falsely represented as aforesaid to be the *Charley*, &c., whereas in truth and in fact the said horse which said *Mills* offered to and exchanged with said *Loring* and which he represented as a sound horse and as the horse called the *Charley* was not a sound horse, and was not the horse called the *Charley*, but was a different horse and unsound, and wholly worthless, &c."

At the trial, after the allegations set forth in the indictment had been proved, except the averments as to soundness, *Mills* introduced evidence tending to prove that the horse exchanged by him with said *Loring* was sound in every way and of equal or greater value than the said colt and five dollars received of said *Loring*, and was as good a horse as the *Charley*. And it was proved that *Loring* in the early part of the evening on which the exchange was made, with the aid of a lamp, went into a shed where the horse represented as the *Charley* stood, not in a stall, and examined the horse, and that the horse was open to full inspection. The counsel for *Mills*, contended, that this indictment could not be sustained. The Judge charged the jury, that the comparative value of the two horses was of no consequence in the case; that although the jury might be satisfied that the horse received by *Loring* was sound and of a value equal to the value of the colt and five dollars, it could not avail the defendant; but if the jury were satisfied that *Loring* was deceived by the false representation of *Mills*, either in regard to the soundness of the horse, of which they from the evidence might reasonably doubt, or as to its being the horse called the *Charley*, and parted with his property in consequence of either of said misrepresentations, it was their duty to return a verdict of guilty. And that it was not necessary for the government to show either that *Loring* received an unsound horse, or that he received a horse of less value than the *Charley*, provided he received a different horse from the *Charley*.

The jury returned a verdict of guilty, and *Mills* filed exceptions.

H. W. Fuller, Jr. argued for *Mills*.

1. The offence charged, if wholly proved, is not indictable.

By the common law, no indictment could be sustained "for a naked lie, or false affirmation." 2 *Russ. on Crimes*, 1375, 1378. False tokens must have been used. 2 *Burr.* 1127; *ib.* 1130. Or there must have been a conspiracy to defraud. 2 *Barn. & Ald.* 204; *Leach*, 274; 6 *T. R.* 628. Mere deception is not enough. "Shall we indict a man," says *Holt C. J.* "for making a fool of another." *Regina* v. *Jones*, 1 *Salk.* 379; *S. C. Ld. Raymond*, 1013. The fraud must have been such as affected the public, as using false weights. 2 *Russ. on Cr.* 1360 *and note*, 1374, 1380. And such that common prudence could not guard against it. 2 *Stark. Ev.* 467, 471; *Cross* v. *Peters*, 1 *Greenl.* 387; *People* v. *Stone*, 9 *Wend.* 182. The *stat.* 33, *Hen.* 8, *c.* 1, was then passed, explanatory of the common law, and providing the mode of conviction and punishment but creating no new offence. The proof required was the same. 2 *Russ. on Cr.* 1383; *People* v. *Babcock*, 7 *Johns. R.* 201; *Commonwealth* v. *Warren*, 6 *Mass. R.* 72. Next followed *stat.* 30 *Geo.* 2, *c.* 24, and which, in consequence of the decision in *Commonwealth* v. *Warren*, was adopted in *Massachusetts*, *(stat.* 1815, *c.* 136*)*; and adopted in the State of *New-York*, in consequence of the decision in *The People* v. *Babcock*. Our *Stat.* 1821, *c.* 13, is precisely the same as the 30 *Geo.* 2, *c.* 24, and is the sole ground of this indictment. All the *Massachusetts*, *New-York* and *English* decisions, made after the adoption of that statute, are therefore applicable. *Cross* v. *Peters*, 1 *Greenl.* 387; *People* v. *Johnson*, 12 *Johns. R.* 204. The *stat.* 33, *Hen.* 8, was the same in effect as the common law, and the *stat.* 30 *Geo.* 2, *c.* 24, only enlarges the description in the former statute. Both are made *in pari materia*, and whatever has been determined in the construction of one is a sound rule of construction for the other. 2 *Russ. on Cr.* 1385, citing 2 *T. R.* 586. Neither statute has ever been applied to cases where common prudence would guard against it, nor to cases not affecting the public. *Cross* v. *Peters*, before cited. In this case common prudence would have guarded against the representations charged. Nor are they such as affect the public. Hardly an exchange of horses takes place without statements as high colored, and as false as this. All falsehoods are not indictable. In civil cases, even, no action lies for falsely affirming the cost or worth

of an article, or the object of a purchase. *Vernon* v. *Keys*, 12 *East*, 632. Or the grounds for delay of payment of a note. 1 *Tyler*, 387. Or for falsely saying that another would not allow him to give more for an estate, although another may be deceived thereby. *Vernon* v. *Keys*, 4 *Taunt.* 488; 2 *Stark. Ev.* 468. If then, the false affirmation as to the quality of an article, at the time of sale, is not indictable, then surely the false affirmation as to the name of an article, *a fortiori*, is not indictable.

2. If two false statements jointly are indictable, each one separately is not; and the Judge erred in telling the jury, that either was sufficient. From the instruction, the jury were to find the accused guilty, if either the horse was unsound, or was not the *Charley*.

To represent falsely that an unsound horse is sound, is not indictable. 1 *Burr.* 1128; 1 *Stark. Rep.* 402; 1 *Carr. & P.* 661; *Lambert* v. *The People*, 9 *Cowen*, 606; *Say*, 205; 4 *M. & Selw.* 214. Or for a false pretence that the accused had money and would pay for an article on delivery. *Rex* v. *Goodale*, *R. & Ry. C. C.* 461; *Russ. C. & M.* 300; 7 *Carr. & P.* 352; 1 *Salk.* 289.

3. The Judge erred in virtually directing the jury, that the comparative value of the horses was of no consequence; and that it was sufficient if *Loring* was deceived, even if he was not in the least defrauded. *Cabbet's Cr. Law*, 215; 1 *Russ. & R. C. C.* 106; 3 *B. & Cr.* 700. There are some loose remarks in the *per Curiam* opinion in *Commonwealth* v. *Wilgus*, 4 *Pick.* 177, and the case was rightly decided on other principles. There is a great difference between fraud and deceit. A man may be deceived by being persuaded that a thing is worse than it is. But fraud implies that the worse is received instead of the better. 2 *Stark. Ev.* 467. Can *Mills* be punished criminally for transferring to *Loring* a better horse than he represented his to be? Can a man be liable to be treated in law as a criminal for selling for firewood hickory instead of hemlock, if he called it hemlock and took but the price of hemlock? And yet the instruction of the Judge goes to this extent. Fraud without damage, or damage without fraud furnishes no ground for indictment. *Cross* v. *Peters*, before cited; *Robts.* 523.

4. The charge is erroneous, because the jury were instructed, that a verdict of guilty should be returned, if *Loring* was deceived by the false affirmation of *Mills*, and parted with his property in consequence of such representation. It makes the intention of *Mills* of no importance, whether he intended to deceive *Loring*, or did not. 2 *Stark. Ev.* 563.

G. M. Weston, County Attorney at the time of the argument, being called on to support the indictment, which however was not drawn by him, contended, that an indictable offence was charged in the indictment. Originally, it is true, no offence of this character was indictable unless it was a public offence. The statute of *Hen.* 8, enlarged the common law and made certain offences against individual rights, when accompanied by false pretences, indictable. The *Stat. Geo.* 2, already cited by the counsel for *Mills*, was still more extensive, and included in the list of indictable offences cases of frauds. It has been truly stated that the latter statute has been adopted both in *Massachusetts* and in *Maine*. By our statute it is an indictable offence to defraud by false pretences. *Stat.* 1821, *c.* 13; 6 *T. R.* 565; 3 *Campb.* 370. If the proof of either one of the pretences is sufficient to support the indictment, and it is proved, it is all which the law requires. It is not necessary to prove every thing which is alleged in an indictment. 2 *M. & Selw.* 384. The Judge could not have intended to instruct the jury, that *Mills* should be found guilty, unless they found that he knew the pretences to be false when he made them. The expressions imply that the pretences were made with the knowledge that they were false. It is not contended that a mere false representation, when no one is defrauded, can support the indictment. But here there was fraud. The man did not obtain the article he bargained for; and it is no answer to say, that another esteems it equally valuable. He is not under obligations to purchase an article he does not want, although others may think it is equally good. A mere attempt to defraud, it is admitted, is not indictable. Here the attempt succeeded, and the man was defrauded.

The opinion of the Court, was drawn up by

WESTON C. J.—The false pretences charged are, that the horse of the defendant was sound when it was unsound; and that he pretended it was the horse called the *Charley*, when in fact it was not that horse. Whatever conflict of testimony may exist, as to the first part of the charge, and assuming that it was not supported by the evidence, the second part of the charge is well sustained, and is not controverted by the defendant. The falsity practised by *Mills*, is alleged to have been done *scienter;* and it is stated that the case was proved. The Judge instructed upon the point of the defence, namely, that the other party was not deceived.

The jury must be understood to have found, that the defendant obtained from the injured party his colt and five dollars, upon the false pretence, that the defendant's horse was known by the name of the *Charley*. And the question is, whether it presents a case, under the statute of 1821, *c.* 13, for the suppression and punishment of cheats, which corresponds with the *English* statute of 30 *George* 2, *c.* 24.

The authorities cited for the defendant, appear to maintain the position, that the facts were not indictable at common law, or under any of the *English* statutes, prior to the one last cited. *English* cases under that statute are in point, and deserve respectful consideration. Decisions arising in civil suits, to several of which we have been referred, are calculated to afford very little aid in the determination of the question.

In *Rex* v. *Young et als.* 3 *T. R.* 99, it was said by *Lord Kenyon*, that the statute of *George* was intended to be general, but that it was not easy to draw the line, and to determine to what cases the statute shall extend. But it was held to include a false pretence, that a certain bet had been made, by which the prosecutor had been defrauded of his money. *Ashurst J.* said, that the statute was intended to protect the weaker part of mankind. A false pretence by a common carrier, that he had delivered certain goods, and had taken a receipt therefor, which he had lost, whereby he obtained pay for their carriage, was held to be within the statute. *Rex* v. *Aivey*, 2 *East*, 30.

Among the precedents given by *Chitty*, of indictments under this statute, 3 *Chitty on Criminal Law*, 1006, are false pretences,

that W. R. was a merchant of good fortune, that a child was a pauper of the parish, and that a person, on whom the prisoner drew, was indebted to him, and a gentleman of fortune. A false pretence by *Count Villeneuve*, that he was employed by the *Duke de Lauzun* to take some horses from *London* to *Ireland*, and that being detained by contrary winds he had spent his money, stated by *Buller J.* in *Rex* v. *Young*, was held to be within the statute. So was a false pretence by the prisoner, that he was sent by a neighbor to borrow money. *Rex* v. *Colman*, 2 *East*, *P. C.* 673.

In *Rex* v. *Dale*, 7 *Car. & Payne*, 352, it was held sufficient to sustain an indictment, for obtaining a filly on false pretences, to prove that any one of the pretences was false, and that the injured party was induced thereby to part with his property. It was held to be a false pretence under the statute of *George* 2, where the prisoner obtained money from the keeper of a post-office, by assuming to be the person mentioned in a money order, which he presented for payment, though he did not make any false declaration in order to obtain the money. And it was further held, that it was not necessary to prove the whole of the pretence charged, that proof of part of the pretence, and that the money was obtained by such part, is sufficient. *Rex* v. *Story*, 1 *Russell & Ryan*, 80.

But a pretence, that the party would do an act, he did not mean to do, (as a pretence to pay for goods on delivery,) is not a false pretence within that act, the court saying it was a mere promise for future conduct, and common prudence and caution would have prevented any injury arising from the breach of it. *Rex* v. *Goodhall*, 1 *Russell & Ryan*, 461. In that case the goods were sent by a servant. As they were to be paid for on delivery, the falsity of the pretence became known to the servant, before the goods were finally parted with.

A false pretence to a parish officer, as an excuse for not working, that the party has not clothes, though he really has, which induces the officer to furnish him clothes, is not within the act, the court holding it was a false pretence to avoid work, not to obtain clothes. *Rex* v. *Wakeling*, 1 *Russell & Ryan*, 504. But if the false pretence had been to obtain the clothes, it would doubtless have been regarded as within the statute.

In *Rex* v. *Douglas*, 2 *Russell & Ryan*, 462, the prisoner obtained a sovereign of the prosecutor, whose mare and gelding had gone astray, under pretence, that he would tell him where they were, but did not. The court held the indictment should have stated, that the prisoner pretended to know where they were. And if it had contained such an averment, it would have sufficiently appeared from his conduct, that he pretended to know that fact.

In the *Commonwealth* v. *Wilgus*, 4 *Pick.* 177, assuming a false name, and making false representations in regard to lottery tickets, was held to be within the statute. The court say, that a mere naked lie may not be sufficient, but admit that it is difficult to draw the line.

The horse, called the *Charley*, might have had the reputation of possessing qualities, which rendered it desirable for the party injured to become the owner of him. The defendant produced a horse, which he affirmed was the *Charley*. It was a false pretence, fraudulently made, for the purpose of procuring a colt and money from another. The attempt succeeded. These facts the jury have found. It is a case litterally within the statute; and we do not perceive why it is not within the mischief, it was intended to punish. To sustain it would not be going farther than precedents warrant. If the construction should be narrowed to cases, which might be guarded against by common prudence, the weak and imbecile, the usual victims of these pretences, would be left unprotected. It may not be easy to lay down any general rule, with proper qualifications and limitations; but in the case before us, we are of opinion, that the offence charged has been committed.

Exceptions overruled.

JOHN C. HAMILTON *vs.* SAMUEL PAINE.

Although the declarations of one in possession of land that he held in subordination to the legal title, made after his conveyance of all his claim thereto, cannot affect the rights of the grantee, yet they do defeat any claim of title acquired by the grantor himself, prior to the conveyance, by disseizin.

A parol disclaimer and abandonment of all claim to land by possession or othorwise, destroy all right of the person making such declarations to insist upon an adverse possession prior to that time.

THIS was a writ of entry, dated *May* 3, 1838, declaring on the demandant's own seizin within twenty years. It was agreed, that *C. W. Apthorp* was once the lawful owner of the premises, being a part of ten mile lot, No. 12, and that he died seized thereof in 1797, and that the title descended to his heirs at law. The demandant read in evidence at the trial before EMERY J. a deed from part of the heirs of *Apthorp* to *John Eastman*, *Jan.* 21, 1820; a deed from the other heirs, *July* 19, 1820, to *Fisk & King*; a deed from *Eastman* to the same of the same date; and a deed from *Fisk & King* to the demandant, dated *Feb.* 20, 1823, the description in each covering the premises demanded, with other land. The land now in controversy consisted of eleven acres, called the bog, on the margin of *Cobbossee* stream. Testimony was then introduced by the tenant to prove that one *Blanchard* was in possession of a tract of land, of which that demanded was a part, forty-nine years ago, and that *Blanchard* and those claiming under him had been in possession since, claiming to hold the same, and particularly the bog by possession, and mowed part of it; that he concluded it was State's land, and was willing to pay a small premium for the sake of a deed. He also introduced evidence tending to prove that the demanded premises were inclosed within a fence. On the part of the demandant, evidence was introduced tending to disprove these facts. The tenant also read a quitclaim deed from *Blanchard* to *Thomas Stinson*, dated *Aug.* 26, 1816, and recorded *September* 21, 1819, and that he was in under the heirs of *Stinson*. *Blanchard* continued to live upon and manage the land in his occupation until *April*, 1823, and after that time *Stinson* carried it on. The other facts material to the understanding of the case will be found extracted in the opinion of the Court.

F. Allen, for the tenant, contended, that no title passed to the demandant by his deed, as the grantors were then disseized. *Hathorne* v. *Haines*, 1 *Greenl.* 238. *Blanchard's* disclaimer of holding adversely after his conveyance to *Stinson*, amounts to nothing. It is not necessary that land should be surrounded with fence to have the exclusive possession of it. It is only one mode. An occupation by mowing annually, is enough. *Ken. Pur.* v. *Springer*, 4 *Mass. R.* 416; *Little* v. *Megquier*, 2 *Greenl.* 176; *Ken. Pur.* v. *Laboree*, *ib.* 275. Where the title is once acquired, a mere conversation between the parties cannot divest it. Much less can that of one party only with third persons.

Evans, for the demandant, argued, that it was the duty of the Judge to define to the jury what a disseizin was; and that it was the province of the jury to decide whether the possession was adverse in its commencement, and whether it continued to be adverse to the owner. The *stat.* 1824, *c.* 307, is merely retrospective, and does not apply to transactions prior to its passage. *Kinsell* v. *Dagget*, 2 *Fairf.* 309; *Little* v. *Libbey*, 8 *Greenl.* 242; *Blake* v. *Freeman*, 1 *Shepl.* 130. The declarations of the persons upon the land were entirely proper to show the nature and character of the possession. If it was not adverse to the owner, the land passed by the deeds. *Smithwick* v. *Jordan*, 15 *Mass. R.* 113; *Hall* v. *Leonard*, 1 *Pick.* 27. But here was no occupation. Going upon uninclosed land, and cutting hay, is not such possession as will give title. But the hay was on but a small part of the land demanded. The declarations of the person entering on the land to third persons cannot amount to disseizin of the owner, unless at his election. *Alden* v. *Gilmore*, 1 *Shepl.* 178.

The opinion of the Court was drawn up by

Shepley J.—The tenant can prevail only by proving such a disseizin committed either by *Blanchard* or *Stinson* as would prevent the demandant from acquiring title.

The report states, that the premises with other adjoining lands were surveyed in *August* or *September*, 1818, and that "it was proved, that at the time of said survey and just previous to it *Blanchard* said he disclaimed every part below high-water mark;

and sometime afterward and after the trial he said, he had no title to it, and could not therefore maintain a prosecution against *Mr. Gardiner* for flowing it." This being after he had released his interest to *Stinson*, the rights of the latter cannot be affected by it; but it effectually put an end to all pretence of claim on his own part; and any possession by him before that time must be regarded as existing in subordination to the legal title.

The report further states, that *Stinson* on the 10th of *November*, 1823, by deed of that date purchased of the demandant a tract of land, which had been included in his deed from *Blanchard*, and that it was "proved that *Stinson* just before taking said deed, said that he would also purchase the intervale or bog, being the premises now demanded, if *Mr. Vaughan* would agree to get the water off of it, or compel *Mr. Gardiner* to do so, for that *Blanchard* had disclaimed it, and he, *Stinson*, had no title of his own to it; and a few days after he received said deed he said, that *Mr. Vaughan*, who acted for demandant, would not so agree, and he had not bought it, and that demandant might now take the land, and do what he had a mind to with it." Here is a full disclaimer and abandonment of all claim by possession or otherwise, and it destroys all right to insist upon an adverse possession prior to that time. And it becomes the duty of the Court upon such proof to decide, that no disseizin had been committed prior to the 20th of *February*, 1823, when the demandant acquired his title.

As those, under whose title the tenant claims, have deprived themselves of the right to withstand in this mode the title of the demandant, it is not necessary to enter upon a consideration of the requests for instruction, or of the instructions which were given.

Judgment on the verdict.

HENRY W. FULLER, *Judge, vs.* LEONARD WING *& als.*

The guardian of a person, *non compos mentis*, who is entitled to a pension from the *United States*, is not bound to apply the pension money in his hands to the payment of pre-existing debts of his ward.

Nor is it the duty of such guardian to make sale of the household furniture of the ward, not subject to be taken on execution, for the payment of his debts.

In a suit for the benefit of a creditor upon a bond given by the guardian of a person *non compos mentis* to the Judge of Probate, where the only breach shown is the neglect of the guardian to return an inventory of the estate of the ward within three months, and where the estate was not subject to the payment of debts, the damages are but nominal.

In a suit upon a guardian's bond to the Judge of Probate where it is not alleged *in the writ* for whose benefit it is instituted, and that the same is sued out for his benefit in the name of the Judge of Probate, as required by the *stat.* 1830, *c.* 470, there being merely an indorsement thereof on the back of the writ, as required prior to that statute, and where but nominal damages could be recovered; the court will not grant leave to set the writ right by amendment, *if the power to grant such amendment exists.*

DEBT upon a probate bond, dated *Feb.* 27, 1837, given by the defendants upon the appointment of *Leonard Wing*, guardian to *Moses Wing*, a *non compos*, now deceased. The parties in interest agreed on a statement of facts. *Leonard Wing* has not returned an inventory of the estate of *Moses Wing* into the probate office. *Owen & Virgin*, for whose benefit this action is instituted, had a just demand against *Moses Wing*, which accrued previously to the appointment of *Leonard Wing*, as guardian, and obtained judgment thereon. They delivered their execution, issued on the judgment, to a deputy sheriff with directions to collect the same, and the deputy, before the commencement of this action, demanded payment of the execution of *Leonard Wing*, as guardian of *Moses Wing*, and the guardian refused to pay it, or to pay any part of it. *Moses Wing* was an aged and infirm man, having in his family a wife, daughter and grand-daughter, and having little or no property other than household furniture sufficient merely for domestic comfort, but had a pension from the government of the *United States*, amounting to the sum of $462,00, payable semi-annually on the 4th of *March* and *September*. At the time the demand was made on *Leonard Wing*, he had in money sixty dol-

lars belonging to his ward, part of *Moses Wing's* pension, and between that time and *Moses Wing's* death, he paid several small debts against his ward, that had been contracted previous to his appointment as guardian. The daughter of *Moses Wing* living with him had an independent property sufficient to support herself. *Moses Wing* died *June* 28, 1837, and his guardian, at the time of his death, had in his hands after paying funeral charges, money belonging to his ward to the amount of $33,52, which he has since paid to the widow of the deceased, administratrix on the estate of her husband, by order of the Judge of Probate.

When the case was called for argument, *May*, for the plaintiff, moved for leave to amend the writ by inserting therein the persons for whose benefit the action was brought, as the same was indorsed on the back thereof. *Emmons*, for the defendants, objected, that the statute, 1830, *c.* 470, § 1, is positive that the writ shall abate for this cause, and the Court have no power to permit an amendment. *May*. The writ is only abateable, like other writs, and is amendable. It is now too late to object.

May contended, that there was a breach of the bond, because *Leonard Wing*, the guardian, did not return an inventory of his ward's estate within three months from the making of the bond. *Stat.* 1830, *c.* 470, § 11; *stat.* 1821, *c.* 51, § 51, 72; *Potter J.* v. *Titcomb*, 1 *Fairf.* 53. It was the legal duty of the guardian to have paid upon the plaintiff's execution whatever funds he had in his hands at the time a demand was made by the officer. *Boyden* v. *Boyden*, 5 *Mass. R.* 427; *Conant* v. *Kendall*, *Law Reporter*, *No.* 9, 266, (21 *Pick.* 36.)

Emmons argued for the defendants, and contended that the guardian had not committed a breach of the bond by omitting to return an inventory. The law does not require that an inventory should be returned, unless there is property to be inventoried subject to be appropriated to the payment of debts. The inventory is not to be returned, unless the Judge of Probate requires it. Here there is no evidence that such order was given. But if there is a breach on that account, the damages are but nominal. The money received on account of the pension is prohibited by the pension act from being taken to pay debts. It is to be appropriated exclusively to the support of the pensioner.

The opinion of the Court was drawn up by

WESTON C. J. — By the act regulating courts of probate, statute of 1821, *c.* 51, § 49, guardians of persons *non compos*, are to be required to make a true and perfect inventory, under oath, of the estates of their wards. In the performance of this duty, their creditors have an interest. The plaintiff, for whose benefit the suit is brought, claims to charge the defendants, upon the failure of the guardian to return an inventory, and upon his refusal to pay to the plaintiff the money in his hands, belonging to his ward, at the time when payment of his execution was demanded.

That money was part of the pension, granted by the *United States* to his ward. It was competent for the government, to determine for what purposes their bounty should be applied. It was manifestly intended for the personal comfort and support of the pensioner. That this object might not be defeated, the act of Congress provides, that it shall not be attachable or made liable for the payment of debts. This was no injury to creditors. The pension had not been provided at their expense. And we are of opinion, that this immunity exists, so long as the fund can be identified; and the guardian was therefore well justified, in refusing to apply the money to the payment of the plaintiff's execution.

The statute of 1821, before cited, § 72, provides, that whenever any administrator shall have received the personal property of the intestate, and shall not have exhibited on oath a particular inventory thereof, execution shall be awarded against him for such part of the penalty of his administration bond, as the supreme court of probate shall on full consideration of all the circumstances of the case, judge reasonable. And the like judgment and proceedings (so far as they can with propriety take place) are to be had upon the bonds of the guardians. We are not satisfied, that the household furniture of the ward, necessary for his domestic comfort, if an inventory of it had been returned, could have been made available to creditors. It was not liable to their execution. Nor could it have been the duty of the guardian to strip him of it, for the payment of his debts. Upon the failure therefore of the guardian to return an inventory, the court could not deem it reasonable, to award execution in favor of a creditor, for any thing more than nominal damages.

Having considered the case upon its merits, it remains to be determined, whether the amendment moved for by the plaintiff's counsel, is essential to the maintenance of the action, and if so, whether such amendment can or ought to be allowed. The statute of 1830, *c.* 470, § 1, expressly provides, that in suits on probate bonds, the name, place of abode and addition of the person, for whose benefit it is instituted, shall be inserted in the writ, otherwise the same shall abate. This positive enactment, we are not at liberty to disregard. Without a compliance with its provisions, no judgment can be rendered for the plaintiff. It is made a condition of which the Court will take notice, ex officio; and it cannot be regarded as rendered unnecessary, by any implied waiver, on the part of the defendant.

It is not one of those circumstantial errors or mistakes, for which, by the act regulating judicial process, statute of 1821, *c.* 59, § 16, no process shall be abated; for the law is imperative, that such shall be the effect of the deficiency under consideration. Such however is the liberality, with which amendments are allowed, that we incline to the opinion, that the Court might, in its discretion, grant the motion to amend; but upon this point it is not necessary to speak decisively, as the justice of the case does not require its allowance on the present occasion to sustain a claim for nominal damages. And it is accordingly refused.

Writ abated.

JOHN QUINBY *vs.* MOSES SPRAGUE.

Where the condition of a bond was, that the obligor should cut down the wasteway of his mill-dam twenty inches below the top of the then wasteway, and should draw down the water and keep the water drawn down twenty inches below the top of the existing wasteway, from the first day of *June*, to the first day of *October*, in each and every year thereafter; *it was held*, that if the wasteway was kept down twenty inches lower than it was when the bond was made, that the condition was complied with, although the surface of the water was less than twenty inches lower than the former wasteway.

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

Debt on a bond from the defendant to the plaintiff, dated *Dec.* 11, 1833, the condition of which was as follows. "That if the said *Moses Sprague* shall cut down the wasteway of the mill-dam at the mills now owned by the said *Moses Sprague*, twenty inches below the top of the present wasteway of said dam, and shall draw down the water and keep the water drawn down twenty inches below the top of the present wasteway of the dam aforesaid, from the first day of *June* to the first day of *October*, in each and every year hereafter, then," &c. The plaintiff claimed for damages done to his mowing land above the dam between the first of *June* and fifteenth of *July*, 1837. At the trial the plaintiff contended, that the wasteway was a portion of the dam thirty-three feet in length, and the defendant insisted, that the wasteway was a part of the dam but thirteen feet in extent, and evidence was introduced on both sides upon this point. Prior to *June* 1, 1834, the defendant cut down the thirteen feet space to the depth of twenty inches. There was no evidence that there had been, prior to the giving of the bond, any custom or practice to draw off the water by hoisting the mill-gates or other sluice ways, except over the dam and over the wasteway. Between the first of *June* and fifteenth of *July*, 1837, the plaintiff's meadow, situated about two hundred rods above the dam, was overflowed from five to seven inches, and thereby injured. During this time the water continued to run over the new wasteway to the depth of several inches, and the water above the dam was considerably higher than the top of the new wasteway.

The plaintiff contended, that even if the thirteen feet space was the true wasteway intended by the parties when the bond was given, and if it had been cut down to the depth of twenty inches, still the defendant had not fulfilled the conditions of the bond, because the defendant was also bound to draw the water down and keep it down twenty inches below the top of the old wasteway. The Judge instructed the jury, that if the thirteen feet space was the wasteway intended by the parties when the bond was given, and if the space was soon after the giving of the bond cut down to the depth of twenty inches, and kept free and open from the first of *June* to the first of *October*, in each year after the date of the bond, it was a fulfilment of the bond on the part of the defendant; that in that event it would be immaterial what depth of water flowed over the new wasteway; and that they would find a verdict for the defendant, although the water was not kept down to the point to which the wasteway was cut down. The verdict was for the defendant, and the plaintiff filed exceptions.

Wells, for the plaintiff, argued, that the condition of the bond plainly and unequivocally provided that the defendant should do two things. 1. Cut down the wasteway of the dam twenty inches below the top of the wasteway then existing. 2. In some way draw down the water, and keep it drawn down, twenty inches below the top of the then wasteway. The condition of the bond provides as much for doing the last as the first. It is enough that the bond prescribes that both these things shall be done; but there was good reason for requiring it. The first could be seen at any time, and the slightest inspection would show whether it was or was not done. Still it was necessary that the water should be lowered twenty inches below the top of the then wasteway to prevent its flowing back upon the plaintiff's meadow, and the defendant engaged to do it in the best way he could, the mode being left at his election. Any other construction would make the last half of the condition entirely nugatory, and would make a different contract for the parties from that which they have made by the most clear and explicit language. *Hawes* v. *Smith*, 3 *Fairf.* 429.

Emmons, for the defendant, contended, that the intention of the parties was simply, that *Sprague* should cut down his wasteway twenty inches, and should keep it so cut down during the time

specified in the condition. This was inferred to be the meaning of the condition of the bond, because the parties have in so many words expressed the exact number of inches which the defendant should cut down his dam. It was not their intention or expectation that any other part of the dam should be cut down, or that the wasteway should be lowered more than twenty inches. If the intention of the parties had been that at all events the water should be drawn down and kept down twenty inches below the top of the existing wasteway, then no number of inches by which the cutting down was to be regulated would have been specified. The defendant could not know beforehand how much he must cut down the wasteway of his dam in order to fulfil the condition of his bond. Were it not so, the specification of the number of inches for cutting down the wasteway was deceptive and calculated to mislead and ensnare the defendant, because it is apparent that the first water that flowed over the wasteway after it was cut down must have occasioned a breach of his bond, as the top of the water could not have been twenty inches below the top of the wasteway as it was before it was cut down. Covenants are to be construed according to the intention and meaning of the parties, and the good sense of the case, and technical words should give way to such intention. 1 *Wms'. Saund.* 320, *and notes.*

The opinion of the Court was drawn up by

Emery J. — It is urged by defendant that a great obstacle against a recovery by the plaintiff arises from the fact, that to the jury was presented for decision the question whether the thirteen feet space was the wasteway intended by the parties when the bond was given. By their verdict we must understand that such was the intention of those interested and entering into the contract. It was further found by the jury that the same space was, soon after the giving of the bond, cut down to the depth of twenty inches, and kept free and open from the first of *June* to the first of *October*, in each year, after the date of the bond.

These facts go very strongly to warrant the direction of the Court "that it was a fulfilment of the bond on the part of the defendant, that in that event it would be immaterial what depth of water flowed over the new wasteway, and that they would find a

verdict for the defendant, although the water was not kept down to the point to which the wasteway was cut down."

We have not arrived at this conclusion without much hesitation. But considering the experience which must have existed previous to the giving of the bond, and the nature of the obstruction which was to be reduced, we are led to believe that the principal object of the bond was to secure the cutting down of the wasteway twenty inches below the top of the then present wasteway. It was equivalent to saying, you shall keep the water drawn down the distance required, by cutting down the wasteway of the mill-dam twenty inches below the top of the present wasteway of the dam. We ought not to suppose that it was the object of the parties to call for a greater sacrifice, because if it had been, it seems quite surprising that any designation should have been made of the number of inches, which should be cut away. It does not absolutely follow that a man may always be protected against responsibility merely from the circumstance that he did not expect all the consequences, which may flow from some unguarded expressions, that may be retained in an instrument, which he may have signed. Indeed it is generally safer to conclude that every expression has been well considered, and effect should be given to all the terms, and in cases of doubt, the construction should be against the person intending to be bound. But it is not to be forgotten that the condition is introduced for the relief of the obligor. It is to be justly expounded to carry out the intention of the parties, to be gathered from the whole instrument.

It is argued that the object was to prevent the flowing of the land above in wet summers. And that there were other modes of reducing the water by means of gates. This may all be true. Nothing however of the kind is presented to us in the bond, or the condition. It might be true that the water would be thoroughly enough drawn down by nearly prostrating the dam or the wasteway. But could that have been the intention of the parties when twenty inches was named as all that was expected? We would rather adopt a construction, which should prevent surprize upon the individual, who appears immediately to have proceeded to reduce the wasteway to the limits prescribed, and which for years

conformed in its effects to the practical construction, which seemed satisfactory when the stipulation was made.

For these reasons the exceptions must be overruled.

JOHNSON LUNT & *al.* *vs.* JAMES M. ADAMS & *al.*

Where a demand was made by the payee of a note upon the maker at eight o'clock on the morning of the day on which the note became payable, and payment not being then made, a suit was immediately commenced thereon; *it was held*, that the action was prematurely brought, and could not be maintained.

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

Assumpsit on a promissory note, made by the defendants to the plaintiffs, dated *Dec.* 2, 1836, for $864,84, payable in six months with interest. The writ was dated *June* 2, 1837. After the note had been read, *Jones*, the deputy-sheriff who served the writ, was offered as a witness by the plaintiffs, and was objected to by the defendants on account of his liability by reason of his having served the writ, it appearing, as the defendants insisted, upon the face of the writ that the note was not then payable. The objection was overruled. The witness then testified, that the writ was handed to him by *Caldwell*, one of the plaintiffs, between six and seven o'clock on the morning of *June* 2d, 1837, a mile or two distant from the store of the defendants; that on arriving near the store, *Caldwell* directed *Jones* to go to the store and wait there, and make no service until he should come, which whould be done shortly; that *Jones* went to the store, and that *Caldwell* came there soon after, and told one of the defendants he wanted an adjustment of his demand; that the reply was, that he would see the other promissors; that in a few minutes they came in; that the conversation after *Caldwell* came in had lasted half an hour, when *Caldwell* told *Jones*, the witness, that it was of no use to try further, and directed an attachment to be made upon the writ; and that the writ was immediately served by an attachment of the goods of the

defendants. Here the plaintiffs rested their case, and the Judge directed a nonsuit. To that direction the plaintiffs excepted.

Vose argued for the plaintiffs, and contended, that the note in suit was due *June* 2, 1837, and that the action brought on the day the note fell due was not prematurely brought, a demand having been previously made. *Bayley on Bills*, 171, *note* 92; *Greely* v. *Thurston*, 4 *Greenl.* 479; *Henry* v. *Jones*, 8 *Mass. R.* 453; *Stanton* v. *Blossom*, 14 *Mass. R.* 116; *Shed* v. *Brett*, 1 *Pick.* 401. But even if no demand previous to the service of the writ is proved, the action can be maintained. *Field* v. *Nickerson*, 13 *Mass. R.* 131; *Ayer* v. *Hutchins*, 4 *Mass. R.* 370. The writ was in force only from the time the direction was given to make service of it. *Badger* v. *Phinney*, 15 *Mass. R.* 359.

Wells argued for the defendants, and contended, that a demand on the day the note fell due should have been alleged and proved, or a suit on that day cannot be maintained. 1 *Chitty on Pl.* 322, 323. And this demand should be made in business hours. If the words proved amounted to a demand of payment, it was of no avail because *Caldwell* had not the note with him. *Freeman* v. *Boynton*, 7 *Mass. R.* 483. The action cannot be maintained with a demand and refusal before the commencement of the suit. *Greeley* v. *Thurston*, 4 *Greenl.* 479. Here the writ was made before the plaintiffs saw the defendants on that day.

The opinion of the Court was drawn up by

Shepley J. — The most favorable position of the case for the plaintiffs is, that a demand was made about eight o'clock on the morning of the day upon which the note became payable, and payment not being then made a suit was immediately commenced. It was decided in the case of *Greeley* v. *Thurston*, 4 *Greenl.* 479, that a suit might be lawfully commenced on the day the bill or note became payable after a demand had been made at a reasonable hour of the same day.

There may be little difficulty in towns and cities, where there are business or banking hours, in deciding, that a demand should be made during those hours. But in places, where no particular hours are known for making and receiving payments there is more difficulty in determining what would be a reasonable hour for this

purpose. It may often happen, that the party having a payment to make would appropriate the earlier part of the day to obtain the means, either by collecting, or by procuring a loan from a bank or from some person in a neighboring town. To establish a rule, that would deprive him of that opportunity and subject him to a suit; and that would render him liable to have his business broken up, while thus employed, might justly be regarded as unreasonable. The general rule being, that the party has all the day to make his payment, that in relation to bills and notes should not be so varied as to prevent his having a fair opportunity to make arrangements and provide the means of payment before he is subjected to a suit. In this case the demand was made at an hour so early as to deprive him of that opportunity; and it was not therefore made at a reasonable hour.

Exceptions overruled.

Stephen Low *vs.* Daniel Marshall.

If one party covenants to convey land to the other within one year at an agreed price per acre, and the other party, at the same time covenants to pay the same price per acre for the same land within the same time, the covenants are dependent, and neither party can maintain an action against the other without proof that he was ready and willing to perform on his part at the proper time.

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

Debt upon a writing under seal from the defendant to the plaintiff, dated *February* 24, 1836. At the trial, the defendant introduced a sealed writing from the plaintiff to him, bearing the same date, in which *Low* agreed *to give, grant, sell, and legally convey* unto *Marshall*, or his assigns, a certain tract of land, described. Then follows: "The condition of the foregoing agreement or obligation is, that if the said *Daniel Marshall* shall within the time of one year from the date hereof pay or cause to be paid to the said *Low*, his heirs or assigns, the sum of one hundred dollars per acre

for all the land contained in the above described premises, then the said *Low*, his heirs or assigns, shall give and make unto the said *Marshall* or his assigns a full and legal conveyance of the aforedescribed premises." The agreement on which the suit was brought, signed by *Marshall*, recited the agreement signed by *Low*, and then proceeded: "The condition of this obligation being that if within one year from the date hereof, I, the undersigned, shall" do either one of certain things, among which was the conveyance of certain land within one year, which conveyance the case shows was made within the year, "I will then purchase of said *Low* the piece of land described in his obligation to me before referred to, and will pay him for the same at the rate of one hundred dollars per acre." The defendant proved that there was the incumbrance of a contingent right of dower in the premises described in the agreement in the wife of a former grantor. No offer was made within the year by the plaintiff to convey the land to the defendant on any terms, nor was any offer made by the defendant to pay the plaintiff therefor if a conveyance should be made. The Judge ruled, that the action could not be maintained, to which the plaintiff excepted.

Vose, for the plaintiff, contended, that these were distinct and independent covenants, and that therefore the action could be maintained without either averring or proving performance, or tender of performance, on the part of the plaintiff. *Manning* v. *Brown*, 1 *Fairf.* 49; 2 *H. Black.* 389; *Tileston* v. *Newell*, 13 *Mass. R.* 406; *Read* v. *Cummings*, 2 *Greenl.* 82; *Sewall* v. *Wilkins*, 2 *Shepl.* 168. But if an offer to perform be necessary, the declaration avers a readiness to perform, and that is sufficient where the defendant was not in readiness to perform on his part. *Rawson* v. *Johnson*, 1 *East*, 203; *Tinney* v. *Ashley*, 15 *Pick.* 546; 2 *B. & P.* 447; 3 *Saund.* 350.

Bradbury, for the defendant, argued, that the two agreements, being made on the same day, and being parts of the same transaction, and on the same subject matter, were to be construed together as one instrument. *Hubbard* v. *Cummings*, 1 *Greenl.* 12; *Holbrook* v. *Finney*, 4 *Mass. R.* 566; 1 *Salk.* 112. In this case the covenants are dependent, neither party being bound to perform

without performance by the other. The defendant was not obliged to pay his money without receiving at the same time a conveyance of the land. No action in such case can be maintained without proof that the plaintiff was ready at the time and place to perform the contract on his part. Here, not only was there no offer to perform by the plaintiff, but the case shows that he had not the power to perform, as the premises were incumbered by a contingent right of dower. He cited 1 *Salk.* 131; *Doug.* 684; 7 *T. R.* 125, 761; 8 *T. R.* 366; 2 *Com. on Con.* 62; 2 *Johns. R.* 207; 10 *Johns. R.* 266; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Sibley* v. *Spring*, 3 *Fairf.* 460; *Porter* v. *Noyes*, 2 *Greenl.* 22; *Sewall* v. *Wilkins*, 2 *Shepl.* 168; *Winslow* v. *Copeland*, 3 *Shepl.* 276.

The opinion of the Court was drawn up by

Shepley J. — The obligation of the plaintiff to convey was upon condition, that the defendant, within one year, should pay him at the rate of one hundred dollars per acre for the land; and this condition is recited in the obligation of the defendant to purchase. The conveyance was to be executed and the money to be paid at the same time; and neither was obliged to perform without performance by the other. The party that would exact performance of the other, should prove that he was ready and willing to perform at the proper time.

When the decision is upon the pleadings, as in the cases of *Rawson* v. *Johnson*, 1 *East*, 203, and *Tinney* v. *Ashley*, 15 *Pick.* 546, averments that the party was ready and willing to perform were held to be sufficient. But in those cases, if the defendants had taken issue upon the facts, it would have been necessary for the plaintiff to have proved that he was ready at the time, and should have performed if the other party had. In *Rawson* v. *Johnson*, Lord *Kenyon* says, "to be sure under this averment the plaintiffs must have proved that they were prepared to tender and pay the money, if the defendant had been ready to have received it, and to have delivered the goods." Any other rule, whatever expressions in any decided case may give it countenance, would be subject to this absurdity, that where neither party had manifested

any readiness to perform until after the time had elapsed, each might call upon the other as being the party in fault for damages.

To entitle the plaintiff in this case to recover, he must have proved, that at the expiration of the year he was ready to have delivered the deed of conveyance upon payment of the money. *Heard* v. *Wadham*, 1 *East*, 619. It does not appear that the plaintiff proved any readiness or willingness to perform until after the expiration of the year. After that time he was not bound to convey, and could not require the defendant to purchase.

Exceptions overruled.

Russell Ellis *vs.* William Jameson.

Although the record of a judgment, in virtue of its rendition, is not admissible evidence to prove a partnership, unless the parties are the same in both suits; yet the record of a judgment rendered by default against certain persons alleged to be copartners, is competent evidence, in a suit where the parties are different, to prove the fact that those persons did hold themselves out to the world as partners.

If a Judge of the Common Pleas decide the law rightly, and give to the jury reasons for his opinion, and those reasons are not the true ones, this furnishes no cause for a new trial.

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

Assumpsit upon a promissory note, signed by the defendant, and made payable to *Smith & Boody & Co.* or order, dated *Nov.* 9, 1836, for $380, payable in *June*, 1837. The note was thus indorsed: "*Smith & Boody & Co.* by *Calvin P. Stevens.*" The defendant denied that the note was duly indorsed, and also denied that *Stevens* had any right to indorse it. The plaintiff contended, that *Stevens* was one of the members of the firm, and as such had a right to indorse the note. The plaintiff released *Stevens*, and introduced him as a witness. He testified that he was a member of the firm, which consisted of *Smith*, *Boody*, *Howard*, and him-

self; that they carried on the lumbering business in partnership; and that he, as one of the partners, took the note and indorsed it to the plaintiff. Witnesses were introduced by both parties for the purpose of proving that there was such partnership, and to disprove it. Among other witnesses on the part of the defendant was one *Dwinell*, who had stated that the company to which he belonged had a lien upon the note. The defendant offered to prove by him, that *Stevens* refused to give up the note to him, but said he was willing to give back the note to *Jameson*, and promised so to do. This testimony was objected to by the plaintiff, and the Judge ruled that it was inadmissible, and rejected it. The plaintiff offered in evidence copies of several writs and judgments, wherein *Smith, Boody, Howard, & Stevens*, were sued as partners, and suffered judgment to be rendered against them by default; and also one where *Smith, Boody, & Howard* were sued as such, and *Stevens* was not joined. The defendant objected to the admission of these copies, but the Judge admitted them, stating to the jury as one reason for their admission, that if *Stevens* had not been a member of the firm, the true partners might have defeated the plaintiffs therein, and put them to other suits. The jury returned a verdict for the plaintiff, and that they found that *Stevens* was one of the partners in the company of *Smith, Boody, & Co.* The defendant filed exceptions.

Wells, for the defendant, said that the question to be determined at the trial was, whether *Stevens* was a member of the firm. His promising to give back the note to the defendant was wholly inconsistent with his having rightly taken it as a partner, for the company was entitled to it. The testimony rejected therefore tended to contradict *Stevens*, and should have been admitted.

It is an elementary principle, and rule of justice, that no one should be bound by the act or admission of another to which he is a stranger. Here, neither plaintiff nor defendant was a party or privy to the writs or judgments. 1 *Stark. on Ev.* 184. But these judgments were not admissible to show a copartnership even in a suit against the firm; and much less here between strangers. *Burgess* v. *Lane*, 3 *Greenl.* 165.

The jury were misinformed by the Judge of the effect of putting the name of a person not liable into the writs. The defendants

could not defeat the action, as the plaintiffs might strike out the name of a defendant, and proceed with the action. *St.* 1835, *c.* 178, § 4. Their interest would not have been to have objected to having *Stevens* brought in to help them pay debts, if he could. And the condition of *Stevens* might have been such, that it would be immaterial to him, whether this judgment stood against him or not. Besides, as there were suits where *Stevens* was not joined, this was a balance for the others. The instruction of the Judge therefore had a direct tendency to prejudice the defendant, and was clearly erroneous.

Boutelle, for the plaintiff, contended, that the testimony offered from *Dwinell* was wholly irrelevant, and therefore was rightly rejected. The writs and judgments were rightly admitted as evidence, subject to be rebutted. They were not held to be conclusive by the Judge. For some purposes they were admissible, and that is sufficient. They were the best evidence to show that the whole four admitted themselves to be partners at that time. The confession of one partner is sufficient to bind the whole, and certainly that of all the persons said to compose the company is. *Smith* v. *Jones*, 3 *Fairf.* 333; *Odiorne* v. *Maxcy*, 15 *Mass. R.* 39; 2 *Esp. Rep.* 608. If they permit *Stevens's* property to go to pay their debts, it is evidence of a common interest. The judgments are proper evidence to prove a fact. *Robison* v. *Swett*, 3 *Greenl.* 316; 1 *Stark. Ev.* 188; 4 *Mass. R.* 702.

The opinion of the Court was drawn up by

Weston C. J. — Proof of certain declarations of *Stevens*, the witness and alleged partner, was rejected, and in our judgment properly. They had no tendency to prove, that *Stevens* was or was not a partner, nor were they adduced to contradict his testimony, nor would they have had that effect.

The writs instituted and judgments obtained by other persons against the alleged partners, including *Stevens*, offered and received in evidence, although objected to, were not legally admissible to prove the facts established by the judgments, in virtue of their rendition. *Burgess* v. *Lane*, 3 *Greenl.* 165, is an authority directly in point. The plaintiff cannot avail himself of a judgment, as such, by which he would not have been bound. It is upon another

ground, that these writs and judgments were admissible in evidence. That certain persons have acted as partners, and have held themselves out to the world as such, is competent proof of partnership, and it is the usual evidence of the fact, where it is controverted. Upon adverting to the writs and judgments objected to, which are made part of the case, it appears that they were all rendered upon default. They were charged as copartners, acting as such under a certain partnership name. The default is a statute admission of the fact. In these suits, the alleged partners, including *Stevens*, being charged as partners by legal process, admit the fact, and suffer judgments to go against them by default. It is not easy to conceive by what more positive act they could hold themselves out to the world as partners, or could more explicitly justify others in dealing with them as such. Had they contested the fact, and it had been found or adjudged against them, it would not have been evidence which could have been used by others.

It is contended, that the Judge erred in one of the reasons which he gave for the admission of this testimony; but that is quite immaterial, it being in our opinion upon other grounds legally admissible.

Exceptions overruled.

JONATHAN PALMER *vs.* HOSEA SPAULDING *& al.*

The certificate required to be sent or delivered by the impounder of beasts to the pound keeper by the stat. 1834, § 5, is wholly defective and insufficient, if it does not state the sum demanded "for damages or forfeiture and the unpaid charges for impounding the same."

If the beasts are impounded for being found running at large in the highway, a statement in the certificate that "the owner or owners are requested to pay the forfeiture and costs," is not a compliance with that provision of the statute.

Such certificate is also insufficient, if it does not give "a short description of the beasts" impounded.

And if it can be shown, that the owner of the beasts saw them put into the pound, this does not excuse the omission to describe them in the certificate.

But the seventh section of the same statute does not require the pound keeper to state the amount "legally and justly demandable" in dollars and cents in his advertisement.

The word *costs* is not used in the fifth and seventh sections of that statute in reference to any claim that may be made by the impounder, but refers to those undefined expenses which may arise during the after proceedings required by the statute.

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

Replevin for four oxen and four cows, alleged to belong to the plaintiff, and to have been illegally detained by the defendants in the town pound of the town of *Rome*. The writ was dated *June* 30, 1837, and was originally returnable before a Justice of the Peace. The service was made and the creatures were replevied the next day, *July* 1. They were taken up by the defendants in the public highway in that town, between six and seven o'clock on the morning of *June* 29, 1837, and were soon after delivered to the custody of the pound keeper, and at the same time a certificate was delivered to him, of which the following is a copy:

"Committed to the care of *Stephen Morrill*, pound keeper of the town of *Rome*, four oxen and six cows found running at large in the highways in the town of *Rome*, to be impounded in the town pound in *Rome*, and the owner or owners are requested to pay the forfeiture and costs, and take them away.

"*Rome, June* 29, 1837. "HOSEA SPAULDING,
ASA EATON."

This certificate was offered in evidence by the defendants, and objected to by the plaintiff as insufficient, because it was not in the form required by the statute, and because it did not state the amount claimed as forfeitures and costs, nor the amount claimed in dollars and cents, and because it was not directed to the pound keeper, did not describe the beasts, was signed by two persons instead of one, and did not distinguish which of the cattle was taken up and impounded by each of the defendants. This objection was overruled by the Judge, who decided, as the exceptions state, that the certificate was a sufficient compliance with the statute, it having been proved and not denied, that the plaintiff was present at the pound and claimed the cattle to be his at the time of delivering the cattle by the defendants to the pound keeper. The defendants then offered in evidence the pound keeper's record as follows:

"Copy of three notices posted up according to law. Impounded in the town pound in *Rome* by *Hosea Spaulding* and *Asa Eaton* of said town, on the twenty-ninth day of *June* instant, four oxen and six cows for being found running at large in the highway in said town. The oxen colored red with some white, four cows colored red, and two cows, one brindle, and the other white with mealy, and the owner or owners are requested to pay what is legally and justly demandable and take them away. *Rome, June* 29, 1837. STEPHEN MORRILL, *Pound keeper of Rome.*"

The plaintiff objected to the admission of that record, and insisted, that it was insufficient, because it did not show that every thing had been done which the statute requires, and did not state specifically what had been done. The Judge overruled the objection, and admitted the record, and decided that it furnished sufficient evidence of the defendants' having taken all the measures incumbent on them to take, subsequent to the impounding, and prior to the replevying.

The plaintiff offered to prove by the pound keeper, that the advertisement mentioned in his record was not posted up and kept posted up and published in manner as the statute requires. The Judge rejected this evidence, but informed the pound keeper, that he might amend his record to conform to the truth. The pound keeper declined to make any amendment. The verdict being for the defendants, the plaintiff filed exceptions.

May, for the plaintiff, argued, that the plaintiff was entitled to recover, unless the defendants have shown a strict compliance with the provisions of the statute 1834, *c.* 137. It is penal in its provisions, and must be strictly construed. The instruction of the Judge was erroneous in directing the jury that the certificate left with the pound keeper was a sufficient compliance with the statute. It is deficient in not being directed to the pound keeper; and in not setting forth the name of the impounder, and his place of residence. When a statute prescribes a form and leaves a blank for any purpose, it is equivalent to a direction that such blank shall be filled. *Bell* v. *Austin*, 13 *Pick.* 90. The certificate should state in dollars and cents, and not by way of reference or inference, the amount claimed, that the owner may know how much to tender to free his cattle, and that it may be entered on the record of the pound keeper. It is no answer to say, that the penalty is fixed by law. The charges of impounding are not fixed by law, but are to be determined by the pound keeper. The impounder may not claim the full penalty fixed by law. The statute is express, that the certificate shall describe the beasts impounded. That the owner of the cattle knew where they were, furnishes no excuse for a violation of the positive provisions of law. The certificate is defective because it shows that two persons have joined in impounding beasts for a forfeiture, or because it does not state which cattle, were impounded by one, and which by the other. Two plaintiffs cannot join in an action to recover a forfeiture, unless the statute gives it to several. Here the penalty is given to the prosecutor in the singular number. 5 *East*, 313; *Wiscassett* v. *Trundy*, 3 *Fairf.* 204; 7 *Cowen*, 252.

The Judge erred in deciding that the pound keeper's record was sufficient; because it does not appear that the certificate was recorded "at length therein;" because the pound keeper has not stated therein "the time when the cattle were impounded, and the time when and by whom taken away." The record does not show the time when the notices were posted up, nor that a notice was kept posted in the pound keeper's dwellinghouse, nor even that one was ever posted there, nor at any other place within the town. He should state specifically what was done, that the Court may

judge of its sufficiency. 13 *Mass. R.* 483; 9 *Mass. R.* 242; 7 *Greenl.* 426; 8 *Greenl.* 334; 12 *Pick.* 206; 3 *Fairf.* 487.

Bradbury argued for the defendant, and said, that as it appeared from the case that the cattle were lawfully put into the pound, the true question was, whether the defendants became trespassers by reason of any subsequent omissions. A substantial compliance with the requirements of the statute is sufficient, and the case shows that to have been done. He examined the several objections made, and contended, that they did not exist in point of fact, or that they were not of a character to render the proceedings invalid. It is not necessary that the certificate should state what the law is. It is sufficient to say, that the penalty fixed by law is claimed. Not claiming any thing for their own services, shows they were relinquished by the defendants. Any omission to describe the beasts is cured either by the fact that the plaintiff was there and saw them put in the pound, or by the bringing this suit, and describing them. The plaintiff had sufficient notice, and could not be injured by the omission. The statement in the record that the notices were posted up according to law is sufficient. *Thayer* v. *Stearns*, 1 *Pick.* 109; *Bucksport* v. *Spofford*, 3 *Fairf.* 487. Where two persons act jointly in taking up cattle running at large in the highway, they must sign the certificate jointly. As there is but one penalty, they are jointly entitled to it.

The opinion of the Court was by

Shepley J. — When the legislature has so clearly pointed out the duty of one impounding beasts, it is much to be regretted, that he cannot take the trouble to read the law informing him of his duty. The *stat.* 1834, *c.* 137, § 5, declares, that "the impounder shall send or deliver to the pound keeper a certificate of the following purport," and then follows the form of one, which requires a statement of the sum in dollars and cents demanded for damages or forfeitures, and the unpaid charges for impounding the same. And provision is made by the twelfth section, that "the party impounding such beast or delivering the same to the pound keeper shall have a reasonable sum for his trouble, to be determined by the pound keeper," subject to the limitation, that it is not to exceed one half of the forfeitures. These forfeitures and charges

are required by the second section, to be paid before the beasts are released, and it appears to have been the intention of the legislature clearly expressed, to enable the owner to know with certainty the amount to be paid for the use of the impounder. The pound keeper is required by the seventh section forthwith to advertise the same, and among other things to state, that "the owner is to pay what is legally and justly demandable." He is not required in the advertisement to state any certain sum in dollars and cents, for the expenses of keeping would continually vary the amount.

The statute also requires, that the impounder in the certificate should give "a short description of the beast." The certificate left in this case with the pound keeper did not describe the beasts, or state any sum demanded in any other manner than by requesting the owner "to pay the forfeiture and costs." The argument is, that the certificate is sufficient, because that is certain, which can be made so, and that the law has determined the amount of the forfeitures; and that no sum being stated as charges for impounding, it is to be understood, that nothing is claimed. The word costs is not used in the fifth and seventh sections of the statute in reference to any claim that may be made by the impounder. It refers to those undefined expenses, which may arise during the after proceedings required by the statute.

If a liberal construction would allow the impounder to dispense with all the words in the form, and deliver a certificate in substance the same, the same construction would require the conclusion, that he used the word costs to describe something which he intended to claim, and therefore designed it to refer to the charges for impounding. Such a construction of his language would be enforced by the considerations, that nothing appears authorizing the conclusion, that he designed to relinquish any of his rights; and that the word has no meaning where it is used by him unless he designed it to cover such a claim.

Can the impounder dispense with both the form and substance of that requisition of the statute making it his duty to describe the beasts, because in this case it might not have been useful to the owner? He does not appear to have waived any of his rights. A party cannot be permitted to say, that he will disobey a law, because he can prove that it occasioned no injury.

It would neither be correct, nor safe, to establish a rule, that the impounder may omit to describe the beasts, if he can satisfy a jury, that the owner was not thereby injured. The statute has not imposed upon the owner the burden of entering upon such an investigation.

Exceptions sustained.

JAMES ODLIN *& al. vs.* CHARLES STETSON *& al.*

Where a note is left by an indorsee with a counsellor and attorney at law for collection, before it falls due, without any instructions to present it for payment to the maker, living thirty miles from the attorney, or to notify the indorser, living at the distance of seventy-five miles, without notice to the attorney of the ability or inability to pay of either party, of which the attorney was ignorant, and without advancing any money, and where there is no proof of any special undertaking of the attorney, or particular custom of the place; it is not the duty of the attorney to present the note to the maker for payment and to notify the indorser, in order to charge him, and therefore the attorney is not liable to the indorsee for omitting so to do.

THE case came before the Court upon a statement of facts. It was a special action on the case against *Charles Stetson* and *Daniel T. Jewett*, as counsellors and attorneys at law for their neglect to charge the indorser of a promissory note, left with them for collection by the plaintiffs before it fell due. There was also a special count for the neglect of the defendants as agents of the plaintiffs in omitting to take the necessary measures to hold the indorser of the note. The note was given by one *Johnson* to one *Blish*, and indorsed to the plaintiffs, and was for the sum of $32, and became payable *January* 1, 1836. Neither the date of the note, nor the time when it was left with the defendants for collection, nor the date of the writ, appears in the papers furnished in the case. The plaintiffs, one of whom was often in this State, lived at *Exeter*, in the State of *New-Hampshire;* the defendants were counsellors and attorneys at law, but were not notaries, and resided at *Bangor*, in the county of *Penobscot; Johnson*, the promisor,

resided at *Corinna*, in the county of *Penobscot*, thirty miles from *Bangor*; and *Blish*, the indorser, resided at *Pittston*, in the county of *Kennebec*, seventy-five miles from *Bangor*. When the note became payable, the defendants commenced an action against the promisor, recovered judgment, and he was arrested on the execution, and was discharged by taking the poor debtor's oath. No demand of payment was made on the promisor, when the note fell due, unless by bringing the suit, and no notice was given to the indorser. The plaintiffs never gave any special instructions to the defendants to demand payment of the promisor, or upon his neglect to pay, to notify the indorser; and the defendants never made any special undertaking so to do, unless it results from their duty as counsellors and attorneys at law. One or both of the defendants knew of the respective places of residence of *Johnson* and *Blish*, but neither of the defendants had any knowledge of the standing as to property of either promiser or indorser. When the note became payable and since, *Blish*, the indorser, had the reputation of being possessed of property. Since the commencement of the suit against *Johnson*, the plaintiffs have called on *Blish* for payment of the note, who refused to pay, denying his liability because he was not notified. The defendants called on the plaintiffs for payment of the costs of the suit against *Johnson*, $7,60, and the officer's fees for committing him, $2,46, and the same were paid. If in the opinion of the Court the defendants were liable, they were to have a deduction of the amount of the expenses of making demand on *Johnson* and giving notice to *Blish*, if the Court should consider them entitled to be paid therefor.

The arguments were in writing.

Potter, for the plaintiffs, contended, that it was a general and sound principle of law, that if through carelessness or want of proper diligence and inquiry, a debt be lost by the inattention of the attorney or agent in omitting to collect it, when in the exercise of proper care and diligence it might have been secured, he will be liable for it. So an attorney who receives a note or other evidence of a debt for collection is undoubtedly liable for the debt, if it be lost by his negligence. *Greely* v. *Bartlett*, 1 *Greenl.* 179; *Huntington* v. *Rumrill*, 3 *Day*, 396. An attorney by presenting

himself to the community as such impliedly engages and promises to those who employ him, that he will faithfully and carefully transact the business which may be entrusted to him, and when this engagement is disregarded and promise violated by his unfaithfulness, he must respond in damages. *Stimpson* v. *Sprague*, 6 *Greenl.* 473; *Cooper*, 480; *Arch. Pl. & Ev.* 23, 24; *Dearborn* v. *Dearborn*, 15 *Mass. R.* 316; 2 *Wilson*, 325. It was the duty of the defendants without any express direction to take every step in the matter of collection which was apparently for the interest of the plaintiffs. *Crooker* v. *Hutchinson*, 1 *Vermont R.* 77; *Brackett* v. *Norton*, 5 *Conn. R.* 519; *Paley on Agency*, 4, 5; *Paley's Moral Philosophy*, 114; 1 *Dane*, 424, § 13. Should it be contended on the part of the defendants that they were not bound to subject themselves to the expense and trouble of notifying the indorser, as no money was advanced to them for that purpose, it is answered by saying that no expense need to have been incurred, as a notice to the indorser by mail would have been sufficient. *Whitwell* v. *Johnson*, 17 *Mass. R.* 449; *Munn* v. *Baldwin*, 6 *Mass. R.* 316; *Stanton* v. *Blossom*, 14 *Mass. R.* 116.

D. T. Jewett, for himself and former partner, said, that they were not disposed to dispute the correctness of the law as laid down in the cases cited for the plaintiffs, but only that they are entirely inapplicable to this case. They only show that attorneys are responsible for neglect of duty, and not that the facts here show such neglect. These cases do not show that it is the duty of a counseller or attorney at law, without special instructions or special undertaking, to travel about the country and make a demand upon the maker, and give notice to the indorser of a note left with them for collection in the ordinary mode. Nor has a very diligent examination enabled them to find any such case. This case shows that the defendants were wholly ignorant in relation to the property of both maker and indorser. The plaintiffs gave no directions to make a demand of the maker of the note; advanced no money for the purpose; and gave no intimation that the maker was unable to pay. It would have cost nearly one half of this small note to have gone thirty miles back into the country and found the maker of the note, and made a demand on him for payment. It is said, that the

defendants were bound to notify the indorser, which could be done by mail. They were not bound to be at that expense, however small, as it would be entirely useless. Besides its being of no benefit to the plaintiffs, it was no part of the duty of the defendants.

If however the defendants are to be considered liable for neglect of duty, the plaintiffs are not to be in a better condition, than they would have been in, if the demand had been made and notice given. If a moderate sum be allowed for such expense, the sum to be recovered would be reduced below twenty dollars, and the plaintiffs could recover but one fourth as much costs as damages.

The opinion of the Court was by

SHEPLEY J.—When a person offers his services to the public in any business, trade, or profession, there is an implied engagement with those who employ him, that he will perform the business entrusted to him faithfully, diligently and skilfully. And if he fails to do so, he is answerable for the damages suffered by reason of such neglect. This engagement is limited however by the nature of the business, and often also by its being carried on only in a particular place. Thus an insurance or ship broker resident in a certain city would not be expected to effect insurance or obtain a freight in a distant city, unless such were proved to be his usual course of business, without a special undertaking to do it. So a notary cannot be expected to perform the duties of an attorney, or an attorney those of a notary, without some special engagement, unless there be proof of a combination of these employments or of a course of business authorizing those employing him to expect that he will do so.

The case finds, that the defendants were not notaries; and it does not appear, that they had so conducted their business as to authorize any one to expect them to act in any other character or manner than is usual for attorneys. The Court must understand from the law, and from the customary course of business as exhibited in cases coming before them, that negotiable paper is placed in the hands of a notary or special agent to have the necessary presentment made and notices given. Cases may and do occur, where an attorney acts also as a notary, and where also an attorney is called upon for advice respecting the manner of perform-

ing these duties; and he may in such and probably in other cases undertake to have them properly done, and in such cases he will be responsible. The defendants were established in business in *Bangor*, and they could no more be expected without any agreement to do so, to perform duties out of Court in a distant place in the same county, than a broker or tradesman having an established place of business could be. The note having been left with them before it became payable, an inference is drawn, that they must have known, that it was the desire and expectation of the holders, that the liability of all parties to it should be preserved. There may however be notes esteemed by the holders to be so well secured by the names of the makers, that they would not desire to incur the expense of a special messenger to make a demand at a distant place for the purpose of retaining the liability of the indorser. And others, where the remedy against the indorser is known to be of little or no importance. As no intimation was given when the note was left, that the maker was not perfectly able to pay, or that the indorser was of ability, or that any thing more was desired or expected, than the usual course of suing out the writ and making efforts to secure the debt in case of neglect to pay at maturity, the defendants were not bound to believe, that any unusual expense was to be incurred, or that an unusual course for an attorney was to be pursued. Without any proof, that it was within the usual course of business at that place, and without any instructions to present the note to the maker and notify the indorser, or any knowledge that it was important for the interest of the plaintiffs that it should be done, and without funds to pay the expenses, the defendants cannot be regarded as having undertaken to make such a presentment at a place thirty miles distant from their place of business. It is said they might have notified the indorser by addressing a notice to him through the post office; but such a notice without a presentment would have been wholly ineffectual.

Plaintiffs nonsuit.

DUDLEY DOE *vs.* JOHN FLAKE.

A levy on land duly made, and recorded within the time prescribed by statute, has precedence over a prior levy not recorded within three months, nor until after the making of the second levy.

The mere fact that the second levying creditor acted as an appraiser when the first levy was made, is not sufficiently strong and decisive evidence of notice to defeat the priority to which such second creditor was entitled, by causing his levy to be made and seasonably recorded.

WRIT of entry, and plea the general issue. The demandant relied on a levy of an execution upon the demanded premises in his favor against one *Hiram Brackett*, issued on a judgment of the Court of Common Pleas, *August Term*, 1827. The execution was extended upon the land, *September* 12, 1827, and was recorded *December* 11, 1827. The tenant then introduced his title, a levy upon the same premises as the property of the same *Hiram Brackett*, under an execution issued upon a judgment at the *December Term* of the Court of Common Pleas, 1826, in favor of one *Burrill* against *Brackett*, and a conveyance from *Burrill* to him, *December* 21, 1829. This extent was made *Jan.* 15, 1827, and recorded *Dec.* 11, 1827. *Dudley Doe*, the demandant, was one of the appraisers when the last levy was made. Both executions were returned into the clerk's office immediately after they were recorded. The tenant has been in possession of the premises for the last ten years. If upon these facts the demandant was entitled to recover, a default was to be entered, and if not, a nonsuit.

Z. Washburn, for the demandant, contended, that the levy made and recorded within three months has precedence over that made prior to it, but not recorded until after the expiration of three months, and after the levy under which the demandant claims. This is fully settled. The fact that the demandant was one of the appraisers when the land was set off on the other execution, cannot alter the rights of the parties. He could not know that the officer would deliver seizin to the creditor, or that the creditor would accept it, or that the debtor would not pay the debt within the three months. The neglect to record his execution for more than three months and until after the second levy, was sufficient to

warrant the demandant in believing that the first levy was abandoned, or the land redeemed by payment of the debt. He cited *M'Mechan* v. *Griffing*, 3 *Pick.* 149; *Norcross* v. *Widgery*, 2 *Mass. R.* 506; *Gorham* v. *Blazo*, 2 *Greenl.* 232; *M'Gregor* v. *Brown*, 5 *Pick.* 170; *Foster* v. *Briggs*, 3 *Mass. R.* 319; *Tobey* v. *Leonard*, 13 *Mass. R.* 200; *Whitman* v. *Tyler*, 8 *Mass. R.* 284; *Waterhouse* v. *Waite*, 11 *Mass. R.* 209; *Chandler* v. *Furbish*, 8 *Greenl.* 408; *Ladd* v. *Blunt*, 4 *Mass. R.* 402.

Vose & Lancaster argued for the defendant, that the levy without being recorded was sufficient to pass the title as between the debtor and the creditor. It is not void, if not recorded within three months. The object of recording is to give notice of its existence. Whenever actual notice of the levy is brought home to a party, it is equivalent to recording. In this respect there is no difference between a levy on land, and a deed. They contended, that the fact that the demandant was one of the appraisers was full proof of his knowledge of the levy. *M'Lellan* v. *Whitney*, 15 *Mass. R.* 137; *Cushing* v. *Hurd*, 4 *Pick.* 253; *Emerson* v. *Littlefield*, 3 *Fairf.* 148.

The opinion of the Court, was drawn up by

Weston C. J. — The authorities, cited in this case, prove very clearly, that a levy duly made and recorded, within the time prescribed by statute, has precedence over a prior levy, not recorded within three months, nor until after the registry of the second levy. This doctrine is not contested; but it is insisted, that if the second levying creditor has notice of the first levy, he cannot take advantage of the neglect of the creditor to cause the first levy to be recorded. Assuming this position to be correct, and such seems to be the bearing of the decisions, the case will turn upon the question of notice.

In the case of *M'Mechan* v. *Griffing*, 3 *Pick.* 149, *Wilde J.* who delivered the opinion of the Court, says, "as to express notice, it has been uniformly held, that the proof must be clear and unequivocal." And in commenting upon implied notice, he says, "the principle is the same in both. The fact of notice must be proved by indubitable evidence; either by direct evidence of the fact, or by proving other facts, from which it may be clearly infer-

red. It is not in such case sufficient that the inference is probable. It must be necessary and unquestionable." For a full illustration of this principle, we refer to that opinion, which is elaborately drawn, and the authorities there cited.

The evidence of notice relied upon is, that the demandant, who was the second levying creditor, acted as an appraiser, when the first levy was made. This would be sufficient, if it was necessarily deducible, from what was done within his knowledge, that the levy was perfected. But the creditor may waive the levy. He may not be satisfied with the appraisement, or may have other inducements for declining finally to accept the land. In *Tobey* v. *Leonard*, 15 *Mass. R.* 200, *Parker C. J.* says, "the creditor may, and sometimes does decline having his levy recorded, not intending to take the land in satisfaction; and this he is at liberty to do. He may also receive satisfaction in money, or otherwise, from the debtor, before the levy is recorded, or other reasons may exist to induce him to waive the title." The demandant, not finding the first levy recorded, within the time limited by law, might suppose it was not intended to be perfected. And in our judgment, the notice proved, is not sufficiently strong and decisive, to defeat the priority, to which the demandant was entitled, by causing his levy to be first recorded.

Judgment for the demandant.

JOSIAH EMERY *vs.* BENJAMIN DAVIS.

Where one contracts to purchase goods on certain conditions to be by him performed, and receives them into his possession, but fails to perform the conditions on his part, he is liable to be charged as trustee of the owner of the goods.

If one having possession of goods under a contract which has ceased to be valid, be summoned as trustee, and afterwards has notice of a bill of sale of the same goods, bearing a date prior to the service, from the person with whom he contracted to a third person, and sets it forth with the facts in his disclosure; and thereupon the creditor objects that the assignment ought not to have any effect to defeat his attachment under the process, and the assignee is duly summoned into Court to try the validity of his assignment, and refuses to come in, and is defaulted, and the alleged trustee is adjudged to be such; the judgment is conclusive against all claim of the assignee upon the trustee under the bill of sale.

And if such assignee, during the pendency of the trustee process, obtains from the alleged trustee by false pretences, payment for the goods by the discharge of a debt against him and by the negotiable note of a solvent man, the amount may be recovered back in an action for money had and received.

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

The action was for money had and received. The plaintiff had purchased of one *Argalis Pease*, prior to *October* 2, 1834, a carriage, for which he agreed to give $145 on certain conditions to be by him performed, and received the carriage into his possession. On the third of *November*, 1834, a process was served on the plaintiff as the trustee of *Pease*, which was entered and continued. The plaintiff disclosed as trustee, that after the service upon him, the defendant exhibited to him a bill of sale of the same carriage to him, *Davis*, dated *October* 2, 1834. The validity of this assignment was denied by the creditor, and the defendant was duly cited into Court to support his assignment, and although he came into the courthouse, and conversed with an attorney in relation to the citation, he did not enter any appearance, and was defaulted. The plaintiff's disclosure shew that he had neglected to perform the conditions on which he was to have the carriage, although the time of performance had elasped, and he was adjudged to be trustee. An execution had issued on the judgment against the plaintiff as trustee, and a *scire facias* had been served upon him, but he

did not prove that he had paid any thing as trustee, or had delivered up the carriage to the officer. During the pendency of the trustee suit, and before any judgment had been rendered therein, *Pease*, acting as the agent of the defendant, saw the plaintiff at his residence at the distance of a number of miles from the court-house, and stated to him that the trustee action "had failed and would not stick," and that he was instructed by *Davis*, the defendant, to sue *Emery* for the carriage immediately, unless he paid over the price agreed upon. *Emery* had a claim for keeping horses, said by *Pease* to belong to *Davis*. This was allowed in part payment, and *Emery* gave a note with a surety to *Davis*, or order, for the balance. *Pease* as the agent of *Davis* gave a receipt to *Emery* that he had received payment for the carriage. There was much testimony recited in the bill of exceptions in relation to the agency of *Pease*, and the agency of *Davis* for a stage company, but it proves nothing satisfactorily, except that *Pease* acted as the agent of *Davis*.

The Judge instructed the jury, that they should first find whether a good title to the carriage did not pass to the plaintiff; that if it had been the property of the company and the defendant was their agent authorized to sell and receive pay, the title passed to the plaintiff; that if it was the defendant's property, the title passed to the plaintiff; that even if it was *Pease's* property, he would now be precluded by his acts and by the receipt from setting up title against the plaintiff; that if the conveyance to the plaintiff made title in him, the payment he made was no more than the defendant had a legal right to receive; and that therefore this action for money had and received could not be maintained, whatever other remedy the plaintiff might have in some other form of action. The verdict being for the defendant, exceptions were filed by the plaintiff.

Vose, for the plaintiff, contended, that money had and received, was the proper form of action. It is not necessary that the defendant should receive money, if he received what was considered by the parties equivalent to it. *Burrow*, 1012; 3 *Black. Com.* 163; 2 *Com. on Con.* 1; *Mason* v. *Waite*, 17 *Mass. R.* 560; *Morton* v. *Chandler*, 8 *Greenl.* 9. He urged, that the defendant

had no right to retain the money received of the plaintiff, independent of the manner in which it was obtained, either on his own account or as agent of the stage company. Had the jury been instructed, that if from the whole evidence in the case the defendant had money in his hands which in equity and good conscience belonged to the plaintiff, or money which he had obtained by fraud and imposition upon the plaintiff, there can be no question but that they would have returned a verdict for the plaintiff. The instructions are objectionable, because they were irrelevant, having nothing to do with the issue made up between the parties, and calculated to mislead the jury. The instructions make the whole case to depend on the title, when that was not in question. *Davis* disclaimed owning the property by his bill of sale, and suffered himself to be defaulted, after being summoned in. But although the plaintiff's title was good, he was indebted for the carriage to *Pease*, and was adjudged his trustee. The defendant, by *Pease*, his agent, obtained the money of the plaintiff by false and fraudulent representations, and must pay it back. The intimation of the Judge that the remedy was in some other form of action was erroneous. Where money has been obtained by fraud, it may be recovered back in an action for money had and received. 4 *Mass. R.* 488; *Burr.* 1012; 17 *Mass. R.* 563; 1 *Doug.* 138; 17 *Pick.* 549; 2 *Stark. on Ev.* 109; 4 *M. & Selw.* 478; *Chitty on Con.* 191.

Wells and *Potter*, for the defendant, contended, that the case shew that *Pease*, as sub-agent of *Davis*, the agent of the stage company, sold the carriage to the plaintiff, and he was bound to pay for it to the right owner. The plaintiff's title was perfectly good under the sale, and the only question was, to whom should he make payment. The payment was rightly made to *Davis*, the agent of the company. The plaintiff knew that *Pease* only acted as the agent of the company before he was charged as trustee, and that judgment can only be binding upon the plaintiff and *Pease*. The defendant is not bound by it. This was not an assignment, the validity of which was to be tried by citing the defendant into Court in that suit, but a mere question to whom the debt was due. But were it otherwise, the plaintiff cannot now maintain this suit in this form of action. The plaintiff has paid nothing, and he may

now come in on the *scire facias* and disclose, and be discharged, or *Pease* may pay the debt. They cited 1 *Greenl.* 125; 6 *ib.* 353; 9 *Mass. R.* 408; 8 *Pick.* 71.

The opinion of the Court was drawn up by

Weston C. J.—By the exceptions, either party may avail himself of the dockets, records, writs and executions, referred to. Upon examining the disclosure of the plaintiff, it appears that the carriage which occasioned the controversy, was in *May* or *June*, 1834, left in the hands of the plaintiff, who was summoned as trustee, under an agreement on his part to purchase it, but upon a condition precedent, with which he had not complied, either when the trustee process was served upon him, or at the time of the disclosure. When he received the carriage of *Pease*, it was his property; for the title of the defendant, either for himself or the stage company, did not accrue, until *October* 2, 1834, the date of his bill of sale, as set forth in the disclosure. In the exceptions, in reciting a part of the disclosure, it is erroneously stated to have been the second of *November*, instead of *October*. The means of correction, however, are afforded by the original, which is a matter of record, and as such is referred to. But whether dated in *November* or *October*, does not affect the merits of the case.

The contract of sale between *Pease* and the plaintiff, not having been perfected, when the latter was summoned, he was then the trustee of the carriage, as the property of *Pease*, and it was liable to be attached in his hands by the trustee process, unless it had been previously assigned to *Davis*. Being notified of such an assignment, the plaintiff sets it forth in his disclosure. The validity of this assignment, the attaching creditor, or creditors, had a right to contest. *Stat.* 1821, *c.* 61. § 7. They did so; and the defendant, the supposed assignee, was cited in, but did not appear, and his non-appearance was entered of record.

In such case the statute provides, that "the assignment shall have no effect to defeat the plaintiff's attachment." The trustee must be charged as such, the alleged assignment notwithsranding. We think it results, that the supposed assignee is concluded by this adjudication. He was called in, that he might have opportunity to vindicate his title. Unless he is concluded, the trustee,

who is a mere stakeholder, after being made liable by law to the attaching creditor, may be subjected to the hazard of being again charged at the suit of the assignee. We cannot give the statute a construction, which would lead to consequences, so manifestly unjust. By proceedings therefore, in which the defendant was cited as a party, and might have been heard as such, as between him and the plaintiff, his title to the carriage is barred. Nor could he have any just or legal right to receive or to retain payment for it of the plaintiff.

It is true, the case shows, that the defendant received payment, before a citation to appear was served upon him; but it was obtained under false pretences, made by his agent, for the civil consequences of which he is responsible. He cannot rightfully enjoy the fruits of the fraud of his agent, merely because it may never before have been brought home to his knowledge. But if the money was rightfully received, the assignment, upon which his right was based, being now barred, the consideration has failed, and he has no right to retain it.

It is contended, that the defendant cannot be charged, first, because if he received the plaintiff's money, it was as agent for the stage company, and not in his own right. Secondly, that he never received money or its equivalent. From the evidence reported, it would seem that the defendant took the responsibility of the business upon himself, and there does not appear to be any other tangible party, to whom the plaintiff can resort. If there were others, to whom the defendant might be held to account, it does not appear that he has done so. And if he has, he had notice of the claims of the attaching creditor, and of the impending and final liability of the plaintiff as trustee. As to payment, he admits it. He acknowledges the agency of *Pease*, and that whatever he received was the same, as if paid to himself. *Pease*, professing to act as the agent of the defendant, accepted a discharge from the plaintiff of his claim for horse keeping, and the negotiable note of a solvent man as payment; and this being adopted and assented to by the defendant is equivalent to the receipt of so much money by him. The Judge instructed the jury, that whether property in the carriage had been in the company, the defendant or *Pease*, the title of the plaintiff thereto could not be impeached, that the

defendant therefore had a right to receive the money, and that the action could not be maintained. It was a decisive legal opinion of the Court against the action, under any view of the evidence, which could be taken. The exceptions are sustained, the verdict set aside, and a new trial granted.

LYMAN TURNER *vs.* JAMES R. BACHELDER.

Where a farm was leased for a term of years, and by the terms of the lease the lessor agreed to furnish farming tools to carry on the farm, "and four cows, one horse, and other stock sufficient to eat up all the hay that shall grow on said farm;" and the lessee agreed that the lessor should have "one half of all the corn and grain, and potatoes that shall grow on the farm, and half the calves, and half the lambs, and half the wool;" *it was held*, that the hay, after it was harvested by the lessee, was not the property of the lessor, and that he could not maintain replevin therefor against an officer who had attached it as the property of the lessee.

REPLEVIN for a quantity of hay taken by *Bachelder*, as a deputy sheriff, on a process in favor of *A. W. Ladd*, against *Lemuel Turner*, as the property of the latter. The facts were agreed for the decision of the Court thereon. *Lemuel Turner* had been in possession of the farm whereon the hay was cut for ten years next before the making of the lease of the premises from the plaintiff to him, dated *April* 1, 1836. The statement of facts shows, that the plaintiff had a bond for a deed of the premises from one *Fogg* and a parol license from him to occupy the premises at the time the lease was made, but does not show whether *Fogg* had or had not title, or under whom *Lemuel Turner* occupied during the ten years. By the lease, *Lemuel Turner* who was the father of the plaintiff, was to hold the farm for five years from its date; *Lyman* was to furnish his father, *Lemuel*, with all necessary farming tools to carry on the farm, to pay the money taxes thereon, "to furnish four cows, one horse, and other stock sufficient to eat up all the hay that shall grow on said farm," and that the father should have the milk of the cows. The father agreed on his part to carry

on the farm for five years, to pay the highway taxes, and further agreed with *Lyman* "that he shall have one half of all the corn and grain and potatoes that shall grow on said farm, all the calves the said cows shall have when they are fit to wean, and to have one half of the wool and half of the lambs that may come from the sheep kept on said farm," and not to commit or suffer strip or waste. These are all the provisions of the lease. The hay replevied was grown upon the farm in 1837, and harvested by *Lemuel Turner*, and was taken by the defendant, *November* 3, 1837. The stock kept upon the farm was the property of the plaintiff, and there was not more than sufficient hay for their keeping. During the year 1837, the plaintiff lived in a different part of the State from that in which the farm was.

Boutelle, for the plaintiff, contended, that the plaintiff was the owner of the land on which the hay was cut against all unless *Fogg*. *Lemuel Turner*, and all claiming under him, are estopped to deny the land to be his. *Moshier* v. *Reding*, 3 *Fairf.* 478. The stock on the farm belonged to the plaintiff, and the lease states explicitly that he was to have as much hay as the stock would eat. The facts show, that there was only sufficient hay for that purpose. This is equivalent to a reservation of the grass. If it be true, that generally the lessee is entitled to the crops, still it is competent for the lessor to reserve any part to himself. This was done as to the hay, and the lessee was to have none of it, unless there was a surplus, after the stock had been fed through the winter. The lessor might have maintained an action against any one trespassing on the grass while growing. *Little* v. *Palister*, 3 *Greenl.* 6. And when cut the hay did not become the property of the lessee, but remained the property of the plaintiff.

May, for the defendant, contended, that by the lease an interest in the soil passed during the existence of the term so that the lessee could maintain trespass for any unlawful entry upon it. 9 *Johns. R.* 108; 16 *East*, 116. A lease for years is a contract for the possession and profits of the land for the recompense of rent, and the property in the crops vests in the lessee, until by sale or otherwise it is vested in another. 4 *Kent*, 85; *Chandler* v. *Thurston*, 10 *Pick.* 205. The mere fact that the lessee was to

keep the cattle from the hay does not pass the property to the lessor. If the lessee should die, the hay would go to his administrator, and not to the lessor. *Wait, Appt.* 7 *Pick.* 100. The covenants and agreements in the lease in favor of the plaintiff are to be regarded as the stipulated rent, and they give no lien upon the produce of the farm, nor would a lien upon the crops, nor a reservation of part of them, have been effectual against an attaching creditor without a delivery after a severance, and before an attachment had intervened. *Smith* v. *Putnam,* 3 *Pick.* 221; *Butterfield* v. *Baker,* 5 *Pick.* 522; *Bailey* v. *Fillebrown,* 9 *Greenl.* 12. But be the right of property in whom it may, the plaintiff had no right to the possession of it when it was attached; and this action therefore cannot be maintained. *Wheeler* v. *Train,* 3 *Pick.* 255; *Vincent* v. *Cornell,* 13 *Pick.* 294; *Wyman* v. *Dorr,* 3 *Greenl.* 183; *Lunt* v. *Brown,* 1 *Shep.* 236.

The opinion of the Court was drawn up by

Emery J. — The plaintiff holding certain real estate in *Rome,* by a parol agreement with *Dudley Fogg,* and having a bond for a deed of it, by indenture on the 1st of *April,* 1836, leased it as his farm with all the privileges and appurtenances thereto belonging, to his father, *Lemuel Turner,* for five years.

The facts disclosed, shew a praiseworthy conduct in the son, if it were intended as a mark of filial respect.

But whatever might be the motives which induced the arrangement, as an attachment has been made of the hay on mesne process, and seized on execution against *Lemuel Turner,* we must ascertain the rights of the parties under the lease. The hay was replevied after the seizure of it on the execution. This hay grew on the place in 1837, and was harvested by *Lemuel Turner.* The plaintiff was absent in *Penobscot* county all that season, and *Lemuel Turner* was in possession and had been for ten years previous.

If the intention was, that all the hay raised should be the several and exclusive property of the plaintiff, the parties to the lease were unfortunate in the wording of the instrument. We cannot infer it from such terms as are employed. *Lemuel Turner* has the exclusive right to the farm for five years, with all its privileges and

appurtenances, without any right in the plaintiff to interfere, till the expiration of the term. Notwithstanding *Lemuel* was in possession before taking the lease, he would by that act be estopped from disputing *Lyman's* general title. *Binney* v. *Chapman & al.*, 5 *Pick.* 124; *Codman* v. *Jenkins*, 14 *Mass. R.* 93.

Although a man upon his feofment or conveyance cannot reserve to himself parcel of the annual profits themselves, as to reserve the vesture or herbage of the land or the like, for that would be repugnant to the grant, as stated in *Co. Lit.* 142, *a*; yet we know that rent is often reserved in a portion of the produce. But the whole property in such produce remains in the lessee till it is divided, and the lessor's share delivered to him or set apart for his use. A creditor of the lessee therefore may legally seize the whole. On his decease before such division and delivery, it would pass to his executor or administrator. *Butterfield* v. *Baker*, 5 *Pick.* 522; *Dockham* v. *Parker*, 9 *Greenl.* 137; *Wait, Appellant*, 7 *Pick.* 100.

On the facts agreed, we perceive no legal ground upon which the plaintiff can sustain his action. He must therefore become nonsuit, and judgment be rendered for a return with damage of six per cent. on the penal sum in the bond, and costs in favor of the defendant.

Alfred Lewis *vs.* Ebenezer Freeman.

The testimony of a witness *that he thought the plaintiff told him* that a certain sum of money had been paid to the plaintiff, *was very confident he said so, but would not swear that he did*, is a statement of the strength of the recollection of a fact by the witness, and is admissible evidence.

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

Assumpsit upon a contract of the following tenor. "Mr. *Alfred Lewis.* Sir, if you will let *Andrew C. Butler* have one hundred dollars worth of oil cloths, and take back what he cannot

sell at the same price he takes them, I will be responsible for what he may sell, *August* 15, 1836. *Ebenezer Freeman.*" The oil cloths were delivered to *Butler*, and one point made in the defence was, that the plaintiff had been paid. To prove the payment the defendant introduced one *Robinson*, who testified, that after *Butler* returned from peddling out the oil cloths, the witness had a conversation with the plaintiff, who informed him that *Butler* had done well in carrying out the cloths, and had made enough, reckoning in the cloths brought back, to pay for the load and twenty-five or thirty dollars more; that the cloths he brought back were but a small part of the load; that *Butler* had made enough to save to himself twenty-five dollars, and desired to take another load; that the plaintiff doubted the propriety of letting him have another load on *Freeman's* order, but concluded to let him have one on certain conditions, and thought that *Freeman* would suppose himself liable for the second load. The witness on being questioned by the defendant as to the admissions of the plaintiff in that conversation, testified, "that he thought the plaintiff told him, *Butler* had paid him for what cloths he had sold and not brought back; was very confident he said so, but would not swear that he did say so." The plaintiff contended, that upon the testimony of *Robinson*, the jury could not legally return a verdict for the defendant on the ground that *Butler* had paid for the cloths.

The Judge instructed the jury, that as witnesses must use their own language in conveying their meaning, and as they express themselves with different degrees of clearness, and use different degrees of caution in the phraseology they adopt, it was for the jury to give their language a fair exposition; that if the testimony of *Robinson* had proved to their reasonable conviction that the plaintiff had knowingly and deliberately admitted that he had received full payment for the first load of cloths from *Butler*, they might thereupon find a verdict for the defendant.

Other points were made at the trial, and the jury returned a verdict on each. They found on this, "that *Butler* did on his return from his first trip deliver over to *Lewis* cloths and money enough to pay up for the hundred dollars worth of cloths delivered on the strength of *Freeman's* guaranty." The plaintiff filed exceptions.

Wells, for the plaintiff. *Robinson* did not, and would not testify that the plaintiff had received payment. There was no other evidence on this point, and the Judge informed the jury, that they might find the fact from his testimony. He testified, that he would not swear to it, and the jury ought not to affirm what he would not swear to. Nor is it supported by his saying he *thought* the plaintiff had told him. "I think," is not sufficient affirmation of a fact. *Sebor* v. *Armstrong*, 4 *Mass. R.* 206.

May, for the defendant. The jury have found that *Butler* upon his return paid for the cloths which he had upon the strength of the defendant's guaranty, and the evidence in the case justifies the finding. At any rate the jury were the judges of the weight of evidence, and such testimony as that of *Robinson* has been held to have been properly submitted to the consideration of a jury in several cases. *Harding* v. *Brooks*, 5 *Pick.* 244; *Aylwin* v. *Ulmer*, 12 *Mass. R.* 22; *Griffin* v. *Brown*, 2 *Pick.* 304. But laying the part of *Robinson's* testimony objected to out of the case, the jury were authorized to find a payment from the admissions of the plaintiff and other circumstances, as related by the witness.

The opinion of the Court was by

Shepley J. — If the instructions respecting the testimony of *Robinson* were correct; and the jury were authorized by that testimony to find, that the plaintiff had been paid, it will not be necessary to consider the other points made in the case.

The argument is, that there was no testimony to prove an admission of payment, because the witness said he "would not swear, that he did say so"; and that his testimony is not strengthened by the expression, "that he thought the plaintiff told him *Butler* had paid him."

In the case of *Sebor* v. *Armstrong & trustee*, it was the province of the Court to decide the fact, and to give such effect to the testimony as it might deserve. The trustee must discharge himself, and the only testimony to have this effect being his declaration that he thought the paper payable to order might well be considered as unsatisfactory. And the argument in this case might be regarded as sound, if that were the only testimony before the

jury upon this point. But the whole of the expressions used by the witness are to be considered, and in connexion with the conduct of the plaintiff. He says, "he thought the plaintiff told him *Butler* had paid for what cloths he had sold and not brought back, was very confident he said so, but would not swear that he did say so." The witness was speaking under the obligation of his oath, when he said, that he was very confident he said so, and that was speaking of his recollection of a fact with no slight assurance that he was correct; and when he adds, that he would not swear to it, the idea communicated is, that he was very confident, but not certain, that the plaintiff so stated. The witness was not giving an opinion, but stating the strength of his recollection of a fact. The circumstances stated by the witness respecting the conduct of the plaintiff and *Butler*, after *Butler's* return, tend to confirm the conviction that the plaintiff had been paid.

The jury were the proper judges of the weight of the whole testimony upon the point; and the instructions were well suited to bring their minds to a just conclusion.

Exceptions overruled.

JOHN HILTON *vs.* JOHN GILMAN.

By the grant of a dwellinghouse, a shed and chaise-house adjoining thereto, connected with the dwellinghouse in such manner as to have all constitute but one building, will pass.

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

Assumpsit for the use and occupation of a cooper's shop and chaise-house from *May* 5, 1835, to the date of the writ. The plaintiff produced a deed from the defendant, of a house, land and out buildings dated *May* 5, 1835. The defendant introduced a mortgage deed of the same estate from the plaintiff to him to secure the payment of ninety dollars per year, and "a lease of the undivided half of a dwellinghouse on the premises, and all the

privileges and appurtenances thereto belonging, given by the plaintiff to the defendant," both dated the same fifth of *May*. The dwellinghouse, shed and chaise-house were "connected together," and "made one building." The house had been the defendant's dwellinghouse for a long time, and after the making of the deed, both parties resided in the house. The chaise of the defendant was kept in the chaise-house, which was large enough to hold two chaises, and the defendant, a very aged man, occasionally worked in the shed. The residue of the chaise-house and shed were occupied by the plaintiff. It did not appear that the plaintiff had objected to the use of these buildings by the defendant. There was no cooper's shop on the premises, but the defendant had sometimes made buckets in the shed.

The plaintiff requested the Judge to instruct the jury that the defendant, by the terms of his lease, was restricted to the use and occupation of the building occupied as a dwellinghouse, exclusive of the shed and chaise-house. This instruction the Judge declined to give, and instructed the jury, that the defendant had the right of occupation of an undivided half of the shed and chaise-house. The verdict was for the defendant, and the plaintiff filed exceptions.

May, for the plaintiff, contended : —

1. The exceptions state, that the dwellinghouse was *connected* with the shed and chaise-house, which language would be absurd, if they were regarded as a part of the dwellinghouse ; and although they are said together *to make one building*, still taking the whole language it must be understood that the shed and chaise-house make one building.

2. A chaise-house cannot be considered as a privilege or appurtenance belonging to a dwellinghouse any more than a chaise would be which might be in it. It is not necessary to the use of the thing granted, for that can be enjoyed without it, and so it does not pass. *Kent* v. *Waite*, 10 *Pick.* 138; *Gayetty* v. *Bethune*, 14 *Mass. R.* 49; *Grant* v. *Chase*, 17 *Mass. R.* 443; 4 *Kent*, 467 ; Although it might pass under the word appurtenance in a will, if it had been used as appurtenant to a dwellinghouse. *Otis* v. *Smith*, 9 *Pick.* 293.

E. Fuller, for the defendant, argued, that the defendant was in possession of the buildings under his mortgage of the whole property. But if his right to occupy depended solely on his lease, the instructions of the Judge were strictly correct. He examined the facts stated in the exceptions, and insisted, that the shed and chaise-house were connected with the dwellinghouse and were a part of it, or appurtenant to it. The words privileges and appurtenances in a deed or lease have uniformly received a very liberal construction, which would well warrant the refusal to instruct and the instruction given. *Doane* v. *Broadstreet Asso.*, 6 *Mass. R.* 332; *Leonard* v. *White*, 7 *Mass. R.* 6; *Ropps* v. *Barker*, 4 *Pick.* 239; *Farrar* v. *Stackpole*, 6 *Greenl.* 154; *Blake* v. *Clark*, 6 *Greenl.* 436.

The opinion of the Court was by

SHEPLEY J. — Land will not pass as appurtenant to land, while it may as appurtenant to a messuage or house; for the reason that one tract of land cannot well be occupied as appertaining and subordinate to another, while it may be so occupied in connexion with a house; thus affording an exposition of the intention of the parties to a deed by the nature and known uses of the estate conveyed.

It is stated in *Cruise's Digest, Title* 32, *c.* 3, § 31, that by the grant of a messuage or house with the appurtenances, all buildings attached or adjoining to it will pass; and the authorities cited fully sustain the position.

In this case the shed and chaise-house are found to have been connected with the dwellinghouse in such a manner as to have all constituted but one building; and the Judge was correct both in withholding and in giving his instructions.

Exceptions overruled.

Ebenezer Hovey *vs.* Hiram Coy *& als.*

Where an action of replevin was tried upon the general issue, and a verdict was given in favor of the defendant, and judgment rendered thereon for costs, but not for a return of the property; and execution was issued against the plaintiff in replevin, and he was arrested thereon and committed to prison, and was released therefrom by taking the poor debtor's oath; the replevin bond is thereby forfeited, and on judgment for the penalty, execution is to issue for the amount of the costs and interest.

Debt on a replevin bond. From facts agreed by the parties, it appeared, that the original action of replevin in which the bond was taken, was tried on the plea of *non cepit* only, and the verdict of the jury was for the defendant in replevin. There was no judgment for a return, but merely for costs for the defendant. Upon this judgment execution was duly issued against the plaintiff in replevin, and he was arrested thereon, committed to prison, and was released upon taking the poor debtor's oath. If the plaintiff is entitled to recover, the defendant is to be defaulted, and execution is to issue for such amount as the Court shall direct; otherwise the plaintiff is to become nonsuit.

The case was submitted without argument by

Vose & Lancaster, for the plaintiff, and by *Williams & McCobb*, for the defendants.

The opinion of the Court was by

Shepley J. — The statute *c.* 63, § 9, provides, that the plaintiff in replevin shall give bond to prosecute the replevin to final judgment; to pay such damages and costs as the defendant shall recover against him; and to restore the goods in case such shall be the final judgment. He has not performed that part of the condition of his bond, which required him to pay the costs. The bond secures a return of the goods only, when the defendant in replevin has obtained a judgment for a return. The bond has become forfeited by the neglect to pay the costs. The defendants are to be defaulted, and judgment is to be entered for the penalty, but execution can issue only for the amount of costs with interest.

THOMAS LEWIS *vs.* SAMUEL HODGDON.

One party to a negotiable note may upon request of another party to it, maintain an action for his benefit.

And the written consent of the indorser, pending the trial, that the suit may be prosecuted in his name for the benefit of the indorsee, is equivalent to a ratification of the previous proceedings.

If a negotiable note be transferred to an indorsee before it becomes payable, without 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.

If the payee of a negotiable note then over due, having knowledge that it was in the hands of an indorsee, for a valuable consideration agrees to pay it, he cannot introduce claims in set-off arising after that time.

If the depositary of papers assume the execution of the trust, he becomes responsible to any party who may suffer by the violation of it; his interest is balanced, and he is a competent witness for either party.

If a witness expects that he will be relieved from responsibility to the plaintiff by the suit, and therefore advised the bringing of it, when in fact his liability is not changed by the result of such suit, he is a *competent* witness.

When a witness has been called by one party and examined on some points, the other party may cross-examine him in relation to facts, material to the issue, other than those elicited by the party calling him; and if the answers are not satisfactory, he may by any legal proof contradict or discredit them.

The rule that if a witness testifies falsely as to any one material fact the whole of his testimony must be rejected, is not of such binding effect as to authorize the Court to instruct the jury, that they cannot believe one part of his statement and disbelieve another. This is but a presumption of law, and cases often occur in which jurors may yield entire credit to certain statements, and disbelieve others.

EXCEPTIONS from the District Court, for the Middle District, REDINGTON J. presiding.

Assumpsit on a promissory note, payable to *Lewis*, or order, signed by the defendant, for $50, dated *December* 31, 1827, and attested by *Arthur Plummer*. The name of *Lewis* was indorsed by him on the back of the note, which was claimed by *G. Evans, Esq.* as his property. With the general issue, the defendant pleaded the statute of limitations by brief statement. The Judge ruled, that as the note had been indorsed to *Mr. Evans*, the suit should have been brought in his name, and that a nonsuit must be entered. *Mr. Evans*, acting as counsel in the case, failing to prove

that the action was prosecuted in the name of *Lewis* by his consent, introduced *Lewis*, who in open Court gave his written assent that the action might be prosecuted in his name for the benefit of said *Evans*. The Judge then ordered the action to stand for trial. The defendant then requested the Judge to order a nonsuit, but this was declined. The note had been indorsed to *Mr. Evans* in payment of a debt before due to him. *Plummer*, the witness to the note, was called by the plaintiff, and objected to by the defendant as interested. The Judge admitted him as a witness. The facts on this point are found in the opinion of the Court, as are also the other facts material to the proper understanding of the case.

After the testimony was closed, the plaintiff contended, that after he had called *Plummer*, and proved by him the execution, attestation and indorsement of the note, the defendant by inquiring relative to other distinct matters, made him, so far as respects those matters, the defendant's witness.

The Judge ruled, that this position was correct, and that if seasonably objected to by the plaintiff, the impeaching testimony would have been excluded; but that that testimony not having been objected to, it was now for the jury in view of all the evidence to decide what degree of credit should be given to *Plummer*; that the plaintiff's case was made out, if they believed *Plummer* in that respect, as soon as the execution, attestation and indorsement of the note had been testified to; that the burden of proof was then on the defendant; that it was from *Plummer's* testimony alone that the defendant expected to make out his defence; that therefore the testimony which tended to prove that *Plummer* had out of Court represented the transaction relative to the deposit of the note, and to the new bargain which gave force to this note, differently from his statements here, operated against the defendant; and if it proved that from his want of recollection or otherwise, *Plummer* was not to be believed in relation to the things for which the defendant had made him his witness, the defence had failed; that there was no testimony in the case which conflicted with *Plummer's*; that the testimony brought to show that *Plummer* had stated that this note was not to be paid was not evidence to the jury that the note was not to be paid, but could be used only to take away from

the credibility of *Plummer*; that if after the note had been left in deposit with *Plummer*, there was no new contract by which it was agreed this note should be in force, this action being brought in the name of the original payee, could not be sustained; that if the jury believed that the note had been executed, attested and indorsed as testified to by *Plummer*, and if the new bargain was made pursuant to which the land was conveyed in *January*, 1832, and this note made operative and in force as testified to by *Plummer*, the verdict should be for the plaintiff. The verdict was for the plaintiff, and the defendant filed exceptions.

The arguments were in writing.

Wells, for the defendant, contended: —

1. The action should have been in the name of *Mr. Evans*. *Bragg* v. *Greenleaf*, 14 *Maine R.* 395; *Bradford* v. *Bucknam*, 3 *Fairf.* 15; *Mosher* v. *Allen*, 16 *Mass. R.* 451.

2. *Plummer* was interested. He gave the note to *Mr. Evans* against the agreement of the parties, which was a direct breach of trust. By his bargain he was directly accountable to *Mr. Evans*. If a witness honestly believes he has an interest, even if he has not, he must be excluded. *Plumb* v. *Whiting*, 4 *Mass. R.* 518; 2 *Stark. Ev.* 747, *note*. But if he is really interested, although he thinks otherwise, he cannot testify. 2 *Stark. Ev.* 746.

3. *Mr. Evans* is not entitled to the character of an indorsee for value. At the best for him, he but took the note in payment of a precedent debt. *Bayley on Bills*, 525; *Bay* v. *Coddington*, 5 *Johns. Ch. R.* 54; *Same Case*, 20 *Johns. R.* 636.

4. There was no sufficient notice to the defendant of the assignment from the nominal to the real plaintiff. *Davenport* v. *Woodbridge*, 8 *Greenl.* 17.

5. The set-off should have been allowed.

6. The ruling of the Judge that *Plummer* by the cross-examination became the witness of the defendant, was erroneous. Where a witness of the opponent is called again to a new matter, after he has left the stand, it is said in the *English* practice, that he is the witness of the party calling him; but there, it is not so on cross-examination. The party calling a subscribing witness, adopts him, and considers him credible. *Whitaker* v. *Salisbury*, 15 *Pick.* 544. If a party calls a witness interested against him, he is com-

petent for the whole cause. *Merrill* v. *Berkshire*, 11 *Pick.* 273. A party cannot impeach or show the incompetency of his own witness. 1 *Stark. on Ev.* 147.

Evans, for the plaintiff, contended, that the action might well be maintained in the name of *Lewis*. Courts protect the interests of an assignee, and his release after notice is void. Mere want of interest does not defeat the suit, and the indorsee may sue in the name of the payee with his consent. *Eastman* v. *Wright*, 6 *Pick.* 316; 10 *Johns. R.* 400; 11 *Johns. R.* 488; *Bragg* v. *Greenleaf*, 2 *Shepl.* 395; *Harriman* v. *Hill*, 2 *Shepl.* 127; *Thornton* v. *Moody*, 2 *Fairf.* 253; *Hatch* v. *Spearin*, 2 *Fairf.* 354; *Fairfield* v. *Adams*, 16 *Pick.* 381; *Bradford* v. *Bucknam*, 3 *Fairf.* 15. The subsequent ratification of an act, is equivalent to a previous consent thereto. *Marr* v. *Plummer*, 3 *Greenl.* 73; *Fisher* v. *Bradford*, 7 *Greenl.* 28; 13 *Pick.* 377; 3 *Pick.* 246; 8 *Pick.* 9. The admissions of an assignor, after assignment, are not admissible in evidence. 1 *Fairf.* 420; 8 *Greenl.* 77.

Plummer had no interest in the event of this suit. The verdict could not be used for or against him. *Franklin Bank* v. *Freeman*, 16 *Pick.* 535. But if he had any interest, it was against the plaintiff, not for him.

No set-off can be allowed. 4 *Greenl.* 101; 1 *Greenl.* 352; 17 *Pick.* 545.

Plummer, as subscribing witness to the note, was called to prove the execution. Thus far he was the plaintiff's witness. But when the defendant examined him relative to an entirely new matter to make out his defence, he made him his witness, and could not impeach him. 1 *Stark. Ev.* 130, § 19; *ib.* 133, § 22; *ib.* 147, § 29. If the witness considered himself under an honorary obligation, when there was no legal one, he is not disqualified. *Moore* v. *Hitchcock*, 4 *Wend.* 292.

The opinion of the Court was by

Shepley J. — This Court has decided that one party to a negotiable note may upon request of another party to it maintain an action for his benefit. *Bragg* v. *Greenleaf*, 14 *Maine R.* 395. The written consent of the indorsee pending the trial was equiva-

lent to a ratification of all the previous proceedings in the prosecution of the suit.

The witness, *Plummer*, having been the depositary of the papers, and having assumed the execution of the trust, was responsible to any one, who should suffer by his violation of it. If through a breach of trust he had been instrumental in inducing *Mr. Evans* to discharge a debt by taking a note, which he knew could not be collected, he would be legally liable to him for the injury; and equally liable to the defendant, if he had paid the note. Being responsible to both parties, his interest was balanced, and he was a competent witness. He says, that he directed the suit, and that it is prosecuted for his benefit. If this statement had not been qualified or explained, he would appear to be interested in the event of the suit; but he afterwards explained, that he "thought it was for his benefit because it would relieve him from a moral obligation he felt under to *Mr. Evans*."

It does not appear from the whole of his statements, as explained, that the suit was prosecuted for his benefit by any agreement between the plaintiff, or *Mr. Evans*, and himself, or that he was responsible for the costs.

That he expected it would relieve him from his responsibility to *Mr. Evans*, and that he advised the suit for that reason, appears to present the true position in which he was placed according to his own account of it. And his liability would not thereby be at all changed. If the plaintiff should recover he will not be relieved, for the verdict in this case could not be evidence in a suit brought against him by the defendant, who might upon proof of his violation of any trust assumed at the time of making the last or former papers, recover for the injury.

The note was transferred for a valuable consideration before it became payable; and the objection, that it was received for a pre-existing debt was considered, and the reasons for the difference between the decisions in *New-York* and in this State were explained in the case of *Homes* v. *Smyth*, 16 *Maine Rep.* 177. If the testimony should satisfy the jury, that when the defendant on the fourth of *January*, 1832, received his deed, he dispensed with the condition upon which the note was deposited, and that he then agreed to pay it as part consideration for the same, knowing it to

be in the hands of *Mr. Evans*, this would be equivalent to a consent to all the prior proceedings with a full knowledge of them; and it would be sufficient to prevent his introducing claims in set-off arising after that time.

It can scarcely be said to have been a fact seriously contested, that this note, with others, was left with *Plummer* to be delivered only by the consent of both parties. For the Judge instructed the jury "that if after the note had been left in deposit with *Plummer* there was no new contract by which it was agreed, this note should be in force, this action being brought in the name of the original payee could not be sustained." The material subject for inquiry then was, whether there existed any such new contract; and the right of the parties were dependent upon the decision of that question. It is therefore apparent, that the cross-examination of the witness might have been safely closed, after he had stated the transactions prior to the fourth of *January*, 1832. And it would then have become necessary for the plaintiff to examine into the transactions of that day to make his title good.

Such a course would have exhibited the testimony respecting those transactions as the testimony of the plaintiff, and liable to be discredited by the defendant's proving, that the witness had made contradictory statements. And the result would have been the same, if the *English*, and perhaps the proper practice of examining had been adopted, which requires the party calling the witness to examine him in relation to all matters material to the issue before the cross-examination, and to confine himself on the re-examination to the matter of the cross-examination. 1 *Stark. Ev.* 179, (*Met. I. & G. Ed.*) Is there any such rule of evidence as deprives the defendant of the right to discredit the witness, because on the cross-examination he permitted him to proceed and relate the whole of the transactions between the parties? It is true that if he examines to a collateral fact, he must take the answer, and cannot contradict it. *Spenceley* v. *De Willot*, 7 *East*, 108; *Rex* v. *Watson*, 2 *Stark. R.* 116. But this rule does not extend to the cross-examination upon facts material to the issue. And he may inquire in relation to other facts, material to the issue, than those elicited by the party calling the witness, and if the answers are not satisfactory, he may by any legal proof contradict

or discredit them. 1 *Stark. Ev.* 164, *(Met. I. & G. Ed.)* It may be said, that in this case the defendant is obliged to rely upon the witness to make out the defence by proving the deposit of the note; and that if he discredits him on other material facts, the rule *falsus in uno, falsus in omnibus* will apply, and the whole of his testimony must be thrown out. But although that rule may apply, it is not of such binding effect as to authorize a court to instruct the jury that they cannot believe one part of his statement and disbelieve another. While that is the presumption of the law, cases often occur, in which jurors are constrained to yield entire credit to certain statements, and to disbelieve others. The case of *Bradley* v. *Ricardo*, 8 *Bing.* 57, presents an application of this rule. It was an action against a sheriff for a false return of *nulla bona* upon an execution. The plaintiff called the sheriff's officer to prove the receipt of the execution, and upon the cross-examination he testified, that no goods of the debtor could be found. The plaintiff then proceeded to prove by other witnesses, that the debtor had goods liable to be seized, but the presiding Judge being of opinion, that if he contradicted his own witness on that part of the case, it would destroy his testimony relating to the receipt of the execution, the plaintiff was nonsuited. A rule was obtained to set aside the nonsuit which was made absolute. *Tindal C. J.* says, "it has been urged as an objection, that this would be giving credit to the witness on one point after he has been discredited on another, but difficulties of the same kind occur in every case, where a jury has to decide on conflicting testimony."

This decides all the points that, it is perceived, will be useful upon a new trial.

Exceptions sustained and a new trial granted.

CHARLES F. PAINE *vs.* BACHELOR HUSSEY *& al.*

Giving a bond to an interested witness, to indemnify him against his liability, does not render him competent.

In an action by an indorsee on a note indorsed by the payee without recourse to him, if the indorser, at the time of making the indorsement, for a valuable consideration received of a third person, gives a written contract "to guarantee to the holders of said note the eventual payment thereof," and explains his meaning by saying that he holds himself "bound to pay the execution which may be recovered on the same in the lifetime of said execution," he has an interest to lessen the amount to be recovered, and is not a competent witness to prove a partial failure of the consideration.

ASSUMPSIT on a note dated *June* 3, 1837, for $5059,91, signed by the defendants, and made payable to *F. A. Butman*, or order, in twelve months with interest, and indorsed without recourse to him as indorsee. At the trial before WESTON C. J., one of the defendants tendered his oath to prove that there was reserved in and by the note more than at the rate of six per cent. per annum for forbearance or giving day of payment, but as the action was in the name of the indorsee, the Chief Justice rejected this mode of proof, although the defendants offered to prove that the note was the property of *Joseph Eaton*, with whom the usurious contract was alleged to have been made. *Butman* was then offered as a witness to show the failure of a part of the consideration of the note. The plaintiff objected, and introduced an instrument signed by *Butman* at the time he indorsed the note, in which he says, "For a valuable consideration rec'd of *Joseph Eaton*, I hereby promise and stand firmly bound to guarantee to the holders of said note the eventual payment of said note — the word eventual to be construed as this, viz. provided said note is not paid when due, and said note is sued in order to collect the same, I hold myself firmly bound to pay the execution which may be recovered on the same in the life of said execution." The defendant then offered to show that *Butman* was indemnified against his guaranty. *Butman* was rejected as a witness. The jury returned a verdict for the plaintiff, which was to be set aside, if the oath of the defendant ought to have been received, or if the witness rejected should have been admitted.

Wells, for the defendants, contended, that *Butman* was a competent witness. The contract was not made with the plaintiff, but with *Eaton*, who paid the consideration. The contract was not transferred or transferrable. *Eaton* is not in any way liable to the plaintiff. A payment of the whole amount of the note to him would not preclude the plaintiff from maintaining his suit. Besides, *Eaton* has disposed of the note to the plaintiff, and cannot recover any damage of *Butman*. It is like where the insured has parted with his interest in the vessel. *Lazarus* v. *Commonwealth Ins. Co.* 5 *Pick.* 76. The contract must have been entered into after the indorsement of the note, and the witness could not afterwards by his own act render himself incompetent. *Burgess* v. *Lane*, 3 *Greenl.* 165. If the witness is under any liability, it is a mere contingent interest, depending upon the suing out of an execution, and a non-payment by defendants, which does not disqualify him. *Eastman* v. *Winship*, 14 *Pick.* 44; 2 *Camp.* 332. But if the witness had an interest which would have excluded him, he was indemnified, and thus his interest was balanced, and he was left indifferent as to the result. *Hall* v. *Baylies*, 15 *Pick.* 51; *Allen* v. *Hawks*, 13 *Pick.* 79; *Chaffee* v. *Thomas*, 7 *Cowen*, 358.

Boutelle, for the plaintiff, insisted, that *Butman* was directly interested, and properly rejected as a witness. The guaranty extends to the holder of the note in its terms; and if it did not, the beneficial interest in the contract being in the plaintiff, he could maintain an action for his benefit in the name of *Eaton*. There is a condition in policies of insurance, that it shall be void if the vessel is sold, and therefore the case cited from *Pickering* does not apply. It is a novel doctrine that offering a bond of indemnity to an interested witness restores his competency. The cases cited only show that in two instances where the liability cannot extend beyond a certain sum, putting *money* into the hands of the witness to the amount, to indemnify him against his liability, renders him competent. This is a very different case.

The opinion of the Court was drawn up by

Shepley J. — The admission of the excluded testimony is claimed upon two grounds; first, that the witness was not so interested as to exclude him; second, that he was indemnified.

He had become guarantee for the eventual payment of the note; and he explains in his contract, what he intended, saying, "I hold myself bound to pay the execution which may be recovered on the same in the life of the said execution." He was offered to prove a failure of a part of the consideration of the note; and such testimony, if believed, would have reduced the amount recovered, and have lessened the sum, which he had contracted to pay upon the execution. He was therefore directly interested in the event of the suit.

The argument to avoid this conclusion is, that his contract not having been assigned was available only to *Eaton*, who having parted with the note would suffer no injury by a failure of payment, and could therefore maintain no action upon it. The contract being in possession of the plaintiff and produced by him, and the note having been transferred to him, he was equitably entitled to the benefit of the collateral security; and if he could not at law, he could in equity, have enforced his right to it. *Martin* v. *Mowlin*, 2 *Burr.* 969; *Green* v. *Johnson*, 1 *Johns. R.* 591. The argument fails to shew, that he was not interested.

Sureties upon bail and replevin bonds, and indorsers upon writs have been admitted to testify upon having deposited with them and at their disposal an amount of money fully sufficient to pay all, for which they could in any event be liable. In the case of *Chaffee* v. *Thomas*, 7 *Cow.* 358, the witness liable for costs was admitted to testify upon declaring on the *voire dire*, that he was indemnified.

The interest of a witness should be entirely discharged before he can be competent to testify. A release operates as a perfect discharge; and the deposit of money, as before stated, may have the same effect; for there can be no delay, expense, or risk, in procuring the means of satisfying any claim against him. But such cannot ordinarily be the effect of a bond, or other contract of indemnity. Some delay and inconvenience must be expected, for he cannot claim to be reimbursed until after he has parted with his money, or suffered injury. And if he can obtain satisfaction by collecting without a suit, his labor and trouble will be equal to a commission. If compelled to collect by a suit, he must pay expenses, which will never be fully repaid. Such will usually be the result admitting the indemnity to be perfectly good. But there

is always more or less of uncertainty whether the contract of indemnity will prove to be good; and no prudent man having what he would consider a good bond, would regard himself so favorably situated as if he were not liable at all. In practice great inconvenience would be experienced in determining, what was or was not an indemnity so perfect as to leave the witness as free from interest as any indemnity could make him. It is much more safe to adhere to a well established rule, than to introduce an exception to it liable to the just objection, that the interest is not fully balanced or discharged, and subject to much inconvenience in practice.

The other point relating to the usury was not insisted upon at the argument. *Judgment on the verdict.*

JOHN SMITH *vs.* BRADBURY G. PRESCOTT.

The transfer of a negotiable note by indorsement, may be proved by evidence of the handwriting of the indorser, without calling him.

In an action upon a negotiable note by the indorsee against the maker, after the handwriting has been proved, in order to let in the defence of payment to the indorser, the burden of proof is upon the defendant to show that the indorsement was subsequent to the payment.

The burden of proof is not changed by the forbearance of the indorsee for three years to put the note in suit.

EXCEPTIONS from the District Court, for the Middle District, REDINGTON J. presiding.

Assumpsit as indorsee of a note by the defendant to *Ebenezer Blake*, bearing date, *April* 10, 1834, for $35 on demand with interest. The writ was dated *March* 14, 1838. To prove the indorsement, the plaintiff called a witness who had seen *Blake* write, and who testified, that the indorsement was in *Blake's* handwriting, and that *Blake* lived about eight miles from the place of trial.

The defence set up was payment, and in proof of it, the defendant introduced in evidence *Blake's* receipt to him, dated *Dec.*

10, 1834, for $36,19 in full of the note, and thereupon contended, that the plaintiff was bound to satisfy the jury that the indorsement and transfer to him was made before the payment evidenced by the receipt, and that whatever the legal presumption in ordinary cases might be, the great lapse of time which had here intervened between the period of payment and that of bringing the action was sufficient to throw the burden of proof on the plaintiff. The ruling of the Judge was against the defendant on this point.

The defendant then offered evidence to prove that the defendant had lived within twelve miles of the plaintiff from the date of the receipt to the commencement of the suit, and during the time had attachable property, and was of sufficient ability to pay the note, and contended, that these facts with the lapse of time, was competent evidence to go to the jury, either as tending to rebut any legal presumption in favor of the plaintiff, or as proof tending to satisfy their minds that the payment was in fact prior to the transfer. The Judge rejected the evidence.

The defendant also contended, that inasmuch as the plaintiff had not called *Blake* to prove the indorsement, nor any other person who saw him write it, he had not produced the best evidence which the nature of the case admitted, and that therefore the evidence admitted was not competent to prove the indorsement. The Judge also decided against the plaintiff on this point. The verdict was for the plaintiff, and the defendant filed exceptions.

S. W. Robinson, for the defendant, contended, that there was no competent proof that the note had ever been indorsed. The evidence admitted to prove the indorsement was not *the best evidence.* The indorser should have been produced. 1 *Stark. Ev.* 102, 389; 4 *Mass. R.* 646; 3 *East*, 192.

The instruction of the Judge, that proof of the indorsement simply was sufficient, after so great a lapse of time, was erroneous. The delay was calculated to throw strong suspicion upon his claim, and was sufficient to require proof from the plaintiff of the indorsement before the payment.

The defendant should also have been permitted to prove that he had lived within twelve miles of the plaintiff, and had been in good credit, and have commented on these facts to the jury. The

charge was erroneous, because it left nothing for the jury to pass upon. 7 *Mass. R.* 58.

E. Fuller & Morrill, for the plaintiff.

It was competent to prove the handwriting of the indorser without calling him. 2 *Stark. Ev.* 246.

The burden of proof was on the defendant, who set up payment of the note for defence, to prove payment to have been made before the indorsement to the plaintiff. Where there is no proof of the time, the presumption of law is, that it was made at the time the note was dated. 5 *Mass. R.* 334, 509; 6 *Greenl.* 390; 5 *Pick.* 526.

The place where the parties lived, and the time when the plaintiff chose to enforce his rights by suit, are wholly immaterial in this case, and the evidence in relation thereto was rightly rejected.

The opinion of the Court was by

Weston C. J. — The regular and usual evidence of the transfer by indorsement of a negotiable note is, by proof of the handwriting of the indorser. This mode of proof is uniformly received in practice. That the indorser should be called for this purpose, as higher and better evidence, is a position not supported by authority, and is clearly at variance with former precedents. Besides, in this case the indorser had an interest against the plaintiff, which he was not obliged to waive.

If the plaintiff recovers, the indorser will be legally bound to refund what the defendant has paid to him on account of the note. But if his testimony defeats the title of the plaintiff, by showing that the indorsement is a forgery, the payment made by the defendant will be available to discharge the note, and the defendant will have no claim against the indorser. The direct effect therefore of his testimony would be, to discharge one liability, without creating another to balance it. The plaintiff would not in that case be concluded by the verdict. He might sustain an action against the indorser, if he could prove his handwriting. That is a contingent consequence, depending upon a subsequent verdict and judgment. The indorser is however, where a prior judgment is relied upon, a competent witness to prove the time of his indorsement. Let that fact be established as it may, his interest is balanced. He is an-

swerable in any event. The effect of his testimony, if taken to be true, is to relieve him from liability to one party while it renders him liable to the other. Here his interest is against the fact of the indorsement; for if disproved, his right to have received and to retain the defendant's money is established; while assuming the truth of his testimony, the plaintiff would have no claim whatever against him.

The jury being satisfied of the indorsement, from proof of the handwriting of the indorser, and it not appearing to have been done after the note became due, the plaintiff must be taken to be a *bona fide* holder. And in order to let in the defence of payment to the indorser, the payee, the burthen of proof is upon the defendant to show, that it was subsequently indorsed. This has been expressly held in the cases cited for the plaintiff; and we have been referred to no conflicting decisions. The forbearance of the plaintiff does not change the burthen of proof. It furnished an argument only, to be thrown into the scale, if there had been any proof tending to show a subsequent indorsement.

Exceptions overruled.

BENJAMIN RACKLEY *& al. vs.* MOSES SPRAGUE *& al.*

The grant of a saw-mill and grist-mill carries also the use of the head of water necessary to their enjoyment, with all incidents and appurtenances, as far as the right to convey to this extent existed in the grantor.

If such grant cannot be beneficially enjoyed without causing the water to flow back upon other lands of the grantor, a right to do this, passed to the extent to which it had been flowed before the grant, by which all privies in estate under the grantor would be bound.

A grant of a saw-mill and grist mill, "with the privilege of raising a full head of water to the usual height, from the middle of *November* to the middle of *May*, so far as it respects lands of the grantor, and at other seasons as may be hereafter agreed," does not restrict the grantee to the use of the head of water during that time only; but is merely a failure to fix exactly by compact to what extent the grantee might flow for the remainder of the year, and leaves that matter as an incident to the grant, to be determined by legal adjudication.

EXCEPTIONS from the District Court, for the Middle District REDINGTON J. presiding.

Complaint upon the statute for flowing the land of the complainants.

The respondents, by brief statement, say, that they derived title to the mill and dam, by sundry mesne conveyances, from *Josiah Little* who then was seized of the land described in the complaint, and that by conveyances and license from said *Little* they have the right and privilege of maintaining their dam as high as the top of the then dam, from *Oct.* 1, to *June* 1, and as high as the top of the waste way of the first or original dam, from *June* 1, to *Oct.* 1, of each year, and so to flow the lands without the payment of damages. A deed from *Josiah Little*, to *William Sprague*, father of the demandants, dated *July* 11, 1818, conveyed the remaining part of a lot described, "not heretofore sold and conveyed by said *Josiah*, or by his late father, *Moses Little* deceased, to said *Sprague*," and "also one undivided moiety or half part of a saw-mill and grist-mill in common with said *Sprague*, together with the undivided half of the privilege for the same, *with the privilege of raising a full head of water to the usual height* from the middle of *November* to the middle of *May* so far as it respects lands of said *Little, and at other seasons as may be hereafter agreed.*" At this

time, *Josiah Little* owned the land alleged in the complaint to have sustained damage by the flowing. On the back of the same deed was written — "It is agreed that the water may be kept as high as the top of the dam from the first day of *October* to the first day of *June* — and from the first day of *June* to the first day of *Oct.* to be drawn as low as the top of the wasteway of the first or original dam. It is understood that the privilege is on the land formerly conveyed to said *Sprague*. *Josiah Little*, by his Agent, *Edward Little*." This was sealed and witnessed, but had no date, and was not acknowledged or recorded. On the back thereof was entered, "*Kennebec ss.* Rec'd this deed with the agreement above written, *November* 30, 1819, and entered the same with the records of deeds for said county, book 34, p. 202. *John Hovey*, Reg'r." This deed was offered in evidence at the trial by the respondents, having the writing on the back thereof. The complainants called upon the respondents to show the authority of *Edward Little* as the agent of *Josiah Little* to make the writing. The respondents called *Edward Little*, and proposed to prove by him his authority. The Judge rejected the witness. It was insisted on the part of the respondents, that the writing on the back was a part of the deed. The Judge ruled, "that even if the authority of *Edward Little* to execute the paper on the back of the deed had been proved, the paper would not constitute such evidence as would maintain against these complainants the right set up by the respondents in their brief statement." The verdict being for the complainants, the respondents excepted "to the rejection of said witness, and the ruling of the Judge in reference to said writing on the back of said deed."

Emmons, for the respondents, in his argument on the first point, contended: —

1. *Edward Little* was agent of *Josiah Little*, or represented himself to be such and acted in that capacity, and as such was liable to be called, and might lawfully be examined as a witness, although he was interested. *Phillips* v. *Bridge*, 11 *Mass. R.* 246; 2 *Stark. Ev.* 767, and cases cited; 1 *Johns. Cases*, 270, 408; 2 *Johns. Cases*, 60; 3 *Johns. Cases*, 47; 5 *Johns. R.* 256; 1 *Leach C. C.* 314; *Bent* v. *Baker*, referred to in 3 *T. R.* 27; *Smith's collection of leading cases*, 30; 2 *H. Bl.* 590; 4 *T.*

R. 590; *Peake*, 129; 10 *B. & C.* 858; 8 *B & C.* 408; 3 *Campb.* 317.

2. His interest was balanced, and therefore he was admissible. 7 *T. R.* 480; 1 *Campb.* 408; 5 *M. & S.* 71.

3. The ruling on this point was incorrect, inasmuch as the witness was rejected generally, when he was competent to testify as to certain things. *Smith* v. *Carrington*, 2 *Peters' Cond. R.* 26.

4. The witness was not interested in the event of the suit, and therefore he ought to have been permitted to testify. *Evans* v. *Eaton*, 5 *Peters' Cond. R.* 311.

On the second point, it was urged, that the instruction was wrong. It is manifest that *Little* conveys in the body and face of the deed the privilege of raising a full head of water, at other seasons than from middle of *November* to middle of *May*. All that remained was to agree as to the other seasons, and the height of the water. When the agreement was made, the effect of it was simply to limit the boundary of time, and height of raising the water. Upon the execution of it, that was made certain and definite which was not so before. *Waterman* v. *Johnson*, 13 *Pick.* 267; *Clapp* v. *Smith*, 16 *Pick.* 249; *Smith* v. *Crooker*, 5 *Mass. R.* 540; 2 *Ch. R.* 187; 1 *Stark. R.* 131; 2 *Wheat.* 196; 2 *Peters' Cond. R.* 408; 3 *Peters' Cond. R.* 495; 13 *Johns. R.* 212; 4 *Serg. & R.* 241; *Wheelock* v. *Thayer*, 16 *Pick.* 68. The privilege, the substantial right and interest, the easement was conveyed in and by the body of the deed, and the agreement written upon the back of the deed was merely a description or specification of what was conveyed in the deed, and was of necessity as much a part of it, as if inserted upon the face of the deed. 5 *Wheat.* 293; *Coke Litt.* 45 *b.* The agreement was carried into effect by the grantee of *Josiah Little*, and those claiming under him, and the privilege, purported to be conveyed, was used, exercised and enjoyed by them, and this with the knowledge of *Josiah Little*, and of the complainants. This amounted to a ratification of the acts of *Edward Little* under a full knowledge of the claim of the respondents. *Copeland* v. *Mercantile Ins. Co.*, 6 *Pick.* 203; *First Par. in Sutton* v. *Cole*, 3 *Pick.* 232; 1 *Caines*, 527; *Lent* v. *Padelford*, 10 *Mass. R.* 230; *Erick* v. *Johnson*,

6 *Mass. R.* 193; *Clement* v. *Jones*, 12 *Mass. R.* 60; *Frothingham* v. *Haley*, 3 *Mass. R.* 70.

Wells, for the complainants, contended in his argument: —

1. *Edward Little* was not a competent witness to prove his authority. *Hewitt* v. *Lovering*, 3 *Fairf.* 201. This was an authority to make a deed, for the agreement is under seal and witnessed. Parol testimony is not admissible for this purpose. *Kimball* v. *Morrill*, 4 *Greenl.* 368; *Ken. Pur.* v. *Call*, 1 *Mass. R.* 483. And as real estate can only be conveyed by deed, the authority of an agent to make such conveyance must be by deed. 2 *Kent's Com.* 613; *Banorgee* v. *Hovey*, 5 *Mass. R.* 11; *Stetson* v. *Patten*, 2 *Greenl.* 358. And the witness is not permitted to prove his own authority. 1 *Yeates*, 200; 2 *Yeates*, 38; 2 *Dallas*, 246.

2. The ruling of the Judge was also correct, that if the authority of *Edward Little* to execute it had been proved, the paper would not constitute such evidence as would maintain against these complainants the right set up by the respondents. The grantee had no right to raise a full head of water at any other time than is mentioned in the deed, between the middle of *November* and the middle of *May*. If "other seasons" *were to be* agreed upon, the other seasons were not *then* agreed upon. The phrase is used to limit the meaning of the previous expressions, and the language implies, that if the grantee desires any greater privilege than he has obtained, he must receive them under a new agreement. It is said, that the agreement is a part of the original deed. This cannot be true. There is no evidence to prove when the paper was made, but the papers show that the agreement was not made until after the deed. The deed was by *Josiah Little;* the agreement by *Edward Little;* the witnesses were different; the agreement states, that the "privilege is on lands *formerly* conveyed to said *Sprague;*" and no other deed but this is shown from the grantor, *Josiah Little*, to *Sprague*. It therefore must be considered, that the agreement made by *Edward Little* was after the deed. This indorsement being for the benefit of the grantor, and prejudicial to the grantee, cannot be allowed to operate upon the principle adopted in *Stocking* v. *Fairfield*, 5 *Pick.* 181, where a condition

was indorsed on an absolute deed whereby it was rendered a mortgage.

It is said, that if *Edward Little* had no authority to make the agreement at the time when it was made, it was ratified by the after acts. If such ratification had been proved, it would have been but a parol ratification, and like a parol authority, is not binding. *Stetson* v. *Patten*, 2 *Greenl.* 358.

The opinion of the Court was drawn up by

WESTON C. J. — In the decision of this cause it is important to determine what right the grantee of *Josiah Little* derived from his deed, independent of the agreement, upon which the respondents rely. The grant of the undivided half of the saw-mill and grist-mill, carried also the use of the head of water, necessary to their enjoyment, with all incidents and appurtenances, as far as the right to convey to this extent existed in the grantor. If then this grant could not be beneficially enjoyed, without causing the water to flow back upon other lands of the grantor, a right to do this passed to the extent to which it had been flowed before the grant, by which all privies in estate, under the grantor, would be bound. This principle was decided in *Hathorne* v. *Stinson et als.*, 1 *Fairf.* 224. The doctrine is there very fully illustrated and the authorities referred to, upon which it rests, by *Parris J.* who delivered the opinion of the court.

The deed under consideration expressly granted the privilege, which as incident and necessary to the subject matter of the grant, became presently operative, upon the execution of the deed. That instrument goes on further to fix and limit the enjoyment of the privilege, from the middle of *November* to the middle of *May*. During this part of the year the head of water was to be raised to its usual height. This appears to be nothing more than would have been implied, without such specification. What follows, namely, " and at other seasons, as may be hereafter agreed," provides for a subsequent limitation of the grant. It refers manifestly to the exact elevation of the head of water.

The right of enjoyment was not made to depend upon the subsequent agreement, but that agreement was to limit, when made, the extent of the water power for that portion of the year, not

precisely determined by the deed. Assuming that the parties had neglected to enter into any such agreement, or that the grantor had refused to do so, it does not follow that the grantee is therefore to be deprived, for half the year, of the use of his privilege. The result would only be, a failure to fix exactly, by compact, to what extent the grantee might flow, and to leave that matter, as an incident to the grant, to be determined by legal adjudication. For any thing which appears, the grantor had quite as much to gain, by the execution of the contemplated agreement as the grantee, considering the season of the year, to which it referred, its design may be presumed to have been rather a limitation, than an extension, of the water power conveyed. It appears to us therefore, that if there were no agreement the respondents are still entitled to the privilege, as it had been before used.

The exceptions are based upon the rejection of *Edward Little*, as a witness, and the instruction of the Judge, that the defence was not sustained by the written agreement, executed by him claiming to act in behalf of *Josiah Little*, indorsed on the deed before referred to. Although thus apparently limited, as this deed is, the case adduced by the respondents, for their justification, the instruction was too narrow, and had the effect to defeat a defence, resting upon the construction of the deed, aside from the agreement. As this may prove decisive upon the merits, in favor of the respondents, the exceptions are sustained, the verdict set aside and a new trial granted.

CYRUS WESTON *vs.* JOHN HIGHT, 2d. *Admr.*

It is essential to a good gift *causa mortis*, that the donor should make it in his last illness, and in contemplation and expectation of death; and if he recover, the gift becomes void.

Where the gift was made while the donee was in expectation of immediate death from *consumption*, and he afterwards so far recovered as to attend to his ordinary business for eight months, but finally died from the same disease; such gift cannot be supported as a *donatio causa mortis*.

The indorsement of a promissory note by the donee, cannot be the subject of a gift *causa mortis*, so as to render his estate liable on his indorsement.

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

Assumpsit against the defendant as administrator of the estate of *Hanson Hight*, deceased. The testimony on the trial is given in the bill of exceptions, wherein it appears, that the presiding Judge, by consent of the parties, ordered a nonsuit. Exceptions to the order were filed by the plaintiff. The facts are sufficiently given in the opinion of this Court. The argument having been made before the appointment of *Shepley J.*, he took no part in the decision.

Tenney, for the plaintiff, in his argument, contended:—

1. The note being indorsed and delivered, became the property of the daughter, so that if the maker paid it, she would have the proceeds. If it was a mere gift, it was effectual. 2 *Blk. Com.* 441; 2 *Kent's Com.* 353, 355. As a gift *inter vivos*, the transfer was perfect, and irrevocable. 2 *Kent*, 354, 356. And it is the same, if a *donatio causa mortis*. 2 *Kent*, 359, 362; 3 *Binney*, 366.

2. The indorsement and assignment of this note make the indorser and his estate liable, as much as if founded on a full pecuniary consideration, provided all the steps have been taken, which are necessary to hold ordinary indorsers under the same circumstances. 10 *Mass. R.* 247; 5 *Pick.* 506; 3 *Pick* 323; 2 *Stark. Ev.* 280; 6 *Pick.* 427; *Par. F. in Fryeburg* v. *Ripley*, 6 *Greenl.* 446, overruling *Boutelle* v. *Cowdin*, 9 *Mass. R.* 254. But here was a good consideration. The note was delivered to the daughter as an advancement out of his estate. The plaintiff

offered to prove by her and her husband, that they did give a release, when the note was delivered. This evidence was improperly rejected. 3 *Stark. Ev.* 1045, 1051, 996, 1021; 4 *Mass. R.* 684.

3. On the maturity of the note the defendant was requested to let the daughter have the land, or pay the note. He refused to let her have the land, and by withholding it, the estate became accountable.

4. There was reasonable demand and notice to charge the indorser. 3 *Kent*, 65; *Bayley on Bills*, 149, *and notes*; 6 *Mass. R.* 524; 13 *Mass. R.* 559; 7 *Mass. R.* 486. But if not, the intestate waived demand and notice. This may be proved by parol. *Fuller* v. *McDonald*, 8 *Greenl.* 213; 4 *Pick.* 525; 3 *Stark. Ev.* 1054. The defendant also, as administrator, waived demand and notice, as he had the power to do. *Bayley on Bills*, 192; 2 *Conn. R.* 478; 2 *T. R.* 713; *Buller's N. P.* 276; 1 *T. R.* 410; 2 *Phill. Ev.* 44; 5 *Mass. R.* 170; 2 *Greenl.* 207; 3 *Mass. R.* 225.

5. The suit was properly brought by the present plaintiff. The first indorser is liable to every subsequent *bona fide* holder. 3 *Kent*, 60; 1 *Esp. R.* 182; *Bay.* 158; 2 *Burrow*, 1216; *Bayley on Bills*, 70; *Stark. Ev.* 249; 6 *Mass. R.* 386; 1 *Dane's Abr.* 387.

Wells, for the defendant.

1. The action cannot be maintained against the indorser, because the demand and notice were not seasonably made. The demand should have been made on the last of *April*, as the note fell due on that day. *New-England Bank* v. *Lewis*, 2 *Pick.* 125; *Greely* v. *Thurston*, 4 *Greenl.* 479; *Woodbridge* v. *Brigham*, 13 *Mass. R.* 556; *Henry* v. *Jones*, 8 *Mass. R.* 453; *Farnum* v. *Fowle*, 12 *Mass. R.* 89.

2. The present plaintiff took the note in *July*, 1835, after it had been dishonored, and therefore took it subject to any defence which could be made, had the suit been brought by the payee. 13 *East*, 479; *Mead* v. *Small*, 2 *Greenl.* 207.

3. There was no consideration passing from the daughter to the father, which is necessary. *Tenney* v. *Prince*, 7 *Pick.* 243. If signed by the father and given to the daughter, it is *nudum pactum.*

Hill v. *Buckminster*, 5 *Pick.* 391 ; 18 *Johns. R.* 145. It was a gift *inter vivos*, taking immediate effect. 2 *Kent*, 444.

4. This was a special indorsement, limited in its character, and not transferrable by the daughter. The plaintiff cannot maintain any action upon it. *Taylor* v. *Binney*, 7 *Mass. R.* 479.

5. It was not a *donatio causa mortis*, because that is a conditional gift in the last illness. 2 *Kent*, 444. But if it were so, it would at the utmost only pass the note, but not a right of action against himself. 2 *Kent*, 445.

The opinion of the Court was drawn up by

EMERY J. — As the note was lost after the commencement of the action, parol proof was rightfully received of its contents and of the indorsement. The note was dated *Feb.* 15, 1832, given by *Joshua Gould* to *Hanson Hight*, or his order, for $270, payable in two years from *April* then next, with interest annually. And a memorandum was made upon the back of the note substantially as follows. *March*, 1832. " For a valuable consideration, I hereby assign the within note to *Abigail Weston* my daughter, to be collected for her own use and benefit; and I hereby assign to her the same security which I hold for the payment of said note." The memorandum was signed by said *Hanson Hight*. And on *July*, 1835, before the commencement of this action, said *Abigail* and her husband, *George B. Weston*, indorsed the note to the plaintiff without recourse to them. The consideration of the note was a bond, which the intestate gave to said *Gould*, to convey certain real estate, owned by the intestate, on *Gould's* paying this and other notes. It was proved, that *Gould* was not supposed to have attachable property, which was visible, in his hands for several years last past. An action was commenced on the note by *George B. Weston* and wife, in their names, against the defendant as administrator, and they failed in proof before the jury, and became nonsuit, after which they transferred the note to the plaintiff. *G. B. Weston* testified, that on the first day of *May*, 1834, he presented the note to said *Gould* and demanded payment, which was refused, and on that day he notified the defendant that the note had been presented to *Gould* and payment refused, and demanded of the defendant payment of the note, or a conveyance

of the real estate, and defendant told him he should not have the land. In the *June* following, the defendant told him he should not have the land, but would pay the note. The testimony of said *Abigail Weston* was, that the intestate indorsed the note to her, and that the substance of the indorsement was, that she should have the same indemnity that he had. He said the note was good, and that the land was holden for it, and if *Gould* did not pay the note, of which he seemed suspicious, that she might have the land for which the note was given, if she chose, or the heirs would pay her the amount of said note, and keep the land.

This is not a case of *donatio causa mortis*. It was not made in the last sickness of the intestate. The note was given to *Abigail Weston* by the intestate, in *March*, 1832, when he was sick and expected to live but a little while; but he got better and attended to his business until *December*, 1832, when he was taken sick again, so as to be confined to his house, and soon after died. His disorder was consumption. It is truly said to be a most flattering, deceptive and fatal disease. It is known to continue for years, but with intervals of such portions of seeming health that it has little effect upon the mental powers, and, as in this instance, not to incapacitate the sufferer from attending to his business. The very ground upon which donations of this description are supported failed. There was such a subsequent recovery as vacated the gift.

In *Holliday* v. *Atkinson & al. Exrs.* 5 *Barnw. & Cress.* 501, (in 1826) *Abbott C. J.* says, a promissory note is not good, as a *donatio causa mortis;* and in *Parish* v. *Stone*, 14 *Pick.* 198, it was held, that the delivery of a donor's own note, payable to the donee, cannot constitute a *donatio mortis causa* to the donee. Nor would the equalizing the distribution of one's estate after his decease be a sufficient consideration for a contract by him to pay money. The attempt here is to charge the administrator by reason of the indorsement of the note. We are not aware that this would in general be greater ground for claim against him, than if the note of the testator had been directly given to his daughter. We are farther satisfied, that if the testimony of *George B. Weston* was credited, the demand and notice were seasonably made. There was, however, contradictory evidence, and the case is presented to us, under some peculiar circumstances. We perceive in a certain

extent of the evidence, an almost certain foundation for the claim of the plaintiff, and in a little farther advance, an unquestionable destruction of it. Looking yet farther we apprehend a possibility, that injustice may be done to the plaintiff from the want of a full exhibition of all the facts which may truly exist. An arrangement was made by consent to bring the case before us; and as our desire is to do full justice to the parties; perceiving that there may have been such a release of the right and interest which *Weston* and his wife had in *Hight's*, the intestate, estate, by way of advancement, as might constitute a good consideration for the indorsement of the note to hold the administrator responsible; we deem it important to set aside the nonsuit and grant a new trial, so that the real truth may be made manifest.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF FRANKLIN, JUNE TERM, 1840.

EZEKIEL PORTER *& al. vs.* EBENEZER WITHAM *& al.*

The Court, sitting as a Court of Chancery, will not interfere to prevent or remove a private nuisance, unless the complainant has long and without interruption enjoyed a right, which has been recently injured, or which is in danger of being injured or destroyed; or unless the right has been established by a judicial determination.

Where there is a gradual fall of water, extending over lands owned by different persons, merely sufficient to allow of one mill-dam; and where the different owners, recently and about the same time proceeded to erect separate dams upon their own land, and the lower dam renders the upper one useless; the Court, acting as a Court of Equity, will not restrain the proprietors of the lower dam by injunction from completing it, or interfere to abate it as a nuisance, before the rights of the parties are determined at law.

THIS is a bill in equity, praying for a writ of injunction, commanding the respondents to stay all further proceedings in the erection of a dam across the *Sandy River*, and to remove the part erected, as a nuisance. The case will be sufficiently understood from the statement of facts found in the opinion of the Court.

The arguments of the counsel were chiefly in relation to the rights of the parties to their respective mill privileges, and their priority of right to erect mills; but that portion only which is pertinent to the question decided by the Court will be noticed.

F. Allen and *R. Goodenow*, for the complainants, contended, that to restrain a private nuisance by way of injunction was within the jurisdiction, and one of the appropriate duties of a Court of Equity; and that this was a case of urgent necessity, requiring the immediate action of the Court. 2 *Story's Eq.* 164, 204, 205, 206; *Bemis* v. *Clark*, 11 *Pick.* 452; *Bemis* v. *Upham*, 13 *Pick.* 169. The statute for the support and regulation of mills does not afford a remedy. That statute applies to the flowing of land, and not to the flowing and destruction of mill privileges. *Calais* v. *Dyer*, 7 *Greenl.* 155; *China* v. *Southwick*, 2 *Fairf.* 341.

Tenney and *H. Belcher*, for the respondents, contended, that this was not a case where the Court would interfere by injunction. The rights of the parties should be first settled at law, or should have been long enjoyed without interruption, before the Court will restrain a party from erecting dams or mills upon his own land. *Van Bergen* v. *Van Bergen*, 2 *Johns. Ch. R.* 272; *Same Parties*, 3 *Johns. Ch. R.* 282; *Gardner* v. *Newburg*, 2 *Johns. Ch. R.* 162; *Reed* v. *Gifford*, 6 *Johns. Ch. R.* 19; *Case* v. *Haight*, 3 *Wend.* 632; *Newburgh T. Com.* v. *Miller*, 5 *Johns. Ch. R.* 101; *Corning* v. *Lowerre*, 6 *Johns. Ch. R.* 439; *City of New-York* v. *Mapes*, 6 *Johns. Ch. R.* 46; *Lansing* v. *N. R. S. Com.* 7 *Johns. Ch. R.* 162; *Belknap* v. *Belknap*, 2 *Johns. Ch. R.* 463.

The opinion of the Court, was prepared by

SHEPLEY J. — It appears from the bill, answer and proof, that there is a place in the *Sandy River*, in the town of *Strong*, called the rocky reach, where there may be a mill site, but the fall of the water is not sufficient to allow of more than one. It is gradual, and extends some distance in the river over the lands owned by both these parties. No mill or dam was in existence there in the spring of the year 1838. Early in that season, the defendants appear to have contemplated building one, and on the 28th of *June* they commenced digging in the bank, and soon laid the foundation of a dam, which they have since completed; and they now use the water power to propel a grain-mill, which has also been erected there. The plaintiffs, owning land on one bank of the river,

only, above them, appear to have contemplated building mills in *Avon*, until about the time when they purchased a tract of land, which had been previously bargained to the defendants, on the other bank of the river; and then to have altered their minds and determined to build a dam about one hundred rods above the dam of the defendants. They soon after commenced and have built a dam there, which is flowed and rendered useless by that of the defendants. The plaintiffs allege, that the defendants did not first commence, and if they did, that they did not thereby acquire either at common law, or by the statute respecting mills, a right to flow their dam and injure them. The defendants claim to be the first occupants, and contend, that they thereby acquired both at common law and by the statute a right to flow, subject only to the payment of such damages, if any, as they may have occasioned.

The bill asks for an injunction against such flowing by the dedefendants, and that their dam may be abated as a nuisance. If the plaintiffs are not entitled to the exercise of this extraordinary chancery power of the Court, upon their own exhibit of their case, it will not be necessary to decide any other questions.

The Court will interfere by injunction, where the party has long and without interruption enjoyed a right, which has been recently injured, or which is in danger of being injured or destroyed; and when if it has not been established by long usage, it has been by a judicial decision. But it is not ordinarily to determine the right in the first instance, that chancery hears the case, and then, if found to be established, exercises its extraordinary power to protect it. Where the thing already exists, it should be decided in a trial at law to be a nuisance before chancery interferes to abate it. Where it is about to be brought into existence, the Court in a proper case may interpose to prevent it. There can be no doubt, that it would be unjust to destroy property or the use of it before it has been determined by a judicial decision or by lapse of time, that the owner can have no such right as he claims and enjoys. Nor is it proper, that such decision should he made in chancery, for it may be, that in a trial at law to establish the right, the party injured will recover an entire satisfaction, and obtain a full compensation in damages, without calling for the redress of his grievances

by a destruction of the property, or by an imprisonment of the person of his opponent.

In the case of the *Attorney General* v. *Nichols*, 16 *Ves.* 342, the Lord Chancellor says, "cases may exist upon which this Court could not interfere, yet an action upon the case might be well maintained." And in *Gardner* v. *Village of Newburgh*, 2 *Johns. Ch. R.*. 164, it is said, "the interference rests on the principles of a clear and certain right of enjoyment of the subject in question, and an injurious interruption of that right." And in the case of the *Attorney General* v. *Utica Ins. Co. ib.* 379, that "the *English* Court of Chancery rarely uses this process, except where the right is first established at law, or the exigency of the case renders it indispensable." In *Van Bergen* v. *Van Bergen*, 3 *Johns. Ch. R.* 287, the Chancellor says, "the cases in which chancery has interfered by injunction to prevent or remove a private nuisance, are those in which the nuisance has been erected to the prejudice or annoyance of a right, which the other party had long previously enjoyed. It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law to call to his aid the jurisdiction of this Court." In *Reid* v. *Gifford*, 6 *Johns. Ch. R.* 19, where the plaintiff had been in possession of mills twenty years, and the defendant for more than three years before the filing of the bill had diverted the water, an injunction was denied on the ground, that the rights ought to be first settled at law. In the case of *Bemis* v. *Upham*, 13 *Pick.* 169, the bill alleged, that the dam had been determined by a judgment at law to be a nuisance.

In this case the plaintiffs have neither established their rights at law, nor secured them by long and uninterrupted enjoyment. It does not appear that they may not, if they have merits, obtain a full recompense in a single suit for all their injuries. And in such a case, the Court is neither called upon, nor permitted to grant an injunction, or process of abatement.

Bill dismissed, with costs for defendants.

NATHANIEL RICHARDS *vs.* THOMAS ALLEN.

Payments made under a parol contract for the purchase of land cannot be reclaimed so long as the seller is not in fault; but if he, without any justifiable cause, repudiate the contract and refuse to be bound by it, a right of action will accrue to the purchaser to recover back the money paid, to the extent required by the principles of justice and equity.

If the purchaser under such parol contract enter into the possession of the land, the amount of the benefit received by him from the occupation should be deducted from the money paid.

If the seller convey the land to a third person, and thus by his own act deprive himself of the power of fulfilment of such parol contract, it excuses the purchaser from the necessity of making a tender of the remaining purchase money, and demanding a deed.

The cause of action does not accrue to the purchaser, under such parol contract, until the seller is in fault, and therefore the statute of limitations begins to run only from that time.

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

Assumpsit for a quantity of bricks delivered in 1829, and a yoke of oxen delivered *January* 27, 1832. The writ was dated *January* 27, 1838. Eighteen or twenty years before the commencement of the suit, the plaintiff contracted verbally with the defendant for the purchase of a farm, and entered upon the farm under that verbal contract, and lived thereon until the time of trial. The bricks and the oxen were delivered at the respective times charged in part payment of the farm, under the verbal contract for the purchase thereof. The plaintiff proved that the defendant, in the spring of the years 1837 and 1838, told the plaintiff that he supposed the plaintiff had paid for about one half the farm by way of the oxen and bricks; that he was ready to give a deed of the farm; and that he would see *Stubbs* and *Dickey*, and come in a few days to the plaintiff's house, and give the plaintiff or his son a deed. The defendant conveyed the same to one *Stubbs* by deed dated *January* 18, 1838. The defendant, for the purpose of showing that the plaintiff had abandoned the contract for the purchase of the land, proved that the plaintiff said to one *Dickey*, in *Sept.* 1837, that he had no interest in the land, and that *Allen* might convey it to whomsoever he pleased. The defendant offered

to prove that shortly afterwards *Dickey* told *Allen* what the plaintiff had said. This was ruled by the Judge to be inadmissible, as it did not appear that the plaintiff wished the statement to be made to the defendant. It did not appear, that the defendant gave the plaintiff any information of his intention to sell the land to *Stubbs*, or that the plaintiff tendered money, or demanded a deed. The defendant filed an account in set-off, for the use and occupation of the farm, and offered at the trial to prove it. The Judge declined to receive the evidence, and directed the account to be laid out of the case. The jury were instructed, that if they believed the admission and promise made by the defendant to the plaintiff in 1837 and 1838 to convey the land, it would enable the plaintiff to recover back what he had paid the defendant therefor, although a part of the payment had been made more than six years before the date of the writ; and notwithstanding the original contract for the sale and purchase of the land was not in writing. The verdict being for the plaintiff, the defendant filed exceptions.

May and *Stubbs*, for the defendant, remarked, that they should not now contend, that money paid in part performance of a verbal contract for the purchase of land, where there is neglect or misconduct on the part of the seller and where the purchaser is not in fault, cannot be recovered back. But where the purchaser by parol has entered into the possession of the land, and has had the benefit of it, even where he is entitled to recover, it should be only the amount paid after deducting the fair value of the rents. If he seeks equity, he should be held to do equity. The amount paid was but a fair equivalent for the use of the farm during the time, but if more, the balance only should be recovered. *Whiting* v. *Dewey*, 15 *Pick.* 428. The set-off should have been allowed. It is necessary to file an account only where there are distinct and independent demands, and not where the mutual demands arise from the same transaction. *Jackson* v. *Hall*, 14 *Pick.* 151; *Erskine* v. *Plummer*, 7 *Greenl.* 447. If this parol contract for the purchase and sale of land is to have effect, it is competent for the parties to abandon and rescind the contract in the same manner, by parol. The instructions on this point were erroneous. The instruction should have been, that the plaintiff could not recover,

unless the defendant was in fault. 12 *Johns. R.* 451 ; 13 *Johns. R.* 359 ; 9 *Cowen*, 46. The defendant has always been ready to give a conveyance of the land when the consideration was paid. There should have been an offer to pay the sum due, and a demand of the deed, before any action could be maintained. Before then the plaintiff was not in fault. The plaintiff had the means of giving a title at any time, and that is sufficient. *Trask* v. *Vinson*, 20 *Pick.* 105. The statute of limitations was a good bar to all the plaintiff's claim unless for the oxen. Here was no promise to pay the amount, or if any can be inferred, it is the conditional one to allow this towards the land, if the remainder should be paid. This condition was never performed. *Porter* v. *Hill*, 4 *Greenl.* 41 ; *Deshon* v. *Eaton*, 4 *Greenl.* 413 ; 8 *Johns. R.* 407 ; 9 *Cowen*, 674.

Randall, for the plaintiff, argued that *Dickey's* testimony was rightly rejected, because it was a mere loose conversation with a third person, and not an agreement with the defendant to give up the bargain. It had relation merely to the legal rights of the plaintiff to convey the land, without consulting him. The law is clear, that the plaintiff may recover back the consideration paid under a parol contract to convey land, when the contract is violated by the defendant. 2 *Stark. Ev.* 69, and cases there cited. There can be no difference as to the operation of the statute of limitations, whether the new promise to pay be in money, goods, or land. A promise to pay in either is sufficient. Here the promise to pay was in land, and the defendant deprived himself of the power to convey the land. In such case it is not necessary, to show an offer to perform on the part of the plaintiff. 15 *Johns. R.* 503 ; 2 *Stark. Ev.* 866. An account for use and occupation of land is not the proper subject of an account in set-off. 2 *Stark. Ev.* 855, 858, 865. Besides, the party cannot be charged on an implied contract, when there was an express one. Here the use and occupation was part of the agreement for the purchase.

The opinion of the Court was by

Weston C. J. — The contract between the parties in regard to the farm, was one, which being by parol, could not be enforced at law. It was however morally binding ; and payments made by

the plaintiff, on account of the purchase, could not be reclaimed, so long as the defendant was in no fault. But if he, without any justifiable cause, repudiated the contract, and refused to be bound by it, a right of reclamation would accrue to the plaintiff, to the extent required by the principles of justice and equity. The statute of limitations would not begin to run, until the cause of action accrued.

The terms of the contract do not appear in evidence; but in the spring of 1837, the defendant recognized the contract as a subsisting one, acknowledged the payment of half the amount of the purchase, by bricks and a yoke of oxen, and promised in a few days to give the plaintiff or his son a deed of the farm, doubtless upon being paid or secured the remainder of the purchase money. On the 18th of *January* following, he conveyed the farm to a third person. This was putting an end to the contract, by depriving himself of the power to fulfil it. Was he justified in this course by any act or failure on the part of the plaintiff? Nothing of this kind was offered in proof by the defendant, except the declarations made by the plaintiff to the witness, *Dickey*. That was a casual conversation, giving no authority to the witness to make any communication to the defendant. The plaintiff cannot thereby necessarily be understood to have waived his rights. He stated, that he had no interest in the land, and that the defendant might convey it to whom he pleased. This was true, if understood, as it may be, of legal interest on the one hand, and of legal power on the other. The testimony of *Dickey* therefore, if received, might not conclusively affect the merits of the cause, or justify the conveyance made by the defendant, without subjecting him to a right of reclamation by the plaintiff.

It may be contended, that this right could not be exerted, until the plaintiff had first tendered to the defendant the remainder of the purchase money and thereupon demanded a deed. This may be true, if the defendant had not, by his own act, deprived himself of the power of fulfilment. This excuses the useless ceremony of tender and demand, which might otherwise have been essential to the maintenance of the action. *Newcomb* v. *Brackett*, 16 *Mass. R.* 161.

But the plaintiff's claim must be limited to what is just and equitable, under all the circumstances. He had made some payments; but he had enjoyed the farm for eighteen or twenty years. The jury should have been permitted to take this into consideration, even without an account in offset, as it was necessarily connected with the plaintiff's claim, and was of a character to affect and qualify it. This not having been done, we sustain the exceptions, and grant a new trial.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF SOMERSET, JUNE TERM, 1840.

REUBEN SAVAGE *vs.* WILLIAM KING.

A note made payable to a married woman, is in law a note to the husband, and becomes instantly his property; and her indorsement transfers no property in the note.

An assignment and delivery of a negotiable note before it falls due, without the indorsement of the payee, places the assignee in no better condition than the payee.

THIS action was brought by the plaintiff as indorsee of a note of hand of which this is a copy. "*Kingfield*, *March* 21, 1836. For value received, I promise to pay *Mrs. Lucy Smith* or order, thirty days from date, two hundred dollars. *William King*."

At the trial before SHEPLEY J. the defence set up was a failure of the consideration. The payee of the note, at the time it was given, was a married woman, and the wife of *Abraham Smith*. Before the note became due, the husband sold it to the plaintiff with the name of *Lucy Smith* indorsed upon the back by the husband, but without any indorsement of his own name. Some months after the note became due, and after it had been presented to the defendant and payment had been refused, *Abraham Smith* authorised the plaintiff to indorse his, *Smith's*, name upon the note, and it was done. Under these circumstances, the defendant was permitted to introduce evidence for the purpose of proving a fail-

ure of consideration, and obtained a verdict in his favor, which was to be set aside, if the testimony and defence ought not to have been permitted.

Tenney argued for the plaintiff, and contended, that the putting the name of the wife upon the back of the note by her husband, and delivering it over to the plaintiff, before it was due, was a valid transfer of the note which precluded the defence set up. But if not, his assent, by putting his own name, related back to the previous transfer. *Bayley on Bills*, 35; *Chitty on Bills*, 26.

F. Allen and *Bronson*, for the defendant, contended, that the legal effect of the note was the same, as if it had been given directly to the husband. *Commonwealth* v. *Manley*, 12 *Pick.* 174; 1 *East*, 432; *Chitty on Bills*, 31, 130. The law requires the name of the payee to be written upon the note to negotiate it to a third person. The indorsement of the name of the wife was merely void.

The opinion of the Court was by

Weston C. J. — The note in question, having been made payable to a *feme covert*, was in the eye of the law a note to the husband, and became instantly his property. *Barlow* v. *Bishop*, 1 *East*, 432; *Commonwealth* v. *Manley & al.* 12 *Pick.* 173. The interest being in the husband, he alone could transfer it by indorsement. The indorsement of the wife could have no legal validity. She did not profess to act in behalf of her husband. The case cited from *East* is precisely in point; and it was there decided, that the indorsement of a *feme covert* to whom a negotiable note was given, could transfer no interest.

The case states, that the husband sold the note to the plaintiff, before it became due. If he had then indorsed it, and the plaintiff had received it *bona fide*, in the due course of business, without notice of the want of consideration, the defence could not have been sustained. An assignment in any other form, places the assignee in no better condition, than the original holder. This was decided in the case of *Calder* v. *Bellington*, 15 *Maine R.* 398. The indorsement of the husband, after the maturity of the note, did not preclude the defence.

Judgment on the verdict.

BENJAMIN HILTON *vs.* JOSEPH SOUTHWICK.

A promise to pay upon the performance of an act by which the party is injured, becomes binding when the act is performed.

If the payee of a negotiable note give his assent by his signature to an assignment, wherein provision is made for the payment of the note, or of a part of it, this does not destroy the negotiable character of the note, or destroy a contract made in contemplation of a sale of it, and it may be afterwards legally transferred, although the effect may be to make the signature to the assignment ineffectual, unless adopted by the indorsee.

If there appears the least attempt on the part of the prevailing party to seek and influence a juror who tries the cause, the verdict will be set aside.

Where the jury were dismissed from *Saturday* evening until *Monday* morning during a trial, and the prevailing party conveyed a juror, living on the road passed by the party, home in his wagon several miles on *Saturday* evening, and where no conversation relative to the cause took place; *it was held*, that although the conduct was indiscreet and incorrect, and if persisted in after a knowledge of its impropriety, would afford sufficient cause for a new trial, yet that the verdict in this case might be regarded as having been found by a jury free from improper influences, and that judgment might be rendered thereon.

ASSUMPSIT on an agreement, of which a copy follows. "*July* 16, 1829. Whereas *Benj. Hilton* is about transferring a note he has against me for $2524,34, I hereby agree that in case I obtain a discount on said note in the payment, that I will account and pay to said *Hilton* the amount which I get discounted thereon.

"*Joseph Southwick.*"

It appeared at the trial before SHEPLEY J. that the plaintiff, in *April*, 1829, had sold to the defendant a quantity of logs, and had taken his note for $2524,34, payable half in *June*, and half in *September*, in payment therefor. Before the first payment fell due, the defendant became embarrassed and assigned the logs thus purchased, with a large quantity purchased of others, to assignees in trust to pay or apply each lot of logs to the payment of the note or notes given for them, either by returning the logs and taking up the notes, or by manufacturing them and applying the proceeds, less the expenses, in payment of the notes. The plaintiff was named in the assignment. Before he had given his assent to it by signing it, on *July* 16, 1829, the contract declared on was made. On the following day, *July* 17, the plaintiff sold the note at a dis-

count of 33⅓ per cent., and on that day signed the assignment. Whether that sale was made to the defendant through the agency of *Homans* and *Brown*, the assignees; or to them on their own account; or to *Homans* alone for his sole account; was a subject of controversy between the parties, and much testimony was introduced on each side, which was submitted to the jury. It was also contended that if *Homans*, or *Homans* and *Brown*, purchased the note on their own account, the defendant obtained a discount in paying it, and this was denied, and the evidence on this question was submitted to the jury.

The counsel for the defendant contended at the trial:—

1. That the plaintiff could not recover because the contract was not binding for want of a consideration. This objection was overruled, and the proof in relation to the facts admitted.

2. That if the defendant himself purchased the note by the agency of others, he did not thereby obtain a discount within the meaning and terms of the contract, and the plaintiff could not recover. This objection was overruled.

3. The plaintiff by signing the assignment on *July* 17 repudiated and annulled the contract of *July* 16, declared on, and could not recover. This objection was also overruled; and the jury were instructed, that if in other respects the plaintiff had proved his case, he might recover, notwithstanding these objections. The verdict for the plaintiff was to be set aside, if the ruling or instuctions were erroneous.

After the verdict, at the same term, the defendant filed a motion to set aside the verdict, because it was against evidence, and because "the said *Hilton* discharged a passenger whom he had agreed to carry home on *Saturday* evening, while this cause was on trial, it having been commenced on *Saturday* in the afternoon, and terminated the *Tuesday* next following, and that said *Hilton* after discharging said passenger took into his wagon, and carried home to *Madison*, one of the jurors who tried said cause. And also that *Samuel H. Hilton*, who was a son of the plaintiff and a witness in said cause, was seen walking arm in arm with another of the jurors after the cause was opened for trial, and before its termination, and did converse with the juror while so walking."

The juror testified in substance, that he came down to Court with his own horse, and sent it home, and it had not come back; that on *Saturday* evening he wished to return home, and inquired if there was any way of his getting home, and *Hilton's* son said his father, the plaintiff, would carry him, and that he did ride home with *Hilton*, and that he lived on *Hilton's* road home, and within about two miles of him. The juror stated, that he could recollect no conversation whatever with *Hilton* at that time, but that if any thing had been said about the case on trial, he thought he must have recollected it, as he remembered that the Judge cautioned them against conversing, or hearing conversation, on the subject. It also appeared, that the same juror, before the cause came on for trial, during the term, went home with the son of the plaintiff, who was a witness, and staid over night with him.

Wells and *H. A. Smith*, for the defendant, argued in support of the objections made at the trial, and cited 4 *Johns. R.* 84; 12 *Johns. R.* 190; 3 *Johns. R.* 534; *M'Culloch* v. *Eagle Ins. Co.* 1 *Pick.* 278; 3 *T. R.* 684. On the argument in support of their motion for a new trial, they cited *Cottle* v. *Cottle*, 6 *Greenl.* 140; *Benson* v. *Fish*, 6 *Greenl.* 141; *Sargent* v. *Roberts*, 1 *Pick.* 337.

Boutelle and *Tenney* argued for the plaintiff, and cited 12 *Johns. R.* 190, 397; 1 *Caines*, 584; *Train* v. *Gold*, 5 *Pick.* 380; *Robertson* v. *Gardner*, 11 *Pick.* 150; *New-England Bank* v. *Lewis*, 8 *Pick.* 113; *Kempton* v. *Coffin*, 12 *Pick.* 129; *Williams College* v. *Danforth*, 12 *Pick.* 541; 1 *Saund.* 211, *note* 2; 2 *Saund.* 137; 1 *Com. on Con.* 16.

The opinion of the Court was drawn up by

SHEPLEY J. — The contract recites, that the plaintiff was about transferring the note, and the defendant promises to account to him for what he should get discounted in the payment of it. That it operated to induce the plaintiff to sell, and that it was so designed, there can be little doubt. The plaintiff on the following day sold the note at a large discount.

A promise to pay upon the performance of an act, by which the party is injured, becomes binding, when the act is performed.

Train v. *Gold*, 5 *Pick.* 385; *Kempton* v. *Coffin*, 12 *Pick.* 129. The contract in substance provides, that if the defendant was not obliged to pay all that should be due, he would pay sufficient to the plaintiff to make up the whole amount. It does not provide, that the discount should be obtained in any particular mode to make it obligatory on the defendant to pay it to the plaintiff. By signing the assignment the plaintiff did not destroy the negotiable character of the note, which might afterward be legally transferred. The effect might be to make his signature to the assignment ineffectual unless adopted by the indorsee, but not to destroy a contract made in contemplation of a sale.

There is a motion for a new trial arising out of the alleged improper conduct of the plaintiff in his attentions to one of the jurors. In the case of *Cottle* v. *Cottle*, 6 *Greenl.* 140, where the party conveyed a juror to the house of his friend and entertained him, it appears to have been done not as an act of ordinary and neighborly kindness, while in this case, although under the circumstances indiscreet and incorrect, it does appear to have been of that character. In that case, it appears from the remarks of the Judge in delivering the opinion, that the party had conversed with the juror respecting the suit, for it is said, "he sought his society, and attempted to impress his mind with the justice of his claim." And that the party sought the juror in an unusual manner. These considerations were justly regarded as sufficient to require the verdict to be set aside. In this case the juror must be understood in his testimony as denying that he had any conversation with the plaintiff about the action, and as stating that the occasion of his riding home with the plaintiff was, that he had ordered his horse to be sent to him, that it had not arrived when the jury was discharged for that day, that he inquired for a passage and was informed by the plaintiff's son, that his father could carry him home. Although this took place while the action was on trial, the plaintiff does not appear to have sought for the juror, or to have conversed with him respecting it; and he did not go out of his own way to accommodate the juror. And yet the exercise of these acts of kindness under such circumstances are suited to produce suspicion that the juror had been influenced by improper motives and the Court must feel a want of perfect confidence as much to be de-

plored by it, as by the losing party. It has however come to the conclusion, not without doubt and hesitation, that the verdict may be regarded as found by a jury free from improper influences. But if such practices are continued, either directly or through the intervention of relatives or agents, they will afford just reason for the conclusion, that there may be an undiscovered influence which must require verdicts found under such circumstances to be set aside. If there appeared the least attempt on the part of the plaintiff to seek and influence the juror, the verdict would be set aside. But without any such attempt, there does not appear to be sufficient cause for it.

Judgment on the verdict.

NATHAN DOLBIER *vs.* PETER NORTON.

If a replevin bond made to one obligee, be altered after its execution, and made payable to another, without authority from the parties, the alteration is a material one, and avoids the bond.

In an action against an officer for serving a writ of replevin against the plaintiff without taking a replevin bond, where it is proved that the bond, returned with the writ, was originally made to a different obligee, and was altered by the officer, and made payable to the plaintiff; it is not incumbent upon the plaintiff to prove that the defendant had not authority to make the alteration, but the burthen of proof is upon the defendant to show that he had authority.

CASE against the defendant for serving as a coroner, a writ of replevin sued out by *William Ladd* against the plaintiff without taking any replevin bond, and for making a false return thereon, stating that such bond had been taken and returned. It appeared on the trial before SHEPLEY J., that a replevin writ and bond had been made by an attorney in favor of *Ladd*, against *James Colman*, and put into *Ladd's* hands to procure service, and that after the bond had been executed, it had been altered, making it payable to the plaintiff instead of *Colman*, the writ having been altered in like manner, to run against the plaintiff instead of *Col-*

man. There was evidence tending to prove by the handwriting, that the alteration of the bond was made by the defendant; and also to prove, that being so altered, it was returned, and was the only bond returned with the replevin writ. The plaintiff prevailed in the replevin suit, and had a judgment in his favor for damage, costs and a return of the property, but could obtain no satisfaction. It appeared that the plaintiff had commenced a suit upon the bond, and on a trial discontinued it.

The defendant's counsel contended, that if the jury were satisfied, that the bond had been altered by the defendant, the bond would not thereby be avoided, as it did not appear that he did it without authority, and that the burthen of proof was on the plaintiff to prove that it was done without authority. The Judge instructed the jury, that if they were satisfied, that when the bond was executed, it was payable to *Colman*, and was altered by the defendant, it would be thereby destroyed as a legal instrument, the alteration being material, unless the person making the alteration had authority from the parties to the bond to make it; and that it was not incumbent upon the plaintiff to prove that the defendant had not such authority, but on the defendant to prove that he had authority to make the alteration. If the instructions were erroneous, the verdict for the plaintiff was to be set aside.

Tenney, for the defendant, contended, that the alteration was not a material one, and therefore the instruction was not correct. The bond related to the same property, the same question was to be tried, the liability would be the same, whether the bond was to *Colman* or to the plaintiff. *Barrett* v. *Thorndike*, 1 *Greenl.* 73; 2 *Stark. Ev.* 329; *Hatch* v. *Hatch*, 9 *Mass. R.* 307; *Smith* v. *Crocker*, 5 *Mass. R.* 538. And if the officer did not return a proper bond, it should have been taken advantage of by plea in abatement. *Cady* v. *Eggleston*, 11 *Mass. R.* 285. If the alteration was a material one, then the burthen of proof was on the plaintiff to show that the alteration was made without authority. The presumption is, that an officer does his duty. He acts under oath, and his return is testimony. The plaintiff adopts the alteration and goes to trial on the bond, which shows his assent, and the consent of the signers of the bond is to be presumed. *Hunt* v. *Adams*, 6 *Mass. R.* 522; 1 *Stark. Ev.* 376; 11 *Johns. R.* 513;

19 *Johns. R.* 345; 3 *East*, 192; 10 *East*, 216; *Com.* v. *Stow*, 1 *Mass. R.* 53; *Lane* v. *Crombie*, 12 *Pick.* 177.

Bronson, for the plaintiff, argued, that the alteration in the bond was a material one. It is the duty of the officer to take a good bond running to the creditor. The creditor does not see it, until he finds it returned with the writ. Even altering the date of a writ avoids it. *Clark* v. *Lyman*, 10 *Pick.* 45. It is said the liability is not changed by the alteration. They were not liable in any way before the alteration, and *that* places them under a heavy responsibility. If a man is willing to be bound to one, it by no means follows, that he is willing to be bound to every one. This is not an exception to the general rule, that the affirmative is to be proved. We show that there is no valid bond, because the defendant took a bond to another person, and altered it to run to the plaintiff. His return might be evidence in a suit between third persons, but is none in an action against him. The bringing of the suit on the bond does not excuse the defendant from his liability. He proceeded until he found it was a forged bond, and then abandoned the suit. His actually recovering judgment on the bond would not have afforded any excuse to the defendant, if the obligors had been without property. *Stat.* 1821, *c.* 89, § 5; *Clark* v. *Lyman*, 10 *Pick.* 45; *Loomis* v. *Green*, 7 *Greenl.* 386.

The opinion of the Court was drawn up by

Weston C. J. — We are very clear that the alteration was material. The sureties might be willing to be bound to *Colman*, from a conviction that he could not defend successfully, while for an opposite reason, they might have declined to enter into a bond to the plaintiff. The alteration then, if unauthorized, avoided the bond. The prosecution of the bond by the plaintiff, was no waiver of his claim upon the defendant for official delinquency. It does not appear that he was apprised that the alteration was made, after the execution of the bond. In making the alteration, the officer was not acting in the discharge of official duty, nor does the act receive any sanction from his official character.

It was his duty to take a valid bond. The violation of that duty is shown, by proving that he received and returned one which was invalid; more especially, if rendered such by his own act.

This was sufficiently proved at the trial, in the absence of all opposing proof. The act done by him was apparently wrong, and the implication against him must remain, unless he removes it by showing an authority. We are not aware of any reason, why it should be presumed, without evidence.

Judgment on the verdict.

Samuel Cole *vs.* Samuel G. Bodfish.

If a bond for the conveyance of land upon certain conditions be assigned by the obligee, and the obligor upon the back of the bond agree under his hand and seal with the assignee by name, to extend the time of performance limited in the condition of the bond; an action thereon cannot be supported by the assignee *in his own name.*

According to the practice in this State, a nonsuit may be *ordered* by the Court, if upon the plaintiff's own showing, his action is not sustained, subject however to his right to except to the opinion of the Judge.

Exceptions from the District Court for the Middle District, Redington J. presiding.

The action was debt, commenced *February* 24, 1836. To support the action, the plaintiff offered in evidence a bond from the defendant to one *Jabez Sawyer*, dated *June* 27, 1835, in the penal sum of $2000, conditioned to be void on the conveyance of a tract of land described in the bond, if *Sawyer* should within thirty days pay *Bodfish* $1225. On the back of this bond were written: — "For a valuable consideration paid to me in hand, I hereby transfer all my right, title and interest to the within bond to *S. E. Drew* of *Monson*. *June* 29, 1835. *Jabez Sawyer.*"

"For a valuable consideration, paid me by *Samuel Cole*, I hereby relinquish all my right and title to the within bond. *June* 29.

"*S. E. Drew.*"

"*July* 25, 1835. — I hereby agree with *Samuel Cole* to extend this bond to the 26th of *August* next, for value received. Witness my hand and seal. *S. G. Bodfish*, [L. S.]

"Attest, *Orin Morse.*"

The plaintiff also read in evidence a receipt, not under seal, of which a copy follows. "*August* 24, 1835.—Rec'd of *S. E. Drew* for *Samuel Cole* one hundred dollars in part of eight hundred dollars, the consideration in a deed to said *Cole* of this date from me. The above hundred dollars are received on a bond given to *Cole* by me for the land deeded to him by me this day, which deed is now in the hands of *Joseph Stockbridge*. *S. G. Bodfish*." The plaintiff offered to show by parol testimony, that the defendant had admitted the plaintiff to be the owner of the bond, and that the plaintiff had performed the conditions of it necessary to entitle him to a deed from *Bodfish*. This testimony was not admitted. The Judge ruled, that upon the evidence offered by the plaintiff in the case, the action could not be maintained in the name of *Cole*, and although the plaintiff wished to go to the jury, directed a nonsuit. The plaintiff filed exceptions. Questions in relation to the admissibility of testimony appear in the exceptions, but are not noticed, as the opinion of this Court was not influenced by them.

Wells, for the plaintiff, contended, that there was a sufficient contract, under seal, from *Bodfish* to *Cole* to enable him to maintain the action in his own name. The Judge should have permitted the jury to pass upon the evidence, instead of deciding the case himself by ordering a nonsuit. Here the plaintiff objected to the nonsuit, and in such case, the Judge cannot order it. *Mitchell & al.* v. *New-England Marine Ins. Co.* 6 *Pick.* 117; *Smith* v. *Frye*, 14 *Maine R.* 457.

Tenney, for the defendant, contended, that the Court have a right to order a nonsuit, when by his own testimony, admitted in its full extent, the plaintiff cannot support his action. In this case *Cole* has no right, by his own showing, to maintain the action in his own name.

The opinion of the Court was drawn up by

WESTON C. J.—The defendant executed a bond to *Jabez Sawyer*, upon certain conditions set forth therein. It was an instrument not negotiable in its character, so as to enable an assignee to bring an action in his own name. It had a penalty, and was subject to chancery. Assuming that the obligor did, subsequent to

the date of the bond, and after the beneficial interest had been assigned to the plaintiff, by an indorsement thereon, under his hand and seal, obligate himself to the plaintiff by name, to extend the time limited in the condition of the bond, a question arises, whether it would authorize the plaintiff to bring an action thereon in his own name.

Where a chose in action is assigned, such assignment may constitute a sufficient consideration, to sustain an express promise, on the part of the debtor, to the assignee, so as to enable the latter to maintain assumpsit in his own name. But this is based upon the new promise. If the obligor should, by express contract under his seal, undertake to oblige himself to fulfil the bond to the assignee, such undertaking would be sufficient to sustain an action of covenant broken, if the obligor failed to perform. But in this case, by the indorsement, the defendant only extends, for the benefit of the plaintiff, the time limited in the bond. And it may be doubtful, whether any other inference can be drawn from it. It would seem, that in all other respects the instrument remains unchanged. It may have the effect to recognize the assignment to the plaintiff, so as to protect his equitable interest from any interference by the original obligee. But an action must be brought in his name, if it becomes necessary to enforce the rights of the assignee.

According to our practice, a nonsuit may be ordered by the Court, if upon the plaintiff's own showing his action is not sustained, subject however to his right to except to the opinion of the Judge. *Sanford* v. *Emery*, 2 *Greenl.* 5; *Perley* v. *Little*, 3 *Greenl.* 97. Regarding every thing as proved, upon which the plaintiff relied, in our judgment he cannot by law support the action in his own name; so that the nonsuit must be confirmed. It becomes unnecessary therefore to determine the competency of a part of his testimony, or the ruling of the Judge upon that point.

Exceptions overruled.

AURIN Z. LITTLEFIELD *& al. vs.* JOHN KIMBALL, JR.

Where an equity of redemption has been attached, and is afterwards mortgaged a second time, and the mortgage is recorded, and the equity is then attached in another suit, and executions issuing on judgments in both suits are put into the hands of an officer, and the equity is sold on the first execution; he is not bound to search the registry and ascertain whether there has been an intermediate conveyance, but may appropriate the balance to satisfy the second execution, if he has no notice of the second mortgage.

A notice to the officer by the second mortgagee, that he had a mortgage upon the premises and that it was recorded, without exhibiting his mortgage or the evidence of his title, is not sufficient to require the officer to pay over the balance to him; but it is sufficient to inform the officer that a claim to it is asserted under the mortgage, and to make it his duty to retain the money a reasonable time after it was received to enable the mortgagee to establish his title by an exhibition of it, and to demand the money.

A reasonable time is not given for that purpose, if the money be paid over on the second execution on the day of the sale of the equity.

CASE against the defendant, a deputy sheriff, for refusal to pay over money received by him upon the sale of an equity of redemption in favor of *Andrew Morse, jr.* against *Dawes & Whitcomb*. *Dawes* had mortgaged certain land to *Andrew Morse, sen'r*, and the equity was attached by *Morse, jr.* in the suit in which the judgment was recovered. After this attachment *Dawes* made another mortgage to the plaintiffs, which was immediately recorded. The execution was seasonably in the hands of the officer, and he duly advertized the equity for sale. Before the sale was made, the plaintiffs gave information to the officer, that they had a mortgage of the same property, and stated to him that if he doubted it, they wished him to adjourn the sale and search the records, and offered to go with him to the registry, a distance of five miles, to search the records, but did not exhibit their mortgage to him. Thereupon an adjournment took place, and the sale was afterwards made. The report does not state for what time the adjournment was, or whether the sale of the equity was made on that or a subsequent day. The defendant sold the equity to one *Soule* for more than sufficient to satisfy that execution and fees, and applied the balance, $147,30, on the same day to satisfy in part an execution in his hands in favor of *Soule* against *Dawes*. The money

was applied to the payment of *Soule's* execution on the day of the sale. Before this suit was commenced, the plaintiffs demanded the money of the defendant. At the trial, before SHEPLEY J., after the facts were out, the parties agreed, that if the plaintiffs were entitled to recover, judgment was to be rendered by default; and if not so entitled, they were to become nonsuit.

Boutelle and *Leavitt*, for the plaintiffs, argued, that the plaintiffs were entitled to the balance, above satisfying the first execution, as their mortgage was given and recorded before any attachment by the second creditor. Our statute on this subject is a literal transcript of that of *Massachusetts*, and the decisions there are applicable here. The notice was sufficient. A mere notice of the assignment, without exhibiting any evidence of it, has been held sufficient. Here the officer dispensed with all evidence but the record, and adjourned to examine that. Notice of the claim is sufficient to protect it, in all cases of money held in trust. By paying the money, as the officer did, he must rely only on the right to pay over the money on the second execution. They cited *Bacon* v. *Leonard*, 4 *Pick.* 277; *Bigelow* v. *Wilson*, 1 *Pick.* 485; *Clark* v. *Austin*, 2 *Pick.* 528; *Brown* v. *Maine Bank*, 11 *Mass. R.* 153; *Davenport* v. *Woodbridge*, 8 *Greenl.* 17; 12 *Johns. R.* 343; 19 *Johns. R.* 95.

Tenney, for the defendant, contended, that on these facts the officer was bound to apply the balance to the satisfaction of the second execution. It is not enough for the plaintiffs to say to the officer, we have a mortgage, but they must exhibit to him the evidence of the existence of it. The officer is under no necessity of going to the registry to see whether there are mortgages after the attachment. Besides, the mere record of a mortgage is not the proper evidence of the existence of it. *Stat.* 1821, *c.* 60, § 20; *Foster* v. *Sinkler*, 4 *Mass. R.* 450; *Dix* v. *Cobb*, 4 *Mass. R.* 508; *Wood* v. *Partridge*, 11 *Mass. R.* 488; and *Clark* v. *Austin*, and *Bacon* v. *Leonard*, cited for the plaintiffs.

The opinion of the Court was by

SHEPLEY J. — The debtor having made a second mortgage of the premises to the plaintiffs, after the attachment and before the sale of the equity of redeeming the first mortgage, all the estate

more than sufficient to satisfy the lien thus created, passed to the plaintiffs; and their property cannot be appropriated to the use of the debtor or his other creditors, unless the plaintiffs have forfeited their rights by neglecting to make them known in such a manner as to protect them. The officer had a second execution in his hands, to which he was by law obliged to apply the surplus, if the money belonged to the debtor.

The plaintiffs had caused their mortgage to be recorded; but it has been decided, that it was not the duty of the officer to search the records to ascertain the existence of any such conveyance. *Bacon* v. *Leonard*, 4 *Pick.* 282. Before the sale of the equity the plaintiffs informed the officer, that they had a mortgage, and that it was recorded, but did not exhibit it to him. After an adjournment the officer sold the equity to the creditor in the second execution, and on the day of the sale applied the surplus to satisfy in part that execution. It is objected, that the notice to the officer was not sufficient to protect him. And it was not sufficient to have authorized him to pay to the plaintiffs without an exhibition of their title. But it was sufficient to inform him, that they asserted a claim to it, and to make it his duty to retain the money in his hands for a reasonable time after it was received, to enable them to establish their title by an exhibition of it, and demand of the money. The plaintiffs might reasonably conclude, that the purchaser would require the whole of the day of sale to make his payment and obtain his title; and the officer having on that day applied it to the second execution, did not afford them a reasonable opportunity to exhibit their title and demand the money, which he ought to have presumed from the previous notice would have been done in proper season. The notice was sufficient to put the officer on his guard and to prevent his applying the money in that hasty manner to the second execution; and he thereby committed a wrong, for which he must be responsible.

The defendant is to be defaulted, and judgment entered for the amount agreed.

AMOS S. HILL *vs.* SCHOOL DISTRICT No. 2, *in* MILLBURN.

In an action against a school district for the price of a school-house, alleged to have been built in pursuance of a contract with a committee of the district, the members of the committee, inhabitants of the district, are competent witnesses for the defendants.

In an action at law, when the question is, whether a party has performed a contract, requiring performance to be made by a fixed day, the Court cannot say, that the time of performance is immaterial.

Where the party contracts to build a house in a particular manner, a substantial compliance is not sufficient. It must be completed according to the contract.

Where one contracts to build a school-house in a particular manner, to the acceptance of a district committee, on land belonging to the district, and erects one thereon, which is not built according to the contract; and where the committee did not unreasonably refuse to accept it, and there was no express or implied acceptance; and where the district derived no benefit from the building; he cannot recover of the district the value of his materials.

The power given to a committee of a school district to build a school-house, gives by implication such a control of the land, and materials, and work, as to authorize them to give notice to the contractor to remove a building placed thereon by him, but not built according to the contract.

If there were defects in the earlier stages of the work in erecting the building, and the committee had waived those defects, yet the contractor would not be entitled to recover, unless the subsequent parts of the work had either been made conformable to the contract, or had been accepted.

After the committee had pointed out defects, and notified the contractor, that the house would not be accepted unless those defects should be remedied, and the contractor had replied, that he should do the work as he pleased, and did not wish for their adjudication or interference until the work was done, no implication can arise from the silence of the committee, that their notice was withdrawn, or these defects waived.

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

This was an action of assumpsit on a written contract, dated *Sept.* 5, 1835, entered into between the plaintiff and a committee of the district, who were inhabitants thereof, by which the plaintiff undertook to build a school-house for the defendants in a particular manner therein specified, to be completed by *November* 1, 1835. It was admitted, that the committee were duly chosen and author-

ized to make said contract and superintend the building. The plaintiff introduced many witnesses whose testimony tended to prove that the plaintiff had built the house according to the contract. The defendants introduced many witnesses whose testimony tended to prove that the house had not been built according to the contract. The committee men were offered by the defendants as witnesses. They were objected to by the plaintiff on the ground of interest. The objection was overruled, and they were admitted to testify. On the question whether the committee had accepted the house, there was much testimony. It was in evidence that they objected to the want of sufficient depth and width in the trenches dug for laying the foundations; to the materials with which the trenches were filled; the quality of the underpinning rocks, the bricks, and the foundation of the chimney; but that notwithstanding these objections, the committee permitted the work to progress, frequently complaining of some new deficiences in the materials or workmanship as the parts of the building were successively advancing; but according to their own testimony, they did not fully decide to reject the building, until the underpinning was completed, the chimney built, the roof shingled, and the clapboarding nearly finished. The committee testified, that on that occasion, that notwithstanding the defects they before discovered, they went to the house to see the progress made in the work, desirous to accept it, and to have the house completed, if it would answer the purpose; but finding that the defects in the materials and workmanship were such as to render it impracticable to have the house made in conformity to the contract, they then and there decided, that they should never accept the house, and thereof notified *George Moody*, the plaintiff's principal joiner, and *Randall Hill*, the plaintiff's son, the only persons then employed at work on the building, the plaintiff being absent, and further informed them, that if the plaintiff advanced any further in the work, he must do it at his own expense, and that the district would never pay. It did not appear that the committee on that occasion pointed out any new defects not before discovered by them. *Moody* and *Randall* testified, that they had no recollection of such rejection of the building, or of such a notice from the committee; and that they never communicated to the plaintiff such notice. The committee

further testified, that they afterwards called separately at the house, prompted by curiosity to see how the work progressed. That they however took no control or supervision in the thing; but that when appealed to occasionally by the workmen as to particular parts of the materials then being worked up, they replied, that the house would not be accepted; and that they took no agency in the business. It was however testified by some of the defendants' witnesses, as well as by some of the plaintiff's, that the committee continued to visit the house, and examine it, and act as committee men up to the completion of the building. The committee testified, that about the 18th of *November*, 1835, they were applied to by the plaintiff to examine and accept the building; that they thought it their duty to go and meet the plaintiff at the house, though they had never rescinded their former decision; and were fully resolved not to accept the house; that they met the plaintiff at the house, and without any further examination informed him, that they should not accept the house. The glass was not then set, and the painting was not finished; the painter was there at work, and the plaintiff informed the committee that he should immediately set the glass. They replied, that the want of the glass made no difference. It did not appear that they made any objection to the time of the job being finished. Prior to the day when the committee decided to reject the house, and notified *Moody* and *Randall*, thereof as aforesaid, there had been frequent interviews between the plaintiff and the committee; that they had frequently apprized him of defects in the work, and notified him that the house would not be accepted, unless these defects should be remedied. The plaintiff replied, that he should do the work as he pleased, should make a good house, and did not wish their adjudication or interference till the work was done. But notwithstanding said objections, the plaintiff not having been forbidden by the committee, but with their knowledge proceeded in the work up to the time of the rejection aforesaid, some of the committee assisting to frame and raise the building after knowing the alleged defects in the foundation works. The house was built upon the defendants' land at the spot designated therefor by the committee; but the district as such never accepted or used the building. In the season of 1836, the committee built another school-house on the same lot, and within

two or three rods of the building now in controversy; and it is that new school-house which the district have used ever since. It was not proved that any inhabitant of the district, except the plaintiff, had ever done any act from which an acceptance by the district could be inferred. The committee at said interview, on said 18th of *November*, notified the plaintiff to remove the building from the ground, but they had no other authority for so doing, than what resulted from their appointment as aforesaid, to procure and superintend the erection of a school-house. The plaintiff offered to prove, that the house which he built was composed of as good materials and workmanship as those put by the district into their new house; and that the house he built was in all respects as good a house as that built by the district. This evidence was objected to by the defendants' counsel, and was ruled by the Court to be inadmissible. The plaintiff's counsel insisted, that if the house was done according to the contract in every thing except as to time, he was entitled to recover the contract price, no objection as to time having been made by the committee, that it was a distinct contract on the part of the district; and they were bound to pay *when* it was done; that if the house was not done strictly according to the contract, but was done substantially according to its requirements, he was entitled to recover the contract price; that if there was a material failure of complying with the contract, yet if the labor and materials were of any value, he was entitled to recover what the labor and materials were worth according to the sum he was to receive for doing the job pursuant to the contract; that if he had failed of fulfilling his contract, yet if the committee were on the ground, and suffered the work to proceed, although they had made complaints, that this was an acceptance of the work piece by piece, and although they refused to accept when the whole was done, the plaintiff was entitled to recover; that if the committee unreasonably refused to accept the work at the end, the plaintiff was entitled to recover. The Judge instructed the jury to ascertain, first, whether the plaintiff had built the house according to the contract; that if he had not so done both as to materials, workmanship and time, he could not recover the contract price, unless the defendants had waived the time, of which the jury would judge from the evidence;—that if the work had all been done according to the

contract, and the committee had unreasonably refused to accept it, the plaintiff was entitled to recover the contract price ; and unless the contract was fully performed, their refusal to accept would not be unreasonable ; that if the job had not been so done, as to workmanship and materials, as to conform to the contract, the plaintiff could recover nothing in this action, unless there had been some express or implied acceptance, or unless there had been some benefit to the defendants from the plaintiff's labor and materials ; —that the erection of the house, though upon the defendants' land, was not such a benefit to the defendants, as to enable the plaintiff to recover, if the house had never been used and was rendered unnecessary as a school-house, by reason of the new house being built by the district, the Judge considering that the property of the building under such circumstances would be in the plaintiff; that if the committee had discovered defects from time to time as the work progressed, and threatened a rejection of the house on that account, it was still competent for them to waive those objections; that if by their subsequent declarations or acts, they encouraged or induced the plaintiff to proceed in the work, under an expectation that he would be paid, those proceedings by the committee might be considered as waiving their objections, and held as acceptances of the preceding parts of the works; that if the work though not in all respects done according to the contract, had been all accepted piece by piece, the plaintiff was entitled to recover such proportion of the contract price as the work done, bore to the work to be done pursuant to the contract; that if there were defects in the earlier stages of the work, and the committee had waived those defects, or accepted the parts to which such defects attached, yet the plaintiff would not be entitled to recover, unless the subsequent parts of the work had either been made conformable to contract, or had been accepted ; that if the plaintiff refused to allow the committee to examine the foundations and the work as it progressed and claimed that they should wait till he should declare the building completed, and if the committee in pursuance of said claim did so wait without deciding or acting upon any part of the work, the final rejection of the committee when called upon to decide, if made honestly and in good faith, would be binding on him, and the defendants would not be liable. The jury found a verdict

for the defendants, and the plaintiff filed exceptions to the rulings, opinions and instructions of the Judge.

Tenney and *Bronson* argued for the plaintiff. The grounds taken by the counsel are stated in the opinion of the Court. Under the first, they cited 2 *Stark. Ev.* 768. Under the fourth, they cited *Van Ness* v. *Pacard*, 2 *Peters*, 143; 1 *Kent*, 279; *Hayward* v. *Leonard*, 7 *Pick.* 181; *Waterhouse* v. *Gibson*, 4 *Greenl.* 230; *Hayden* v. *Madison*, 7 *Greenl.* 76; *Abbott* v. *Hermon*, 7 *Greenl.* 118; *Norris* v. *School District No.* 1 *in Windsor*, 3 *Fairf.* 293; *Miller* v. *Plumb*, 6 *Cowen*, 665; *Holmes* v. *Remsen*, 20 *Johns.* 229. Under the fifth, they cited 2 *Phil. Ev.* 83; *Lawrence* v. *Dale*, 3 *Johns. Ch. R.* 23; *Jewell* v. *Schrappel*, 4 *Cow.* 564.

Boutelle and *Wells* argued for the defendants.

The inhabitants of a school district are admissible witnesses by *stat.* 1821, *c.* 87. And are admissible independently of the statute. 2 *Stark. Ev.* 781, *note.*

The mode of building, quality of the materials, price, and time to be completed, were prescribed in the contract. Its meaning and force were well understood by the parties. The committee were the chosen men of both parties for the purpose of preventing dispute and litigation; and their decision, honestly and fairly made, would necessarily be final. *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21; *Mason* v. *Bridge*, 14 *Maine R.* 468.

The very agreement for building a school-house to the acceptance of the committee, implied the right of removal on non-acceptance.

They contended, that the finding of the jury, under the instructions, had settled the facts against the plaintiff, upon the supposed existence of which several of the objections urged for the plaintiff are founded. They commented upon the cases of *Abbott* v. *Hermon*, *Hayden* v. *Madison*, and *Norris* v. *Windsor School District*, and contended that they were clearly distinguishable from the present case; and cited *Knowlton* v. *Plantation No.* 4, 14 *Maine R.* 20.

The opinion of the court was drawn up by

SHEPLEY J. — It is insisted in the argument for the plaintiff, that the verdict ought to be set aside and a new trial granted: —

1. Because the committee chosen to build the house were admitted as witnesses for the defendants. The objection to them is not, that they were interested as members of the district, for that is removed by the provisions of the statute *c.* 87; but it is, that being agents of the district, if they have not acted faithfully, they are liable to the district and therefore interested. But a recovery in this case would not imply any fault on their part, and they do not therefore necessarily gain or lose by the result. And the verdict would not be evidence for or against them upon the trial of that question. They stand in this respect like town officers and agents, who have always been admitted as witnesses for their towns.

2. It is contended, that there was error in requiring the house to be finished within the time stipulated. There are cases, in which time is not regarded as of the essence of the contract, and equity will relieve against it. But in an action at law, when the question is, whether a party has performed a contract requiring that performance shall be made within a certain time, the Courts cannot say, that is immaterial, which the parties by their contract have made material. It is said, that the jury should have been instructed, that the testimony if believed, proved a waiver of the time. The Judge properly left it to the jury to consider whether there had been such a waiver proved, and if a more specific instruction was desired upon that point, it should have been requested.

3. It is said, the jury should have been instructed, that a substantial compliance was sufficient; that nothing is perfect, and that trifling defects may always be found. It may be quite true, that no mechanical work is perfect. The question did not arise upon the perfection of the work, but upon performance agreeably to the contract; and that, it is to be presumed, was practicable, and good faith required it.

4. That the jury should have been instructed, that if the plaintiff failed to fulfil his contract, he was entitled to recover for the value of the materials. The jury, under the instructions which were given, must have found, that the house was not built accord-

ing to the contract, that the committee did not unreasonably refuse to accept it, that there was no express or implied acceptance, and that the defendants had derived no benefit from it. Upon such a state of facts it would be difficult to perceive upon what principles of law or justice, the defendants should be required to make up to the plaintiff any portion of the loss occasioned by his own neglect or misconduct. There can be no just ground, upon which the defendants can be called upon to pay, unless it be their duty to take the building or materials and make the best use or disposition of them in their power and account to the plaintiff. What right has the plaintiff to call upon them to assume such a responsibility and duty? Are his faults to be made the occasion of imposing upon those, who are without fault, a task so undesirable? It should at least be shown before they can be required to do this, that they have refused to permit the plaintiff to remove them. The parties having agreed in the contract, that the building might be erected on the defendants' land, it was not placed there by wrong, and it could not for that reason become their property. It is said, that where a building is placed upon the land of another, it becomes his property, unless the party building, on account of the relation in which the parties stand toward each other, such as landlord and tenant and the like, be entitled to remove it. But where such relation does not exist, if it be put on by consent, the mere fact of placing it there does not transfer the property; some other act must take place to have that effect. It is true, that while a building is being constructed for another under a contract, it must be regarded as so far attached to the freehold, that it cannot be removed until the owner of the land by refusing to accept it disclaims the ownership, because the design is, that it should be built for his use; and it is to be his upon condition, that he does not reject it on the ground, that it has not been built according to agreement. But when he does so reject it, his conditional title is terminated, especially when he has also directed it to be removed. It is said, that the committee had no authority to notify the plaintiff to remove the building. The power to build the house, gives by implication such a control of the land and materials and work, as to enable them at all times to reject and displace any materials wrought or unwrought, and

in any state of preparation; and this power is not lessened or lost until the whole trust is executed, and their power thereby extinguished. The argument supposes, that the Judge instructed the jury, that the house could not be beneficial to the district, because another had been built. But the language used by him is not liable to such a construction. He instructs the jury, "that it was not such a benefit to the defendants, as to enable the plaintiff to recover, if the house had never been used and was rendered unnecessary as a school-house, by reason of the new house being built by the district," thereby submitting it to the jury to decide, whether for that and other reasons it was or not beneficial to the district.

5. The Judge instructed the jury, "that if there were defects in the earlier stages of the work, and the committee had waived those defects, or accepted the parts to which such defects attached, yet the plaintiff would not be entitled to recover, unless the subsequent parts of the work had either been made conformable to the contract, or had been accepted;" and it is said, that in this there was error. And the argument is illustrated, by supposing a well to have been sunk and accepted to the top stones, and those to have been improperly and unfaithfully laid. In the supposed case, the parts faithfully and unfaithfully executed would not be so connected as to be incapable of separation and re-construction without an injury to, or a destruction of, the whole work. Such would not usually be the condition of the unfaithful construction of parts of a building. What value would there be in the well constructed parts of a building combined with other parts so badly constructed as to render the whole building unsuited to the purposes for which it was designed? But if that argument be not satisfactorily answered, it is sufficient to justify the instructions, that if parts were accepted, it must be implied, that they were so only upon condition that the remaining parts should be built according to the contract.

6. It is said, that the notice to the workmen was insufficient. Admitting it to be so, the case states, that the committee had before pointed out defects, and "notified him, that the house would not be accepted, unless these defects should be remedied." And "the plaintiff replied, that he should do the work as he pleased, should make a good house, and did not wish their adjudication or interferance till the work was done." After such a notice to them no im-

plication could arise from their silence, that their notice was withdrawn, or that his acts were approved; and he cannot reasonably complain of their neglecting to give him any further notice until they were called upon to accept the house.

In the case of *Norris* v. *School District in Windsor*, 3 *Fairf.* 293, the work had proceeded under the eyes of the committee without objection except by one, who was not regarded as authorized to speak for them. And such conduct was considered as equivalent to an acquiescence, from which the jury might infer a promise to pay.

In the case of *Knowlton* v. *Plantation No.* 4, 14 *Maine R.* 20, the cases of *Hayden* v. *Madison*, and of *Abbott* v. *Hermon*, are commented upon, and fully distinguished from such a case as the present.

Judgment on the verdict.

John Drummond *vs.* Josiah P. Churchill.

In a suit upon a bond where the acts to be done by the parties respectively, by the condition of the bond, were to be concurrent, the plaintiff cannot maintain an action without proving a tender on his part, unless it is expressly waived by the defendant, or excused by his disability.

If the obligee, on the last day of performance, say to the obligor that the money was ready for him whenever he would give a deed, but produces no money, and the other party reply, that he would procure him a deed, but immediately goes away; this is no waiver of performance or of the tender thereof.

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

Debt upon a bond the condition of which was, that "if the said *Churchill* shall make out and deliver to the said *Drummond*, or cause to be delivered, a good warranty deed of (a lot of land described,) and the said *Drummond* shall pay or cause to be paid to the said *Churchill* the sum of fifty dollars in six months, then this obligation," &c.

It was proved, that on the last day on which the conditions of the bond could be performed, *Sawyer*, the assignee of the bond, met *Churchill* in *Sawyer's* store, and notified *Churchill*, that the money was ready for him whenever he would give a deed, and *Churchill* replied that he would procure him a deed, and spoke to a person standing by to write one, and went immediately away. At the time when this conversation took place the plaintiff had in another room in the house in a trunk locked, silver, which was lawfully a tender, belonging to him as administrator of an estate, to an amount exceeding the sum to be paid for the land. No deed was tendered by the defendant to the plaintiff, nor was one offered by the plaintiff to the defendant for his signature. A nonsuit was ordered by the Judge, on the ground, that the plaintiff had not introduced sufficient evidence to entitle him to a verdict; and the plaintiff filed exceptions.

Tenney argued for the plaintiff, and to the point that the plaintiff had done what was necessary to entitle him to recover, cited 3 *Stark. Ev.* 1393; *Com. on Con.* 41; 10 *Johns. R.* 233; *Aiken* v. *Sanford*, 5 *Mass. R.* 494; 2 *Johns. R.* 145; *Gardiner* v. *Corson*, 15 *Mass. R.* 500; *Tileston* v. *Newell*, 13 *Mass. R.* 406; *Hunt* v. *Livermore*, 5 *Pick.* 395; *Howland* v. *Leach*, 11 *Pick.* 151; *Kane* v. *Hood*, 13 *Pick.* 281; 2 *Johns. R.* 207; 10 *Johns. R.* 268. And to the point that there was a waiver of the tender, cited *Borden* v. *Borden*, 5 *Mass. R.* 67; *Frazier* v. *Cushman*, 12 *Mass. R.* 277.

Bronson, for the defendant, contended, that there should have been an actual offer of the money. *Brown* v. *Gilmore*, 8 *Greenl.* 107. And that there was no waiver in this case; and that performance, or tender of performance, by the plaintiff on his part was necessary. *Brown* v. *Gammon*, 2 *Shepl.* 276.

The opinion of the Court was by

Weston C. J. — The acts to be done by the parties respectively were, by the condition of the bond, to be concurrent. In such case, the plaintiff cannot maintain an action, without proving a tender on his part, unless it is expressly waived by the defendant, or excused by his disability. *Brown* v. *Gammon*, 14 *Maine R.*

276. No tender was proved, and no facts appear in the case, which would dispense with its necessity.

Exceptions overruled.

Aurin Z. Littlefield *& al. vs.* Jonathan Smith *and* Edward S. Moulton, *as his Trustee.*

A chose in action may be assigned for a valuable consideration by the delivery of the evidence of the debt without any written transfer.

An assignment of a chose in action which is valid between the parties, and where there is no fraud, cannot be defeated by a trustee process.

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

The following is a copy of the survey bill referred to in the disclosure. "*Moscow, April* 1, 1836. Surveyed for *Edward S. Moulton & Co.* of *Saco,* 103.342 feet of timber, hauled by *E. Ford* and *J. Smith* of *Brighton,* at 10*s.* 6*d.* per thousand — payment as follows — one third in *June* next, one third in *September* next, and one third in *December* next. *Wadsworth Boulter,* Surveyor."

On the back was written without date. "We, the subscribers, indorse this billl, holden for debt and costs, and waive demand and notice. *E. Ford, Jona. Smith.*" And on "*July* 2, 1836. Rec'd of *E. S. Moulton* fifty dollars in part of the within."

The facts are stated in the opinion of the Court.

E. Allen, for the plaintiff, contended, that this being a partnership, and *Moulton* alone being summoned as trustee, he cannot be charged. *Collyer on Part.* 15; *Cushing on Tr. Pr.* § 87, 88.

There was no adequate evidence furnished of a partnership between *Smith* and *Ford,* and therefore any assignment of *Smith* alone would not pass the property. 6 *Cowen,* 151; *Perkins* v. *Parker,* 1 *Mass. R.* 117; 3 *Peere Wms.* 199.

There was no delivery over of the evidence of the debt. The survey bill was merely to show the quantity of the logs, not that

Moulton was the debtor of *Smith*. *Lowell* v. *Foster*, 4 *Mass. R.* 308.

C. Greene, for the trustee, contended, that here was a sufficient assignment of the demand to *Jewett*, before the service upon the trustee, to pass the equitable interest to him. *Jewett* had paid the consideration, the debt had been verbally assigned to him by *Smith* and *Ford*, who were partners, and the survey bill containing the contract delivered over to *Jewett*. Here the transaction was honest and open and for a full consideration, and that is what the Court look at in determining whether there is or is not an assignment, rather than the form.

The opinion of the Court was drawn up by

SHEPLEY J. — The statement of the principal, *Smith*, is by the agreement of the parties received, and it makes a part of the case. He says, that the debt due to him was agreed to be assigned to *Jewett* in part payment of a debt, and that the survey bill was delivered to him before the service of the writ. And that a written transfer was made on the back of the bill after the service of the writ, which was exhibited to the trustee, and made a part of his disclosure. This bill appears to have been the regular evidence of the debt due to *Smith*, for it not only states the service performed, but the different times at which payment was to be made by instalments, and the trustee declined payment to *Smith* without a production of it.

Smith could legally assign his own interest in the debt due to him and *Ford*, and this he had done before the service, if the transactions between him and *Jewett* were sufficient for that purpose. It has been decided, that a chose in action may be assigned for a valuable consideration, by delivery only, without any written transfer. *Clark* v. *Rogers*, 2 *Greenl*, 143; *Vose* v. *Handy*, 2 *Greenl.* 322; *Briggs* v. *Dorr*, 19 *Johns. R.* 95. And such an equitable assignment will be protected. *Smith* could not have defeated the rights of *Jewett* as they existed at the time of the service, and the plaintiffs are in no better condition.

Exceptions overruled.

SAMUEL WYMAN *vs.* EPHRAIM HEALD *& al.*

In an action between the original parties, commenced more than six months after its date upon a note, given as the consideration for a bond from the payee to the maker to convey a tract of land upon the payment of a certain sum within six months, where the contract was made and the note given by reason of the false and fraudulent representations of the plaintiff in relation to the quality, situation and value of the land, and where the land was found to have some value, but far less, than it was represented to have had at the time the contract was made, no conveyance of the land having been made from the plaintiff to the defendant; — *it was held*, that it was competent for the defendant to prove the fraud in defence of the note, although he had not offered to return the bond until the time of trial, long after the six months had elapsed, and had not shown that he had remained ignorant of the fraud.

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

Assumpsit on two notes of hand, given to the plaintiff by the defendants *Heald*, *Cragin* and *Witham*, *Oct.* 9, 1835, as the consideration of a bond of the same date, from the plaintiff to *Witham*, in which the plaintiff agreed to convey to *Witham* a tract of land on certain conditions. The bond is referred to as part of the case, but no copy of it is found in the exceptions, or in the papers in the case here. It appeared, however, from the testimony in the case, all of which was recited in the exceptions, that the land actually described in the bond, when run out accurately by a surveyor, was principally upon *Mount Bigelow*, and of very little or no value. The defendants introduced several witnesses to prove, that the plaintiff before and at the time of the sale had represented the land to them to be situated in a different place, to be well timbered, and that half of it was good settling land, and in other respects different and more valuable than that described in the bond. To the admission of this testimony the plaintiff objected, and contended, that as the tract was truly described in the bond, no parol representations or opinions that the land was situated in a different place from what it in fact was, on the part of the plaintiff, ought to be received in evidence in this action. The Judge admitted the testimony. The plaintiff contended, that the testimony, if admissible and true, did not impair the right of the plaintiff to recover

on said notes. The Judge ruled, that it was proper for the jury to weigh the testimony, and determine whether it did, or did not, support the issue on the part of the defendants. The plaintiff introduced testimony for the purpose of showing that there was no misstatements made to the defendants by the plaintiff, and that the defendants knew where the land was in fact situated, before, and soon after the notes were given. The defendants, during the trial, deposited the bond with the Clerk of the Court for the use of the plaintiff, but the plaintiff did not give his assent to it. There was no evidence that the bond had before been offered to the plaintiff.

The plaintiff again contended, that on the facts proved, he was entitled to recover.

The exceptions state, that the Judge instructed the jury, that if they found, that the notes in suit were given in consideration of the bond; that the land described in the bond lies principally to the south of the summit of *Mount Bigelow*; that to *Witham*, and to *Viles*, when he was known to the plaintiff to be acting as the agent of *Heald*, in exploring the land with a view to ascertain the quantity and description of the timber growing thereon, or if to either of the defendants, the plaintiff did falsely represent that the land covered by the bond was situated wholly to the north of the summit of *Mount Bigelow*, and point out the same as lying north of the summit; that the defendants when they gave the notes did really believe that the bonded land lay north of the summit of said mountain; that they were led into this belief by the false representations of the plaintiff; that the plaintiff, when making those representations, knew them to be false; that said false representations were made by the plaintiff for the purpose of fraudulently deceiving the defendants, or either of them, and of fraudulently obtaining the notes of the defendants for the value of the land north of the mountain, while he intended to bond, not the land which he had pointed out, but the other tract; that he did obtain the notes with said fraudulent intent; and that the land covered by the bond was decidedly less in value than the land pointed out as aforesaid; then the plaintiff cannot recover in this action. But if they did not find all the foregoing propositions in favor of the defendants, then their verdict would be for the plaintiff. And the Judge further instructed the jury, that in deciding whether the defendants did believe that the

land they expected to obtain would lie north of the top of the mountain, they might take into consideration any knowledge which they might believe the defendants had upon the subject, arising from their residence in the neighborhood or from other sources; that if the plaintiff did make the false representations, and for the fraudulent purposes aforesaid, yet if the defendants did not believe them, but took the bond and gave their notes, knowing or expecting that the bonded land would be found to lie where in fact it does lie, then the defendants were liable upon the notes; and that independently of all other considerations in this case, if they found the land covered by the bond was wholly worthless and of no value, then the action cannot be sustained; but if the land was of any value, their verdict would be for the plaintiff. The jury returned their verdict for the defendants, and stated *that they found the land to be of some value.* The plaintiff excepted to the admission of evidence, and to the rulings and instructions.

Wells, for the plaintiff, in his argument, contended: —

1. The defendants can only claim to rescind the contract on the ground of frand. The want of consideration was negatived by the finding of the jury, that there was some value in the land. If they would rescind the contract on account of fraud, they were bound to return the bond in a reasonable time to the plaintiff, and they should have been prompt in their action. *Hunt* v. *Silk,* 5 *East,* 449; *Kimball* v. *Cunningham,* 4 *Mass. R.* 502; *Norton* v. *Young,* 3 *Greenl.* 30; 17 *Johns. R.* 439; 2 *Kent,* 470; 1 *Campb.* 190. There was no offer to return the bond, unless at the trial two years afterwards. During all this time, the defendants had the right to take advantage of the market, and sell at an advance, and it was too late to rescind the contract. If the suit on the notes had the effect to enlarge the time of performance, it could have none upon the time of rescinding the contract.

2. The defendants were bound to use ordinary prudence. It is not for every falsehood, against which common prudence might guard, that the law will give an action. Strong representations are expected to be made by vendors. *Chitty on Con.* 135, 137, 222; *Bean* v. *Herrick,* 3 *Fairf.* 269; 12 *East,* 632. If the information is derived from sources to which both parties have access, as in this case, equity will not afford any relief, even against false

representations. *Jeremy on Eq.* 385; *Stebbins* v. *Eddy*, 4 *Mason*, 414. And courts of law will not go farther than courts of equity in cases of this kind. The jury should have been instructed, that the defendants were bound to use ordinary prudence.

3. It does not appear, that the plaintiff knew where the limits of the tract described in the bond would fall. If the defendants were deceived, so was the plaintiff; and as they had the same means of knowledge, that he had, the presumption is that both parties labored under a misapprehension as to the location of the land. There is no evidence in the case showing fraud on the part of the plaintiff, and the land was of some value, and therefore the defence is not made out, and there should be a new trial. The evidence was examined by the counsel to show that his conclusions were rightly drawn.

Tenney, for the defendants, insisted, that under the instructions of the Judge, the jury must have found, that the plaintiff represented the land as almost entirely different from that described in the bond; that although the land was of some value, yet it was of decidedly less value than the plaintiff represented it to be; that such representations of the plaintiff were false and fraudulent; that he knew them to be so at the time they were made; that he made them with a design to defraud the defendants; that the defendants at the time did not know those representations to be false, but supposed them to be true by reason of the false and fraudulent conduct of the plaintiff; and that the notes were obtained by the plaintiff by reason thereof. To recover these notes then would be to enable the plaintiff to recover the fruits of his own false and fraudulent conduct.

There is no testimony in the case to show, nor is it shown by the finding of the jury, at what time the fraud was discovered by the defendants. If the time of performance has not been extended beyond the time limited in the bond, there is no ground to presume, that the fraud could be known to the defendants before that time expired, and the bond was then entirely void and worthless, and need not be returned. If the course taken by the plaintiff, in attempting to enforce the payment of the notes after the time limited in the bond for the defendants to take the land had expired,

extends the time for taking it, then the tender of the bond in court is soon enough.

But when a promise has been obtained as it is found this was, by falsehood and fraud, it has no binding obligation, and the party making it is at liberty at all times to treat it as a nullity; it cannot be enforced against his will; it is as though never made; and nothing is necessary for the defendants to do, when they have not availed themselves of the consideration. When the action was brought, the title to the land was in the plaintiff, and so remains to this time, and he might dispose of it as he pleased. There was no property of the plaintiff in the hands of the defendants for them to return in order to rescind the contract. *Com. on Con.* 58; 2 *Stark. Ev.* 586, 739; 3 *Stark. Ev.* 1015; 8 *T. R.* 147; 1 *Dane's Ab.* 173; 9 *Mass. R.* 270; 13 *Mass. R.* 371; 15 *Mass. R.* 113; 16 *Mass. R.* 348; 2 *Johns. R.* 177; 13 *Johns. R.* 430, 302; 20 *Johns. R.* 129; 7 *East,* 473; 2 *Pick.* 191; 6 *Greenl.* 187; 8 *Mass. R.* 46; 7 *Mass. R.* 112; 1 *Greenl.* 378; 4 *Greenl.* 306, 488; 8 *Greenl.* 515. The person making a false representation is answerable for the injury occasioned thereby. 4 *Mass. R.* 502; 8 *Pick.* 250; 13 *Mass. R.* 139.

The opinion of the Court was drawn up by

Emery J. — The plaintiff contends, that because the jury found there was some value in the land for which the bond was given, the defendants were bound to return the bond in a reasonable time to the plaintiff, and should have been prompt in their action; that as the bond was given in *October* 9, 1835, and not returned to the clerk until the trial in *November,* 1837, it was too late, especially as the plaintiff did not consent to that course. Generally speaking, if one would rescind a contract of sale on the ground of misrepresentation or fraud, he should return seasonably the article in which he has been deceived. We consider that in this case every thing was executory. The plaintiff still holds the land. Now when the suit is upon the notes it is proper to make defence against it on the ground which has been assumed. And so far as we can trust to the verdict of the jury, the notes were obtained by false representation of the situation and quality of the land, for the conveyance of which the bond was given. We have had occasion to

express our views on this subject, in the case of *Robinson* v. *Heard*, in the county of *Cumberland*, in 15 *Maine Rep.* 296, to which we refer. And we are satisfied, that in such a state of facts as the jury have pronounced to be fraudulent representations, we cannot see a reason for setting aside their verdict. The credit to be given to the witnesses was all resting with the jury. The Judge was not called upon to express any opinion whether the defendants had exercised ordinary prudence in assenting to the contract. And though the circumstances disclosed, seem to present a fair ground of argument, that the defendants were not the victims of a sudden impulse, we do not perceive any evidence that the plaintiff was not well disposed to keep up the illusion.

The jury seem to have been deeply impressed with the belief, that notwithstanding the land was of some value, that the fraudulent representations made by the plaintiff, relieved the defendants from the responsibility of paying their notes. What the value was, is not found. But we cannot say, the verdict is against the weight of evidence, or with such facts as the jury have pronounced upon, that it is against law. The fraud vitiates the whole.

The exceptions are therefore overruled.

Inhabitants of GUILFORD *vs. Inhabitants of* ABBOTT.

If a pauper be likely to become chargeable to a town by falling into distress there, such town has a remedy, under the *stat.* 1821, *c.* 122, *by complaint* against the town wherein the pauper has his legal settlement, although a place has been provided for his support in the town where the settlement is.

If at the time of the trial, the removal of the pauper has already been effected, so that a warrant for his removal has become unnecessary, the complaint may still be prosecuted for the recovery of the expenses incurred.

If the complaint allege, that *the pauper was likely to become chargeable* to the town, it is competent for the Justice at the trial, to allow an amendment of the complaint by adding after *chargeable*, the words *by reason of age and infirmity.*

In a complaint under the *stat.* 1821, for the relief of the poor, *c.* 122, if the pauper be not summoned nor present at the trial, the judgment will not be reversed for such omission at the instance of the town where the settlement of the pauper may be.

WRIT of error to reverse the adjudication of REDINGTON J. in the Court of Common Pleas, that one *Andrews* had his legal settlement in *Guilford.* From the record it appears, that the complaint of the inhabitants of *Abbott* against the plaintiffs in error was instituted by the overseers of the poor, *June* 16, 1837, before a Justice of the Peace, for the removal of *Ephraim Andrews*, alleging, that his lawful settlement was in *Guilford*, and that he was likely to become chargeable to *Abbott* by reason of age and infirmity. It was admitted, that his legal settlement was in *Guilford.* It was proved, that at the time of filing the complaint he was over eighty years of age, had strength to perform some labor, and was abundantly able to travel from town to town, but for many years had no regular or stated business. More than twenty years before the adjudication, which was at *March Term*, 1838, *Andrews* was at one time so furiously mad, that the public security required him to be confined, and occasionally since that time, he has been deranged in mind. From *March* to *July* 1837, he was insane, roving in great destitution in several neighboring towns, and was in *Abbott* when the complaint was filed. He was a pensioner, receiving from the *United States* forty-eight dollars per year. In *February*, 1837, *Andrews* fell into distress in *Abbott*, and was relieved by the overseers to a small amount. The overseers of *Guilford* on

receiving notice of this expense repaid it, and caused *Andrews* to be removed to *Guilford*, and at the same time notified the overseers of *Abbott* that a place in *Guilford*, the house of one *Herring*, was provided for the maintenance of *Andrews*, and forbade any future expense to be incurred by *Abbott* on his account. In 1822 for some consideration paid by *Andrews*, a bond was given to him for his maintenance during life by *Herring*. Several years ago, *Andrews* without any just cause became dissatisfied with his treatment at *Herring's*, and since that time has wandered about from town to town. It was proved, that *Andrews*, while at *Herring's* house, had conducted with great impropriety, and was a very turbulent and quarrelsome old man. *Andrews* was not cited as a party or witness in this process. The complaint originally stated, that *Andrews* was likely to become chargeable, but did not state on what account, and was amended, on leave granted, by adding after *chargeable*, the words *by age and infirmity*. To this amendment the then defendants objected.

Upon this evidence, the Judge of the Common Pleas decided, that the complaint was sustained, and thereupon rendered judgment for the removal of *Andrews*, and that the complainants recover the expenses incurred in maintaining *Andrews* seventeen weeks subsequent to the filing of the complaint, amounting to forty dollars, and costs of process.

The errors assigned by the inhabitants of *Guilford* were: —

1. That *Andrews*, the pauper, had a place of residence provided for him in the town of *Guilford*, and therefore was not likely to become chargeable to any other town.

2. That he was at the time of the trial at the Court of Common Pleas, and for months before that time, in *Guilford* at the house provided for him.

3. That the complainants originally charged, that said *Andrews* was likely to become chargeable, and did not state from what cause he was likely to become chargeable, and did not assign any of the causes mentioned in the statute.

4. That said *Andrews* was not cited as a party or witness in the aforesaid process, and was not present at the hearing.

5. The general error.

Tenney, for *Guilford*, argued, that the defects pointed out in the assignment of errors, were sufficient to require the Court to reverse the judgment. He cited *Walpole* v. *West Cambridge*, 8 *Mass. R.* 276.

C. Greene, for the original complainants, contended, that there was no cause for reversing the adjudication.

It is the duty of the town, where a pauper is found in want, to relieve him, and may recover it of the town where his settlement may be found. The town cannot delay, and suffer the pauper to starve, while they inquire whether some person or other has agreed to support him. Here the pauper was not only likely to become chargeable to *Abbott*, but had been so shortly before, and was again shortly afterwards. *Stat.* 1821, *c.* 122, § 11. If the pauper was at *Guilford* at the time of the trial, that does not take away the right to go on with the complaint. It may proceed even after his death. § 16. This is not a criminal proceeding, but is subject to amendment like any other civil process. The town and the pauper are independent parties, and it may be good as to one and bad as to the other. It is not necessary to inquire whether the law requires an insane pauper to be notified, as he does not complain. It was decided as early as in *Shirley* v. *Lunenburgh*, 11 *Mass. R.* 379, that the town cannot take advantage of the omission to notify the pauper. The part of the statute on which this decision was made has since been re-enacted in this State in the same words, and therefore with the construction put upon it at the time by the Court.

The opinion of the Court was drawn up by

Weston C. J. — We are of opinion, that neither of the errors relied upon have been well assigned. If the pauper was likely to become chargeable to the town complaining, by falling into distress there, they were bound to relieve him, under the act for the relief of the poor, *stat.* of 1821, *c.* 122, § 11, notwithstanding a place may have been provided for his support, in the town where he had his settlement. And to be relieved from this liability, the remedy here pursued is given.

If at the time of the trial, his removal had already been effected, so that a warrant for that purpose was no longer necessary, the

complaint might however be prosecuted for the expenses incurred, as it may under the sixteenth section, where the pauper has actually deceased. The third error assigned is removed by the amendment, which in our judgment it was competent for the justice to allow. The complaint is a civil remedy, not a criminal prosecution. As to the omission to cite the pauper to appear, it was not to the prejudice of the plaintiffs in error. The pauper alone could avail himself of this error, as was directly decided in *Shirley* v. *Lunenburgh*, 11 *Mass. R.* 379. In regard to the proceedings under consideration, our statute is a transcript of that of *Massachusetts*, existing at the time of our separation.

Judgment affirmed.

Eleazer Eddy *vs.* Alexander Herrin *& al.*

A lawful imprisonment is no duress.

Where the defendant was induced from the threat of a lawful imprisonment upon a warrant for an assault and battery upon the plaintiff to submit to others the amount to be paid as a satisfaction for the injury, and also to give a note for the amount thus ascertained, such note cannot be avoided for duress.

But had the note been obtained from threats of an unlawful imprisonment, it might have been avoided.

Exceptions from the Court of Common Pleas, *March Term*, 1839, Redington J. presiding.

The action was originally commenced before a Justice of the Peace upon a note from the defendants to the plaintiff, dated *Jan.* 19, 1833, for thirteen dollars, payable in six months. After the action had been entered by appeal, in the Court of Common Pleas, it was referred by rule of that Court to referees, to be decided upon legal principles. In *March*, 1839, the referees heard the parties, and made a special report, stating the facts proved, and concluding, that if upon the facts duress upon *Herrin* was shown, such as by law would avoid the note, they award costs for the de-

fendant; but if the note is not void in the opinion of the Court, then they award that the plaintiff should recover the amount thereof with costs. The referees state in their report, that the defendants, before them, rested their defence upon two grounds. 1. That the note was obtained by duress. 2. That it was void for want of consideration. The material facts are stated in the opinion of this Court. The Judge of the Court of Common Pleas ordered judgment to be rendered for the defendants, and the plaintiff filed exceptions.

E. Allen, for the plaintiff, said, that the warrant for an assault and battery was legal, and that abundant cause was shown for issuing it. There is nothing to show that more was included in the note than a fair compensation for the injury to the plaintiff. In fact the reverse is shown, for the parties left to others to say what would be a fair compensation, and the plaintiff gave up a part of that to obtain a surety. There was no evidence of any agreement of the plaintiff not to have the warrant served. The award of the referees was conclusive between the parties. *North Yarmouth* v. *Cumberland*, 6 *Greenl.* 21; *Brown* v. *Bellows*, 4 *Pick.* 179.

A mere threat to prosecute for legal cause is no duress. Even the actual arrest of the party does not operate as duress, if the imprisonment be lawful. *Tyler* v. *Dyer*, 1 *Shepl.* 41; *Whitefield* v. *Longfellow*, *ib.* 146; 8 *Petersdorff's Ab.* 496.

Kidder, for the defendants, argued, that the note was void for duress. And he also contended, that it was void for want of consideration, and cited *Chase* v. *Dwinal*, 7 *Greenl.* 134.

The opinion of the Court was by

Weston C. J. — The plaintiff having a claim upon the principal defendant, for an injury done to his person, the parties agreed to refer the matter to the arbitration of others, upon whose award, subsequently partially modified by mutual consent, the note in question was given. This constituted a sufficient consideration; and the plaintiff is entitled to recover, unless the defence of duress, set up by the defendants, has been sustained. The burden of proof is upon them.

The plaintiff had made a complaint against the principal defendant, and had procured a warrant for his arrest, to answer to

the charge. This he had a right to do; and if the defendant had been thereupon arrested, the imprisonment, or restraint of his person, would have been lawful; and a lawful imprisonment is no duress. The referees have found, that no arrest was made. The defendant was given to understand, that he would be arrested, unless the parties effected a settlement. With a view to this, they went to *Skowhegan-falls.* The officer testifies, that he would not have suffered him to have escaped. By which we are to understand, that if he had attempted to do so, he should have arrested him. This was no more than the precept of the warrant, and his duty, required. The referees further find, that the fear of the prosecution of the warrant, or in other words, an arrest under it, induced the principal defendant to enter into the arbitration, and also to accede to the final proposition of the plaintiff, to accept a note for a less sum, than was awarded in his favor, with the defendant's father as a surety.

The prosecution of the warrant, and the arrest as incident to it, was a lawful course of proceeding. The threat, therefore, of such an arrest, and the fact that the defendant was induced by it to give the note, did not constitute duress, as it would have done, if he had acted from the fear of unlawful imprisonment. *Whitefield* v. *Longfellow & als.* 13 *Maine R.* 146. In our judgment, therefore, the defence of duress, which is submitted to the determination of the Court, has not been made out. The exceptions are accordingly sustained; and the plaintiff is entitled to judgment on the report.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF PENOBSCOT, JUNE TERM, 1840.

GUSTAVUS W. HAWES *& al. vs.* SIMON B. DINGLEY.

Where the question to be tried is, whether the goods claimed by the plaintiffs, which had been attached by an officer, as the property of one who was alleged to have purchased the same of them, were obtained of the plaintiffs by the debtor by means of false representations, with intent to defraud the sellers; false and fraudulent representations made by the debtor about the same time to others in the same town, of whom also he had obtained goods thereby, are admissible to prove a formed design to commit frauds in that manner, from which, connected with other proof, the jury may infer, that the contract under investigation was made by reason of similar representations.

Where goods can be reclaimed by the seller from the purchaser, because the sale was effected by the false and fraudulent representations of the latter, the same right of reclamation exists against an officer attaching them as the property of the fraudulent purchaser.

REPLEVIN for certain articles of merchandize, which were claimed by the defendant, a deputy sheriff, by virtue of an attachment thereof as the property of *William P. Kelley* and *Jonathan Jewell*, on a writ against them in favor of one *Sawyer*. The plaintiffs claimed the property, because they alleged, that they had been induced to part with the possession of it by means of false representations made to them by *Kelley & Jewell*, with intent to defraud them of the goods. To maintain the issue on their part, at the trial be-

fore WESTON C. J., the plaintiffs offered testimony contained in certain depositions, to show that *Kelley & Jewell* had made false representations to other dealers in *Boston*, where the plaintiffs resided, and where the goods were obtained, about the same time, and thereby obtained goods of them, and that at the time of making these representations, *Kelley & Jewell* referred those of whom they obtained the goods to the plaintiffs. To the introduction of this evidence, until proof had first been made of representations made to the plaintiffs, the defendant objected. The plaintiffs made no offer to prove declarations made directly to themselves, but contended, that the testimony was admissible as circumstantial evidence, from which, coupled with the references to the plaintiffs, the jury might fairly infer that similar representations were made to them. The Chief Justice excluded the testimony.

The plaintiffs then offered to prove that a fraudulent transfer of a large part of the goods purchased of the plaintiffs, was made on board the vessel in which they were carried from *Boston* to *Bangor*, and a second transfer immediately after their arrival; that the goods were landed at an unusual place, at a distance from the store of *Kelley & Jewell* situated near a convenient landing place, carried to the store of another person and piled up there in the chamber of the store; that others who had sold goods to *Kelley & Jewell* had claimed to take them back on account of fraud, and that the goods had been given up; and that *Kelley & Jewell* became insolvent before the goods were landed at *Bangor*. The plaintiffs then contended, that with this evidence, the depositions first offered were admissible. The depositions were still excluded. It was submitted to the decision of the whole Court, whether the depositions rejected, were legally admissible.

G. B. Moody argued for the plaintiffs, and contended, that the testimony rejected ought to have been admitted, both on authority and upon principle. For the definition of presumptive evidence, he cited 1 *Stark. Ev.* (*Ed. of* 1832,) 15, 18, 39. On the general ground, that the testimony rejected had a tendency to prove the issue on trial, and therefore was admissible, he cited 1 *Stark. Ev.* 52; 1 *Phill. Ev.* 116, 139; 2 *H. Black.* 187; 3 *Esp. R.* 194; *Rankin* v. *Blackwell*, 2 *Johns. Cas.* 198; *Gardner* v. *Preston*, 2 *Day*, 205; *Rowley* v. *Bigelow*, 12 *Pick.* 307; *Howe*

v. *Reed*, 3 *Fairf.* 515; *Allison* v. *Matthieu*, 3 *Johns. R.* 235; *McKenney* v. *Dingley*, 4 *Greenl.* 172; *Seaver* v. *Dingley*, 4 *Greenl.* 306.

Rogers and *M. L. Appleton*, for the defendant, contended, that there was here no proof or offer of proof, that any fraudulent or false representations had been made to the plaintiffs by those who purchased their goods; and that therefore the question was, whether false representations made to third persons, were admissible to prove, that similar representations had been made to the plaintiffs. Fraud is not to be presumed, but must be proved. The testimony to support an action on the ground of the present, should be strong enough to convict upon an indictment. *Cross* v. *Peters*, 1 *Greenl.* 376; *Buffington* v. *Gerrish*, 15 *Mass. R.* 156; 7 *Sergt. & R.* 43; 1 *Stark. Ev.* 501, 515; 2 *Stark. Ev.* 467. They examined the cases cited for the plaintiffs, and contended, that they only went to the extent, that when proof has been introduced of false representations made directly to the seller of the goods in question, then similar representations to others may be introduced to show the fraudulent intent.

The opinion of the Court was drawn up by

SHEPLEY J. — The question to be tried was, whether the goods replevied were obtained of the plaintiffs by *Kelley & Jewell* by false representations, with intent to defraud them.

The depositions contain certain representations, said to be false, made about the same time to other dealers in *Boston*, of whom they obtained goods. To prove, that they made false representations to others and thereby obtained goods, does not prove, that they made the same, or similar ones to the plaintiffs. But the testimony might satisfy a jury, that they had at that time formed a design to obtain goods fraudulently by such means. And proof of such a design being made, the jury might more satisfactorily judge of the other circumstances, and of the direct testimony, tending to prove, that they obtained goods of the plaintiffs in the manner alleged. If such a purpose of defrauding as they should find opportunity, should be proved upon them, they cannot complain, that the effect is to cast suspicion upon all their contracts of purchase, while it may be reasonably supposed to operate. The defendant

claiming only by a process of attachment, can hold only what of right belonged to them. To make it appear probable, that the sale or purchase in question was fraudulent, testimony that the grantor or purchaser about the same time made like fraudulent sales or purchases, in dealing with others, has been admitted. *Gardner* v. *Preston*, 2 *Day*, 205; *Allison* v. *Matthieu*, 3 *Johns. R.* 235; *Foster* v. *Hall*, 12 *Pick.* 89; *Rowley* v. *Bigelow*, *idem.* 307; *M'Kenney* v. *Dingley*, 4 *Greenl.* 72; *Howe* v. *Reed*, 3 *Fairf.* 515.

The testimony in most of those cases appears to have been received to prove a formed design to commit frauds in that manner; and to authorize the jury to make use of such proved design as a circumstance, from which, connected with other proof, they might infer that it was acted upon in making the contract under investigation. And for this purpose the depositions, except those parts which may be liable to objection for other reasons, may be admitted.

Sarah Buswell *vs.* Thomas R. Bicknell.

Where an election is given to the party receiving a chattel to return it, or to pay a sum of money, by a given day, the property in the chattel immediately vests in him.

Where the owner of a cow delivered her to another, on his promise to pay a certain sum of money therefor by a given day, or to return the cow and pay a lesser sum for the use thereof, the property in the cow immediately passed from the former to the latter.

Replevin for a cow. The taking was alleged to have been on *May* 25, 1835. The defendant claimed the right to take the cow as his own property. At the trial before Shepley J. it appeared by the testimony of several witnesses, introduced by the respective parties, that the cow was formerly the property of the defendant, and had been for about a year in the possession of the plaintiff; that the defendant took her from the plaintiff's pasture, *May* 25, 1835;

and that the cow came into the possession of the plaintiff in *June*, 1834, under a verbal contract, that she should pay for the cow to the defendant, by *April* 4, 1835, sixteen dollars, or return the cow and pay four dollars for her use. The plaintiff attempted to prove that she had paid the defendant for the cow before the time stipulated, and it appeared she had made payments to him in *Feb.* 1835, to an amount exceeding the price of the cow, and that the time of payment for the cow was in *June* instead of *April*. The defendant contended, that the money was paid for hay previously had of him by the plaintiff.

The counsel for the plaintiff insisted, at the trial, that the action was maintainable upon the evidence; that if the year expired by *April* 4, 1835, the defendant by delay had waived a strict compliance with any condition, if any such existed, and could not take the property; that if the year expired in *June*, as the plaintiff contended it did, the defence was not made out; and that if on the general account, the balance was in favor of the plaintiff, the action was maintainable.

The Judge instructed the jury, that if the cow was taken by the defendant before the year had expired, and the plaintiff had not performed her contract, and had not brought her suit until after the expiration of the year, it could not be maintained; that the defendant had a right to take the cow, though the time had elapsed, if there had been no performance of the contract by the plaintiff; and that the plaintiff must show a special appropriation of the money paid to this contract, to have a performance of it, although on general account she might be a creditor. The verdict for the defendant was to be set aside, if the instructions were erroneous.

J. Appleton, for the plaintiff, contended, that by the terms of the contract the property in the cow passed to the plaintiff at the time it was made. *Hurd* v. *West*, 7 *Cowen*, 752; *Wilson* v. *Finney*, 13 *Johns. R.* 358; *Holbrook* v. *Armstrong*, 1 *Fairf.* 31.

Other points made in the case were argued, but the decision is founded only on this.

J. Godfrey, for the defendant, contended, that the true contract was, that the cow should remain the property of the defendant, unless the plaintiff should become the purchaser on the payment

of a certain sum by a given day. The sale was a mere conditional one, and the condition has not been performed.

The opinion of the Court was drawn up by

Weston C. J. — The plaintiff received a cow from the defendant, for which she was to pay, by the fourth of *April* following, sixteen dollars, or to return the cow and to pay four dollars for her use. The question is, whether the property in the cow passed to the plaintiff, or whether it remained in the defendant, the plaintiff being merely bailee.

Sir *William Jones*, in his treatise on bailments, 143, says, "there is a distinction between an obligation to restore the specific things, and a power or necessity of returning others equal in value. In the first case, it is a regular bailment; in the second, it becomes a debt." *Story on Bailments*, *c.* 6, § 439, says, "the distinction between the obligation to restore the specific things, and a power of returning other things equal in value, holds in cases of hiring, as well as in cases of deposits and gratuitous loans. In the former case, that is, the obligation to restore the specific thing, it is a regular bailment; in the latter, viz. where there is a power of returning other things equal in value, it becomes a debt."

This doctrine is recognized in *Hurd* v. *West*, 7 *Cowen*, 752, and is further illustrated in a note to that case. The cases to which this principle is usually applied are, where the article received is to be returned in kind, or in the alternative, either specifically or by an article of the same kind, either in the same condition or in a manufactured state. In all such cases, the property passes to him, who would otherwise be merely a bailee. *Seymour* v. *Brown*, 19 *Johns.* 47, may seem in its application to be an exception to this principle; but *Chancellor Kent* says, that this decision was not in conformity to the true and settled doctrine. 2 *Kent*, 589. Whether the alternative is, to return specifically or in kind, or specifically or to pay a certain sum, the principle is the same. The property in the thing delivered passes, and the remedy of the former owner rests in contract. It is the option conceded to the party receiving, which produces this effect. He may do what he will with the article received. If he pays, he fulfils his contract. If he neither pays nor returns, he is liable to an action.

In *Holbrook* v. *Armstrong*, 1 *Fairf.* 31, where cows were delivered, to be returned at the end of two years, or their value in money, the doctrine was very fully gone into by *Parris J.* who delivered the opinion of the court; and it was held not to be a bailment, but a sale. The same rule was applied to a similar case in *Dearborn* v. *Turner*, 16 *Maine Rep.* 17. That case is not to be distinguished from the one before us.

New trial granted.

JOSEPH BAKER, JR. *vs.* JOHN WENTWORTH *& al.*

The *stat.* of 1835, *c.* 194, for the preservation of fish in *Penobscot Bay* and *River* and their tributary waters, forbids all persons, under penalties, either to take fish, or to impede their passage "in weirs," from sundown on *Saturday*, until sunrise on *Monday*, although the fish may have entered into the weir before the commencement of that time.

DEBT by the plaintiff, as a fish warden of the town of *Orrington*, to recover of the defendants, owners of a fish weir in *Penobscot River*, for the penalties imposed by the *stat.* 1835, *c.* 194, for the preservation of fish in the *Penobscot* waters, for keeping the gate of the weir open at an unlawful time, and for taking fish at a time forbidden by the law. At the trial, before WESTON C. J., it appeared, that on *Saturday*, *May* 21, 1836, after sundown, the defendants had opened the gate of their weir, but that they had put boards across the passage way, the entrance to the weir being closed previously, which prevented the free passage of fish. The jury found, that the defendants took from their weir on *Saturday* night, after sunset, fifty shad which had entered the weir before sunset, and that they took therefrom no fish which had entered after sunset. There was no way of securing the shad which had entered the weir before sundown, but by interposing the boards across the passage until the tide had so far ebbed that they might be taken.

The counsel for the defendants insisted, that they had a right to take after sunset the shad that had entered before, and that in so doing, or in interposing the boards across the passage way as a means necessary for the exercise of this right, the entrance to the weir being closed, they incurred no penalties whatever. The Chief Justice instructed the jury, that if the testimony was believed, the penalties were incurred. If this instruction was erroneous, the verdict for the plaintiff was to be set aside.

Rogers argued, that the objection made at the trial was well taken, and fatal to the action. The instruction was therefore wrong. He cited *Coolidge* v. *Williams*, 4 *Mass. R.* 140; *Freary* v. *Cooke*, 14 *Mass. R.* 488; *Melody* v. *Reab*, 4 *Mass. R.* 471; *Gibson* v. *Jenney*, 15 *Mass. R.* 205; *Whitney* v. *Whitney*, 14 *Mass. R.* 88; *Holbrook* v. *Holbrook*, 1 *Pick.* 248.

Poor, for the plaintiff, argued in support of the ruling at the trial, and insisted, that the construction put upon the statute by the defendants was a virtual repeal of it. He cited opinion of the Court, 7 *Mass. R.* 523; *Melody* v. *Reab*, 4 *Mass. R.* 471; 2 *Cowen*, 419; 2 *Inst.* 611.

The opinion of the Court was drawn up by

Weston C. J. — The statute under consideration of 1835, *c.* 194, was made for the preservation of the kinds of fish, therein mentioned. And it is to receive a reasonable construction, in furtherance of that public and beneficial object. The second section positively requires that the gate of the weir should be kept open, during the period, when the passage of the fish was not to be impeded. By the fourth section, the owners of weirs are at liberty to take fish between sunrise on *Monday*, and sunset on *Saturday* in each week. Whatever could be secured within this period, are lawfully taken for their use. From sunset on *Saturday* to sunrise on *Monday*, the law forbids them under penalties, either to take fish or to impede their passage "in weirs." The terms of the statute are too plain and clear in our judgment, to justify the construction, for which the counsel for the defendants contends.

Judgment on the verdict.

CYRUS S. CLARK *vs.* WILLIAM H. WINSLOW *& al.*

Where the penal part of a bond, signed by six obligors, is joint in its terms, containing nothing indicating a several interest, or a several liability, and the condition recites the several agreement of each to secure a certain proportion of a specified sum of money by certain notes, to be further secured by a mortgage on a township, subject to a prior mortgage, and concludes by saying, "if we shall well and truly keep and perform our said several agreements, then this obligation is to be void as to each one so performing, otherwise to remain in full force; it is the joint bond of all the obligors.

THE six defendants made their writing under their hands and seals, dated *July* 21, 1835, to *Clark*, in the penal sum of twenty thousand dollars, saying, "to the which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, firmly by these presents." A copy of the condition follows. "The condition of the above obligation is such, that whereas for a valuable consideration, we have severally agreed with and promised the said *Clark*, that within four months from *July* 17, 1835, we will well and truly pay him the sum of 17,077,50, in the proportions following, viz., the said *Winslow* and *Bugbee* one fourth each, and the said *Gardner*, *Cutter*, *Tinkham* and *Cahoon* one eighth each, in manner following, viz., by good notes for the above proportions, payable in four equal sums in one, two, three and four years from *July* 17, 1835, with interest annually, to be secured by mortgage on township (describing it) subject to a prior mortgage to *E. Craig, Jr.* and others. Now therefore if we shall well and truly keep and perform our said several agreements, then this obligation is to be void as to each one so performing, otherwise to remain in full force."

Neither of the obligors had performed any part of the conditions of the bond. The question submitted for the opinion of the Court by the parties was, whether the bond declared on is joint or several.

Preble and *S. W. Robinson* argued for the plaintiff, and cited 5 *Com. Dig. Oblig. F.*

Rogers and *Hobbs*, for the defendants, contended, that no particular words were necessary to make the bond joint or several, and that the question was to be determined by the intention of the par-

ties, to be sought in the whole instrument. By the terms of the instrument, if one of the parties performs on his part, he is to be forever discharged from any obligation whatever. But whether any one performs or not is immaterial in looking at the true construction of the instrument. The performance was to consist in doing several acts, and not joint ones, and one was to perform more than another. A release to one would not discharge the others. They examined and compared the different parts of the instrument, and insisted that the interest was several, and that the performance was to be several, and therefore that the instrument was to be considered as a several bond. They cited *Peckham* v. *North Par.* in *Haverhill*, 16 *Pick.* 274; *Eaton* v. *Smith*, 20 *Pick.* 150; 2 *Ev. Pothier on Con.* 53, 55, and cases there cited; 5 *Com. Dig. Title Oblig. F;* 1 *Saund.* 155, *note* 2.

The opinion of the Court was drawn up by

Weston C. J. — The penal part of the bond in question, is joint in its terms; containing nothing indicating a several interest, or a several liability in the obligors. 5 *Com. Dig. Obligation, F.* The condition recites the several agreement of each to secure a certain proportion of a specified sum of money, by certain notes, to be further secured by mortgage on a certain township, subject to a prior mortgage.

Whether each had it in his power severally to execute a mortgage, which would create a lien upon the township, does not appear from the condition. Perhaps however, this may be deduced, for it is expressly provided, that if they shall well and truly keep and perform their said several agreements, then the obligation shall be void, as to each one so performing.

The meaning of this singular combination of joint and several terms, may be somewhat obscure; but we are of opinion, that the intention of the parties may be best promoted, by giving them a literal interpretation. "If we," that is all, perform, then the obligation of each, so performing, is to be void. The obligee did not intend to accept performance, as to a fractional part, unless all performed. There might be strong reasons of convenience, for insisting upon this condition. He had a right to look to the whole sum to be secured and the land to be mortgaged, as collateral thereto, and

to prescribe, that unless all performed, the obligation should remain in full force.

But it is distinctly provided, that the obligation shall remain in force, unless the condition is performed. It is agreed, that this has not been done, by all or either of the obligors. As the penal part is joint, we perceive nothing that can or ought to relieve them from a joint liability for damages. Unless this had been intended, it is not easy to account for their uniting in an instrument of this character. The condition settles the proportions, and determines what each was to do. If done, the obligee was bound to accept it. If not done, he holds their joint bond in full force, as security for the damages he may have sustained.

SAMUEL SPRINGER *vs.* JOSEPH WHIPPLE.

The attorney of record, acting in a suit, has no power as such to release the liability of a witness to pay a part of the costs of the suit.

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

Assumpsit on a note of hand. The facts in the case sufficiently appear in the opinion of the Court. The verdict was for the plaintiff, and the exceptions were filed by the defendant.

The argument was in writing.

Washburn, for the defendant, argued, 1. That the witness was interested, and not competent, unless the interest was discharged by the release. And 2. That the attorney had no right, by virtue of his general character as an attorney, to release an interest of this description. 13 *Mass. R.* 319; *Lewis* v. *Gamage*, 1 *Pick.* 357; 10 *Johns. R.* 220; 6 *Johns. R.* 51; 11 *Johns. R.* 464; 7 *Johns. R.* 557; *Adams* v. *Gould*, 8 *Greenl.* 438.

Wilson, for the plaintiff, contended, 1. That the witness had no interest. 2. That if he had, it was discharged by the release. *Fling* v. *Trafton*, 1 *Shepl.* 295.

The opinion of the Court was by

EMERY J. — Objection was taken in the Court of Common Pleas to the admission of *Joseph Foss* as a witness, another having testified that "the plaintiff said he and *Foss* had each a note of fifty dollars; that he, the plaintiff, had sued his; that he and *Foss* were equally interested, and *Foss* was not to sue his note till he saw how that came out."

This disclosure coming from the plaintiff, though of somewhat equivocal character, it was deemed important that a release should be made and executed by the plaintiff's attorney, *Nathaniel Wilson, Esq.*, to *Foss*, in order to qualify him for admission.

As it was not proved that *Mr. Wilson* had any authority to execute said release other than the authority, incident to an attorney employed to commence a suit at law, we are constrained to decide that such interest as the plaintiff confessed did exist between him and *Foss*, the proposed witness, was not removed by the act of the attorney. Such a course we think is not to be justified from the mere relation of client and attorney in this particular cause. The authority to release any collateral interest does not result from that relation. And as it would have a tendency to put the rights and interests of clients unnecessarily into the power of their attorneys, we cannot deem it an authority incident to *Mr. Wilson's* retainer and employment in this suit.

Whether there was other evidence, sufficient without the testimony of *Mr. Foss*, to warrant a recovery by the plaintiff, it becomes unnecessary to examine, because *Mr. Foss* was admitted to testify in relation to the representations made by the plaintiff and himself at and before the purchase of the bond, the sale of which was the consideration of the note, in relation to the timber on the land, and its effect on the minds of the jury, we cannot determine. It went to the very ground-work of the defence.

It is true that there are many acts, which may be done by the attorney, by which his employer may be bound. But this proceeding, in relation to attempts to qualify witnesses, by releases executed by the attorney, in the pressure of a trial, has received the consideration of the Court in the county of *York*, in the suit of *The President, Directors and Company of the York Bank* v. *Apple-*

ton, ante, p. 75 ; and such a release was held unavailing to remove the interest. There must be special authority given by the client to the attorney, to warrant him effectually to qualify the witness. The residue of the exceptions it becomes unnecessary to discuss, because for this reason, the exceptions must be sustained, the verdict set aside, and a new trial granted.

CHARLES L. SMITH *vs.* IRA WADLEIGH *& al.*

No person can use a deposition taken *in perpetuam*, unless it appears to have been taken at his request, or at the request of those under whom he claims.

The Court will not in future enforce parol agreements in respect to the prosecution of a cause, unless made in writing.

Whether such parol agreements heretofore made, shall be recognized by the Court as binding the parties, will depend upon the nature of the agreement, and the clearness of the proof by which it may be established.

Where a deposition was taken *in perpetuam*, at the request of a third person, and the defendants in the cause on trial, were notified as the adverse party, and were present, and agreed with this plaintiff that the same deposition might be used in the present suit, and the deponent had deceased, the deposition was permitted to be used.

ASSUMPSIT for labor performed in running logs out of *Pleasant River* at the request of the defendants.

At the trial, before SHEPLEY J. the plaintiff offered the deposition of *S. P. Dutton*, who had then deceased, taken *in perpetuam*, at the request of *Seth Whittier* and others, not including the plaintiff, who severally had actions pending against the defendants for similar services. The Justices, who took the deposition, certified, that the defendants, being all the persons living within twenty miles of the place of caption, or in the State, known to be interested in the property to which the deposition relates, were duly notified, and that one of them attended in person, and the other by an attorney. A verbal agreement, that the deposition might be used in this action was proved. The defendants objected to the reading of the deposition. The Judge, however,

admitted it. If the deposition was not legally admissible under the agreement, or as taken *in perpetuam*, the verdict for the plaintiff was to be set aside.

Rogers, for the defendants, contended, that the deposition was not admissible, as one taken *in perpetuam*. The deposition was not taken at the request of the plaintiff or of any one under whom he claims. It cannot therefore be legally used by him. *Wells* v. *Fish*, 3 *Pick.* 74. The *stat.* 1821, *c.* 85, § 8, merely authorizes such deposition to be used "in any cause to which it may relate;" — that is, any cause between the same parties.

He insisted, that mere loose talk out of doors, proved by witnesses who put their own construction on the language used, ought not to be permitted to make that evidence which by law is inadmissible.

J. Appleton, for the plaintiff, insisted, that the deposition was admissible, as one taken *in perpetuam*. The subject matter was the same in this case and in that in which it was taken. It is within the spirit and plain language of the statute.

It is admissible as evidence agreed by the parties to be used in the case. It is immaterial by what mode the agreement is proved, whether by written or parol evidence. And such agreements are beneficial to both parties, as it saves the expense of taking in every case. A contract made with the attorney respecting the suit is valid, and surely it is so, if made by the party himself. *Union Bank* v. *Geary*, 5 *Peters*, 99.

It is also admissible as the best evidence, since the death of the deponent. 3 *Bingh.* 421.

The opinion of the Court, was drawn up by

Weston C. J. — The act of 1821, *c.* 85, prescribing the mode of taking depositions, is a transcript of the statute of *Massachusetts*, existing at the time of our separation. It had there been decided that a deposition, taken *in perpetuam*, after an action had been instituted, could not be used in such action. *Greenfield* v. *Cushman*, 16 *Mass. R.* 393. This objection has been removed by the *statute* of 1823, *c.* 211.

The general statute provides, that a deposition, taken *in perpetuam*, may be used as evidence in any cause, to which it may re-

late. But it seems reasonable, that it should have some limitation as to parties, whose interests are to be affected by it, and that those, against whom it is to be used, should have the means of being apprized for whose benefit it is to be taken. The necessity and expediency of such a limitation, in a similar statute in *Massachusetts*, was settled in the case of *Wells* v. *Fish, & al.* 3 *Pick.* 74. It was there held, that no person can use such deposition, unless it appears to have been taken at his request, or at the request of those under whom he claims. We are satisfied with the correctness of that decision, without repeating the reasons, upon which it is founded. The deposition in question, not having been taken at the request of the plaintiff, or of any one under whom he claims, could not, in our opinion, be used by him under the statute.

It is insisted however that it was admissible, in virtue of the parol agreement of the parties. Justice may require, that the lawful agreements of parties, in respect to the prosecution of a cause, fairly entered into, should be carried into effect. And we have no doubt, that where they are clearly established, the Court have authority to cause them to be enforced. We think however, that they should appear in writing, that the terms may be clearly understood, and that there may be no room for mistake or misapprehension. Where they depend on parol evidence, witnesses may, and often do differ in their recollection. They may be perverted, from the frailty and imperfection of memory, as well as from other causes; and there is certainly danger, that they may rather embarrass than aid the administration of justice. We desire therefore, that it may be distinctly understood, that the Court will not in future enforce such agreements, unless made in writing. Whether any one heretofore made, not sustained by written evidence shall or shall not be recognized as binding the parties, will depend upon the nature of the agreement, and the clearness of the proof, by which it may be established.

In the case before us, the defendants were notified of the time and place of caption. One of them attended in person, and the other was represented by his counsel. They agreed that the deposition should be used in this action. This the jury have found, upon satisfactory proof. The deponent has deceased, and his testimony is forever lost, unless the plaintiff can avail himself of this

deposition, in pursuance of the agreement, made with the defendants. But for that, they might have preserved the evidence, in a mode legally admissible. And under all the circumstances we are of opinion, that the defendants have no right to complain of the use of the deposition, and that the verdict ought not to be disturbed upon this objection.

Judgment on the verdict.

Eastern Bank *vs.* Albert G. Brown.

If a person direct the messenger of a bank to leave his notices at a certain place, a notice to him, as indorser of a bill, left by the messenger at that place, will be deemed sufficient, until the direction is countermanded, or the messenger is otherwise directed.

Assumpsit on a bill, dated *April* 14, 1836, payable to the defendant in four months from date, at the *Suffolk Bank* in *Boston*, and by him indorsed to the plaintiffs. A demand was made at the *Suffolk Bank* on the 17th of *August*, 1836, and a notice immediately sent by the notary to the plaintiffs for the defendant, which arrived by due course of mail at that time at *Bangor*, the place of business of the defendant, on the morning of the twentieth of the same month. The cashier of the *Eastern Bank* testified, that he received the notice to the defendant as indorser the same morning, and immediately delivered it to *William Rice*, messenger of the bank, to be given to the defendant; and that he supposed the counting room of *Lincoln, Foster & Co.* to be *Brown's* place of business, and did not know that he lived in *Bangor*. *Rice*, the messenger, was called by the plaintiffs, and testified, that he received the notice from the cashier on the same 20th of *August*, and that on that day, either gave the notice to the defendant in hand, or left it at his dwellinghouse, or at the counting-room of *Lincoln, Foster & Co.*, who are his brothers-in-law, in *Bangor*, but had no doubt that he left it at the latter place; that prior to

this, within the year, that the defendant, upon inquiry of him where his notices should be left, had directed him to leave them at the same counting-room, and thought he said he kept his books and did his business there for the present; that on the 20th of *August* he did not know, nor did he inquire, whether the defendant had removed his books from that room; that he did not know that the defendant lived in *Bangor*, or had any other place of business there; and that the defendant had never countermanded the order to leave his notices at that counting-room, and had not directed him to leave them at any other place. *Lincoln*, called by the defendant, testified, that the defendant moved from *Orono* to *Bangor*, in *April*, 1836, and boarded in his family until the last of *May* or *June*, and then moved into his own house in *Bangor*, and at the same time carried away his books from the counting-room, and had not made that his place of business since. Under the instructions of the Chief Justice, who tried the action, leaving to the jury to give a construction to the testimony of *Rice*, the verdict was for the defendant, and was to be set aside, if upon the evidence, the notice left at the counting-room was left at the proper place. There was a motion for a new trial on account of newly discovered evidence.

A. G. Jewett, for the plaintiffs, contended, that a notice left at the place where the messenger of the bank was directed by the defendant to leave it, was sufficient; and that this should have been the instruction to the jury, instead of leaving it to them to make an erroneous decision.

J. Appleton, for the defendant, contended, that it was the duty of the messenger to have inquired, whether that was the defendant's place of business, and to have used due diligence to ascertain whether his dwelling was in *Bangor*, and where; and that upon the evidence the verdict was right. *Bank of United States* v. *Corcoran*, 2 *Peters*, 121; *Granite Bank* v. *Ayers*, 16 *Pick.* 392.

The opinion was by

Weston C. J. — The defendant having, on the inquiry of the messenger of the bank, directed him to leave his notices at the counting-room of *Lincoln, Foster & Co.*, where he kept his books, we are of opinion upon the whole, that notices left in pursuance of

this direction, until countermanded, or the messenger otherwise directed, ought to be deemed sufficient. This conclusion will best comport with the justice of the case; and it is one which leaves the defendant no fair ground of complaint.

New trial granted.

JOSHUA W. CARR *vs.* EDMUND DOLE *& al.*

Where an assignment of property for the benefit of creditors has been executed by the debtor and by the assignees, but where no creditor has become a party, an attachment thereof as the property of the debtor will hold against the assignees.

ASSUMPSIT by the plaintiff upon a receipt for property, attached by him as a deputy sheriff. The attachment was made by the plaintiff, *July* 3, 1833, on a writ, *T. A. White* against *Chesley & Lowell*, and the defendants, at the request of the debtors, signed the receipt, dated the same day, acknowledging that they had received of the plaintiff "sundry goods and merchandize to the value of eight hundred dollars," attached as aforesaid by the plaintiff, as the property of *Chesley & Lowell*, and describing the court to which the writ was made returnable. The conclusion of the receipt was, "We hereby jointly and severally promise to keep said property, and return the same to said *Carr*, or bearer of this receipt, on demand and free of expense to said *Carr*, or the creditors, or pay the above sum of eight hundred dollars. It is understood that the demand for the above goods is not to be made until judgment is obtained in the suit." The defendants acknowledged in writing upon the back of the receipt that a demand had been made for the property within thirty days after judgment. The execution was delivered to an officer within thirty days after judgment. The defendants shew, that on the second day of the same *July*, *Chesley & Lowell* made an assignment of all their goods,

merchandize and other property, to *Allen Gilman* and *Charles Gilman*, for the benefit of certain creditors named therein, but no one of those creditors had signed the assignment or assented thereto until the fourth of *July*, after the plaintiff's attachment. *Charles Gilman* had receipted for a piece of broadcloth, but it did not appear to have been a part of the goods attached. A default was entered, subject to be taken off, if the action could not be maintained.

Rogers, for the defendants, said, if the assignment passed the goods attached to the assignees, that constituted a good defence, for the goods in such case were not the property of the debtors when the receipt was given. The assent of the creditors is to be presumed, as it was for their benefit, and the assignors cannot object to it. The creditors of the assignors cannot by their attachment place themselves in a better situation than the debtors, unless there is fraud. *C. Gilman*, as a receiptor for a part of the property embraced in the receipt and in the assignment, had an interest as a creditor, sufficient to sustain it.

J. Godfrey, for the plaintiff, contended, that at the time of the attachment no creditor had become a party to the assignment. In such case the property is subject to be taken by attachment at the suit of a creditor. *Hastings* v. *Baldwin*, 17 *Mass. R.* 552; *Marston* v. *Coburn*, 17 *Mass. R.* 454; *Ward* v. *Lamson*, 6 *Pick.* 358; *Brewer* v. *Pitkin*, 11 *Pick.* 298.

The opinion of the Court was drawn up by

WESTON C. J. — No creditor having become a party to the assignment, at the time of the attachment, it is very clear from the authorities, that the attachment must prevail over the assignment. In *Ward & al.* v. *Lamson & trustees*, 6 *Pick.* 358, the Court say, that "for twenty years it has been considered to be law, that if an attachment is made before any creditor has become a party to the assignment, the attachment will hold." And in *Brewer* v. *Pitkin & trustees*, 11 *Pick.* 298, this is considered a point too well settled to be regarded as an open question.

With regard to the consideration moving from the assignee, *Charles Gilman*, arising from his having receipted for what was attached at the suit of *Clark*, that was for a piece of broadcloth,

which does not appear to have formed a part of the goods attached by the plaintiff, and if it did, it would entitle him, as the receipter, to retain that piece of goods only. But the receipt, now in suit, is for a certain amount of goods, without condition or qualification; and it cannot be assumed, without evidence, that any part of them was subject to a prior attachment.

Judgment for plaintiff.

Henry Warren *vs.* Allen Gilman.

Where a bill is left in a bank for collection, although the bank has no interest in it, yet for the purposes of making a demand, and of receiving and transmitting notices, they are to be considered the real holders.

In the negotiation of this business, the cashier is the regularly authorized agent of the bank; and any communications affecting them, are properly addressed to him in his official capacity.

A notary employed for that purpose by the cashier of a bank, to which the bill has been indorsed and transmitted for collection only, has sufficient authority to make a demand, and to give notice.

If due notice of the presentment and non-payment of a bill be given to an indorser, it is not necessary that he should also be notified, that the holder will look to him for payment.

Where a bill which was drawn, accepted and indorsed by residents of *Bangor* and made payable at a bank in *Boston*, was indorsed to a bank in *Bangor*, and by that bank indorsed and transmitted to a bank in *Boston* for collection, and was by direction of the cashier of the latter bank duly presented there for payment by a notary, and notices thereof and of non-payment were immediately made out by him to all the prior parties, and transmitted by the first mail to the cashier of the *Bangor* bank; and where on the same morning the notices reached *Bangor*, the cashier took them from the post-office, and directed one to the indorser, then a resident of that city, and immediately replaced it in the post-office; *it was held*, that as the notice came from the notary in *Boston*, that this mode of transmitting it was sufficient.

This action was referred to *J. Cutting, Esq.* who awarded that the plaintiff should recover of the defendant the sum of $481,93, and costs, unless from facts proved before him, and which were stated in his award, the Court should be of the opinion that the plaintiff could not maintain the action.

The action was brought against the defendant as the indorser of a draft of the following tenor. "*Bangor, June* 30, 1836. Thirty days from date, value rec'd, please pay to the order of *Allen Gilman*, at the *Suffolk Bank* in *Boston*, four hundred dollars.

"Yours, &c. *Samuel A. Gilman.*

"*Charles Gilman, Bangor, Me.*"

The bill was accepted by *C. Gilman*, and indorsed by the defendant, and also as follows. "Pay *M. S. Parker*, Cashier, or order, *John Wyman*, Cashier." The plaintiff proved by the deposition of *William Stevenson*, a notary public residing in *Boston*, as well as by the original protest of *Stevenson*, if admissible, that on the second day of *August*, 1836, the bill was duly presented by him at the *Suffolk Bank* for payment, which was refused, whereupon he duly protested the bill for non-payment, *and sent notices of the non-payment thereof* to the drawer, accepter and indorser, to *John Wyman, Esq.* Cashier, per mail to *Bangor, Maine, requiring payment of them respectively*, which bill was presented and protested by *Stevenson*, at the request of the said *M. S. Parker*, Cashier, the last indorsee. *John Wyman* testified, to be received if admissible, that the bill was left by the plaintiff in the *Penobscot Bank* in *Bangor* for collection, on the 16th day of *July*, 1836, and that on the 19th day of the same month, he, as cashier of the *Penobscot Bank* indorsed the bill and forwarded it to the *Suffolk Bank* for collection; that after the bill was protested, it was returned to him, as well as the notices spoken of by *Stevenson;* that he received the notices from the post-office in *Bangor* on the morning of the fifth of *August*, 1836, inclosed in a letter from *Stevenson*, but was unable to fix the time when he received them, otherwise than that he knew he received them in due course of mail, which would be on the morning of the 5th; that on the same morning on which he received them he directed and left the one for *Samuel A. Gilman* at his store in *Bangor;* and that he directed the other for the defendant, and either gave it to him in person on the same morning of receiving it, or having sealed and directed it to him, put it into the post-office in *Bangor* that morning. *John Bright*, assistant postmaster at *Bangor*, testified, that during the months of *July* and *August*, 1836, the defendant kept a box at the post-office from which he was in the habit of daily

receiving his letters; that on the fifth day of *August*, 1836, the western mail arrived at five o'clock, A. M. which was about the usual time at that season. All the parties to the bill resided in the village of *Bangor*, except *M. S. Parker*, whose residence was in *Boston*.

Rogers, for the defendant, objected to the right of the plaintiff to recover: —

1. That it should affirmatively appear, and not be left to inference, when the notices were put into the mail, and when received. Notice is of the essence of the contract, and ought not to rest upon presumption and inference. 7 *Hals.* 268; 3 *Gill & John.* 474.

2. *Wyman* was not a party to the bill, and upon its being returned to him, he could not have maintained an action upon it. *Chanoine* v. *Fowler*, 3 *Wend.* 173; *Stanton* v. *Blossom*, 14 *Mass. R.* 116. The notices should have been sent to the *Penobscot Bank*. *Wyman* was a mere agent, and not a party, and notice through him to the defendant should have been as early, as if sent directly through the mail. *Sewall* v. *Russell*, 3 *Wend.* 276.

3. Notice was not sufficient, being only, that the bill was protested for non-payment, and not that the holder looked to him for payment.

4. The notice was not sufficient, being left at the post-office in the same city, and not at the dwellinghouse or place of business of the defendant. 10 *Johns. R.* 491; 20 *Johns. R.* 372; 1 *Conn. R.* 329; 3 *Conn. R.* 89; 1 *Stark. R.* 314; 2 *Peters*, 96.

5. As a notice from *Stevenson*, it was not received in season. Being put into the post-office in *Bangor* after the distribution of the mail, it would not go into the defendant's box until the next day, one day too late. As a notice from *Wyman*, it is defective in coming from a stranger who could maintain no action upon it, and because it was *Stevenson's*, and not his. *Chitty on Bills*, (8th *Am.* from 8th *Lon. Ed.*) 527.

6. If *Wyman* was not a party to the bill, but a stranger, the protest is defective in not showing notice, and this defect cannot be supplied by parol. *Phœnix Bank* v. *Hussey*, 12 *Pick.* 483.

J. Hodsdon, for the plaintiff, contended, that as the case was referred in the usual way to the referee, and he had decided in favor of the plaintiff, unless the Court should come to a conclusion that

he was wrong in his decision, that the Court ought not to re-examine the case, but order judgment on the report. 3 *Meeson & W.* 332. But if the question is to be decided by the Court, as referees, they should order judgment for the plaintiff. The first objection is founded on an erroneous view of the facts. The witnesses are positive and direct in their statements. As to the second: *Wyman* was the immediate indorser to the *Suffolk Bank*, and the notices were to him in the usual and proper manner. A cashier receiving a bill for collection, is entitled to the same time as an owner, to notify prior indorsers. *Mead* v. *Engs*, 5 *Cowen*, 303.

As to the third. It is enough to notify the party to be charged on the non-payment. *Lindenberger* v. *Beall*, 6 *Wheat.* 104; *Miller* v. *Hackley*, 5 *Johns. R.* 375; 11 *Wheat.* 431. As to the fourth. Notice to an indorser may be by mail in all cases except where the parties reside in the place where the bill is made payable. 3 *Conn. R.* 489; 1 *Campb.* 246. As to the fifth and sixth, he merely cited *Dickens* v. *Beall*, 10 *Peters*, 578.

The opinion of the Court was by

Weston C. J. — Where a bill is left in a bank for collection, although the bank has no interest in it, yet for the purpose of receiving and transmitting notices, they are to be considered as the real holders. *Mead* v. *Engs*, 5 *Cowen*, 308, and the cases there cited. In the negotiation of this business, the cashier is the regularly authorized organ of the bank, and whatever is done by him in that capacity is the act of the bank; and any communications affecting them, are properly addressed to him in his official capacity.

It was never doubted, that notice might be given by the holder or his agent, but in *Chanoine* v. *Fowler*, 3 *Wend.* 173, it was held, that it was not absolutely necessary that it should come from the holder, but that it might be given by any one, who is a party to the bill, and who would on the same being returned to him, have a right of action on it. In *Stanton & al.* v. *Blossom & al.* 14 *Mass. R.* 116, it was held, that notice must come from the holder of the bill, or from one authorized by him, or from one liable as indorser.

The bill in question was left for collection in the *Penobscot Bank*. The cashier of that bank, in pursuance of the trust con-

fided in him, indorsed the bill to the cashier of the *Suffolk Bank*, where it was made payable, and remitted it to the latter bank for collection. According to the usage in these cases, we doubt not both the cashiers became, for the purpose of collection, nominally parties to the bill. *Hartford Bank* v. *Barry*, 17 *Mass. R.* 94. But if the plaintiff, who had the beneficial interest, is to be regarded as the holder, the cashiers became his authorized agents, acting in behalf of the banks they respectively represented.

Mr. Stevenson, the notary employed on this occasion, was duly called upon to act in his official capacity by the cashier of the *Suffolk Bank*. Notices, coming from him, affect the parties intended to be charged. It appears from the protest, as well as from the deposition of the notary, that on the second of *August*, 1836, the day of the maturity of the bill, the notary demanded payment at the *Suffolk Bank*, which being refused, and the bill duly protested, he thereupon sent notices by mail, to *Wyman*, the cashier of the *Penobscot Bank*, at *Bangor*. There is no other date, to which these proceedings are referred, but the second of *August*, and the fair import of the language seems to require, that it should be so understood. But if any doubt could be raised upon this point, we think that it is rendered certain by the testimony of *Wyman*.

If the notary forwarded his notices by the first mail, after the protest, they must have arrived on the morning of the fifth, and such *Wyman* testifies was the fact. He adds, that the only reason he had, for being able so to testify, was, that he knew the notices were received in due course of mail. And he positively testifies therefore, that they must have arrived on the morning of the fifth. He explains what he means by due course of mail. Without such explanation, so far as it depends upon his testimony, the point might have been left uncertain; but as explained, his testimony proves, that the notices were received on the morning of the fifth, which must have been the first mail after the protest.

The notice for the defendant, enclosed by the notary, was either delivered to him in hand, or after being sealed and directed, left for him at the post-office, by *Wyman*, the same morning it arrived. The notice is not proved, so as to charge the defendant, unless either mode was sufficient. If delivered to him in person there

could be no question ; and we are of opinion, that the notice coming from the notary, the post-office was a proper channel of communication.

No want of diligence is imputable to the cashier. He received and opened the whole package directed to him, and the same morning returned to the post-office, with proper directions, the notice enclosed, prepared for the defendant. Whatever strictness of construction, on the question of notice, may have obtained upon some points, it appears to us, that the notice to the defendant is sufficiently made out, by proving, that having been prepared and duly forwarded by the notary, it was ready for him, properly directed, at the post-office in *Bangor*, on the morning of the fifth of *August*.

It is objected, that it does not appear that the defendant was apprized by the notice, that the holder looked to him for payment. We are not aware that this formality is required. He was entitled to notice of the dishonor of the bill ; but was bound to know the legal consequences. The rights of the holder would remain the same, whether he intended to enforce them or not. In the *Bank of the United States* v. *Carneal*, 2 *Peters*, 543, it was held, that the holder need not notify an indorser, that he held him liable.

Exceptions overruled.

William Goddard *vs.* Hazen Mitchell.

Where the obligor in a bond, conditioned to convey an undivided moiety of a mill on the payment of certain sums of money, has disenabled himself from performing on his part by conveying the land to another, although the obligee may be excused from tendering performance on his part, he cannot maintain an *action of assumpsit* to recover back the money paid.

In such case, to maintain assumpsit, on the ground that the obligor by his acts *had rescinded the contract*, the least that can be required, would be clear and unequivocal proof, that the defendant had rescinded the contract, *when the action was brought.*

If the obligor owns the whole mill, his making a mortgage of one undivided half thereof to a stranger, does not furnish such proof.

The action was assumpsit, and was brought, as the report of the case states, to recover payments made upon a contract alleged to have been rescinded. The writ was dated *Nov.* 3, 1836. At the trial, before Shepley J., the plaintiff read as testimony an account between the parties, adjusted *Sept.* 15, 1836, showing, that the plaintiff had advanced to the defendant a large sum of money towards the building of a steam saw-mill. He introduced the copy of a mortgage deed from the defendant to *John T. Goddard* and *C. W. Cutter*, of one undivided half of the mill and land connected therewith to secure to them the amount of $12,944,62, dated *Oct.* 19, 1835; the copy of a deed dated *July* 3, 1836 from the defendant to *John T. Goddard* of one fourth part of the same premises in trust to pay to the *Portsmouth Iron Foundery Company* a debt due them; the copy of a deed, dated *Oct.* 18, 1836, from the defendant to *William Emerson*, of one half of said premises, subject to the mortgage to *John T. Goddard;* the copy of a deed from the defendant to *Emerson*, dated *Nov.* 25, 1836, of the other half of the premises, subject to the mortgage to *Goddard & Cutter.* He also introduced a bond, executed *May* 11, 1836, from the defendant to the plaintiff, obliging him to convey to the plaintiff one undivided half of said steam-mill and privileges, when the same should be completed, and the amount of the cost ascertained, and upon paying or securing to *Mitchell*, by the plaintiff one half of the costs of said steam saw-mill. Many letters between the parties were introduced, showing that the steam-mill was being built on joint account of plaintiff and defendant, and that the plain-

tiff was to own one half of it, when completed, and that the bond was executed for that purpose, and that the money advanced by the plaintiff was on that account. The defendant read an agreement signed by the plaintiff, dated *July* 22, 1836, assenting to the conveyance of *July* 3, 1836, to *John T. Goddard.*

Upon this testimony the plaintiff claimed to recover, because the defendant had disenabled himself to fulfil his contract by conveying away the whole estate, and the plaintiff therefore was entitled to rescind the contract. The defendant denied that the plaintiff had any claim upon him, without first performing on his part, according to the terms of the bond.

The action was then taken from the jury by agreement of the parties, and submitted to the decision of the Court, and judgment was to be rendered for the plaintiff, or for the defendant, according to their legal rights.

W. P. Fessenden and *Rowe* argued for the plaintiff, and cited *Van Benthuysen* v. *Crapser*, 8 *Johns. R.* 257 ; *Judson* v. *Wass*, 11 *Johns. R.* 525 ; 5 *Burr.* 2639 ; *Tucker* v. *Woods*, 12 *Johns. R.* 190 ; *Newcomb* v. *Brackett*, 16 *Mass. R.* 161 ; 1 *T. R.* 133 ; *Gillett* v. *Maynard*, 5 *Johns. R.* 85 ; 2 *W. Black. R.* 1078 ; *Chambers* v. *Griffith*, 1 *Esp. R.* 150 ; *Chapman* v. *Shaw*, 5 *Greenl.* 59 ; 1 *Caines*, 47 ; *Farrer* v. *Nightingal*, 2 *Esp. R.* 639 ; 2 *Com. on Con.* 52, 82 ; 7 *T. R.* 177.

Rogers argued for the defendant.

The opinion of the Court was drawn up by

Weston C. J. — To secure to the plaintiff a conveyance of one half of the steam saw-mill, he had united in building with the defendant, the latter executed a bond to the plaintiff, dated *May* 11th, 1836. The advances previously and subsequently made by him, were covered by the condition of that bond. If the defendant has failed to perform on his part, the proper remedy for the plaintiff is upon that instrument. It is said this cannot be prosecuted, because the plaintiff has prevented the defendant from entitling himself to such an action, by performance on his part. If the plaintiff has thus prevented the defendant, performance by the latter would be excused, without defeating the appropriate action. So if the plaintiff, without justifiable cause, has vol-

untarily deprived himself of the power of fulfilment, a tender by the defendant may be excused. If therefore such is the fact, it is very questionable, whether assumpsit can be maintained, on account of the advances. The case, so far as this principle is involved, bears a near resemblance to that of *Charles & al.* v. *Dana*, 14 *Maine R.* 383, to which we refer.

The ground upon which it is insisted, that assumpsit for money had and received may lie is, that the defendant had rescinded the special contract, by conveying the property to which it refers to others. Admitting that this would change the remedy, which is not conceded, we are not satisfied that such was the fact, at the time of the commencement of the action. The defendant was then the owner of one half the property in question, subject to a mortgage to *Goddard* and *Cutter*. What the cost of the whole investment amounted to, does not appear. The amount to be paid by the plaintiff for his half was to be liquidated, as provided for in the condition of the bond, after the works should have been completed. If the plaintiff then paid or secured his half to the defendant, he was to be entitled to a deed. This payment might have enabled the defendant to discharge the mortgage. It does not appear, that the defendant would not have done this before the plaintiff was entitled to demand a deed, or that he might not have had it in his power to procure the release of the mortgagees, when the demand might be made. And this, with a conveyance from himself, would have saved the condition of the bond. *Brown* v. *Gammon*, 14 *Maine R.* 276. To justify the remedy by assumpsit, the least that could be required, would be clear and unequivocal proof, that the defendant had rescinded the contract, when the action was brought. This is so far from being true, that it could not then have been known, that he would not be ready to fulfil it, when the plaintiff was entitled to demand it. Since the action, the defendant has sold his whole interest to *William Emerson*, but that fact cannot avail the plaintiff in the present suit.

Judgment for defendant.

Oliver Crosby *vs.* Daniel Chase.

Nothing but payment in fact of the debt, or the release of the mortgagee, will discharge a mortgage.

One party is not estopped by the recitals in a deed taken by him from giving the truth in evidence to sustain it, if the other party goes behind the deed to defeat it.

Thus, where the mortgagee received from the mortgagor a deed of the same premises, wherein it was said, that the deed was made to cancel the mortgage, and the land was taken by an attachment made before the deed and consummated by a levy afterwards, *it was held*, that the mortgage, which with the notes had remained in the possession of the mortgagee by parol agreement at the time with the mortgagor to await the attachment, was not discharged by taking the deed.

The action was a writ of entry, and was referred by rule of Court in the usual form. At the hearing before the referees, it appeared, that the title to the premises prior to *May* 23, 1831, was in the demandant; that on that day, he conveyed the same to one *Cyrus Chase*, for the consideration of $400, to secure which sum, he gave the demandant four notes of $100 each, payable in one, two, three and four years, and a mortgage of the same premises, recorded *May* 31, 1831; that on *July* 21, 1835, *Cyrus Chase* gave a deed of the demanded premises to *Crosby*, recorded *July* 28, 1835, having the following words after the description. "And the same which said *Crosby* conveyed to me by deed, dated *May* 23, 1831, and of which I the same day gave him a mortgage deed for the surety of the payment of the purchase sum, and this deed is intended to cancel said mortgage, and the notes given for the purchase sum." It was then agreed, that the notes should remain in the possession of *Crosby* "until it should be seen what steps should be taken by the tenant," and the notes and mortgage remained in the possession of *Crosby* until the hearing before the referees. At the time the deed was given in *July*, 1835, a paper not under seal was made and delivered to *Cyrus Chase* of the following tenor. "*July* 21, 1835. *Cyrus Chase* has this day paid me his four notes for $100, all dated *May* 31, 1831. *Oliver Crosby.*" There was nothing in fact paid by *Cyrus Chase* to *Crosby*, unless by the deed of the land. On the part of the tenant it was proved, that on *July* 2*d*, 1835, he attached the same land in a suit in his favor

against *Cyrus Chase*, recovered judgment, and within thirty days therefrom duly levied the execution upon the demanded premises, and recorded his levy within three months.

The referees awarded, that *Crosby* should recover against the tenant, *Daniel Chase*, possession of the demanded premises, unless *Cyrus Chase*, or those claiming under him, should within two months after rendition of final judgment in the action, pay *Crosby* the amount due on said mortgage, with costs, unless the Court upon the facts should be of opinion, that he is not entitled to recover; and in such case the demandant was to be nonsuit, and the tenant have costs.

Rogers, for the tenant, said, this was the common case of two creditors attempting to obtain their debts in different ways, one by deed and the other by attachment. The first in point of time should prevail. Here the debt was discharged, and that is a discharge of the mortgage. If the demandant did not obtain what he expected, a good title to the land, it was his misfortune to have pursued a wrong course, and he cannot disturb the tenant in rights legally acquired. 1 *Cowen*, 122; 2 *Cowen*, 196; 18 *Johns. R.* 114, 488; 2 *Har. & M'Hen.* 7; 3 *Har. & M'Hen.* 399; 1 *Hals.* 471; 2 *Greenl.* 333.

J. Appleton, for the demandant, contended, that the report of the referees was conclusive in favor of the demandant. Wherever the opinion of the referees appears, it is final. *Jurist*, No. 41, *p.* 146, citing *Barton* v. *Ranson*, 3 *M. & W.* 332. The decision of the referees in favor of the demandant was according to law. Nothing was in fact paid, as the title to the property failed in consequence of the acts of the tenant. A receipt is always open to explanation. 3 *Stark. Ev.* 1044, 1272; 11 *Mass. R.* 27; 9 *Johns. R.* 310. The mortgage and notes were not intended by the parties to be cancelled, unless the demandant acquired a perfect title. This is like a payment in counterfeit coin. There must be a real, substantial payment of the debt to discharge the mortgage. 2 *N. H. Rep.* 525; 9 *Mass. R.* 242; 16 *Pick.* 22; 7 *Vermont R.* 493; 6 *Conn. R.* 374; 5 *Peters*, 481; 8 *Pick.* 522; 5 *N. H. Rep.* 252; 1 *N. H. Rep.* 267. Here was no merger of the mortgage by taking the deed. A mortgage will be

upheld or considered cancelled, according to the interest of the holder. 3 *Greenl.* 260; 7 *Greenl.* 102; *ib.* 377; 2 *Shepl.* 9; 1 *Paige*, 292; 2 *Cowen*, 247.

The opinion of the Court was prepared by

Weston C. J. — Whatever the parties may have intended, it is manifest that the interest of the mortgagor, with which payment was made in point of form, had previously been taken from him by an attachment, which being consummated, relates back to a day anterior to the deed from the mortagagor to the demandant. If nothing but payment in fact, or the release of the mortgagee, will discharge a mortgage, which is a principle, not only equitable in itself, but sustained by the authorities, cited for the demandant, his lien upon the land created by the mortgage, remains in force. Indeed, the mortgage and the notes were retained by him, with the assent of the mortgagor, avowedly to meet the movements of the tenant. The certificate by the demandant, that payment had been made, may operate as a receipt, which is open to explanation. It is certainly not a paper of a higher character. The recital in the deed, that it was intended to cancel the mortgage and the notes, being accepted by the demandants, may conclude him from denying that fact. He does not now deny it; but avers truly, that what was intended has failed, by reason of the prior attachment of the tenant. The supposed payment has become unavailable. He has not been permitted to realize the consideration, which he was to accept, instead of payment of the notes in money.

The tenant throws himself upon his legal rights, and insists, that although the demandant may be disappointed in the result he expected, his mode of doing the business has given the tenant an advantage, which he may lawfully enforce. We think this position, taken to defeat the interest of the demandant, may be satisfactorily answered. The tenant, in virtue of his prior attachment, goes behind the deed, given by the mortgagor to the demandant, and avoids it. He is remitted to the state of the title, at the time of the attachment. He cannot be permitted to defeat the deed for one purpose, and to set it up for another. If the demandant is embarrassed by any estoppel, supposed to result from his accept-

ance of the deed, he is relieved, by the course taken by the tenant, who in the exercise of his legal rights, so far as the deed operates upon him, rides over and defeats it.

The levy, however, made by the tenant, transferred to him the right to redeem, existing in the mortgagor, at the time of the attachment. *White* v. *Bond*, 16 *Mass. R.* 400. And we are of opinion, that the award in favor of the demandant, is sustained by the law of the case.

Exceptions overruled.

JOTHAM BABCOCK *& al. vs.* NATHANIEL WILSON *& al.*

The general rule is, that where one party agrees to pay to the other certain sums at different fixed times, in consideration of which the other agrees to perform an act, leaving the time of his performance indefinite, the covenants are independent.

But if the payment of any one of the sums is made to depend upon the performance of any act by the other party, as it respects that one, they are dependent, while as it respects all the others, they remain independent.

The promise of one party is a sufficient consideration for that of the other.

Where the contract was "to give a good and sufficient deed of warranty of all and fully the promisor's interest in M. lot, meaning all and fully the same right, title and interest deeded to him by P. by deed dated *May* 28, 1835," *it was held*, that the contract required only to convey with warranty the same title received from P. and not to warrant that P. had good title.

ASSUMPSIT upon an agreement not under seal, of the following tenor. "We hereby promise, covenant and agree to and with *Amasa Hewins* and *Jotham Babcock* to take up and fully discharge ten several notes of hand, given by said *Babcock* and *Hewins* to *Waldo T. Pierce*, or order, in *May* last, for the sum of two hundred and fifty dollars each, payable annually, with annual interest, and that we will save them, their heirs, executors and administrators from any and all costs and damage that can arise or accrue to them, or either of them in consequence of said notes. And we further agree to pay or cause to be paid to said *Babcock* and *Hew-*

ins, or order, eight hundred dollars, as follows, *viz.* four hundred dollars in three months from date, and four hundred dollars in one year from date. As a full consideration for which the said *Babcock* and *Hewins* agree to give to us, or order, a good and sufficient deed of warranty of all and fully their interest in *Marsh-point* lot, situated on *Marsh Island* in *Orono*, meaning all and fully the same right, title and interest deeded to them by *Waldo T. Pierce* and others, as by reference to said deed, dated *May* 28, 1835, will more fully appear. *Orono, Sept.* 2, 1835. *Nath'l Wilson, Elijah Webster.*" A similar paper, signed by the plaintiffs, was given to the defendants. The deed referred to was from *W. T. Pierce* and others to the plaintiffs, defendants, and *Albert G. Brown*, conveying the *Marsh Island* point lot, describing it, to them by deed of warranty.

The action could not be tried during the jury term, and to bring the case before the Court for the determination of the questions of law, the report of the case states, that the defendants insisted, that the plaintiffs, in consideration of the obligation on the part of the defendants agreed to give them a good and sufficient deed of warranty, which they have never given or tendered, and which they never had it in their power to do in a manner which would convey the land; first, because the possession of a large and valuable part of the premises has never been in the plaintiffs, but is now and was at the time the writing was given claimed by and in the possession of one *Marsh*, as his own in fee, which he refuses to surrender. Secondly, that if a deed had been made and tendered, instead of receiving possession, the defendants would have been subjected to a vexatious law suit, contrary to the true intent and meaning of the agreement. The plaintiffs claimed the eight hundred dollars mentioned in the agreement, but they offered no proof of the execution or tender of a deed from themselves to the defendants. The latter offered to prove the points by them taken. The parties desired to submit to the determination of the whole Court, first, whether to maintain the action, the plaintiffs are bound to prove the delivery or tender to the defendants of such a deed as the agreement describes. Second, whether the other ground taken by the defendants, if proved, is legally available in their defence.

I. Washburn, for the plaintiffs, said, that there were three kinds of covenants or promises laid down in the books. 1. Such as are *mutual* and *independent*, where either party may recover of the other for the breach of the covenant or promise in his favor, and it is no excuse for the defendant to allege a breach on the part of the plaintiff. 2. There are covenants which are conditions dependent on each other, where the performance on one part depends on a prior performance by the other. 3. Mutual or concurrent covenants, to be performed at the same time.

Part of the covenants or promises in the same instrument may be dependent and the others independent. *Couch* v. *Ingersoll*, 2 *Pick.* 292; *Kane* v. *Hood*, 13 *Pick.* 281. If these covenants were of the second class, the plaintiffs were not bound at all events to tender a deed before they can recover. The eight hundred dollars were to be paid, long before the defendants were obliged to pay the notes. If the promises were of the third class, the plaintiffs need only to aver a readiness to perform. 15 *Pick.* 546; 1 *East*, 203; 8 *Taunt.* 69; *Brown* v. *Gammon*, 14 *Maine Rep.* 276. But the main reliance was placed upon the first principle, that these promises were mutual and *independent*. The promise to pay the eight hundred dollars was independent, absolute and unqualified. In his argument on this point, the counsel cited *Manning* v. *Brown*, 1 *Fairf.* 49; *Hunt* v. *Livermore*, 5 *Pick.* 395; 1 *Strange*, 535; *Read* v. *Cummings*, 2 *Greenl.* 82; 1 *Salk.* 171; 2 *H. Black.* 389; *Gardiner* v. *Corson*, 15 *Mass. R.* 471; 1 *Saund.* 319; 2 *Johns. R.* 272; 5 *Johns. R.* 78; 9 *Johns. R.* 126; *Com. on Con.* 41; 1 *Ld. Raym.* 665; 6 *T. R.* 572; 2 *Stark. Ev.* 92; 12 *Mod.* 461; *Smith* v. *Woodhouse*, 2 *N. H. Rep.* 233; *Hill* v. *Woodman*, 14 *Maine Rep.* 38.

The proof offered by the defendants of the claim of *Marsh* to a part of the premises is no defence to this action. The plaintiffs only agreed to convey *their interest in the premises*, "*the same right, title and interest*, deeded to them by *Waldo T. Pierce* and others." The plaintiffs were only to warrant against incumbrances upon that interest. The covenants cannot enlarge the grant. *Allen* v. *Holton*, 20 *Pick.* 458. A promise to give a deed of warranty is not an engagement to give a perfect title. *Tinney* v. *Ashley*, 15 *Pick.* 546; 16 *Johns. R.* 268.

Wilson, for the defendants, contended, that the plaintiffs cannot sustain their action, because it was their duty to have made and tendered to the defendants "a good and sufficient deed of warranty," before attempting to enforce performance on the part of the defendants. *Sugden's Law of Vendors*, 205, 265; 2 *Com. on Con.* 52; 1 *Selw. N. P.* 160. Before the defendants can be compelled to pay, the plaintiffs are bound to exhibit a good and indefeasible title to the premises, free from all incumbrances. The agreement is void for want of consideration. To entitle the plaintiffs to recover, it is incumbent on them to prove performance, or tender of performance on their part. 4 *T. R.* 761; 8 *T. R.* 366; 9 *Mass. R.* 78; 10 *Johns. R.* 266; *Porter* v. *Noyes*, 2 *Greenl.* 22; *Eveleth* v. *Scribner*, 3 *Fairf.* 24; *Hunt* v. *Livermore*, 5 *Pick.* 395.

The opinion of the Court was prepared by

SHEPLEY J. — By the first clause in the contract the defendants promise to pay ten promissory notes, payable annually; and to save the plaintiffs from all cost and damage arising from their having signed them. This promise could be performed by paying each yearly, with the interest annually, as it became due; and it secured to the defendants a credit extending to nearly ten years for the last instalment.

By the second clause the defendants engage to pay a further sum of eight hundred dollars, one half in three and the other half in twelve months from the date. "As a full consideration for which" the plaintiffs agree to convey their interest in the *Marsh-point* lot. If the word *which* is to be referred for its antecedent to the payments to be made, the plaintiffs might not be required to convey the title until the final payment was made. Permitting it to have reference to the promises of the defendants, as the counsel of each party admits was the intention, and no time is appointed for making the conveyance, there is nothing in the contract indicating an intention, that it should precede the payments as a condition precedent, nor that it should be executed at the time of payment of any one of the instalments. The contract exhibits evidence of an entire confidence then reposed by each party in the other for the performance of their respective engagements. And it is highly

probable, that it was expected that the notes due to *Pierce* would be discharged, or differently secured by some new sale or negotiation, in a short time, when the title would be conveyed to some third party. Any such expectations, if entertained, have not been realized, and they now appeal to the law to decide upon their rights.

In the case of *Terry* v. *Duntze*, 2 *H. Bl.* 389, it was decided, that when payments were to be made by instalments the covenants were independent, although the last instalment was to be paid when the work was completed. This rule appears to have been approved in the cases of *Seers* v. *Fowler*, 2 *Johns. R.* 272, and *Wilcox* v. *Ten Eyck*, 5 *Johns. R.* 78; while it is impugned in *Johnson* v. *Reed*, 9 *Mass. R.* 78; and the case is alluded to, apparently with approbation, in *Gardiner* v. *Corson*, 15 *Mass. R.* 503. The rule should be received with the qualification, that if the payment of any instalment is made to depend upon the performance of any act by the other party, as it respects that one, the stipulations are dependent, while as respects all the others, they remain independent.

In the note of *Sergeant Williams* to the case of *Pordage* v. *Cole*, 1 *Saund.* 320, the rule is stated to be, that if the day appointed for payment must or may happen before the act is to be performed for which it is the consideration, performance is not a consideration precedent to the payment; "and so it is," he says, "where no time is fixed for performance of that, which is the consideration of the money or other act." This rule appears to be well established by the cases to which he refers, and it received the approbation of the Court in the case of *Couch* v. *Ingersoll*, 2 *Pick.* 300. The application of it to this contract decides, that the stipulations were independent, and that each might exact performance of the other without proving that he had performed on his own part.

It is objected, that there was no consideration for the defendants' promises, but the promise of one party was a sufficient consideration for that of the other.

The second question submitted relates to the title which was agreed to be conveyed. The plaintiffs and defendants, and *Brown*, had, on the twenty-eighth day of *May* previous, purchased the *Marsh-point* lot of *Pierce*, in certain proportions, receiving a deed

of general warranty. The defendants, by this agreement, contracted to purchase the share thus conveyed to the plaintiffs. Was it the intention of the parties that the plaintiffs should add their warranty to that already received from *Pierce*, or were they only to convey with warranty the same title which they had acquired? The contract declares, that they are to give "a good and sufficient deed of warranty of all and fully their interest in the *Marsh-point* lot," "meaning all and fully the same right, title and interest deeded to them by *Waldo T. Pierce & als.* as by reference to said deed, dated *May* 28, 1835, will more fully appear." The engagement is not to convey a certain portion of the lot, but only their interest in it; and to remove all doubt respecting the extent of that interest, it is to be the same conveyed to them by *Pierce* and others. How can the defendants claim, that they should convey a greater or different interest, when the contract by which they require it declares, that it shall be the same, and neither more nor less? The language appears to have been carefully applied to carry into effect the apparent design of placing the defendants in the position of the plaintiffs as respects that portion of the lot conveyed to them, and of requiring this to be done by their executing a deed of warranty of the interest, which they had acquired. If there were doubts respecting the title, and none appear to have existed at that time, it must have been the intention, that the defendants should rely upon the warranty of *Pierce*, and others, to whom the principal portion of the purchase money was to be paid. The matters stated in the report cannot therefore constitute a defence to this action.

Samuel C. Gage *vs.* John H. Wilson.

Where the plaintiff, to prove property in himself, introduces a bill of sale thereof which is not admitted in evidence because the subscribing witness is not called to prove its execution, he cannot introduce parol evidence of the sale.

If the defendant is compelled to rely upon repelling proof in consequence of illegal evidence of the sale, and for that purpose calls a witness whose testimony proves the sale to have been made and tends to prove it to be fraudulent, this does not preclude him from availing himself of the erroneous admission of evidence, to obtain a new trial.

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

Replevin for two horses, a clock and seven beds and bedding therefor. The defendant in his brief statement alleged, that he was a deputy-sheriff, and that as such, on the 11th of *March*, 1837, by virtue of a writ in favor of one *Irving*, against *William I. Thomas*, he attached the goods replevied as the property of *Thomas*, the true owner, denying the title of the plaintiff. The plaintiff, to maintain his action, first called *William I. Thomas, Jr.* who testified among other things that he saw a delivery of the property in controversy from his father to *Gage*, in *January* or *February*, 1837, but failed to prove a sale by him. The plaintiff then called *William I. Thomas*, the former owner under whom both parties claimed. This suit was defended by *Irving*, the creditor in the suit on which the attachment was made by the defendant. That action had been tried the present term, and a verdict found against him, but exceptions were filed by him, and the questions arising remained to be decided. The defendant objected to *Thomas* as a witness, on the ground of interest. The objection was overruled. *Thomas* then said that the evidence of the sale was in writing. The bill of sale was then produced by the plaintiff. It was witnessed by two persons of whom one had deceased, and the other lived within the State. The defendant called for proof of the execution of the bill of sale by the testimony of a subscribing witness, and objected to its admission in evidence. The proof was not introduced and the bill of sale was excluded. The plaintiff proposed to prove the sale by *Thomas*. Parol evidence to prove

the sale was objected to by the defendant. This objection was overruled, and *Thomas* was permitted to testify to facts showing a sale. The defendant called one *Conner* as a witness, and his testimony tended to prove that the sale from *Thomas* to *Gage* was fraudulent, but he stated that a sale had been made. The exceptions set forth, that the Judge, in committing the cause to the jury, stated to them that it had been proved, that the plaintiff had a bill of sale of the property, which though offered had not been read in evidence; that it was not competent for the plaintiff to show by parol evidence the contents of the bill of sale, but that the plaintiff contends, that there is sufficient evidence of a sale without it by the delivery of the articles and subsequent payment for them, and for the keeping of the horses, together with the recognition of the sale by the defendant's evidence; and he directed them to inquire, if a sale of the property to the plaintiff had been proved; and if it had, they would also inquire, whether it was made in good faith or to defraud creditors, and to return their verdict as they should find the evidence to be on those points. The verdict was for the plaintiff, and exceptions were taken by the defendant.

Washburn and *Prentiss* argued for the defendant, and contended, that as the sale was in writing, and that writing in existence and in the possession of the plaintiff, that parol evidence to prove the sale was inadmissible. It is no cause for the introduction of parol evidence that the plaintiff failed to prove the execution of the paper. The defendant had the right to insist on the production of the subscribing witness, to prove fraud by him. 1 *Stark. Ev.* 102; 3 *Stark. Ev.* 995; 5 *Mass. R.* 303; 1 *Mass. R.* 101; 15 *Pick.* 449; 2 *Fairf.* 253; *ib.* 404; 1 *Shepl.* 31; 12 *Johns. R.* 221; 1 *Moody & Rob.* 279.

Thomas, the vender of the property, was interested, and incompetent as a witness. Nor was it a balanced interest. 6 *Greenl.* 420; 3 *Fairf.* 51; 2 *Greenl.* 199; 3 *Fairf.* 9; 11 *Johns. R.* 57; 6 *T. R.* 5.

When the defendant was compelled to show fraud in consequence of the improper testimony admitted to prove the plaintiff's right to the property, the testimony of the witness of the defendant that there was a bill of sale, but that it was fraudulent, is no justification or excuse of the improper ruling of the Judge. The

admissions of the adverse party, even if made in Court, do not avoid the necessity of calling the subscribing witness. 1 *Stark. Ev.* 330; 4 *East*, 53; 2 *M. & S.* 62; 2 *Stark. R.* 180.

Wilson, for the plaintiff, contended, that as the bill of sale was ruled out on the objection of the defendant, that was out of the case. The testimony of the witnesses was not offered to prove the contents of the writing, but to show other facts, proving the sale, delivery and payment. Such testimony is not excluded by any rule of evidence. But the plaintiff's case was fully proved by the return of the defendant on the writ, *Irving* v. *Thomas*, and by *Conner*, the defendant's own witness. *Irving* is not a creditor of *Thomas*, and has no right to come in here and set up a defence to this suit. The case shows no interest of *Thomas*. But if it did, his testimony is wholly immaterial, the sale being proved by the defendant's witness. A new trial will not be granted, where the jury have found facts decisive of a case in favor of the party prevailing, or where immaterial testimony has been erroneously admitted. *Jewett* v. *Lincoln*, 2 *Shepl.* 116; *Polleys* v. *Ocean Ins. Co. ib.* 141; *Watson* v. *Lisbon Bridge, ib.* 201; *Kelley* v. *Merrill, ib.* 228.

The opinion of the Court was drawn up by

Weston C. J. — The plaintiff was bound to prove property in the chattels in controversy in himself, before he could be entitled to a verdict. He relied upon a sale from *William I. Thomas*, the original owner. The evidence of that was in writing. It was a single transaction, of which the written instrument was the appointed and legal proof. It was given as the proper evidence of title, and as such held by the plaintiff. It was the best evidence, which he was therefore bound to produce. And when produced, it was incumbent on him to prove it.

It had two subscribing witnesses. One of them had deceased; but the testimony of the other might have been obtained. Secondary evidence of its execution was inadmissible, and the instrument was properly excluded. But this did not entitle the plaintiff to adduce parol evidence of the sale. It was inferior in its character to the written evidence, which was executed for the purpose of fixing and ascertaining what had been agreed. We are of opinion

then, that the testimony of *Thomas* as to the sale, which was objected to, was not legally admissible.

It is contended, that by the testimony of *Conner*, a witness for the defendant, proving the sale, that fact is established from testimony, to which he is not at liberty to object. His legal objection to the evidence of sale being overruled, the defendant was under the necessity of resorting to repelling testimony, and attempted to prove by *Conner*, that the sale was fraudulent. This evidence, thus introduced, ought not to have the effect to preclude him from questioning the plaintiff's title, which he had failed to prove by competent testimony.

As the case is presented, the competency of *William I. Thomas*, as a witness for the plaintiff, may well be questioned. He was the plaintiff's vendor, interested to sustain his title. Unless it is balanced by an equal interest on the other side, he is incompetent. It would have been, if *Irving*, who is represented by the defendant, had been his creditor. This is so far from being established by proof, that a verdict has been rendered against him; but whether rightfully or not, is yet to be determined.

Exceptions sustained.

JOHN K. GOODMAN *vs.* MILFORD P. NORTON.

Where the indorser of a note is notified of the demand and the default of the maker by mail, the notice must be put into the post-office on the day of the demand, or in season to be sent by the first mail of the succeeding day.

A new trial will not be granted merely because the Judge in open Court, in presence of the counsel, answers in writing a written inquiry sent from the jury by the officer in attendance.

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

Assumpsit against the defendant as indorser of a note made to him by *Horace Weeks* and *Thomas Wentworth* for $500, dated at *New-York*, *Aug.* 25, 1836, and made payable at the *Leather*

Manufacturers' Bank in that city in three months. The making and indorsement of the note were admitted. The plaintiff proved that the note was protested on the day it fell due, *Nov.* 28, and a notice thereof made out and directed to the defendant at *Bangor, Maine*, the place of his residence when the note was made, and put into the post-office in the city of *New-York*, on the 29th day of *November*, 1836, but the time of day was not shown. The witness stated, that the notice was given at the time, and in the usual and customary mode, according to the usage and custom among the banks in the city of *New-York*. The exceptions state, that hereupon the plaintiff requested the Court to instruct the jury, that if the notice was sent to the place of *Norton's* residence, that the demand and notice were sufficient. It is not stated, that any decision was made in relation to this request. The defendant then proved, that the bank in the city of *New-York* closed business for the day at three o'clock P. M.; that the regular land mail for the eastward left daily at six o'clock A. M. and that the steamboat mail left from four to five o'clock P. M.; that letters in the ordinary course of business went by the land mail, and that letters intended for the steamboat mail must be marked "steamboat" to secure a passage by that mode. The defendant produced the notice, and it appeared to be dated *New-York*, *Nov.* 28, 1836, and had upon it the post-office mark, "*November* 30."

The counsel for the defendant contended, that the notice was not sent in season. The Judge instructed the jury, that the plaintiff was not bound to have sent notice by the steamboat mail, unless he chose to elect that mode of conveyance; that if he put it into the post-office in season to go on the following day in the usual course of mail, it would be all that was required of him to do; that inasmuch as the evidence showed the written notice to have been put into the post-office at *New-York*, on the 29th, but not at what hour of the day, if they should be satisfied that it was in season to have gone by the mail on that day, and had been delayed in the office that would not be the fault of the plaintiff.

Sometime after the jury had retired to their room, they sent into Court, by their foreman, to the Judge, by the officer, a note "inquiring whether it would be due diligence on the part of the plaintiff to have put the notice into the post-office at any time on the

twenty-ninth." The Judge returned an answer, "that it would, if put into the office in season to go by the mail on that day." The verdict being for the defendant, the plaintiff filed his exceptions.

J. A. Poor argued for the plaintiff, and contended, that the custom of the city of *New-York* should govern, the bill being made payable there, and the notice having been sent conformably to that usage. This was a question of law, and should have been decided by the Court as the counsel for the plaintiff requested. *Mills* v. *Bank of the U. S.* 11 *Wheat.* 431. Independent of the custom of the place, the notice was put into the office as soon as the law requires. It was not necessary to have sent by any but the regular mail. And it is in season, if put into the office at any time during the day succeeding the day the note became payable. *Whitwell* v. *Johnson*, 17 *Mass. R.* 449; *Chitty on Bills, (8th ed.)* 514, 518. Here the notice was put in the next day and it could not be required that the notice should be made out and put into the office to be mailed before six o'clock in the morning. Reasonable diligence and attention is all that the law exacts. *Robinson* v. *Ames*, 20 *Johns. R.* 146; *Smedes* v. *Utica Bank*, *ib.* 372; *Mead* v. *Engs*, 5 *Cowen*, 303. Each party is entitled to one day to give notice, which the plaintiff could not have, if it was necessary to put the notice in before six in the morning. *Bayley on Bills*, 263; 9 *East*, 347. The Judge had no right to send instructions to the jury, after they had retired to their room. *Sargeant* v. *Roberts*, 1 *Pick.* 337.

J. Appleton, for defendant. Had the parties all lived in the city of *New-York*, notice must have been given on *June* 28 to hold the indorser. *Woodbridge* v. *Brigham*, 12 *Mass. R.* 403. And when the indorser lives in a different town from the one where the demand is made, notice must go as early as the first mail of the day following that on which the note falls due, whether early or late. *Chitty on Bills, (8th ed.)* 518; 3 *Car. & P.* 250; *Lenox* v. *Roberts*, 2 *Wheat.* 373; *Mitchell* v. *Degrand*, 1 *Mason*, 176; 2 *Aiken*, 263; *Whitwell* v. *Johnson*, 17 *Mass. R.* 449.

The opinion of the Court was drawn up by

WESTON C. J. — In *Smedes* v. *The Utica Bank*, 20 *Johns. R.* 372, it was held, that if the indorser lives in a different town, from

that in which the demand is made, notice must be forwarded to him on the day of the demand, or the day after, and by the next mail. In *Darbishire* v. *Parker*, 6 *East*, 3, the Court advert to the rule, that notice to the indorser, must be sent by the next mail after demand, but qualify it by saying, that it must be by the next practicable or convenient mail, but if delayed until the next day, it must be sent by the mail of that day. And this case is cited with approbation, in *Mead* v. *Engs*, 5 *Cowen*, 303, cited for the plaintiff. In *Lenox* v. *Roberts*, 2 *Wheat.* 373, the Supreme Court of the *United States*, lay down the rule to be, that notice of the default of the maker, upon due demand, must be put into the post-office early enough, to be sent by the mail of the succeeding day. And in *Mitchell* v. *Degrand*, 1 *Mason*, 176, *Story J.* holds, that notice must be sent to the parties intended to be charged, by the next practicable mail, after demand.

In *Whitwell & al.* v. *Johnson*, 17 *Mass. R.* 449, cited for the plaintiff, the Court say, that notice to the indorser, put into the post-office the next day after demand, is early enough, if put in in season to go by a mail of that day. To the same effect substantially is the case of *Debree* v. *Eastwood*, 3 *Car. & Payne*, 250. And we are satisfied, that the ruling of the Judge below was in conformity with mercantile law, as settled at the present day.

With regard to the communication between the Judge and the jury, it was in open Court, in the presence of counsel, and differs, therefore, materially from the case of *Sargent* v. *Roberts & al.* 1 *Pick.* 337, which took place after the adjournment of the Court.

Exceptions overruled.

JOSHUA BURNHAM *vs.* LAODICEA CHAPMAN.

The *stat.* 1821, *c.* 170, having expressly provided, that in regard to male children bound out, provision shall be made in the deed, that they shall be instructed to read, write and cypher; the omission of such provision is fatal to the validity of such indentures.

To substitute for the statute requirement, a covenant by the master, *to see that the minor is properly educated and instructed*, is not sufficient.

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

Assumpsit to recover a sum of money for the labor and services of one *Jeremiah Lowell*, on the ground that *Lowell* was the apprentice of the plaintiff. To show that *Lowell* was his apprentice, he proved that on *April* 20, 1832, that *Lowell*, then about thirteen years of age, was supported by the town of *Bucksport;* and offered in evidence an indenture, dated the same day, by which the overseers of the poor of *Bucksport* undertook to bind out *Lowell* to the plaintiff, as his apprentice until he became twenty-one years of age. To the admission of this indenture the defendant objected, because it was not in conformity with the provisions of the statute. The objection was overruled, and the indenture was read to the jury. The covenants in the indenture on the part of *Burnham* were the following. "And the said *Burnham* on his part covenants and agrees to keep and provide for said minor all good meat, drink and clothing necessary during said time; to see that he is properly educated and instructed, and to use his best endeavors to see that he is properly qualified for usefulness both for himself and for the public; and at the expiration of said term to give him two good suits of wearing apparel, one for working, and one for the Lord's day."

A verdict having been returned for the plaintiff, the defendant excepted.

Kent, for the defendant, contended, that the papers offered and admitted as indentures did not conform either to the letter or spirit of the statute, authorizing overseers of the poor to bind out children, and therefore were void and inoperative. *Stat.* 1821, *c.* 170; *Butler* v. *Hubbard*, 5 *Pick.* 250; 3 *Sergt. & R.* 158; *Nickerson* v. *Easton*, 12 *Pick.* 110.

Poor, for the plaintiff contended, that as this purported to be a binding out to the plaintiff by the overseers, and as there was a mode pointed out in the *stat.* 1821, *c.* 170, § 3, for discharging the minor from his indentures, that it is not competent for the defendant here to set up any irregularity in the indentures. It is the same in principle as *Knox* v. *Jenks*, 7 *Mass. R.* 488. Being an apprentice *de facto* is sufficient to support the action against a wrongdoer. 6 *Johns.* 276; 12 *Johns. R.* 188. Here was however a substantial compliance with the provisions of the statute, and that is sufficient. *Bowes* v. *Tibbets*, 7 *Greenl.* 457; *Dodge* v. *Hills*, 13 *Maine R.* 151.

The opinion of the Court was by

WESTON C. J. — It is incumbent on the plaintiff, before he can maintain an action, to show that he is legally entitled to the services of the minor. The title he sets up is in virtue of indentures, executed by himself and the overseers of the poor of the town of *Bucksport*. He relies upon a binding under the sixth section of the act for the relief of the poor. *Statute* of 1821, *c.* 122. It is there expressly required, that in regard to male children bound out, provision shall be made in the deed, that they shall be instructed to read, write and cypher. This provision is too important to be disregarded; and its omission in the indentures in question, must be held fatal to their validity. The overseers were not at liberty to substitute the opinion of the master, as to what might be necessary to qualify the child for usefulness. The plaintiff having no other right to the services of the minor, the verdict cannot be supported.

Exceptions sustained.

SETH F. DAVIS *vs.* AUGUSTUS GOWEN.

If the writ is indorsed by one of two partners as attorneys at law in his own name, and there is no agreement to indemnify him, the other partner is not bound by the partnership relation to contribute towards any loss that may happen in consequence of the indorsement, and is a competent witness in the case for the plaintiff.

If the indorser of a note, when he knows that no demand has been made upon the maker, promises to pay it, he will be liable.

But the plaintiff must prove affirmatively that the indorser knew that there had been no demand.

Such knowledge cannot be inferred from the mere fact of the promise to pay.

If it be proved that the indorser knew, at the time of the promise, that no demand had been made, it is to be presumed that it was done with a knowledge of his legal rights.

EXCEPTIONS from the District Court, for the Eastern District, ALLEN J. presiding.

Assumpsit against the defendant as indorser of a note dated *Sept.* 23, 1837, for $32.13 payable in thirty days, given by one *Mayo* to the defendant and by him indorsed. The parties all lived in *Orono*, and it was proved that the note was left in the *Stillwater Bank* in that town for collection, and that on the 26th of *Aug.* written notices were made out directed to the maker and indorser, and left in the *Orono* post-office. The plaintiff then called *Nathaniel Wilson*, who was objected to by the defendant as interested. He stated, in answer to questions by the defendant's counsel, that the action was commenced by *N. Weston, Jr.* and himself, then in partnership as attorneys at law, and indorsed by *Weston;* that he and *Weston* had dissolved their connection in business, and that by the terms of the dissolution he was to settle the business of the office, and had since prosecuted this action. The objection was overruled. *Wilson* testified, that the note was brought to him on or about the last day of grace by the plaintiff, who desired to have a writ made upon it immediately; that on the same day or within two or three days the witness called on the defendant with the note and told him what directions he had received; that the defendant said, if the witness would not sue the note he would immediately see it paid; that he delayed to sue it on account of the promise; that he called on the defendant again, and he believ-

ed a third time, when similar promises were made. There was no other evidence.

The defendant's counsel requested the Court to instruct the jury, that on the facts in the case the action could not be maintained. The instruction given was, that the notices left in the post-office were insufficient to charge the indorser; that a promise by the defendant to pay the note, made with the knowledge that he was discharged by the laches of the holder, would amount to a waiver of notice; that if the jury should find that the defendant made the promise, and should further find that when he made it, he knew the facts and circumstances affecting his liability as indorser, and such facts and circumstance would discharge him; they were to presume that he made the promise with a knowledge of his legal rights; that is, with the knowledge that he was discharged by the laches of the holder; and if so, that the plaintiff would be entitled to recover.

The defendant filed exceptions, the verdict being for the plaintiff.

Washburn, for the defendant, argued: —

1. *Wilson*, the witness, was interested. His partner was liable for costs, and *Wilson* would be liable to contribute his share. 2 *Pick.* 285; 3 *Pick.* 420; 6 *Paige*, 76; 6 *N. H. Rep.* 547; 8 *Wend.* 665; 4 *M'Cord*, 259; 11 *Mass. R.* 246.

2. The defendant was discharged, and the promise testified to was made under an ignorance both of the law and of the facts. Such a promise, it has repeatedly been decided, is not binding. The promise is without consideration, and does not operate as a waiver of demand and notice. 9 *Mass. R.* 408; 7 *Mass. R.* 448; *ib.* 488; 4 *Mass. R.* 342; 10 *Mass. R.* 84; 4 *Bing. N. C.* 227; 5 *Burr.* 2690; 1 *T. R.* 712; 12 *East*, 434; 4 *Taunt.* 93; 5 *Esp. Rep.* 265; *Chitty on Bills, (6th ed.)* 236; 5 *Paige*, 104; 2 *Bailey's R.* 475. The burthen of proof is on the plaintiff to show that the promise was made with a knowledge of all the facts, and the proof must be clear and conclusive. The facts in this case are wholly insufficient to charge the indorser. In addition to the cases already cited are the following. 16 *Johns. R.* 152; 1 *Cowen*, 397; 6 *Wend.* 658; 2 *Brock.* 20; 7 *N. H. Rep.* 271; 3 *N. H. Rep.* 346; 17 *Pick.* 335. As there was no

dispute about the facts, it was a question of law for the decision of the Court. 1 *Cowen*, 397; 7 *Cowen*, 707; 1 *Fairf.* 467; 10 *Mass. R.* 84; 17 *Mass. R.* 449.

Wilson, for the plaintiff, contended, that the witness was under no liability whatever to the indorser of the writ, and therefore was competent.

The promise was made with a full knowledge of all the facts in the case, and so the jury must have found under the instructions of the Court. The promise proved is sufficient to hold the defendant. 12 *Peters*, 497. The consideration was sufficient. 2 *Shepl.* 138; 4 *Greenl.* 387; 5 *Greenl.* 81. The Court will not set aside a verdict, where substantial justice has been done. 2 *Shepl.* 228; 4 *T. R.* 468; 7 *Mass. R.* 507; 1 *Johns. Cas.* 250.

The opinion of the Court, was drawn up by

WESTON C. J. — The attorney for the plaintiff is not liable to the defendant for his costs, unless he indorses the writ. It is no part of his duty, in virtue of his retainer, to do this. It is in practice often done by him, but the obligation it imposes, depends upon his indorsement, to which a certain legal effect is attached, and not upon the relation in which he stands, as the attorney of the plaintiff. The partner of *Mr. Wilson*, the witness objected to, indorsed in this case the plaintiff's writ. He might have done it in the name of the firm. If he had, they would doubtless have been bound, being done in the prosecution of their professional business. But he did in fact indorse it in his own name. He had a right to to do so. The indorsement was not objectionable. We do not perceive how it can render the firm liable to the defendant. He had no right to require their indorsement. Nor does it appear to us, that the actual indorser has a remedy over against them. It was a liability by him voluntarily assumed in his individual capacity, not a duty arising from his professional relation.

After their dissolution, the business was continued and to be settled by *Mr. Wilson*. This did not subject him to any liability for costs, which the firm had not assumed. It does not appear in the exceptions, that he had undertaken to indemnify his former partner. As the case stands, no such interest is disclosed, as would render the witness incompetent.

The liability of the defendant was originally conditional, depending upon legal demand and notice, which it was incumbent upon the plaintiff to prove. It is not pretended, that such proof has been made. An express promise is relied upon, which it is insisted is a waiver of the condition, and binds the defendant absolutely. The authorities are clear, that to have this effect, it must have been made with a full knowledge of the facts, which would have entitled the defendant to have been discharged. And this must be made to appear affirmatively, from the proof adduced by the plaintiff.

The decisions in *New-York*, cited for the defendant, maintain this doctrine. In *Trimble* v. *Thorne*, 16 *Johns. R.* 152, it was held, that the promise itself is not evidence, that the indorser was apprized of the facts. In *New-Hampshire*, it has been decided, that a new promise by the indorser, to be binding, must have been made with a full knowledge, that there had been no legal demand and notice. *Otis* v. *Hussey*, 3 *N. H. Rep.* 346; *Farrington* v. *Brown*, 7 *N. H. Rep.* 271. In *Martin* v. *Winslow*, 2 *Mason*, 241, *Story J.* says, "a promise to pay with a full knowledge of all the facts, is binding upon the indorser, although he might otherwise be discharged. But if he promise in ignorance of material facts, affecting his rights, it is not a waiver of those rights."

In some of the cases cited for the defendant, the Court intimate an opinion, that the indorser ought to know that he is legally discharged. But in practice, no other proof has been required, but such as is calculated to afford reasonable satisfaction, that the indorser had a knowledge of the facts, which relieved him from legal liability. In *Hopkins* v. *Liswell*, 12 *Mass. R.* 52, the jury were instructed, that if the indorser, when he made the promise, knew that no demand had been made upon the maker, he was liable; and they were left to infer this knowledge, from the circumstances proved. These instructions were sustained by the Court.

In the case before us, the same instructions were given, with the addition, that from a knowledge of the facts, it was to be presumed that he knew that he was legally discharged. We are of opinion, that the law, as to the effect of a promise thus made, was properly laid down by the presiding Judge. It was the province of the

jury to determine the facts, which is a matter not submitted to our revision.

But there does not appear to have been sufficient evidence, upon which to base the instruction. There is no affirmative proof, that the defendant knew of the laches of the holder. The promise itself does not establish that fact. And we are of opinion, that the jury should have been so instructed, upon the request of the counsel for the defendant.

Exceptions sustained.

NATHANIEL HATCH *vs.* BUCHAN HASKINS.

When two mortgages, dated and acknowledged at different times, are recorded upon the same day, their priority of registry must be determined by the record alone, and no parol evidence is admissible to show which was first received.

The order in which the mortgages are entered upon the book of records, furnishes no evidence that one was received prior to the other.

Where so far as it respects the record, the rights under two deeds are equal, the title under the one first made is not defeated or impaired by such registry of the second; but to give the second deed the priority, it must be first recorded.

As the possession and production of a deed by the grantee, is *prima facie* evidence of its having been delivered; so if it be found in the hands of the grantor, the presumption arises that no delivery had been made.

THIS action was brought to recover possession of certain mortgaged premises, and came before the Court upon a statement of facts, in the form of the report of a trial, the parties agreeing, that evidence stated as given should be subject to any objections to its competency, and that the Court might infer from the evidence any facts which a jury would be authorized to find. The demandant produced a deed of the premises from *Bussey* to *Brown*, dated *March* 15, 1833, and acknowledged and recorded *April* 27, 1833; a mortgage from *Brown* to *Emmons*, dated *April* 26, 1833, to secure the payment of four notes of $69,60 each, which were pro-

duced by the demandant, overdue and unpaid, acknowledged *April* 27, *and recorded the 29th of the same month;* an assignment of the mortgage from *Emmons* to the demandant, dated *May* 2, 1833, acknowledged *May* 3, 1833, and recorded *May* 30, 1838.

The tenant then produced in evidence a mortgage of the same premises to secure the payment of four notes of $69,60 each, from *Brown* to *Bussey*, dated *March* 15, 1833, acknowledged *April* 27, *and recorded April* 29, 1833; a quitclaim deed from *Bussey* to the tenant and *Griffin*, dated and acknowledged *June* 9, and recorded *June* 10, 1835; and an assignment of the mortgage from *Bussey* to the tenant and *Griffin*, dated *June* 9, 1835, but not acknowledged or recorded.

The demandant then proved a notice to *Mr. Poor*, the tenant's counsel, to produce a mortgage deed from *Bradbury* and *Griffin* to *Brown*. *Mr. Poor* denied the right to call for the deed, and refused to produce it. The demandant then called *Mr. Poor* as a witness, and he testified in substance, that he found a paper in the common form of a mortgage deed from *Bradbury* and *Griffin* to *Brown*, dated *August* 10, 1833, and acknowledged the same day, conditioned, that the mortgagers should pay the notes of *Brown* to *Bussey*, and to *Emmons;* that *Bradbury* died intestate, *January* 29, 1834; that the witness was attorney of the administrator, and first found this paper after the commencement of this suit among the papers of *Bradbury's* administrator, in the office of *McGaw, Allen & Poor*, which papers were under his peculiar care, but were accessible to his partners, and students in the office; and that he did not know of its existence until after the sale by *Bradbury's* administrator. The demandant introduced a deed of warranty of the premises from *Brown* to *Bradbury & Griffin*, dated *Aug.* 10, 1833, and acknowledged and recorded the same day; a deed of one half of the premises from *Griffin* to *Bradbury*, dated *Nov.* 18, 1833, and recorded *July* 11, 1835; and a deed from the administrator of *Bradbury* to the tenant, dated *June* 8, 1835, acknowledged the 9th and recorded the 10th of the same month. The clerk in the register's office in *April, May* and *June*, 1833, testified, that he made a memorandum appearing on the back of the mortgage *Brown* to *Emmons*, signed by him, which certifies, that the *Emmons* mortgage was received and entered prior to the

mortgage from *Brown* to *Bussey*. The demandant produced a volume of the records of deeds whereby it appeared, that the *Emmons* mortgage was entered on an earlier page than the *Bussey* mortgage, but there was nothing, unless this, showing which was entered or recorded first.

The tenant then proved by the register of deeds, that all deeds recorded in his office are entered by their titles in a small book the day after they are received, and when recorded, are entered as of the day when left; that in *April*, 1833, deeds were not actually recorded, until two or three weeks after they were received; that several volumes were in use at the same time; and that an entry on an earlier or later page proved nothing as to priority of receipt of either of two deeds received on the same day. The tenant proved, that *Emmons*, at the time he took his mortgage from *Brown*, knew of the existence of the notes and mortgage to *Bussey*, the latter having been made to secure the purchase money, and that to him to secure his profits on the sale.

Hatch, *pro se*, in his argument, contended, that by the deed from *Bussey* to *Brown*, and the mortgage from *Brown* to *Emmons*, proved to have been recorded before any mortgage to *Bussey*, the *Emmons* mortgage had priority; unless postponed by *Emmon's* knowledge of the *Bussey* mortgage. This knowledge of *Emmons* could not affect the rights of his assignee, the demandant. *Stat.* 1821, *c.* 36; *Connecticut* v. *Bradish*, 14 *Mass. R.* 296; *Trull* v. *Bigelow*, 16 *Mass. R.* 406; *Cushing* v. *Hurd*, 4 *Pick.* 253; *Sigourney* v. *Larned*, 10 *Pick.* 72; 2 *Powell on Mort.* (*Cov. & R. Ed.*) 631, *and note.* As the demandant had no actual notice of the *Bussey* mortgage, none can be implied. 7 *Greenl.* 195; 5 *Greenl.* 369; 8 *Greenl.* 94; 3 *Pick.* 149. No time is allowed in this State for the registration of deeds, and therefore it takes effect only from the time the deed is entered. As the tenant has the legal estate by deed from the administrator of *Bradbury*, the quitclaim to him is a merger of the mortgage, and it cannot be set up as now existing. 3 *Greenl.* 260; 6 *Pick.* 492. The assignment of the *Bussey* mortgage to the tenant, never having been acknowledged, or recorded, cannot avail the tenant, but shows merely, that the quitclaim deed was intended as a discharge. 2

Greenl. 322. The tenant took the land, on the purchase from *Bradbury's* administrator, subject to the payment of the *Emmons* mortgage, and cannot set up any title acquired by the *Bussey* mortgage against it. As *Brown's* deed to *Bradbury*, and *Bradbury's* mortgage back to *Brown*, were executed and acknowledged the same day, the law will presume it was one transaction, and that they were delivered at the same time. 4 *Greenl.* 20; 5 *Pick.* 181. It is not essential to the validity of a deed that the grantee should be present, or that it should be accepted by him personally at the time. 9 *Mass. R.* 307; 10 *Mass. R.* 456; 17 *Mass. R.* 213. The testimony of the clerk was properly admitted to prove the time of the receipt of the deeds for registry. It was not to contradict the record, but merely to supply a fact which the record did not show. 8 *Greenl.* 438. If the testimony of the clerk was improper, then that of the register should be rejected. The record itself shows, that the *Emmons* mortgage was first recorded.

J. A. Poor, and *H. V. Poor*, for the tenant, handed the Court this brief of their argument.

1. *Hatch* can gain no advantage by his deed that *Emmons* could not. He has legal notice of the prior mortgage. The deposition of *Porter*, the clerk, and the certificate upon the mortgage from *Brown* to *Emmons*, may be evidence to show *Hatch's* knowledge, but not to show a prior registry.

2. A deed recorded takes effect from and operates as notice to all parties taking subsequent conveyances, from the time of its registry. *Van Rensselaer* v. *Clark*, 17 *Wend.* 25. Our Court has never sustained the doctrine of the cases *State of Conn.* v. *Bradish*, 14 *Mass. R.* 296, and *Trull* v. *Bigelow*, 16 *Mass. R.* 406, but have intimated a contrary doctrine. The case cited from 17 *Wend.* is directly opposed to the *Massachusetts* cases.

3. The plaintiff can take nothing against the defendant's title until his assignment is recorded. The doctrine contended for by the plaintiff destroys his own case. The defendant had no notice of any title in any one, except *Emmons*, whose title was fraudulent, as set up against our prior deed.

4. The case shows, that the two mortgage deeds were recorded simultaneously. No parol evidence is admissible to vary, explain or

alter the registry. If recorded simultaneously our mortgage being prior must take precedence. *Hopkins*, 569; 1 *Paine*, 525; 6 *Johns. C.* 417; 4 *Johns. C.* 70; 2 *Cowen*, 246.

5. The defendant by taking the equity and the mortgage, has not discharged the mortgage. Courts will keep alive a mortgage, or consider it extinguished, as is most for the benefit of the mortgagee. *Hatch* v. *Kimball*, 14 *Maine R.* 9; *Thompson* v. *Chandler*, 7 *Greenl.* 377; *Russell* v. *Austin*, 1 *Paige*, 192; *Forbes* v. *Moffatt*, 18 *Vesey*, 384; *James* v. *Morey*, 2 *Cowen*, 246.

6. There is no evidence that the mortgage from *Bradbury* and *Griffin* to *Brown* was ever delivered or in force. All presumption is against its delivery. It is never presumed to have been delivered when left unexplained in the hands of the grantor. It is found here in the hands of the grantor. *Jackson* v. *Leek*, 12 *Wend.* 105; *Church* v. *Gilman*, 15 *Wend.* 656; *Jackson* v. *Richards*, 6 *Cowen*, 617.

The opinion of the Court was prepared by

SHEPLEY J. — It appears, that *Brown*, who purchased of *Bussey*, reconveyed to him on the same day in mortgage, and on a subsequent day made a second mortgage of the premises to *Emmons*. Both these mortgages were recorded on the same day, there being no indication of the hour of the day, and nothing upon the record to show, that one was received before the other, unless it can be inferred from the fact, that one appears to have been recorded on an earlier page of the book than the other. It is the date of the reception and record, and not the order in which the entry is made, that is to be relied upon as giving notice of priority. The record is the instrument of notice to subsequent purchasers of the state of the title; and to permit it in any manner to be affected by parol or extraneous evidence would not only destroy its value for that purpose, but would convert it into an instrument for deception. It would be dangerous to the rights of all subsequent purchasers, and contrary to the established rules of evidence to admit any of the testimony offered to explain or vary the record; and it must all be regarded as out of the agreed statement of facts; and the decision of this point in the case must be made from the information to be derived from the record alone.

By the mortgage to *Bussey*, the estate passed, and did not remain in the grantor until the deed was recorded. *Marshall* v. *Fiske*, 6 *Mass. R.* 31. This title may be defeated by a subsequent conveyance first recorded. But to have this effect the record should be first, not simultaneous. The record of both the mortgages must in this case be regarded as made at the same time. So far as it respects the record their rights are equal, and the title which passed by the first deed is not defeated by an equality, but by a superiority of right in the record. A stranger to the title wishing to purchase and applying to the proper source for information finds the owner has made two conveyances to different persons one before the other, and that both were recorded at the same time; how can he justly conclude, that the title by the first conveyance has been defeated, when the second purchaser has not in any way acquired a superiority of right? Judge *Trowbridge* says, if "the last deed is recorded before the first the estate will pass to the second purchaser." 3 *Mass. R.* 531. Mr. Justice *Jackson*, in delivering the opinion of the Court, in the case of *State of Connecticut* v. *Bradish*, 14 *Mass. R.* 300, says, "but if the second purchaser procures his deed to be recorded before the other, and then sells the land *bona fide*, and for a valuable consideration to a person wholly ignorant of those circumstances, the latter will hold the land against the first purchaser."

The demandant failing to shew, that the title by the first mortgage was defeated, can recover only by assuming the position of a second mortgagee, and shewing that the debt secured by the first mortgage has been paid, or that the tenant holds it in such a manner, that he cannot set it up against him. The first mortgage cannot be regarded as paid or merged; for it is agreed, that it was assigned to the tenant and *Griffin*, and that it was given to secure certain notes, "which were produced by the tenant overdue at the commencement of this suit and unpaid." The tenant derives his title by a conveyance from *Brown* to *Bradbury* and *Griffin*, and from *Griffin* to *Bradbury*, and from the administrator of *Bradbury* to himself. The demandant contends, that *Bradbury* and *Griffin* on the day of their purchase from *Brown* mortgaged the premises to him to secure the payment of the notes given by him to *Bussey* and to *Emmons*. Such a deed appears to have been signed,

sealed and acknowledged by them. The only testimony to prove it to have been delivered and to have taken effect as their deed is, that *Mr. Poor*, who was attorney for the administrator of *Bradbury*, "first found this paper after the commencement of this suit among the papers of *Bradbury's* administrator in the office of *McGaw, Allen & Poor.*" It is said, that the delivery must be inferred from the delivery of the deed from *Brown* to them, both being parts of the same transaction. If both had taken effect, they should be construed together as designed to effect one object; but it may be, that after the deeds were prepared and signed, another mode of securing or paying the consideration of their purchase was substituted, and that it was not intended to be delivered. And the absence of all evidence that *Brown* ever had possession of it, or that it has been in the possession or control of any one but one of the grantors and his legal representative, with the fact, that it was found among the papers of that one after his death, raises a presumption, that such must have been the fact. The possession and production of a deed by the grantee is *prima facie* evidence of its having been delivered; and for like reasons in the absence of all contradictory testimony the presumption arises, when found in the possession and produced by the grantor, that it has not been delivered. Upon the testimony in this case, although the fact may be otherwise, that mortgage cannot be considered as a valid deed. The tenant being in possession under a prior mortgage not paid, and so far as now appears not being under any legal obligation to pay the mortgage held by the demandant, may resist his entry.

Plaintiff nonsuit.

William Holmes *vs.* Edward P. Baldwin *& al.*

The poor debtor act of 1835 does not allow the service of the notice to the creditor to be made upon the attorney, except when the creditor resides without the State.

The *statutes* of 1839, upon the same subject, make the notice effectual although issued by a Justice or by the party, but do not change the time, or manner of serving it, or the person upon whom service should be made.

The return of an officer that he arrested the debtor on an execution on a certain day, and that he gave bond, must be considered as stating the day of arrest truly, until the contrary be made to appear.

The fact that the bond bears date upon a different day affords no satisfactory proof that the return was wrong.

Where the bond recites the amount of the debt, costs and fees, and is for double the amount thus stated, and there is no evidence that the statement is not correct, the obligors are bound by their declarations.

Exceptions from the District Court, for the Eastern District, Allen J. presiding.

Debt on a bond in the penal sum of $29,62. The judgment was for $14,05. In the statement of facts, it was said, that the notice was served on the plaintiff's attorneys, on *Feb.* 28, 1837, and that the debtor disclosed before two Justices on *March* 15, following; and that the Justices gave him a certificate directed to the jailer, reciting notice to the plaintiff's attorneys, and that the debtor was admitted to take the oath. In the execution and in the bond the plaintiff was called of *Bangor*. At the time of the issuing and service of the notice and ever since, the plaintiff, with his family, resided within the State, at *Hartford*, in the county of *Oxford*. The facts appear in the opinion of the Court.

The district Judge ordered judgment to be rendered in favor of the plaintiff, and the exceptions were thereupon filed by the defendant.

A. W. Paine argued for the defendants: —

1. The bond is void, because it bears date on the day the judgment was rendered, and recites in the condition that the debtor had been arrested on that day. *Stat.* 1821, *c.* 60, § 3; *Allen* v. *Stage Co.* 8 *Greenl.* 207. The arrest was illegal, and a bond to procure his release was void.

2. The bond is not taken for twice the amount of the debt, costs and officer's fees, and therefore is not good as a statute bond. *Pease* v. *Norton*, 6 *Greenl.* 232. The debtor actually disclosed, and was wholly insolvent. If any damages should be recovered, they should be nominal. *Winthrop* v. *Dockendorff*, 3 *Greenl.* 156.

3. The conditions of the bond were complied with. The debtor did submit himself to examination, and was admitted to take the oath. The only irregularity, if any there was, was in the service of the notice. The plaintiff in his execution called himself of *Bangor*, and he was so styled in the bond. As the debtor could not find him there, he was not bound to follow him out of the county, and a service on his attorney was good. *Howe* v. *Reed*, 3 *Fairf.* 515.

4. But however defective the service may have been under the *stat.* of 1835, the statute of 1839 makes the service good; — at least so far as to permit the defendants to show that no actual damages have accrued to the plaintiff.

Blake, for the plaintiff.

1. The judgment was rendered *Oct.* 3, 1836, the execution was dated *Oct.* 7, 1836, and the arrest was made *Nov.* 18, 1836, as appears by the return of the officer on the execution. The arrest then was legal, and the bond is good though misdated by the defendants. They cannot take advantage of their own error or wrong.

2. The second objection rests only upon a mistake in point of fact. The bond was taken for double the amount for which the debtor was arrested, and no more.

3. There was no service of the notice. It cannot be made upon the attorney when the plaintiff lives within the State.

4. The *stat.* 1839 was intended to cure certain defects in the citations, but not to change the mode of service. That remains precisely as before. The citation in the present case would have been bad, unless remedied by that statute.

The opinion of the Court was drawn up by

Shepley J. — By the agreed statement of facts it appears, that the judgment was rendered on the third day of *October*, the execution bears date on the seventh of *October*, and the officer's re-

turn upon it is of an arrest on the eighteenth of *November* and a discharge by giving bond, which bears date on the third of *October*, 1836. The return of the officer must be considered as stating the day of arrest truly until the contrary is made to appear. The date of the bond affords no satisfactory proof to the contrary; it is not the declaration of the officer but of the defendants; and the bond might well take effect from the day of the delivery. It recites the amount of the debt, and of the costs, and of the fees for execution; and of the officer's fees, and is for double the amount thus stated. No copy of the judgment or of the execution is produced, and no legal evidence is offered proving, that the defendants did not correctly state them in the bond, and they must abide by their own declaration.

The act of 1835 allows a service of the notification to be made upon the attorney only, when the creditor resides without the state. The notice being illegal is not cured by the certificate of the Justices, for it is agreed, that it recited only a notice to the attorneys of the plaintiff without deciding upon it.

It is contended, that this defect is cured by the statute of 1839, which provides, that if it shall appear, that the debtor prior to a breach of the bond had taken the oath after notice issued by himself or by a Justice of the Peace, " and served upon the creditor named in the bond, or upon the attorney of such creditor," the defendants shall have a right to a trial by a jury and to make certain defences named. It is quite evident, that this act did not intend to prescribe, what should be a legal service of the notice, for it does not determine how many days it shall be served before the time of taking the oath, nor by whom the service shall be made, nor whether it should be made by a copy or otherwise. It must have been the intention, that the service as to time and manner should be legal, as well as that it should be upon the person designated by law. The expressions, upon the creditor or upon the attorney of the creditor, are explained by the law to mean, upon the creditor when the law so requires, and upon the attorney, when that is permitted. If this be not the true construction no service could be good under the act of 1839, when made upon the clerk of the court or Justice issuing the execution in those cases where no creditor, attorney or agent resides within the

State, as provided by the statute of 1835. The object of the statute of 1839, as respects the notice, was to make the notification effectual although issued by a Justice or by the party, but it does not appear to have been intended to change the time, manner, or mode of serving it, or the person upon whom service should be made as provided by law.

Exceptions overruled.

JOSEPH JOHNSON *vs.* LUDO THAYER *& trustee.*

An order drawn by a creditor upon his debtor in favor of a third person, and accepted, may operate as a valid assignment of the debt, although it be not negotiable, or expressed to be for value received.

Where the supposed trustee discloses an assignment, valid in its form, and the plaintiff does not request the assignee to be summoned in, that its validity may be tried by a jury, under the provisions of the *stat.* 1821, *c.* 61, § 7, although the facts disclosed may justly create a strong suspicion that the assignment is fraudulent and void, and where yet it is possible that on a trial before a jury, the assignment might be proved to be legal and operative, *the Court* cannot decide it to be fraudulent.

When the case has been argued and presented to the Court for a final decision upon the disclosure alone, it is too late for a motion to summon in the assignee.

THE question in this case was, whether *Nathaniel Treat,* who had been summoned as the trustee of *Thayer,* should be charged upon his disclosure. *Treat* was indebted to *Thayer, October* 24, 1838, in about the sum of two hundred dollars. On that day *Ludo Thayer* drew an order upon him of the following tenor.

"*Orono, Oct.* 24, 1838. *Mr. N. Treat.* Please to pay *Charles Thayer* the amount due me from you on account of erecting the dam, and oblige yours, *Ludo Thayer.*"

The order was accepted by *Treat* on the day of its date. The service of the trustee process was made upon him, *Nov.* 7, 1838. *Treat,* in answer to the interrogatories of the plaintiff, stated, that *Charles Thayer* was a son of *Ludo Thayer,* and at the time was

a minor; that the order was delivered to the defendant, *Charles* not being present; that the defendant said he wished for something to save a trustee suit, and *Treat* signed the order; it was never presented to him by *Charles*, but it was by his father to whom *Treat* paid about one hundred dollars after it was given and before the service of the writ. After the service of the writ, the order was presented to him by *John Bennock, jr.* to whom it had been transferred in writing, by *Charles Thayer;* but the transfer was made after the service.

Washburn, for the plaintiff, insisted, that the trustee should be charged. There was no assignment to *Charles Thayer*, and if none to him, that to *Bennoch*, made subsequently to the service of the trustee process, necessarily falls. The order was not negotiable, and was never delivered to *Charles Thayer*. Giving an acceptance to the defendant, the person to whom the debt was originally due, is no assignment thereof. Unless the disclosure affords *prima facie* evidence of an assignment, the trustee must be charged. There is no foundation laid by the disclosure for presenting the case to the jury under the provisions of the *stat. c.* 61, § 7. Unless a valid disclosure appears by the assignment, there is no question to try. *Cushing's Tr. Pro.* 101, § 242; *Dunning* v. *Sayward*, 1 *Greenl.* 366; *Cushman* v. *Haynes*, 20 *Pick.* 132. If the Court have doubts, the plaintiff would wish the supposed assignee summoned in, and to have a trial by the jury.

F. Fuller, for the trustee, contended; — that if the drawing and acceptance of the order was done *bona fide*, it was sufficient in law to assign the debt. A promise to accept an order to be drawn, will operate as an assignment. 16 *Mass. R.* 341. Mere delivery of a note may be an assignment. 13 *Mass. R.* 304. An accepted order in favor of a third person is sufficient. 4 *Mass. R.* 450. It need not be expressed to be for value received. 1 *Pick.* 461. An account or chose in action may be assigned so as to discharge a trustee. 4 *Mass. R.* 508. If fraudulent, the fraud should be tried and detected in the mode provided by the statute. Here the trustee does not declare it to be fraudulent, and the Court cannot presume it to be so. Its genuineness is a mere question of fact to be tried by the jury, and if the plaintiff doubted it, he

should have had it tried in the mode provided by the statute. 8 *Pick.* 67; 13 *Mass. R.* 215. The trustee must be discharged unless the plaintiff causes him to be made a party; for if the plaintiff does not thus object to its validity, he admits it. *Adams* v. *Robinson*, 1 *Pick.* 461.

The opinion of the Court was by

SHEPLEY J. — An order drawn by a creditor upon his debtor in favor of a third person and accepted, may operate as a valid assignment of the debt, although it be not negotiable or expressed to be for value received. *Adams* v. *Robinson*, 1 *Pick.* 460; *Legro* v. *Staples*, 16 *Maine R.* 252.

The person summoned as trustee in this case was obliged by his acceptance to pay to *Charles Thayer* the debt due to the defendant; and he should be protected against a liability to him and a payment to the plaintiff, unless he has disclosed facts, which authorize the court to decide, that the assignment is inoperative.

The defendant procured the order to be accepted, payable to his minor son, stating that he wished to avoid the effect of a trustee process; and he afterwards presented it and received a payment upon it.

These facts may justly create a strong suspicion, that the assignment was without consideration, fraudulent and void. But while these facts are admitted, it may be true, that it was made in good faith and for a valuable consideration. If the plaintiff had made the objection permitted by the *statute*, *c.* 61, § 7, it is possible, that the assignee, though a minor, might have proved, that he paid a valuable consideration, and that the father acted as his agent in procuring the acceptance and the payment afterwards made upon it. He would not be bound by any declarations of the father with which he was not connected. However improbable, judging from the present state of the case, it may be, yet when the court perceives, that it is possible, that the assigment might, on trial before a jury be proved to be legal and operative, it cannot decide it to be fraudulent. The presumption of law is in its favor, and it must be proved to have been fraudulently made before the court can be authorized to decide against it.

The argument for the plaintiff suggests, that the assignee may now be summoned, and may become a party for the purpose of trying the validity of the assignment. He is not obliged to appear for the purpose of protecting his rights unless he is summoned. The plaintiff has made no such objection as the statute requires to enable the court to present the case to a jury for decision. It was the design of the statute to permit the plaintiff to put the validity of the assignment in issue before the case was presented to the court for its final decision, and not afterwards. It is too late to present that question after the case has been argued and presented for a final decision upon the disclosure alone.

Trustee discharged.

PHILIP COOMBS *vs.* HENRY WARREN.

It is a rule well established, that if a bill in equity prays for discovery and relief, if the party is not entitled to relief, he is not entitled to a discovery.

In this State, where there exists a plain, adequate and sufficient remedy at law, a bill in equity cannot be sustained for relief.

THIS was a bill for discovery in aid of several suits at law, and for general relief. There was a prayer for an injunction to restrain further proceedings at law on the part of the defendant in equity. The defendant filed a general demurrer.

The facts in the case sufficiently appear in the opinion of the Court.

Rogers, for the defendant, argued in support of the demurrer; and contended, that every bill in equity is in reality a bill of discovery; and that species usually distinguished as bills of discovery, are merely to assist other courts. And when all material facts can be exhibited without the aid of chancery, discovery is not required, and the trial elsewhere shall not be delayed. *Mitford's Treat.* 52; *Fonb. Eq.* 710, *note.* Our Court has not jurisdiction in mat-

ters of discovery merely. The statute under which the power exists does not give general chancery jurisdiction. If any such bills are entertained, where will the Court stop? As a bill of discovery this is defective, in not averring that the complainant is unable to prove his facts by other evidence. *Seymour* v. *Seymour*, 4 *Johns. Ch. R.* 411; 2 *Munf.* 260; 4 *Hen. & M.* 478; 4 *Dessaus.* 105. Where a bill seeks discovery in aid of a bill pending against the party in chancery, it is termed a cross-bill. 1 *Mad. Ch.* 196. An inquiry by a stranger, or by a rival claimant, standing on equal grounds, which is the present case, is a fishing-bill, and cannot be maintained. 2 *Caines' Ca.* 296; 2 *Johns. Cas.* 413. Where a bill is brought for discovery and relief, but the former is only sought as auxiliary to the latter, the complainant cannot have discovery, if he is not entitled to relief. 3 *Conn. R.* 135. This bill charges usury, and the enforcement of paid paper, and this Court has not jurisdiction of the premises. *Pratt* v. *Bacon*, 10 *Pick.* 122; *Given* v. *Simpson*, 5 *Greenl.* 303; *Galvin* v. *Shaw*, 3 *Fairf.* 454. Equity will not compel a discovery in this case, when it subjects the respondent to a forfeiture or penalty. 1 *Johns. Ch. R.* 367; 3 *Johns. Ch. R.* 47; 4 *Johns. Ch. R.* 432; 16 *Johns. R.* 597. He who seeks equity must do equity, and if the borrower comes into court for relief against his usurious contract, he must bring into court the money actually borrowed with legal interest. 2 *Dessaus.* 341; 3 *Har. & J.* 185; 12 *Serg. & R.* 46; 1 *Johns. Ch. R.* 367, 439. After a verdict at law, a party comes too late with a bill of discovery. 3 *Johns. Ch. R.* 355; 2 *Dessaus.* 40.

Hobbs argued for the complainant, and in the course of it, enforced these positions. The demurrer covers the whole bill. If therefore it should be found good for part only, it must be overruled. 8 *Vesey*, 403; 17 *Ves.* 280; 2 *Madd.* 286; *Story's Eq. Pl.* § 443. The demurrer puts in issue the jurisdiction of the Court. If, therefore, there is sufficient matter in the bill, either for an injunction, for discovery, or for relief, the bill must stand confessed by the demurrer. The equity powers of the Court, so far as concerns the present suit, are derived from *stat.* 1830, *c.* 462. This statute does not specify any particular mode in which

the Court may grant relief. It is enough if the bill presents a case of "fraud, trust, accident or mistake," or a reasonable ground for the Court to believe, that injustice will be done to the plaintiff in equity, provided he has not a plain, adequate and sufficient remedy by the rules of the common law. In such case the Court is authorized to administer relief "according to the course of courts of equity."

The Court will sustain the bill, as it respects the prayer for an injunction. Wherever a party, by fraud, accident or otherwise, has an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make the Court an instrument of injustice, a court of equity, to prevent a manifest wrong, will interpose by restraining the party, whose conscience is thus bound, from using the advantage he has improperly gained. 1 *Madd. Ch.* 133. The facts charged in the bill are confessed by the demurrer. *Cooper's Eq. Pl.* 111; *Mitf. Eq. Pl. by Jeremy*, 211; *Story's Eq. Pl.* 355, and cases cited.

The Court will sustain the bill as a mere bill of discovery. It is sufficient in form, and its subject matter is within the jurisdiction of the Court. A bill of discovery is favored in equity. 2 *Story's Eq.* § 1488. The affidavit of the complainant does set forth sufficiently, that he was unable to prove his facts by other evidence, and is in conformity with the rule in 16 *Vesey*, 222, recognized in *Seymour* v. *Seymour*, 4 *Johns. Ch. R.* 411, cited for defendant. A party may maintain a bill of discovery not only when he is destitute of other evidence to establish his case, but also to aid such evidence, or render it unnecessary. *Hare on Discovery*, 1, 110; 2 *Ves. Sen.* 398; 2 *Atk.* 241; *Mitf. Eq. Pl. by Jeremy*, 307; 2 *Story's Eq.* 701; *Story's Eq. Pl.* 260, *note.*

The bill can also be sustained as a bill for relief. If the Court find the complainant entitled to relief, they will retain the bill for that purpose, rather than send the actions back to a trial at law. 3 *Atk.* 263; *Fonb. Eq. B.* 1, *c.* 1, § 3, note to page 27, and cases cited. The complainant is entitled to a surrender of the accommodation paper deposited as collateral security for the payment of a note, which note has been paid. 1 *Ves. Sen.* 278; 2 *Johns. Ch. R.* 100; 2 *Ves. Jr.* 372; 7 *Ves.* 272; 2 *Vern.* 84. The complainant, having placed his name as surety for *Morrill* on a

note to defendant, and having paid the debt himself, is entitled to all the securities put into the hands of the defendant by *Morrill*. 1 *Story's Eq.* § 327.

The doctrine that the defendant cannot have relief from an usurious contract, without bringing the money borrowed with legal interest into Court, is founded on the principle that a discovery of the usury would lead to a forfeiture of the contract. 1 *Story's Eq.* 300; 5 *Johns. Ch. R.* 142. As there is no forfeiture in this State, the objection is untenable. Courts of equity will grant relief against unconscionable and exorbitant contracts. 1 *Story's Eq.* § 331; 2 *Vern.* 26.

The opinion of the Court was prepared by

WESTON C. J. — The gravamen alleged in the bill is, that the defendant has brought at law a suit, now pending, on a note of hand, which has in fact been paid. That another suit is prosecuted for the benefit of the defendant, in the name of *Asa Warren*, on certain bills of exchange, two of which have been paid, and that upon others excessive and usurious interest has been reserved and taken. That other bills, prosecuted by or for the defendant, in two other suits still pending, are also tainted with usury. And further, that the defendant has already received usurious interest, upon the consideration of the bills set forth; and that there is included therein certain damages, to which the defendant was not legally entitled.

The act to restrain excessive usury, *statute* of 1834, *c.* 122, has made ample provision at law, for the relief of the party aggrieved, by way of defence, if the usurious interest has not been actually received, and by giving him an action to recover it back, if it has. And if a demand in suit has been paid and discharged, this is matter of defence available at law. So if there is included in any bill or note, under pretence of damages or otherwise, any sum illegally extorted, or against equity or good conscience, the injured party has a right to defend at law against such illegal claim.

If then the matters alleged in the bill, as a ground for specific relief, would otherwise fall within the range of the chancery powers of this Court, it is very manifest, that the plaintiff has a plain, adequate and sufficient remedy, by the rules of the common law.

Where this exists, the chancery jurisdiction of this Court does not attach.

It is contended, however, and this is the main question in the case, that this process may be sustained as a bill of discovery. If such a bill is authorized by our law, there is a class of cases, where by the *English* practice, a court of equity may afford relief, consequent upon the discovery, notwithstanding there might be a perfect remedy at law. *Story*, in reviewing the doctrine upon this subject, says, that there is a distressing uncertainty on this branch of equity jurisdiction in *England*. 1 *Story's Com. in Equity*, § 66. But from the practice in the courts of the *United States*, in the State of *New-York*, and in the courts of other States, possessed of chancery jurisdiction, he endeavors, in the following sections, to extract rules of greater simplicity, and of more uniform application. One of them is, that in cases, where the remedy at law is more appropriate than the remedy in equity, or the verdict of a jury is indispensable to the relief sought, the jurisdiction will be declined; or if retained, will be so, subject to a trial at law.

The necessity of this qualification, in our jurisprudence, is enforced by the constitution of this State, *art.* 1, § 20, which in civil suits secures to parties a trial by jury, except where it has been heretofore otherwise practised. And this in itself is a sufficient reason for declining to withdraw controversies, in relation to property, from the common law, in all cases not falling directly within the equity powers conferred upon this court. In cases, therefore, where a plain and adequate remedy exists at law, it would be a question well entitled to grave consideration, whether they are properly embraced within the equitable powers of this Court, merely because they are presented under a bill for discovery.

Relief in certain cases has been afforded as incident to, and consequent upon such a bill, but it is not the ground, upon which the bill is sustained in chancery practice. Such a bill, in a proper case, is doubtless sustained in *England* and in other courts, possessing general chancery powers. It has been said, that every bill in equity is properly a bill of discovery. 2 *Story's Eq.* 700, and so far as it is used in aid of the statute power of this Court, it may be sustained as one of the means of administering relief, according to the course of courts of equity. *Stat.* 1830, *c.* 462.

The bill before us is for discovery and relief, and not for discovery merely. It is a rule well established, that if a bill prays for discovery and relief, if the party is not entitled to relief, he is not entitled to a discovery. *Loker* v. *Rolle*, 3 *Vesey*, 7; *Muckleston* v. *Brown*, 6 *Vesey*, 63; *Baker* v. *Mellish*, 10 *Vesey*, 553; *Gordon* v. *Simpkinson*, 11 *Vesey*, 510; *Jones* v. *Jones*, 3 *Meriv.* 502; 1 *Story's Eq.* 87.

As there exists in this case a plain, adequate and sufficient remedy at law, the bill cannot be sustained for relief; and according to the rule referred to, it cannot be prosecuted as a bill of discovery. The opinion of the Court, therefore is, that the bill must be adjudged bad upon the demurrer, and the defendant is to be allowed his costs.

THOMAS A. HILL, *Adm'r vs.* JOHN PENNY.

The administrator may maintain an action of trespass *de bonis asportatis* to recover the *value of trees* unlawfully cut on land of his intestate and carried away during his lifetime, but cannot recover damages for an injury done to the real estate.

Where the action originally was trespass *quare clausum* by an administrator against the defendant, for breaking and entering the close of the intestate, in his lifetime, and cutting and carrying away trees there standing, and for taking and carrying away a quantity of underwood lying upon the land, the Court has power to permit an amendment by adding a count, *trespass de bonis asportatis*, for the trees and underwood.

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

The action was brought by *Hill*, as administrator of the estate of *Starrett*, and the declaration alleged, that *Penny* on, &c. with force and arms broke and entered the close of said *Starrett*, who was then living, and being so entered cut down and carried away a large number of trees there standing and growing, and also took and carried away a large quantity of underwood lying on said land. *Starrett*, before his death, conveyed the land to *Morrison*, for

whose benefit this suit is brought, and the alleged trespass was before this conveyance. The plaintiff had leave to amend his declaration, and afterwards filed a count, trespass *de bonis asportatis.* The defendant objected, that this new count ought not to be received. The Judge overruled the objection, and allowed it to be filed as an amendment. The defendant then objected, that the action could not be maintained in the name of the administrator on either count of the declaration. The Judge overruled this objection, and decided, that the action was properly brought. The defendant then requested the Court to confine the plaintiff to his second count, and that he should not be permitted to show that the defendant took from the close any lumber other than that which had been previously severed from the land. The Judge instructed the jury, that the plaintiff was not entitled to recover any damage for forcibly breaking and entering the close and the cutting down of the trees; but that he was entitled to recover for all lumber and wood which he took from the close, whether the same was standing and growing or lying on the land at the time he entered, which he carried away and converted to his own use. The defendant filed the exceptions, the verdict being against him.

J. Godfrey, for the defendant, argued in support of the grounds taken at the trial, and cited *Holmes* v. *Moore*, 5 *Pick.* 257; *Little* v. *Conant*, 2 *Pick.* 527.

Washburn argued for the plaintiff, and cited *Monumoi Beach* v. *Rogers*, 1 *Mass. R.* 159; *Thayer* v. *Dudley*, 3 *Mass. R.* 296; *Jones* v. *Hoar*, 5 *Pick.* 285; *Ball* v. *Clafflin*, 5 *Pick.* 303; *Hill* v. *Haskins*, 8 *Pick.* 83; *Clark* v. *Lamb*, 6 *Pick.* 512; *Cummings* v. *Rawson*, 7 *Mass. R.* 440; 2 *Chitty on Plead.* 383; *Mitchell* v. *Tibbetts*, 17 *Pick.* 298; *Stetson* v. *Kempton*, 13 *Mass. R.* 272; 1 *Chitty on Plead.* 149; *Noy*, 125; *Nelson* v. *Burt*, 15 *Mass. R.* 204; *Howard* v. *Lincoln*, 1 *Shepl.* 122; 2 *Roll. Ab.* 569.

The opinion of the Court was drawn up by

Shepley J. — An administrator cannot maintain an action for an injury done to the real estate of his intestate during his lifetime, but may maintain trespass for an injury done to his personal property. The plaintiff in this case cannot maintain an action for

breaking and entering the close, or for cutting down the trees. After they were severed from the freehold the trees became personal property, and for taking and carrying them away the administrator may maintain an action. The instructions limited the plaintiff to a recovery for the value of the property carried away. The declaration, before it was amended, contained a count in trespass *quare clausum*, and an informal claim for taking and carrying away a large quantity of underwood lying on the land. The plaintiff was permitted to amend by inserting a count *de bonis asportatis*. And it is insisted, that although these counts may ordinarily be joined, the amendment was not proper, because, as the action was originally brought, it could not be maintained. There was, however, something more than a claim for breaking and entering and the consequential injury; and it was within the discretion of that Court, over which discretion this Court has no control, to allow that informal claim to be formally stated. And the administrator by claiming for injuries, for which he had no right to recover, does not destroy his right to recover for other trespasses.

Exceptions overruled.

William Churchill *& al. vs.* Silas Hatch *& al.*

By the poor debtor acts of 1835 and 1836, the certificate of the Justices that notice was duly given to the creditor, where they have jurisdiction of the subject matter, is conclusive.

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

Debt on a bond, dated *Aug.* 26, 1836, under the poor debtor act, to procure the release of *Hatch* from an arrest upon an execution against him. The defendants produced the certificate of two Justices of the Peace and of the Quorum, certifying, that the plaintiffs were duly notified of the time and place of the debtor's

submitting himself to examination and taking the oath, and that the proper oath was duly administered by them.

The third, and only objection urged in this Court was, that the plaintiffs, at the trial in the C. C. Pleas, "offered to show by said notification and officer's return accompanying and annexed to said certificate, that the plaintiffs had not any notice, that the said *Hatch* would make a disclosure of his affairs and take said oath at the time and place mentioned in said certificate." "The Judge refused to permit the above evidence to go to the jury, and ruled, that said certificate be read to the jury; and that the plaintiff could not be permitted by law to show that notice was not given previous to said disclosure; and that the said certificate must be taken conclusive as to notice."

"Intending to save the foregoing questions, with an understanding of the parties, a nonsuit was ordered," to which the plaintiffs excepted.

J. Godfrey argued for the plaintiffs, and cited *Knight* v. *Norton*, 3 *Shepl.* 337; *Slasson* v. *Brown*, 20 *Pick.* 436.

Kent argued for the defendants, and cited *Agry* v. *Betts*, 3 *Fairf.* 415; *Black* v. *Ballard*, 13 *Maine R.* 239; *Haskell* v. *Haven*, 3 *Pick.* 404; *Putnam* v. *Longley*, 11 *Pick.* 487; *Leonard* v. *Leonard*, 14 *Pick.* 283; *Kendrick* v. *Gregory*, 9 *Greenl.* 22.

By the Court. — The two first points, taken by the counsel for the plaintiffs, being expressly waived, the only remaining question is, whether the certificate of the Justices, that notice was duly given, is conclusive. And we are of opinion that it was, they having jurisdiction of the subject matter. This was so decided, in *Agry* v. *Betts*, 3 *Fairf.* 415, which is a case exactly in point. There is no inconsistency between that case and *Knight* v. *Norton & al.*, 15 *Maine R.* 337. In the former, there was a foundation laid for the jurisdiction; in the latter, it was otherwise.

Exceptions overruled.

BENJAMIN SPENCER, JR. *vs.* JOHN PERRY.

The statute of 1834, *c.* 101, gives power to a Justice of the Peace to continue a cause to be tried by another Justice before whom the writ was made returnable, *only on the return day of the writ.*

If a writ be returned and entered before a Justice and continued by him to a future day, he has no right to order a further continuance prior to the day appointed.

Where the Justice is not present at the time and place to which a cause has been duly continued, it operates a discontinuance of the suit.

If a Justice proceeds to render judgment in a cause and issue execution after his jurisdiction has ceased, he is liable to an action of trespass for an arrest made by virtue of such execution.

THIS action was case, and was originally commenced before a Justice of the Peace, and came before this Court upon an agreed statement of the facts. The plaintiff was sued for a pound breach by *Horace Spencer* and others, the writ having been made returnable before the defendant, as a Justice of the Peace for the county of *Penobscot, Oct.* 15, 1836. The writ was served, and duly entered before the defendant on the return day, and continued by consent of parties to the third of *December* following, and again on that day to the thirty-first of that month. On the twentieth day of *December* the Justice was under the necessity of leaving town, and did not return until *Jan.* 5, 1837. Prior to his leaving town the Justice informed one of the attorneys of the plaintiffs in that suit, that he was under the necessity of being absent on the thirty-first of the month, and could not try the action at that time, and that he would continue it until *Jan.* 11, when he would be at home and attend to it. Two days prior to *Dec.* 31, one of the attorneys of the then defendant and present plaintiff was notified of the necessary absence of the Justice, and that it would be continued to *Jan.* 11, at which time it would be tried. No objection was then made, but on *Dec.* 31, the then defendant's attorney demanded a trial, and said he should not consent to a continuance, and claimed his costs. On being reminded of the unavoidable absence of the Justice, and that no objection was made when notice was given him, the objection was still insisted upon, and the action was continued in writing until *Jan.* 11*th*, by another Justice,

being one of the attorneys of the then plaintiffs. This continuance was regular, if the Justice could at this time legally cause the continuance. On *Jan.* 11, 1837, the present plaintiff and his attorney, had notice that the Justice had returned, and that the action would come on for trial agreeably to the notice and continuance. The then defendant did not appear at the time and place appointed, and the Justice proceeded to hear the witnesses for the plaintiffs in that suit, and gave judgment for the plaintiffs for $10,15, damages, and $17,50, costs. Execution issued, the present plaintiff was arrested upon it, gave the poor debtor's bond, took the poor debtor's oath, and brought this suit against the Justice to recover damages. The judgment remains wholly unsatisfied. A nonsuit or default was to be entered.

Washburn and *Prentiss* contended: —

1. The Justice had no right to continue the action in vacation. An adjournment improperly made, amounts to a discontinuance of the suit. 2 *Johns. R.* 192; 4 *Johns. R.* 117; 5 *Johns. R.* 353; 8 *Johns. R.* 391.

2. The attempt to continue the action by another Justice, from *Dec.* 31 to *Jan.* 11, was a void act. A different Justice has no authority under the *stat.* 1834, *c.* 101, to continue an action except at the time named in the writ for the entry of the action. Again, a Justice of the Peace who cannot try an action, cannot continue it. The supposed continuance was by the attorney of the plaintiffs, who cannot try the action. No Justice "can hear a cause commenced by himself." *Stat.* 1821, *c.* 89, § 4; 13 *Mass. R.* 341. The notice having been given after the order for a continuance, the silence of the party cannot be construed into an agreement to continue the suit.

3. The Justice, having given judgment erroneously, at a day when the cause was not legally before him, is liable. 10 *Mass. R.* 120; *ib.* 35; 17 *Johns. R.* 195; 19 *Johns. R.* 39; 2 *Johns. Cas.* 49; 12 *Johns. R.* 422; 15 *Johns. R.* 157; 1 *Wend.* 210. When the Justice assumed to render judgment, he had no jurisdiction of the parties; there was no action between them pending before him. Nothing is presumed in favor of the power of a Justice. 4 *Mass. R.* 641; 19 *Johns. R.* 39; 3 *Dane, c.* 75, *art.* 7, § 4.

Wilson, for the defendant, contended: —

That the action could not be maintained upon the broad principle of law, that no action can be maintained against any Judge, Justice of the Peace, or other judicial officer, for any official act in a judicial capacity, although illegal. The notice to the present plaintiff of the necessary and unavoidable absence of the Justice, and of the postponement of the action, with the express assent of the plaintiff in this action, is an absolute waiver of any right to object to that course, and a bar to any action against the Justice.

The adjournment by another Justice was legal and valid, although entirely unnecessary.

The opinion of the Court was by

WESTON C. J. — The *stat.* 1834, *c.* 101, makes provision for the continuance of a cause by another Justice, when the Justice, before whom the cause is to be tried, by reason of sickness or some other cause, is unable to attend at the time and place appointed for trial. We think, that upon a fair construction, this is intended to be limited to the return day of the writ. Such is the obvious meaning of the statute. There could be but one continuance under it, and the same pleadings and proceedings are to be had, as if the cause had not been continued. This evidently implies, that the defendant had no opportunity to plead, by reason of the absence of the Justice.

The case finds no assent to the continuance in question by the plaintiff or his counsel. His mere silence could not confer a power, not warranted by law. The Justice not being present at the time and place, to which the cause was duly continued, operated a discontinuance of it. This is very clear upon principle and authority. The Justice had no right to order a further continuance, prior to the day appointed. It might lead to great abuse in practice; and is authorized neither by statute, nor by the common law.

The cause being discontinued, the jurisdiction of the defendant was at an end. His subsequent proceedings were *coram non judice*, and afford him no justification. He acted under a misapprehension of his authority. We perceive no reason to impute to him any thing wilfully wrong, but he has in our opinion rendered himself liable to an action of trespass, having proceeded after his

jurisdiction had ceased. *Briggs* v. *Wardwell,* 10 *Mass. R.* 356; *Butler* v. *Potter,* 17 *Johns. R.* 145.

Defendant defaulted.

PAUL R. BARKER *vs.* MILFORD P. NORTON.

After an action has been entered at the regular term of the Court, holden on the first *Tuesday* of *October*, and the defendant has appeared, and there have been several continuances without any saving of exceptions, and the writ is found to have been made returnable to the same court, to be holden on the *fourth Tuesday* of *October next*, it may be amended by striking out *fourth*, and inserting in its place *first*.

THE writ was dated *June* 17, 1837, served upon trustees the same day, and upon the defendant, *Aug.* 25, 1837, entered at the term of the C. C. Pleas, holden on the first *Tuesday* of *October*, 1837. The action was answered to at the first term, and no motion made or plea filed, and was continued from term to term, until the *January Term*, 1839, when the plaintiff's counsel filed a motion to amend the writ by striking out the word *fourth*, preceding the words *Tuesday* of *October* next, and inserting in its place the word *first*. To this motion for amendment, the counsel for the defendant objected, and moved that the writ may be quashed.

The parties agreed, that if the amendment be allowable, in the opinion of the Court, the cause should stand for trial, otherwise to be dismissed.

J. Appleton, for the defendant, contended, that the writ was returnable out of term, and *ipso facto* void, and not amendable. *Bunn* v. *Thomas*, 2 *Johns. R.* 190; *Burk* v. *Barnard*, 4 *Johns. R.* 309; *Bell* v. *Austin*, 13 *Pick.* 90; *Wood* v. *Hill*, 5 *N. H. Rep.* 229; *Bailey* v. *Smith*, 3 *Fairf.* 196.

J. A. Poor, for the plaintiff, contended, that the amendment under our statute was allowable. Both parties here were before the Court, and the case *Bell* v. *Austin*, cited for the defendant, is directly in our favor. *Bragg* v. *Greenleaf*, 14 *Maine R.* 395;

Sawyer v. *Baker*, 3 *Greenl.* 29; *Rule of Court*, 15. It is an unimportant amendment, as it was too late to make this objection after the action had been continued several times. *Trafton* v. *Rogers*, 13 *Maine R.* 315.

The opinion was drawn up by

WESTON C. J. — The time, when the defendant is to appear, is to be clearly and distinctly stated in the process. And if it is not, his failure to appear, does not justify any legal conclusion against him. *Bell* v. *Austin & al.* 13 *Pick.* 90. And it was there held, that in such case, the error cannot be cured by amendment. If, however, the defendant do appear, and interposes no objection to the regularity of process, the purpose of which is to bring him into court, it would seem not unreasonable to hold him to have waived the exception.

But however that may be, we think the error may be amended, after appearance and after a general imparlance. There is something to amend by. The time of holding the court, next after the date of the writ, is fixed by law; and if there is a misrecital of the time, and the defendant is not deceived or misled, but appears at the next court and there is a continuance, without any saving of exceptions, we are of opinion, that the error may be corrected. In the case cited, although the Court held it improper to amend, the defendant not having appeared, yet they say, "where the parties are before the Court, there seems to be no danger in giving to Courts great latitude of discretion, in the allowance of amendments."

Amendment allowed.

Park De Witt *vs.* Elisha Moulton.

The registry of a deed, without acknowledgment, is illegal, and confers no priority, and gives no rights.

Where a deed is illegally registered, it is not constructive notice to third persons, and should not be admitted in evidence to affect their rights.

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

Replevin for a house-frame, boards, &c. In his brief statement the defendant alleged the property to be in one *Calvin Copeland*, whose servant he was. To prove property in himself the plaintiff offered in evidence a deed of mortgage from *Benjamin Morgridge* to *Elisha Foster*, dated *Nov.* 18, 1836, of certain land on which the frame had stood, and claimed property in the frame, under a bill of sale from *Foster*, dated *April* 11, 1837. The mortgage to *Foster* was recorded in the registry of deeds for the county of *Penobscot*, *Nov.* 19, 1836, but it had upon it no certificate of acknowledgment. The defendant objected to the introduction of this deed, because it did not appear to have been acknowledged. The Court permitted it to be read in evidence.

The defendant read in evidence a bill of sale of the same property from *Morgridge* to *Moulton*, dated *March* 18, 1837, and the payment of $50 therefor, and a sale from *Moulton* to *Copeland*. *Morgridge* sold the frame, which was then standing on the lot mortgaged, upon some stones, with the consent of *Foster*, who afterwards, and before the frame was entirely removed, gave notice that he retracted his consent.

There were several other questions with respect to the admission of testimony made at the trial, and argued in this Court by the counsel, but as the Court here considered the testimony immaterial, these questions will be no farther noticed.

The jury found for the plaintiff and the defendant filed exceptions.

J. Appleton, for the defendant, contended, that the deed from *Morgridge* to *Foster*, introduced by the plaintiff, claiming under *Foster* by purchase, and not being acknowledged, was improperly admitted by the Judge on the trial in the Court below. Such deed

gives no title to a purchaser, and should not have been admitted in evidence. Although the deed was improperly placed upon the records, it cannot be considered as giving notice to third persons of the existence of the mortgage. *Stat.* 1821, *c.* 36, § 1; 1 *Watts*, 322; 2 *Watts*, 31; 2 *Conn. R.* 527; 3 *Conn. R.* 406; 3 *Day*, 508; 5 *Mason*, 244; 2 *Mason*, 117; *Sigourney* v. *Larned*, 10 *Pick.* 72.

Brinley, for the plaintiff, contended, that the deed was rightly admitted in evidence to show that the frame was the property of *Foster*, when he sold it to the plaintiff as personal property. By execution and delivery of the deed, the land passes from the grantor to the grantee, and when the deed is recorded, the title relates back to the date. The statute is merely directory to the recording officer, but when the record is actually made, it is immaterial whether an acknowledgment appears or not. The deed was properly admitted to show that when the sale was made by *Morgridge* to the defendant, that the fee of the land was in *Foster*, and therefore the defendant took nothing by his bill of sale. *Marshall* v. *Fisk*, 6 *Mass. R.* 24; *Commonwealth* v. *Dudley*, 10 *Mass. R.* 403; *Pray* v. *Pierce*, 7 *Mass. R.* 381; *Pidge* v. *Tyler*, 4 *Mass. R.* 541.

The opinion of the Court was by

Weston C. J. — The plaintiff derives title from *Elisha Foster*, whose right to the property in question, is based upon a deed from *Benjamin Morgridge*. That deed was recorded, without being acknowledged. We are satisfied, that it derived no validity from the registry. That acknowledged deeds only are entitled to be recorded, is very clearly implied from the *stat.* of 1821, *c.* 36, § 2, which makes a copy of a deed not acknowledged, left in the register's office, a caution to all persons against purchasing, or levying upon land so conveyed, for the space of forty days. And by the first section of the same statute, a deed is to have no operation, except against the grantor and his heirs only, unless it is both acknowledged and recorded. That the registry of a deed, without acknowledgment, is illegal, and confers no priority and gives no rights, was decided in *Sigourney* v. *Larned*, 10 *Pick.* 72, under a statute, of which the one before cited is a copy. The

registry not being legally made, would not even be constructive notice to third persons. *McNeil* v. *Magee & al.* 5 *Mason*, 244. The deed to *Foster*, therefore, could not affect the rights of the defendant, and ought not to have been received in evidence for that purpose.

We do not find the verdict supported by other parts of the testimony, if admissible. If *Foster* was entitled to the frame as mortgagee, the mortgagor might lawfully sell it with his consent, which was given. And the title being legally conveyed in virtue of it, he could not vacate the sale by revoking his consent. He derived no rights from the repurchase; it being a contract entered into with the vendee, after he had legally parted with his interest to *Copeland*, under whom the defendant justifies.

Exceptions sustained.

Samuel Briggs *vs.* Benjamin Fiske *& al.*

In an action under the *stat.* 1821, *c.* 62, § 5, to recover the increased value of the land, by reason of a possession and improvement thereof for six years or more, against those making an entry into the land without judgment and withholding the possession thereof; an entry by one having a bond from the defendants to convey the land to him, without other authority, does not render them liable.

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

This action was assumpsit for money paid, laid out and expended, brought against *Fiske*, *Bridge*, *Stetson* and *Brown* to recover of them, as appeared from the bill of particulars, the increased value of a certain lot of land by buildings and improvements alleged to have been made by the plaintiff. After the action had been entered and continued, the plaintiff moved for leave to amend his writ by striking out the names of *Stetson* and *Brown*. This was objected to, but the leave thus to amend was granted. The amendment was not made until a subsequent term, and the counsel

for the defendants objected to the striking out of the names of any of the defendants, unless their costs were first paid, and contended, that this amendment impaired the rights of the remaining defendants. The Court permitted the amendment, and it was made, and the costs were not paid.

The plaintiff proved an occupation of more than six years, when one *Cyrus J. Fay* entered upon the land by virtue of a bond from *Fiske* and *Bridge* to convey the same to him upon his making certain payments.

The counsel for the defendants requested the Judge to instruct the jury, that upon the evidence, the plaintiff was not entitled to recover; that there was no evidence showing that *C. J. Fay* was an agent of the defendants; and that there was no legal evidence, that the defendants ever entered and turned the plaintiff out. The Judge declined to give either of the instructions requested. The jury having found a verdict for the plaintiff, the defendants excepted.

M. L. Appleton, for the defendants, contended, that the amendment could only be made on the payment of costs. *Stat.* 1835, *c.* 178, § 4. The amendment should not have been permitted to be made, because it impairs the rights of the remaining parties.

If a cause of action be shown against any one, it is against the plaintiff's witness, *Fay*. No entry has been made by the defendants upon the plaintiff, as is required to sustain an action by *stat.* 1821, *c.* 62, § 5. *Fay* entered on his own account, and without any authority from the defendants.

J. Appleton, for the plaintiff, contended, that the present defendants could not take advantage of any neglect to pay the costs to those whose names were stricken out. The non-payment of costs may be corrected without opening the whole case. *Boyd* v. *Brown*, 17 *Pick.* 453.

The entry by *Fay* was under the defendants, and they are liable. *Lombard* v. *Ruggles*, 9 *Greenl.* 62.

The opinion of the Court was drawn up by

Weston C. J. — The plaintiff had leave to amend, by striking out two of the defendants. This was allowed, under the *statute* of 1835, *c.* 178, § 4. He should have paid them their costs, which is a condition imposed by that statute. Whether this is a

question only between the plaintiff and the defendants, whose names were stricken out, or whether if not, it cannot be corrected without setting aside the verdict, it is unnecessary to determine, as we are of opinion, that the exceptions are sustained upon another point.

There is no sufficient proof, that the defendants have entered into the land, and withheld the possession from the tenant, so as to bring the case within the *stat.* of 1821, *c.* 62, § 5. The privity between the defendants and *Cyrus J. Fay*, who did enter, appears in *Fay's* deposition. The defendants had given *Fay* a bond to convey the land to him. This did not carry with it a right to put the plaintiff out of possession. If *Fay* thereupon proceeded to do so, against the consent of the plaintiff, the tenant, he should have sought his remedy against him. The defendants were not implicated by his illegal acts, merely because they had contracted to convey to him. When he had entitled himself to a deed, they might have extinguished the plaintiff's claim, if it had not already been done. There is in the case some evidence, tending to show that *Fay* was the agent of the defendants; but how he stood in relation to this lot, appears from his deposition. Having contracted to purchase, he entered on his own account, presuming on the indulgence of the defendants, so far as their interest was affected, which is not unusual in such cases. But in order to charge them under the statute, it should appear affirmatively, that *Fay* acted for them, so as to render them distinctly liable for his entry.

Exceptions sustained.

EDWARD E. UPHAM *& al. vs.* SAMUEL A. BRADLEY.

It is only where it is apparent on the record that the Court has not jurisdiction, that the writ or process will be abated *on motion.*

The Court will not, therefore, on motion, dismiss a petition for partition, because it is not therein alleged that the land lies within the county.

An objection to the ability of a petitioner for partition to appear and prosecute, can only be taken advantage of by plea in abatement.

A mortgagor in possession may maintain a petition for partition.

If one of several petitioners for partition, after the process is pending, conveys his share of the estate to a third person, the respondent cannot give that fact in evidence under the general issue, but only under a special plea or brief statement.

Two or more tenants in common may join in a petition for partition, and have their proportion of the land assigned to them, to be holden between themselves in common.

The requisitions of the *stat.* 1838, *c.* 345, that the lands reserved for public uses shall be set off before partition, may all be complied with in making the partition.

It is not necessary that an attorney at law, regularly admitted to practice, should produce evidence of his authority to appear and represent a party.

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

This was a petition for partition of a township of land, the petitioners claiming one third part, entered at the *January Term*, 1837. The respondent came in, and at the *January Term*, 1838, moved to dismiss the process, and on the motion being overruled, filed a plea of sole seizin of the premises, traversing the seizin of the petitioners, and filed the following brief statement. That the said petitioners at the time of prefering their said petition were not and now are not seized and possessed jointly of one third part of said township as tenants in common and undivided. Further, that said petitioners at the time of prefering their said petition were not, and now are not, seized and possessed of any portion of said township. Further, that the one thousand acres reserved for public uses mentioned in said petition, were not at the time of prefering said petition, nor as yet have been, set apart for public uses. And further, that by the said petition it does not appear, that said township is situated within the county of *Penobscot*, or any other county

in the State of *Maine*, and that the said Court, sitting in this county, has no jurisdiction over the subject matter of said petition. The trial was at the *January Term*, 1839, and a verdict was returned that the petitioners were seized of one third part of the township. The respondent filed exceptions.

The proceedings at the trial, and the facts pertinent to the proper understanding of the case, will be found in the opinion of the Court.

The arguments were in writing.

Kent, for the respondent, contended in his argument: —

1. The petition should have been dismissed on motion, as not containing matter enough to give the court jurisdiction, it not appearing affirmatively that the land of which partition is prayed is within the county of *Penobscot*. The *stat.* 1821, *c.* 37, § 2, provides, that the party may make application to the court of the county where the land lies. *Farrington* v. *Blish*, 14 *Maine R.* 423; *Little* v. *Thompson*, 2 *Greenl.* 228. As this is a local action, the venue is not mere matter of form. *Trevor* v. *Wall*, 1 *T. R.* 151. A formal plea is not necessary, it may be by motion. *Hathorne* v. *Haines*, 1 *Greenl.* 245; *Blake* v. *Freeman*, 13 *Maine R.* 130; *Cowper*, 410; 2 *East*, 499. The objection that the motion or plea comes too late, is answered first, that it is a motion, and not a plea in abatement; and second, that in a process of this description, a respondent may come in, and make his motion or file his plea at any time before final judgment.

2. The objection that no proof was exhibited, that the person acting for the petitioners was their duly authorized agent or attorney, should have been sustained. *Colton* v. *Smith*, 11 *Pick.* 311; *Procter* v. *Newhall*, 17 *Mass. R.* 91; *Cox* v. *Hill*, 3 *Hammond*, 409; *Kimmel* v. *Kimmel*, 5 *Sergt. & R.* 294.

3. Our great objection, so far as the direct merits of the case are concerned, is the ruling of the Judge, that partition could be made as prayed for, viz. one third part to be set off to the petitioners to hold in severalty, they holding different proportions by distinct titles. The petitioners cannot amalgamate their several distinct titles, and add them together, and then ask to have that third set off to them to hold in severalty. We admit that the petitioners may join in the petition, but they ought so far to sever therein as to ask to have

each man's share set off to him. The object of the statute is to dissolve and not to create tenancies in common. Here the doctrine relative to partition was reviewed by the counsel, and the following cases cited. *Symonds* v. *Kimball*, 3 *Mass. R.* 302; 2 *Cruise's Dig. Tit.* 19, § 20; *Booth on Real Actions*, 244; *Com. Dig. Tit.* 18, § 32; *Cook* v. *Allen*, 2 *Mass. R.* 469.

4. The public lands have not been set off, as required by *stat.* 1838, *c.* 345, § 2, or the taxes paid. It is proper however to admit that this petition was pending before the statute passed.

J. Appleton, contended, in his argument for the petitioners: —

1. The objection is not that the land does not lie within the county, for it does, but that it is not alleged in the petition to be within the county. The Court here have jurisdiction, and it is unnecessary to make such allegation to give it to them. *Sewall* v. *Ridlon*, 5 *Greenl.* 459. The Court take notice of the boundaries of counties. 4 *Gill. & John.* 63. The motion to dismiss for want of jurisdiction was made too late. All pleas in abatement, or motions in the nature of abatement must be, by the rules, filed the first term.

2. The authority of a regular attorney of the court to appear, is not to be questioned, and he cannot be compelled to show it. 7 *Har. & John.* 275; 10 *Martin*, 638; 9 *Martin*, 88; 6 *Johns. R.* 302; *ib.* 34; 7 *Pick.* 137. The objection was made too late. *Knowlton* v. *Inhabitants of No.* 4, 2 *Shepl.* 20; *Pen. Boom Cor.* v. *Lamson*, 4 *Shepl.* 224.

3. The object of the statute is *not* to "dissolve and not create tenancies in common," as is asserted for the respondent. It is to make partition of land, and to make it as desired by those interested. Such is the manifest provision of the statute, and such has been the practice under it. 3 *Fairf.* 143; 5 *Greenl.* 459.

4. The statute passed after this petition was pending, cannot affect this case. If it were applicable, the public lands may be set off by the commissioners, before the partition is made between the owners.

5. To have partition made, the statute only requires the petitioner to be interested. The owner of an equity has an interest, and partition may be had of the whole fee, or any portion of it.

6 *Ves.* 498; 15 *Mass. R.* 155; 1 *Paige*, 469; 3 *Fairf.* 399. If the respondent intended to have taken advantage of the conveyance of a portion of the interest of the petitioners, after the process was pending, it should have been done by plea *puis darrein continuance*. 1 *Chitty's Pl.* 530. All actions are to be tried on the title as it existed at the institution of the suit, and if any matter of defence subsequently arises, it must be specially pleaded. 11 *Mass. R.* 299; 4 *East*, 503; 13 *Mass. R.* 472.

The opinion of the Court, was drawn up by

SHEPLEY J. — It appears from the exceptions, that the petitioners filed their petition in this county, praying that one third part of the township designated as letter B in the seventh range of townships, from the easterly line of the State, might be set off to them. The township was within the county, but it was not so alleged in the petition; and for this cause the respondent's counsel moved the Court to dismiss it for want of jurisdiction. It is only where it is apparent on the record, that the Court has not jurisdiction, that the process will be abated on motion. *Gage* v. *Gannet*, 10 *Mass. R.* 176. It not appearing in this case affirmatively by the description that the lands were not within the county the motion was properly denied.

At the trial, an objection to further proceedings was interposed for want of proof, that the person who signed the petition as attorney for the petitioners, was duly authorized to do so; and the objection was not sustained by the Court. This Court has decided, that it is not necessary in our practice, that an attorney should produce evidence of his authority to appear and represent a party; the fact that he is admitted to practice as such being sufficient. *Boom Corporation* v. *Lamson*, 16 *Maine R.* 224. If the objection extends further, it must be in the nature of a plea to the ability of the petitioners to prosecute, which can only be taken by a plea in abatement; and it was not open to the respondent under the plea and brief statement which had been filed.

It was made a point of the defence by the brief statement, that the lands reserved for public uses had not been set off. The second section of the *stat.* 1838, *c.* 345, applies to process thereafter

to be commenced; and the requisitions of the law may all be complied with in making the partition.

Nor can the fact, that some of the petitioners have conveyed their interest in mortgage be interposed by the respondent to prevent their share from being assigned to them. Between the parties to a mortgage and their assigns the title is in the mortgagee or his assigns; but with respect to strangers to the mortgage, the mortgagor in possession is regarded as the owner of the estate, and so seized of it as to enable him to convey it, or to maintain a real action counting upon his own seizin. *Wellington* v. *Gale*, 7 *Mass. R.* 138. Such title was sufficient to prove the issue of seizin, and to entitle the petitioners to a decision of it in their favor.

Since the commencement of the process, two of the petitioners have conveyed their interest to a third person, but this fact is not by the plea or brief statement made a matter of defence; and unless it can be received under the general issue, the respondent cannot avail himself of it. It has been decided, that in a writ of right every thing but collateral warranty may be given in evidence under the general issue. *Poor* v. *Robinson*, 10 *Mass. R.* 134. But in actions of entry the defendant under the general issue can give in evidence a title, under which he does not claim, only to defeat the seizin of the plaintiff, which has reference to the time of the commencement of the suit. If it does not have this effect of defeating the plaintiff's seizin, it must be pleaded in bar. *Walcot* v. *Knight*, 6 *Mass. R.* 419. As the respondent has not put this fact in issue, he can have no advantage from it; and no injury can happen from permitting the petitioners to prosecute, as their grantee has recognized their right to do it.

The respondent denies the right of several persons to join and have their proportion assigned to them to be holden as between themselves in common. It is provided by *stat.* 1826, *c.* 347, *s.* 7, that two or more tenants in common may join or sever in petitions for partition; and the answer to that part of the brief statement which alleges, that the petitioners were not jointly seized may be, that the statute does not require it, but permits such a joinder in the suit without regard to the character of the title. The statute *c.* 37, authorizes "the share or shares of the party applying for the same to be set off and divided from the rest," and it does not re-

quire, that the share of each petitioner shall be assigned to him to be held in severalty. The manner in which the petitioners shall continue to hold among themselves after the partition is made can be of no importance to the owner or owners of the part remaining; and it is not a matter which they are authorised by the statute to put in issue. Nor is it put in issue by the pleadings in this case. The manner in which the partition shall be made can properly arise only on the report of the commissioners. It may appear by their return, that the estate cannot be subdivided without great inconvenience, and it may all be assigned to one, as provided in the ninth section of the statute; or it may be made in certain cases by assigning the use or profits for certain periods as stated in *Hanson v. Willard*, 3 *Fairf.* 147. One object of the statute appears to have been to avoid the inconvenience which exists under the writ of partition, of having all the shares in the tenancy assigned; and another, that of enabling one or more of the tenants to relieve themselves from difficulties, to which they might be subjected on account of the character or situation of their associates. But there is no indication, that it was the policy of the law to destroy tenancies in common, except where some one or more of the associates desired it. And there does not appear to be any provision of the statute which deprives the persons petitioning from framing their petition to suit their own convenience so far as it respects the future occupation of the portion to be assigned to them.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF WASHINGTON, JULY TERM, 1840.

ISAAC HOBART *vs.* JONATHAN BARTLETT.

Where an interested deponent states in his deposition, that the party calling him, and in whose favor the interest is, has given him a release, without producing it that the Court may judge of its sufficiency, his incompetency is not removed.

ASSUMPSIT upon a note signed by *Giles Humphrey* and *Alexander Foster*, as principals, and by the defendant as their surety. The suit was against *Bartlett* alone. The deposition of *Humphrey*, one of the principals in the note, who had left the State and was insolvent, was offered in evidence by the defendant. This was objected to because the deponent was interested. There was no evidence of a release, unless contained in the deposition; and the only statement in relation to it found therein, is contained in the following interrogatory and the answer of the deponent thereto.

"*Int.* 5. Has the defendant given you a release from all liability to him for damages and costs that may arise to him in consequence of having signed this note as your surety? Have you any interest in the event of this suit? To the fifth, the deponent answers, the defendant, *Jonathan Bartlett*, has given me such a release, as that mentioned in this interrogatory. And I have no interest in the event of this suit."

If the deposition was not admissible, the defendant was to be defaulted.

J. Granger, for the plaintiff, contended, that the deponent had a direct interest in the event of this suit, as the defendant could recover of him all paid in consequence of a recovery in this action. Such witness cannot be permitted to testify until his interest is removed.

D. T. Granger, for the defendant, contended, that the deponent's interest was balanced. If the plaintiff prevails, the defendant has a right of action against the witness, and if the defendant prevails, the plaintiff still has his remedy against the witness. But if he had an interest, it was released. When the testimony is by deposition, the only way in which the removal of the interest can be shown, is from the answer of the deponent that he has been released.

The opinion of the Court was by

SHEPLEY J. — The defendant is surety, and will be entitled upon payment to call upon the witness to repay to him the amount thus paid. The witness is therefore interested in the event of the suit. Whether a witness is incompetent by reason of interest is a preliminary question to be decided by the Court before he can be admitted to testify.

When the interest is apparent and it is proposed to discharge it by a release, the Court must judge of its sufficiency. In this case no release is produced, and the Court cannot decide upon it. The witness cannot be permitted to do it, nor can he be allowed to testify to any fact in the case before the Court has decided, that he is competent. To decide the witness to be competent would deprive the Court of the power of performing its appropriate duty and devolve it upon the witness.

Defendant defaulted.

LEONARD PIERCE *vs.* WILLIAM DELESDERNIER.

If an execution is delivered to an officer, with instructions to call upon the debtor, and to return the execution to be discharged upon securing one sixth part thereof, the officer is entitled only to fees for his travel and on the amount secured.

On collecting an execution an officer is entitled to his travel, computing the distance *by the road usually travelled*, whether he in fact travels a more or a less distant way to suit his own convenience.

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

Assumpsit for money had and received. It was proved at the trial that Messrs. *Downes & Cooper*, attorneys of the creditors, in 1833, at *Calais*, placed in the hands of the defendant, then sheriff of the county, an execution in favor of *T. West & al.* against *Pierce*, then in force, for the sum of $2490,84, damages, and $12,85 costs, informing him that an arrangement had been made between the creditors and debtor whereby the execution was to be discharged on *Pierce's* paying $400 in four notes of 100 each, with good sureties, and instructing him, that on receiving such notes, and collecting the costs, $12,85, he might return the execution to be discharged. *Mr. Downes* stated, that the defendant took the execution and was to go to *Houlton* where *Pierce* resided, to have that arrangement effected; that he did not recollect whether he named the sureties to be obtained, or referred it to the defendant to take such sureties as he should think proper; that he presumes he ordered the defendant to commit *Pierce*, unless he should furnish the notes and pay the costs, and that he has this impression because it was his practice to give such orders in similar cases; that the defendant went to *Houlton*, and there procured the notes, and afterwards delivered them over to the witness, with the costs, at *Calais*, and the witness thereupon discharged the execution. It appeared from the testimony in the case, that the nearest road between *Calais* and *Houlton* was eighty or ninety miles; that the road on this route was then bad and unsafe for travel; that by the road most frequently travelled, it was one hundred and fifty miles; and that the defendant in fact went by the route first mentioned. *Pierce* then gave to the defendant an order on a person in *Eastport*

for fifty dollars, which was paid. The plaintiff was then indebted to the defendant on a note, but no part of the fifty dollars was appropriated towards the payment of it, and the whole has since been collected of the plaintiff. Before the commencement of the suit, the plaintiff demanded of the defendant the balance of the fifty dollars above paying the costs and fees on the execution. The defendant replied, that the costs and fees, with another claim of seven dollars, amounted to more than the fifty dollars.

The counsel for the plaintiff requested the Judge to instruct the jury, that if they should believe that the defendant acted merely as the agent of the creditors in effecting an arrangement of the execution, he would not be entitled to receive any thing from the plaintiff, but must resort to the creditors for his compensation. The Judge, thinking that the evidence would not justify the jury in such conclusion, declined giving such instruction. The plaintiff's counsel then insisted, that the defendant was entitled to receive poundage only upon the four hundred dollars secured. The Judge instructed the jury, that the defendant was entitled to poundage on the whole amount of the execution. The jury found that the claim set up by the defendant for seven dollars was not supported, and returned a verdict for the plaintiff for the balance of the fifty dollars, having first deducted the costs and the fees for travel, and dollarage on the full amount of the execution. The plaintiff filed exceptions to the ruling and instructions of the Judge.

Bridges, for the plaintiff, argued in support of the points made at the trial, and cited *Shattuck* v. *Woods*, 1 *Pick.* 171; *Commonwealth* v. *Bagley*, 7 *Pick.* 279.

Chase and *Fuller* argued for the defendant, and insisted that the sheriff was entitled to dollarage on the whole amount of the execution. Any consideration which the creditors were willing to take as a satisfaction for their debt, received by the officer of the debtor and paid to the creditor, is a payment, and entitles the officer to his fees. Having the execution, he was responsible for the whole amount, and if nothing had been secured, he was bound to have committed the plaintiff for the full sum. There is no distinction as to the right to receive fees between our statute and that of *New-York*. *Scott* v. *Shaw*, 13 *Johns. R.* 378; *Hildreth* v.

Ellice, 1 *Caines*, 192; *Bolton* v. *Lawrence*, 9 *Wend.* 435; 17 *Wend.* 14; 5 *Johns. R.* 252.

The opinion of the Court was prepared by

SHEPLEY J. — The sheriff was allowed fees by the *statute* of 1821 *c.* 105, for "levying executions." And by *statute* of 1829, *c.* 445, "for levying and collecting executions." In this case the sheriff collected only four hundred dollars and the costs. And if he had made a return of his doings upon the execution, he could have returned only, that he had collected that sum, and the execution would have remained unsatisfied for the remainder; for he was not authorized to satisfy the execution, but to "return the execution to be discharged." It was indeed satisfied, but not by any collusion to deprive the sheriff of his fees, for he was informed at the time he received it, that an arrangement had been made for its discharge by the payment of that sum. Nor can it be justly said, that the whole amount was at the risk of the defendant, for if the plaintiff had failed to obtain the security required, and the defendant had neglected to arrest him, he would be liable to the creditor only for the injury actually sustained, and might prove the inability of the plaintiff to pay the whole debt.

The statute provides, that the travel shall be computed "by the usual way," and it is not material whether the sheriff travelled a more or less distant way to suit his own convenience. In this case he will be entitled to fees for such travel, and on the amount collected, and to nothing more.

Exceptions sustained.

THOMAS MCNEAR *vs.* DANIEL M. ATWOOD.

Where the plaintiff had agreed with his debtor to take a note payable in three months to himself or to T. and afterwards gave an order on the debtor to "let A. (the defendant) have the note as we agreed for the balance due me;" this does not as between them furnish presumptive evidence of an assignment of the demand to the defendant for value.

If the defendant, on being sent by the plaintiff to take a note from his debtor in discharge of an existing demand, wrongfully takes the note payable to himself and disposes thereof for his own use, the plaintiff may waive the wrongful act and claim to have the note delivered to him, and may maintain trover against the defendant for its conversion.

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

Trover for a note of hand. The plaintiff offered evidence to prove that about *January* 1, 1837, the *St. Croix Manufacturing Company*, doing business at *Calais*, owed him $43,25, for which the agent, *Noah Smith, Jr.* had agreed to give him a note payable in three months, or would make it payable to *Spencer Tinkham*, if plaintiff desired it. On the next day the plaintiff gave to the defendant an order of the following tenor. "*Mr. Noah Smith, Jr.*, Sir, let *Mr. Atwood* have the note as we agreed for the balance due me, and oblige yours, &c. *Thomas McNear. Calais, Jan.* 2, 1837."

The defendant presented this order to *Smith*, who inquired to whom he would have the note made payable, and the defendant replied, to himself. The note, the same described in the declaration, was so made, and delivered to the defendant. *Tinkham* testified, that the plaintiff had bargained with him for a barrel of pork and a barrel of flour for which the plaintiff was to give him the note of *Noah Smith, Jr.* payable in three months; that on the next day, or soon afterwards, the defendant came into his store and asked if the plaintiff had not had some conversation with him respecting a barrel of pork and flour, and the witness said, that *McNear* had made arrangements for a barrel of pork and one of flour; that the defendant took out the note, and showed it to the witness; and that he did not take the pork and flour, but put the note into his pocket. It was proved, that the defendant soon after sold the note, and received the amount for his own use.

The plaintiff's counsel contended, that the defendant received the note as his agent or servant, and that it was the plaintiff's property, the order not being for value received on its face; and there being no evidence of any consideration paid by the defendant; and that the subsequent conversion of it to his own use, made the defendant liable in this action.

The defendant's counsel contended, that the demand of *McNear* against the company was transferred to the defendant, and that the note was the defendant's own property. But if it was not, that this action could not be maintained, as the taking of the note payable to himself was a conversion by the defendant of the order and not of the note, and that if the plaintiff could maintain any action, it would be for the conversion of the order.

The Judge instructed the jury, that the drawing of the order for the amount due to *McNear* from *Smith* was *prima facie* or presumptive evidence of an assignment of the demand to *Atwood*, whereby it became his property, and gave him a right to take the note and do what he pleased with it, and that they must find for the defendant, unless the plaintiff had repelled this presumption by evidence that notwithstanding the order, the property in the note was his; that the burthen of proof was on the plaintiff to satisfy the jury of this, the presumption of law from the drawing of the order being against him; and left it to the jury to decide whether the evidence did or did not repel that presumption.

The verdict being against him, the plaintiff filed exceptions.

J. Granger, for the plaintiff, argued in support of the principles contended for by him in the court below, and cited 8 *Conn. R.* 7; 3 *Caines*, 87.

N. Abbott, for the defendant, contended for the correctness of the instructions of the Judge, and cited *Robbins* v. *Bacon*, 3 *Greenl.* 346; *Adams* v. *Robinson*, 1 *Pick.* 460.

The opinion of the Court was drawn up by

Shepley J. — In cases arising under the trustee process, if the legislature had not provided, when the supposed trustee should disclose an assignment of his debt, that the assignee should be summoned in and be allowed to make proof, that the assignment was made *bona fide*, and for a valuable consideration, there would be

no mode of ascertaining the validity of the assignment. For the purpose of affording such assignee the benefit of the provisions of the statute, the Court must consider the assignment itself in whatever form presented as *prima facie* evidence, that the debt has been assigned. And the cases cited by the counsel for the defendant arose under this statute provision.

The order in this case is not expressed to be for value received, and if it were so expressed, not partaking of the character of a bill of exchange or negotiable promissory note, it would not dispense with the proof of value, or consideration. *Mandeville* v. *Welch*, 5 *Wheat.* 282. It is true, that an order to pay to another, or to do some other act, may be an equitable assignment of the fund, or give an equitable right to exact performance; and in many cases it is not the duty, or important to the person upon whom it is drawn to inquire, whether the holder has paid any value for it, as he will in any event be protected in making payment as requested.

But if the assignor, before payment or performance, should countermand the order, it would be necessary for the holder to prove a valuable consideration to entitle him to the assistance of the Court for his protection. *Prescott* v. *Hull*, 17 *Johns. R.* 284. And in cases arising under the trustee process, the duty of the assignee is the same when he has become a party to the suit; the order or assignment being regarded as making a *prima facie* case only for the purpose of enabling him to come in and protect his rights.

In this case, the plaintiff might have countermanded the order before the note was delivered, and the effect could have been prevented only by the defendant's proof, that he had received the order for a valuable consideration, and thereby acquired an interest in the debt, for which the note was to be given.

The case finds also, that the *St. Croix Manufacturing Company* being indebted to the plaintiff, its agent had agreed to give a note for the amount due, payable to the plaintiff or to *Spencer Tinkham*. The order of the plaintiff upon the agent to "let *Mr. Atwood* have the note as we agreed for the balance due me," appears to refer to the agreement before made, part of which was, that the note should be made payable to the plaintiff or to *Tinkham*. And the defendant taking the order with such a reference must be

supposed to have been informed of the agreement, and to have known, that the note was to be so drawn. And it would be a wrongful act in him to direct it to be drawn in his own name. But the plaintiff might waive this wrong and claim to have it delivered to him.

Exceptions sustained and a new trial granted.

Samuel Tuttle *vs.* Daniel Lane.

A writ of entry upon a mortgage, may be maintained against the tenant in possession, although he may not be the holder of the equity of redemption.

And if the tenant in possession, before the commencement of the suit, has holden the premises under an expired lease from the mortgagee, an action on the mortgage may be maintained against him without any previous notice to quit.

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

Writ of entry on a mortgage. The tenant, with the general issue, alleged in a brief statement, that he was not tenant of the freehold, but was tenant for a term of years.

The demandant read in evidence a deed of mortgage from the tenant to himself, dated *July* 10, 1833, and recorded *Sept.* 17, 1833, of the same premises, to secure the payment of a note due before the commencement of the suit. It was admitted, that the tenant had been in possession during the whole time since the mortgage was given. The demandant here rested.

The tenant then read in evidence a deed of the premises from himself to one *Wilson*, dated *Aug.* 26, 1836, and recorded before this suit was commenced. He also offered a lease of the premises for one year from the demandant to him, without date. The Judge inquired, if the tenant expected to show, that the lease was in force at the time of the commencement of the suit, and his counsel replied, that he did not, but merely that it was given after the mortgage. The Judge thereupon ruled, that it could not be ad-

mitted in evidence without proof, that it was a subsisting lease when the action was commenced. No other evidence was offered. The Judge instructed the jury, to find a verdict for the demandant, and the tenant filed exceptions.

J. Granger, for the tenant, contended, that the action could not be maintained, because it was brought against one who was not tenant of the freehold. The case of *Keith* v. *Swan*, 11 *Mass. R.* 216, was decided without authority, and without any reasons for it, and is opposed to the whole current of authorities. Non-tenure is a good plea when the action is on a mortgage, as well as in other cases. *Olney* v. *Adams*, 7 *Pick.* 31; *Jackson on Real Actions*, 90; *Otis* v. *Warren*, 14 *Mass. R.* 239; *Dewey* v. *Brown*, 5 *Pick.* 238; *Hunt* v. *Sprague*, 3 *Mass. R.* 312; *Parlin* v. *Macomber*, 5 *Greenl.* 413; *Prop. No.* 6, v. *McFarland*, 12 *Mass. R.* 325.

The lease should have been admitted in evidence. As the tenant remained after the year expired, he must be considered as holding from year to year. But whether the holding was to be considered for the year or not, having been in possession under a lease from the demandant, he was entitled to notice to quit; and until a reasonable time had elapsed, the action could not be maintained. Here the suit was commenced without any notice. *Moshier* v. *Reding*, 3 *Fairf.* 478; *Brewer* v. *Knapp*, 1 *Pick.* 332; *Ellis* v. *Paige*, *ib.* 43; 1 *Cruise*, 286; 3 *Peters*, 49; 1 *T. R.* 162; 5 *ib.* 471.

Bridges, for the demandant, insisted, that an action on a mortgage can be maintained against any one in possession. It is not necessary that it should be against the holder of the equity, who is the only person, but the mortgagee, who can be said to be tenant of the freehold. The case of *Keith* v. *Swan*, 11 *Mass. R.* 216 has been confirmed in *Hunt* v. *Hunt*, 17 *Pick.* 118; and may be considered settled law.

The relation of landlord and tenant did not exist between these parties. Even had there been an existing lease, the conveyance by the tenant would have produced a forfeiture of it. *Bennock* v. *Whipple*, 3 *Fairf.* 346; *Campbell* v. *Proctor*, 6 *Greenl.* 12. The tenant could be nothing more than a tenant at sufferance, who is not entitled to a notice to quit before the commencement of the suit. *Davis* v. *Thompson*, 1 *Shepl.* 209.

The opinion of the Court was drawn up by

EMERY J. — A verdict having been rendered for the plaintiff on the Judge's instruction to find it, the action is brought before us by exceptions with a view of testing the correctness of those instructions.

The case has a portion of novelty in it. A mortgagee, as the plaintiff is, became so by the defendant's deed, executed on the 10th of *July*, 1833, given to secure the payment of a note of hand for 468,80, payable in four equal annual payments. The deed and note were read in evidence. *From the time the mortgage was given, the defendant has continued in possession.* But he would relieve himself from responsibility in this suit, on the ground of defendant alleging in a brief statement under the general issue which was joined, that he was not tenant of the freehold, but was tenant for a term of years. If this defence be a good one, the defendant must have the benefit of it. For he has shewn that on the 26th of *August*, 1836, he gave a deed of the premises to one *Lewis Wilson*, and besides this, would have shewn and produced in evidence, a lease to him, the defendant, from the plaintiff, of the premises for one year without date, if the Judge would have indulged in doing so. And if the counsel of the defendant had expected to show that the lease was a subsisting lease in force at the time of the commencement of this action, the Judge stated, that it should be admitted, but otherwise, not. The defendant's counsel, with that integrity and directness, which ought to characterise the conduct of the bar in the management of causes in courts of justice, replied that he did not expect to shew that it was so in force, but that it was given some time after the mortgage was given.

The defendant then could not pretend to be more than a tenant at sufferance, he came into the possession by lawful title, and after the determination of his interest, he holds over by wrong. If we might indulge in conjecture, we might suppose that the lease was given in the expectation that it might appear that the plaintiff had entered for the breach of the condition; and now, that the lease is determined, he apprehends that his evidence on that subject is not so clear and unquestionable as might be desirable, and he therefore commences his action.

Whether such are his views we cannot assert with certainty. But we must perceive that the defendant is presented before us clothed only with the naked possession, and he cannot maintain it against his own deed to the plaintiff. The lease has spent its force. For if the defendant has right under the lease, he has alienated that by his conveyance to *Lewis* on the 24th of *August*, 1826.

As against this defendant, the plaintiff is restored to all his former rights, and has undoubted right to maintain the action.

Exceptions overruled.

GEORGE W. COFFIN *& al. vs.* BRADBURY COLLINS.

The books of a corporation are the regular evidence of its corporate acts.

Where the records of a corporation are in existence and can be obtained, parol evidence is inadmissible to prove the acceptance of the charter, or to prove what persons are members of the corporation.

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

Replevin for a quantity of board logs. The brief statement of the defendant alleged that the logs were taken by him as a deputy sheriff, and were then the property of one *Sabin P. Jordan*, and were seized on an execution in favor of one *Bracy* against the *Narraguagus Log-driving Company*, of which *Jordan* was alleged to have been a member, and liable for the company debts.

The defendant, having admitted that he took the logs from the possession of the plaintiffs, introduced evidence to show that the logs were the property of *Jordan*. He proved *Bracy's* judgment against the *Company*, which was founded on a note given to him by one *Curtis* as treasurer of the *Company*, in payment for services rendered in driving logs; and produced an execution issued on the judgment, and which had been placed in the hands of the defendant for collection. The defendant then proposed to prove the existence of the corporation, that *Jordan* was one of its members, and that his property was liable to be taken to satisfy the execu-

tion. He introduced an act incorporating the *Narraguagus Log-driving Company*, dated *March* 25, 1836. He then offered to prove, that prior to the date of the charter, a part of the persons named in the act agreed with each other in writing to accept the charter when it should come, and to proceed forthwith to the choice of officers; that prior to the charter, officers were chosen, among whom one *Nichols* was chosen clerk; to prove by parol that when the charter was obtained, a part of the persons named therein expressed their satisfaction with it; that a part of them after the act was obtained met together and agreed to act under it; that a part of the persons named in the act employed an agent to drive logs, who employed many hands in the business; that one of the persons named in the act acted as treasurer, and gave notes in the name of the company in payment for the labor of the hands employed in driving the logs; that *Nichols* had represented himself to be clerk, and *Curtis* to be treasurer of the company; and that both before and after the commencement of this suit, the business of driving logs was carried on by persons representing themselves to be agents acting in behalf of the company. To the admission of all the testimony thus offered, the plaintiffs objected, and the Judge ruled that it was inadmissible. To this ruling of the Judge, the defendant excepted.

Burbank, for the defendant, contended, that the testimony rejected ought to have been admitted. It is not necessary to show the acceptance of a charter by vote. It may be shown by corporate acts. The act shows that *Jordan* was named in it, and the evidence offered was sufficient to have justified the jury in saying that he acted under it. The jury were the proper judges of the weight of the testimony. *Angel & A. on Corp.* 48; *Ch. R. Bridge* v. *Warren Bridge*, 7 *Pick.* 344; *Ellis* v. *Marshall*, 2 *Pick.* 269; *Bank U. States* v. *Dandridge*, 12 *Wheat.* 71. *Jordan's* property was liable to be taken on an execution against the company, he being a stockholder. *Spec. Laws* of 1836, *c.* 159.

Hobbs, for the plaintiffs, said, that the testimony offered supposed that there was a clerk of the corporation. No excuse is given for the omission to call upon the clerk to produce the records of the company. The best evidence of the acceptance of the char-

ter and of the organization under it, is derived from the records themselves. Parol evidence, being of an inferior character, is inadmissible, where record evidence exists and may be obtained. *Owings* v. *Speed*, 5 *Wheat.* 420; *Angel & A. on Cor.* 378.

The persons named in the act of incorporation did not become stockholders unless they assented to it afterwards, and this assent should be proved by the records. *Ellis* v. *Marshall*, 2 *Mass. R.* 269; *Lin. & Ken. Bank* v. *Richardson*, 1 *Greenl.* 79.

The declarations of individual members of a corporation, not acting as agents, cannot bind the corporation, and are not admissible to prove others to be members of it. *Polleys* v. *Ocean Insurance Co.*, 14 *Maine R.* 141.

The testimony offered was rightly rejected, because it was immaterial. It does not show that *Jordan* ever recognized the charter as binding on him, or that he ever acted under it.

The opinion of the Court was prepared by

Weston C. J. — The logs in controversy, having been taken from the possession of the plaintiffs, to sustain the defence, it was incumbent on the defendant to prove, that the *Narraguagus Log-driving Company* was an existing corporation, legally acting as such, that *Jordan* was a member of it, that the logs were his property, and that they were duly seized, in virtue of an execution against the company. The acceptance of the charter, creating that company, like every other controverted fact, is to be proved by the best evidence, in the power of the party who relies upon it. The books of a corporation are the regular evidence of their doings. *Owings* v. *Speed & al.* 5 *Wheat.* 420. Parol evidence is in its nature of an inferior character. If books have not been kept, or have been lost or destroyed, or not accessible to the party, upon whom the affirmative lies, doubtless an acceptance of the charter may be proved by implication from their acts, if such acts are otherwise capable of proof. In this case an individual claimed to hold and exercise the office of clerk of the company. He might have been summoned to attend with their books. For any thing which appears, the acts and doings of the corporation might, in this mode, have been duly and regularly proved. The declarations of some of the persons named in the charter, or the movement of part of them, in the business

contemplated by it, would affect them only as individuals, unless done in a regular corporate capacity, or under the direction of the corporation. No formal vote of acceptance was necessary. It may be implied from proof of any regular corporate act, of which as has been before stated, its books are the best evidence.

But whatever proof may have been offered of the acceptance of the charter, by some of the corporators, it does not appear, that *Jordan* became actually a member. His being named in the act, does not necessarily prove his assent to, or acceptance of the powers conferred. *Ellis* v. *Marshall*, 2 *Mass. R.* 269. The act renders the private property of every member liable for the debts of the corporation. *Special Laws* of 1836, *c.* 159, § 6. There should be regular proof of the existence of the corporation, and the actual membership of the party to be affected, before a liability so onerous can legally attach.

Exceptions overruled.

JOHN KELLAR, *Treasurer, vs.* DANIEL SAVAGE *& als.*

A collector of taxes cannot be excused from the performance of his duty in collecting and paying over taxes committed to him, by reason of any illegality in the prior proceedings of the town, or of its officers, unless he was thereby prevented from performing his own duty safely.

A liberal and favorable construction should prevail to support the proceedings of towns; especially when no one is injured by it, or deprived of any right, and when the object is only to require one to perform a service which he has voluntarily undertaken.

When there is no town clerk, as well as when the clerk of the town cannot be present, towns have authority under *stat.* 1824, *c.* 260, to choose a clerk *pro tempore*, to record the proceedings of that meeting.

The provision of the *stat.* 1821, *c.* 114, requiring a record to be made of the persons sworn as town officers, is directory, and does not prevent the fact of their having been sworn from being otherwise proved, when there is no record thereof made.

A constable still in office may amend his return on a warrant for calling a town meeting, by stating the time and manner of calling it.

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

Debt on a bond, dated *May* 29, 1834, given by *Savage*, as principal, and by the other defendants as his sureties, to *John Dickinson*, Treasurer of the town of *East Machias*, or his successor in office, conditioned, that *Savage* having been chosen collector of taxes for that town for the year 1834, should collect and pay over all taxes committed to him, according to his warrants. The defendants by brief statement pleaded general performance, and that *Kellar* was not successor to *Dickinson* as treasurer.

The execution and delivery of the bond; the vote of the town to raise the taxes assessed; the assessment of them; the commitment of the tax lists with a warrant to *Savage;* that he had collected and paid over the principal portion thereof, and all but $213,23, which had been demanded of him; were proved by the plaintiff. It appeared by the records, that the annual town meeting at which the persons acting as assessors were chosen as such, and at which *Savage* was chosen collector, was holden *April* 3, 1834. The town was incorporated in 1826, and it was admitted, that the manner of summoning the inhabitants to assemble in town

meeting had never been prescribed, or agreed upon by the town. It was also admitted, that the meetings of the town since its incorporation had been uniformly called in the same manner that this had been. It was here objected by the defendants, that the meeting at which the tax was voted, and at which the officers were chosen, was not warned according to any mode agreed on by the town. To show that *Kellar* was the successor of *Dickinson* as treasurer, the records of the meeting of *April* 7, 1837, were produced by the plaintiff, on which it appeared, that *Kellar* was chosen treasurer; that *J. C. Talbot* was chosen clerk; and that *Talbot* being absent, *John F. Harris* was chosen clerk, *pro tem.* This record was attested by *Harris*, as clerk, *pro tem.* The defendants objected to the sufficiency of the record. 1. Because it was signed by *Harris*, as clerk *pro tem.* instead of by *Talbot*, the clerk. This objection was overruled. 2. Because it did not appear by the record, that *Harris* had been sworn as clerk. The plaintiff then offered the certificate of the magistrate who administered the oath to *Harris* to prove that he was sworn. As the certificate had not been recorded, it was rejected by the Judge. The plaintiff then offered to prove by the magistrate that *Harris* was sworn. The defendants objected, but he was admitted, and proved, that the oath had been administered. The defendants then objected, that this meeting was not legal, because the constable's return upon the warrant merely certified that he had warned the inhabitants to attend the meeting, and was without date, and did not specify in what manner the notice was given. On motion of the plaintiff, the defendants objecting, the constable being still in office, was permitted to amend his return, and it was done by him by affixing a date, "*March* 23, 1837," and by adding the words "by posting up copies of the warrant in two public places in the town." The clerk, *Talbot*, being still clerk, was allowed to amend the record by making it conform to the amended return of the constable. The defendants also objected, because the town had never agreed upon any mode of calling town meetings. The record was then read. Here the plaintiff stopped. The exceptions state, that "the defendants moved a nonsuit, which was ordered." Why the nonsuit was ordered, is not told. The plaintiff filed exceptions.

J. A. Lowell, for the plaintiff, contended, that the mere neglect of the town to fix upon the mode of calling the town meetings, could not prevent the town from holding them. The acquiescence of the town so long in the mode adopted to warn the inhabitants, was a determination of the mode. The defendants could not object that the meeting was improperly warned. *Ford* v. *Clough*, 8 *Greenl.* 343; *Bucksport* v. *Spofford*, 3 *Fairf.* 491. The defendant, after having acted as constable under a choice at that meeting, and having given a bond to pay over the money collected by him, cannot keep the money collected in his pocket, by setting up the illegality of the meeting, or of the assessment of the taxes. *Ford* v. *Clough*, before cited.

Kellar was legally chosen treasurer, and as such may maintain the suit.

The objection is first, that *Harris* was not sworn. The certificate of the magistrate was a proper mode of proof. *Abbott* v. *Hermon*, 7 *Greenl.* 118. And the one permitted by the Judge, the testimony of the magistrate, was proper. *Cottrell* v. *Myrick*, 3 *Fairf.* 234; *Bucksport* v. *Spofford*, *ib.* 487. The record of the warning was sufficient before the amendment. The plaintiff is not obliged to go behind the record to show the warning to have been legal. *Thayer* v. *Stearns*, 1 *Pick.* 109; *Hartwell* v. *Littleton*, 13 *Pick.* 229. But the amendments were rightfully made. *Howe's Pr.* 383; *Chamberlain* v. *Dover*, 13 *Maine Rep.* 466; *Avery* v. *Butters*, 9 *Greenl.* 16; *Welles* v. *Battelle*, 11 *Mass. R.* 477.

R. K. Porter, for the defendants, contended, that the meeting was shown not to have been called according to law, not having been called in the manner directed by a vote of the town. This is an admitted fact in the case, and therefore no presumptions can be allowed that the warning was legal. The taxes therefore were illegally assessed by persons without authority, and the collector is not obliged to collect the tax. The sureties are not liable on the bond, even if the money had been collected, which was not the fact. *Foxcroft* v. *Nevens*, 4 *Greenl.* 72.

The plaintiff is not the successor of *Dickinson* as treasurer, because there was no legal proof of his authority to act. The record can only be made by the town clerk. *Stat.* 1821, *c.* 114, §

1. The oath of the clerk, when sworn by a magistrate, can only be proved by a copy of the record, after the oath has been returned to the town clerk and recorded. There can be no such officer as town clerk *pro tem.* when there is no clerk in office. But if *Harris* was clerk, his record was wholly defective, and *Talbot* cannot legally amend the record of *Harris.*

The opinion of the Court was by

SHEPLEY J. — The annual meeting in 1834 was notified as all previous meetings had been since the incorporation of the town in 1826. In the case of *Ford* v. *Clough,* 8 *Greenl.* 343, the objection, that the meeting was not notified in a mode agreed upon by the town, was considered, and it was decided to be no sufficient excuse for the omission of duty by a collector of taxes.

The collector in this case cannot be excused from the performance of his duty by reason of any illegality in the prior proceedings of the town or of its officers, unless he was thereby prevented from performing it. And it does not appear, that he could not legally and safely do it.

It is objected, that the plaintiff cannot maintain the action, because he was not legally chosen treasurer. A liberal and favorable construction has prevailed to support the proceedings of towns, and this may well be the rule, when no one is injured by it, or deprived of any right; and when the object is only to require one to perform a service, which he has voluntarily assumed. Such a construction of the *stat. c.* 260, would authorize the choice of the clerk *pro tem.* The statute requiring a record to be made of the persons sworn into office, is directory, and it does not prevent the fact from being otherwise proved, when there is no such record.

There can be no legal objection to the amendment made by the constable while in office; and by his return as amended, the meeting appears to have been notified in the usual manner. Any payment made to the treasurer under such circumstances would be good. The town could not object, that he was not their agent for such purposes. The defendants can have no right to claim an exemption from the performance of their contract by alleging, that the proceedings of the town had been so defective, that others may by possibility have been injured, when they have neither suf-

fered injury, nor been prevented from performing their own duties safely.

Exceptions sustained and a new trial granted.

HANNAH HATHAWAY, *Adm'x vs.* JEREMIAH CROSBY *& al.*

In all actions upon bonds with a penalty, with a condition which provides for the performance of some covenant or agreement, under the additional act regulating judicial process and proceedings, *stat.* 1830, *c.* 463, the jury are to assess the damages sustained by breaches of the condition thereof.

But where the condition of the bond is such, that it is to be void or is to be defeated upon the performance of some act or duty, the damages are to be assessed by the Court, under the provisions of the *stat.* 1821, *c.* 50, giving remedies in equity.

Bonds given in the common form under the poor debtor acts, are of the latter description, and damages arising from breaches thereof are to be assessed by the Court, unless in cases where the poor debtor acts direct such assessment to be made by the jury.

Where a debtor committed to prison on execution, obtained his release therefrom by giving a bond conforming to the provisions of the acts for the relief of poor debtors in all respects, with the exception that performance was to be made within a shorter time than the law required; and where the conditions were performed within the time required by law, although not within the time limited in the bond; *it was held*, that such bond was not valid as a statute bond, but was good at common law, and subject to chancery; and that the measure of damages in an action by the creditor was the amount actually suffered by him.

The judgment debt is not discharged by such proceedings.

As the act authorizing exceptions to the decisions of the Court of Common Pleas in matters of law, does not require this Court to send the cause to a new trial in every instance where error is found, but only as "law and justice may require;" if a Judge of the Common Pleas erroneously submits to the jury the determination of the amount of damages, and they decide correctly, a new trial will not be ordered.

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

Both parties excepted. From the exceptions on the part of the plaintiff it appeared, that the action was debt, declaring on the penalty of a bond by the defendants to *Warren Hathaway*, the intestate, dated *April* 30, 1836, in the penal sum of $1415,78 given to procure the enlargement of *Crosby* from prison, to which he had been committed on that day on execution in favor of the intestate, issued on a judgment recovered against *Crosby* at the *Sept.* Term of the Court of Common Pleas, 1835, for $686,15, debt, and $9,61, costs. The action on which the judgment was recovered was commenced *March* 27, 1835, and was founded on a judgment at the *Sept.* Term of the Court of Common Pleas, 1830. The defence was made on the general issue, and general performance by brief statement.

The condition of the bond was as follows. "Now if the said *Jeremiah Crosby* from the time of executing this bond shall continue a true prisoner within the limits of the jail yard, until he shall be lawfully discharged, and shall not depart without the exterior bounds of said jail yard until lawfully discharged from said imprisonment, and if he be not discharged from his said imprisonment according to law, within six months from the date hereof, shall surrender himself to the jail keeper within said six months and go into close confinement, and commit no manner of escape, then the said obligation to be void; otherwise to remain in full force." The counsel for the defendants contended, that this case came within the provisions of the *stat. March* 11, 1830, *c.* 463, § 1, and offered evidence to show that the plaintiff had not sustained any damages by the breach of the condition of the bond, if a breach should be found by the jury. What this evidence was, appears in the exceptions taken by the defendants, and will be found in the opinion of the Court. To the admission of this evidence the plaintiff objected, but the objection was overruled by the Judge, and the evidence went to the jury. The Judge instructed them that this case was within the provisions of the statute aforesaid, and directed them, if they found a breach of the condition, to inquire into the damages sustained by the plaintiff; and to give such damages as they should think that the plaintiff was entitled to by the evidence, not exceeding the original debt, interest and costs. The jury

found a verdict for the plaintiff. and assessed the damages at the sum of one dollar. The plaintiff filed exceptions.

The counsel for the defendants, at the argument, stated that he waived the exceptions on their part, if those taken by the plaintiff were overruled; and no decision was made by the Court upon the points presented in them.

D. T. Granger argued for the plaintiff.

This is not a bond falling within the provisions of the *stat.* 1830, *c.* 463. The condition does not either in fact or in law amount to or import a "covenant or agreement;" is simply a condition by way of defeasance. There is a substantial difference between bonds to secure covenants, and bonds on condition or defeasance. There are no covenants in fact between the parties embodied in the condition of the bond, the performance of which the penalty was designed to secure. The benefit which the plaintiff would derive from this bond, was to come from the breach of the condition. The defendants had their election to perform or not to perform.

There is a substantial difference between bonds to secure covenants and bonds by way of defeasance. *Douglass* v. *Clark*, 14 *Johns. R.* 177; 5 *Dane*, 245; 3 *Dane*, 562; 4 *Dane*, 156. Were the condition of the bond a covenant, the obligee might at his option bring debt or covenant. *Stearns* v. *Barrett*, 1 *Pick.* 449; 5 *Dane*, 244; 3 *Dane*, 559, 563. But if the condition be by way of defeasance, covenant cannot be maintained. 1 *Pick.* 449; 3 *Dane*, 559; 1 *Paine's C. C. Rep.* 422; 4 *Kent*, 145.

A comparison of this *stat. c.* 463, with *stat.* 1821, *c.* 50, will show that the bond in suit does not come within the statute first named.

The *English stat.* of 8 and 9 *Wm.* 3, is similar to ours of 1830, *c.* 463. The *English* statute has been held not to apply to bail or replevin bonds. 3 *Maule & S.* 155; 1 *Selw. N. P.* 485; 9 *Eng. C. L. Rep.* 33.

The measure of damages, applicable to this case, by the decisions of the Courts, and by principles of law, should be determined by the Court, and not left to the jury. The true measure is, the amount of the execution, interest and fees. *Freeman* v. *Davis*, 7 *Mass. R.* 200; *Burroughs* v. *Lowder*, 8 *Mass. R.* 373; *Smith* v. *Stockbridge*, 9 *Mass. R.* 221.

The poor debtor act of 1822, *c.* 209, is the one applicable to the present case. That statute has provided the modes in which the debtor may be discharged from imprisonment without affecting the judgment. 1. By giving the statute bond and taking the oath. 2. By the creditor's leaving a written permission for the debtor to go at large. If the debtor be enlarged in any other way, by consent of the creditor, it operates by the common law a discharge of the judgment. The creditor, by bringing this suit, must be considered as assenting to the discharge on this bond. The consequence is that the judgment is discharged, and the bond is substituted for it. The measure of damages therefore in this case is, the amount of the execution, with interest, fees and costs. *Forster* v. *Fuller*, 6 *Mass. R.* 58; 14 *ib.* 443; 5 *Dane*, 219; 1 *ib.* 414; 8 *Cowen*, 171; 6 *Johns. R.* 51; 5 *ib.* 364; *King* v. *Goodwin*, 16 *Mass. R.* 63.

J. A. Lowell, for the defendants, argued the points taken in the exceptions of the defendants; and in relation to those taken by the plaintiff, insisted, that this bond came within the *stat.* of 1830, *c.* 463, and also that the poor debtor act of 1839, was applicable to this case. There was a mistake in inserting *six* instead of *nine*, or this would have been a good statute bond. The principal defendant did perform fully all required by the bond within the time limited by the statute. The testimony proved, that he was unable to pay from the time the debt was contracted to the time of trial. The plaintiff could suffer no damages, and was entitled to none. The case of *Winthrop* v. *Dockendorff*, 3 *Greenl.* 156, was considered conclusive, that but nominal damages could be recovered.

The *stat.* 1830, *c.* 463, should be liberally construed; and if so, would include the present bond. 1 *Burns' Law Dic.* 233; 1 *Bacon, Cov.* 526; *Powell on Con.* 314; 1 *Chitty on Pl.* 106.

The opinion of the Court was drawn up by

Shepley J. — There is a material difference between bonds with a condition, which provides for the performance of some covenant or agreement, and those conditioned to be void or defeated upon performance only of some act or duty. In the latter class of bonds with a defeasance the obligor is not obliged to perform the act. He may do it or not at his election; and no action of cove-

nant can be maintained against him. In the former class the obligor is obliged to perform in the manner provided in the condition, and the penalty of the bond is but a security for it. Covenant will lie to compel a performance, and equity will in a proper case decree it.

The additional act regulating judicial process and proceedings, c. 463, provides, "that in all actions upon any bond or penal sum for the performance of any covenants or agreements, and in all actions of covenant, the plaintiff may assign as many breaches, as he may think fit;" "and in all actions upon any bond or penal sum as aforesaid; if the verdict be for the plaintiff, the judgment shall be as heretofore for the amount of such bond or penal sum, and the jury shall ascertain by their verdict the damages for such of said breaches, as the plaintiff upon trial of the issue shall prove." This statute extends only to that class of bonds, which provide for the performance of some act by a covenant or agreement. The language does not include any other; and the jury are authorized to assess damages only for such of the breaches of any such covenant or agreement as the plaintiff may prove. The substance of these provisions appears to have been derived from the statute of 8 and 9 *W.* 3, *c.* 11, and it has been decided, that bonds for the payment of money by instalments are within that statute, but that those for the payment of a sum certain, at a day certain, are not within it. *Murray* v. *Earl of Stair*, 2 *B.* & *C.* 82.

The bond in this case was strictly a bond of defeasance. The obligors do not stipulate in the condition to pay any sum of money or to perform any act. They only secure to themselves an option to avoid the bond by the performance of certain acts. The obligee could not exact performance. He could only claim the penalty by an action of debt in case of neglect to perform. The language used in the case of *Potter* v. *Titcomb*, 7 *Greenl.* 334, must receive a construction with reference to the subject then before the Court. And where the statute is said to embrace all bonds, it must be understood to mean all bonds of that description. This bond not being within that statute, the rights of the parties upon a forfeiture are to be determined by the Court under the provisions of the act for giving remedies in equity. *c.* 50, § 2.

There was error in submitting the assessment of damages to the jury, but under our statute providing for exceptions, it does not necessarily follow, that there must be a new trial. That *stat. c.* 193, § 5, provides, that this Court "shall render judgment thereon, or may grant a new trial at the bar of said court as law and justice may require." And if upon examination it should prove, that the plaintiff has not been injured by that error, and that the judgment is such as should have been rendered by the Court without the aid of a jury, justice would not require a new trial merely because a jury has come to a correct conclusion respecting the damages.

In the bill of exceptions taken by the defendants the facts submitted to the jury on this point appear. It is there stated, that the defendants "did prove, that said *Crosby* was destitute of property at the time when the original demand in this action accrued in 1826; that he had continued to reside within this State, and most of the time within this county from that date to the present time; was present in court at the trial; and had no property during any part of said period of time." It further appeared, that he had regularly notified the creditor of an intention to take the poor debtor's oath on the 28th of *May*, 1836, but that the justices did not proceed to take his disclosure because the execution had erroneously issued in the name of *James* instead of *Warren Hathaway*. That error having been corrected, and the name of *Warren*, having been substituted for that of *James* in the bond by the agreement of the sureties, he caused the creditor to be duly notified, and took the poor debtor's oath on the 12th of *Nov.* 1836, and was discharged; but this was not done within the time prescribed in the condition of the bond, it having erroneously required this to be done within six instead of nine months.

The plaintiff's counsel contends, that the debt has been discharged, and that the just measure of damages is the debt and interest; and relies upon the cases cited as decided in *Massachusetts*.

This case differs from those in important particulars. It does not appear in those cases, that the debtor was destitute of property, or that any attempt was made to take the poor debtor's oath. The ground of action in those cases, was that the debtor had escaped from the prison limits. In this case it does not appear, that the debtor had committed any escape from the prison liberties.

The breach was occasioned by his neglect to surrender himself and go into prison within the time prescribed in the bond. The injury which the plaintiff has suffered arises out of such neglect to go into prison. And the true question respecting the damages is, what injury has the plaintiff suffered by not having the body in prison? If the sheriff had neglected to arrest the debtor on the execution, and the action had been brought for such neglect, upon the facts in this cause, his damages could have been but nominal; and why should they be greater against the sureties on the bond for a like omission to have the debtor in prison? The plaintiff in prosecuting this suit does not allege or prove any escape, and how then can he be said to have assented to any by bringing a suit upon the bond? In pursuing a remedy, which the law gives him he cannot be regarded as impliedly assenting to any thing which he does not allege. It does not appear from the facts in this case, that the debtor could allege and prove, that he had been released from arrest or imprisonment by the consent of the creditor express or implied; and the right of the creditor therefore remains unimpaired to obtain his debt by any means, which the law may afford him. If the bond had been taken according to the provisions of the statute, that would have determined the amount of damages. Not having been so taken, it is a good bond at common law and subject to chancery. And this Court cannot say, that "according to equity and good conscience," the plaintiff is entitled to more than nominal damages. If a new trial should be granted, this Court must come to the same result, and pass a judgment like that which has been rendered; and it does not appear to have been the intention, that a new trial should be granted for an error, which was not injurious to the party.

The counsel for the defendants abandons his exceptions, if the plaintiff's are not sustained.

Exceptions overruled.

Cyrus Stockwell *vs.* Nehemiah Marks.

Where a tenant holding under a written lease erects a furnace for warming the house, thereby making a material alteration of parts of the building, and where the house would be injured by the removal of the furnace; if the tenant does not remove it during his term, he cannot maintain trover against the proprietor of the house for refusing to permit him to enter and remove it afterwards.

Nor can the tenant maintain such suit, if the lease permit him to make any alterations or improvements during his occupancy, provided the same shall not lessen the value of the property, or occasion expense to the lessor.

Where the duration of a tenant's term is fixed in his lease, his rights cease at the expiration of the term without any notice to quit.

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

Trover for a furnace used for warming a tavern house in *Calais*, called the *Boundary House*. The plaintiff entered into the occupation of the house under one *Thompson*, but before the expiration of the lease, and during the occupation of the house by the plaintiff, the defendant had become the owner subject to the lease. The lease under which the plaintiff entered, was dated *May* 5, 1836. By that lease, he was to occupy one year from *July* 1, 1836, at the rate of $525 for that year. He also by the lease had liberty to occupy for several successive years, provided, he should at the end of each year, so elect and determine. The lease provided, that the plaintiff should at the end of the term quit and deliver up the premises peaceably and quietly, in as good order and condition, reasonable use and wearing excepted, as they were then in, and not make or suffer any waste; that the lessor might enter to view the premises, and expel the lessee, if he should fail to pay the rent and to do what other things he had in and by said lease undertaken to do; that the plaintiff might, during the term he should occupy, make any alterations or improvements therein he might wish, provided, the same should not lessen the value of the property nor be any expense to the lessor. The plaintiff entered under said lease, and during the first year, placed in the basement story the furnace now in question, to construct which, took from 1000 to 1500 bricks, which were laid in lime mortar. The furnace consisted of an iron oven or stove, with grates, pipes and ventilators, besides

the bricks aforesaid. It rested upon a foundation of stones laid upon the ground. That part of the basement story in and around the spot where the furnace was put, was rough finished into a bedroom, entry, closets and a cupboard. The furnace when completed, occupied a space three by four feet. In order to build it, the floor of the basement story was taken up and two of the sleepers on which it had rested were cut off, and a portion of them removed. The remaining part of the sleepers were well supported by stone blockings. In a part of the operation, 200 bricks belonging to the wall of the basement story were removed from it. Whether these bricks were used in erecting the furnace, the evidence was contradictory, all the other bricks and materials for the furnace were supplied by the plaintiff. In preparing to erect the furnace, there was taken away a portion of one of the side partitions of the bedroom, this partition having helped to support the floor above. The two rough closets and cupboard, which together had occupied a space of $3\frac{1}{2}$ by 8 feet were cut away. To accommodate the pipes and ventilators the floor above was cut through in three places, into which soap stones had been placed. One of the sleepers of that floor, eight inches square was cut off, and eighteen inches in length of it removed, but a partition run along under where the sleeper was cut, and gave sufficient support to that part of the floor. Another timber of that floor, called the main trimmer, into which sleepers and other timbers were framed, was cut into on opposite sides, to the depth of from $\frac{1}{3}$ to $\frac{1}{2}$ of its thickness. These cuts were four feet apart. There was a hall in the upper story passing the whole length of the house, and a partition which contributed to its support, passed directly across said trimmer. The hall was arched, and the house had no beams extending from plate to plate, but had collar beams. It was in evidence, that the plaintiff during his occupancy had made considerable improvements upon the house, the expenses of which were estimated at from $100 to $400. The furnace could not have been removed as it then was, but must have been taken to pieces in order to be removed. Several witnesses testified upon the question of injury done to the house by said alterations, some testifying that if the furnace were removed, the house could not be made in all respects so good as before, and others, that the house would not

be materially injured, except for the expense of repairing, which was estimated by the witnesses at sums varying from $10 to $50. On the 30th of *June*, 1837, plaintiff gave written notice to said *Thompson*, that he should not occupy the premises the second year. He however remained in the house beyond the expiration of the first year, and there was no evidence that he had ever been notified to quit. As early as the 7th of *August*, he began to remove his furniture from the house, and on account of the moving, his wife slept that night and dined the next day at a neighbor's. There was no proof that she was ever again at the house. On the morning of the 7th or 8th of *August*, *John Marks* placed one *Thompson* in possession under the defendant. It was admitted, that *John Marks* and *Thompson* were the defendant's agents on both said days, and *Thompson* has ever since remained in the house. On the day aforesaid, about eleven o'clock in the forenoon, *Thompson* brought a part of his furniture into the house. In the same forenoon, the plaintiff directed one *Ward* to remain in the house and keep possession for him, a part of the plaintiff's furniture then being in the house. This employment of *Ward* was known to *Thompson*. At 9 or 10 o'clock that evening, *Ward* with some friends undertook to bring in a bed to lodge upon, the plaintiff's beds having then been all carried away. *Thompson* forbade the bringing in of the bed, and with a stick in his hand, resembling an axe-handle, which he flourished over the head of *Ward* and his friends, ordered them to leave the house, and drove them out, and they were compelled to leave. On the 9th of *August*, the plaintiff tendered money for rent to the defendant, which he received, as tendered, and gave therefor to the plaintiff a receipt in the following form.

"Rec'd of *Cyrus Stockwell* $53,95 on account of rent of the "*Boundary House*, which I receive without any prejudice to my "legal rights against said *Stockwell*; not claiming rent after the "7th of *August*, 1837. *Nehemiah Marks.*

"*Calais*, *Aug.* 9, 1837."

On the 9th of *August*, 1837, the plaintiff demanded the furnace of the defendant, at defendant's house in *St. Stephens*, in *New-Brunswick*, about half a mile from the *Boundary House*, and defendant replied, that he should do nothing about it. A witness

testified, that at the plaintiff's request, he went to the *Boundary House* about ten o'clock in the forenoon of 8th of *August;* that soon afterwards, *Thompson* came in and brought a bed and some other furniture; that thereupon the plaintiff told said *Thompson* and said *John Marks,* that he would not yield the possession of the house, except by force, till he had removed his effects away; and he requested them to permit him to remove the furnace among other things; that *Thompson* refused to permit such removal, and threatened to knock the plaintiff down if he should attempt to remove it; that the plaintiff thereupon told both *Marks* and *Thompson,* that he would put the house in as good repair as before, if they would allow him to remove the furnace; that they forbade its removal; and that *Thompson* at that time appeared to take forcible possession of the house. The testimony of this witness was not contradicted.

The presiding Judge instructed the jury, that the plaintiff at any time during his occupancy, had a right to take away the furnace, provided, he restored the house to its original form, and put it into as good repair as before; that if he really in good faith wished and intended so to do, and would have so done, had he not been prevented by his forcible expulsion by defendant's agent, under the circumstances testified to in the case, he was entitled to a verdict in his favor. The verdict was for the plaintiff, and the defendant now excepted to the instructions of the Judge.

B. Bradbury, for the defendant, argued:

1. That the furnace was a fixture of the description which is not by law removable. *Amos & Fer. on Fixtures,* 8, 14, 78; 3 *East,* 53; 4 *Moore & P.* 143; 6 *Bingh.* 637; 2 *Brod. & B.* 54.

2. The stipulations in the lease show, that it was not the intention of the parties, that the tenant should remove any erections or improvements made by him during his term, unless for the purpose of making equally valuable erections. 1 *Taunt.* 19; 2 *Stark. R.* 403; 2 *B. & Cres.* 608.

3. The plaintiff covenanted in his lease to quit and deliver up the premises at the end of the term in as good order and condition, reasonable use and wearing excepted, as they were then in, or should be put in, and not make or suffer any strip or waste, which could not be done, if the furnace was removed. These covenants

would be broken by its removal. 2 *Brod. & Bing.* 54; *Co. Litt.* 53, *a*; 3 *East*, 38.

4. If the plaintiff might have removed the fixtures in question during the continuance of his term, he lost his right by not doing so. He not only did not attempt to remove them during his term, but not until after he had ceased to be in the occupation. *Amos & F.* 86 to 96; 7 *Taunt.* 191; *Gaffield* v. *Hapgood*, 17 *Pick.* 192; *Co. Litt.* 270, *b*; 8 *East*, 358; 1 *T. R.* 54; *ib.* 162; *Sampson* v. *Henry*, 13 *Pick.* 36.

5. The facts do not show a conversion of the furnace. The defendant did not prevent the plaintiff from taking it away.

6. The Judge's charge decides that certain facts, if proved, constitute a conversion, and entitle the plaintiff to a verdict; but he ought to have left it to the jury to say whether upon the facts proved there was a conversion. The court cannot infer a conversion, but the jury must find it. *Dane, c.* 77, *art.* 9, § 29.

7. This action is not maintainable against a landlord for fixtures annexed to the freehold. *Amos & F. on Fixtures*, 243; *Gaffield* v. *Hapgood*, 17 *Pick.* 194.

Bridges, for the plaintiff, contended, that the furnace was not a part of the realty, but merely an article of furniture, and subject to be removed. *Kent* speaks of stoves and furnaces as articles of that character which a tenant has the right to take with him on going out, when he has put them up. 2 *Com.* 343, 344. There is no distinction between articles put up in the way of one's trade, and put up for use and convenience. This Court has carried the doctrine much farther than we contend for in *Russell* v. *Richards*, 1 *Fairf.* 429. Stoves and furnaces have now become of common use, and are not considered as belonging to the building, but merely as furniture. He commented upon the facts in the case, and contended that the furnace could be taken away without injury to the building, and that the plaintiff was in possession when he attempted to remove the furnace and was forcibly prevented by the defendant. 9 *Com. L. Rep.* 30; 19 *ib.* 123; 20 *ib.* 407.

The plaintiff by the lease had the right to make alterations. This very case must have been contemplated, when the lease was made.

By taking rent for the house after the year expired, the defendant admits that the plaintiff was rightfully in possession. He was

entitled to at least thirty days notice to quit, and then could be expelled only by process of law, and not by force. *Davis* v. *Thompson*, 13 *Maine R.* 209.

The opinion of the Court was drawn up by

WESTON C. J. — The subject matter of this suit was a fixture, the construction of which having occasioned a material alteration of the house, in many parts of its interior arrangement, it would be going far to hold it removable, even between landlord and tenant. Such removal is not allowed, where it may cause any material injury to the estate. 2 *Kent*, 342. Thus a conservatory, erected by tenant for years, on a brick foundation, attached to a dwelling-house, and communicating with it by windows, opening into the conservatory, and a flue passing into the parlor chimney, becomes part of the freehold, and cannot be removed by the tenant or his assignees. *Buckland* v. *Butterfield & al.* 2 *Brod. & Bing.* 54.

Nor is the exercise of this right necessarily deducible from the permission, accorded to the plaintiff, to make any alteration or improvement, during his occupancy, provided the same should not lessen the value of the property, or occasion expense to the lessor. If however, during the term, the plaintiff had again altered the house, by restoring it, if it could be done, to its original condition, the removal of the furnace, under this clause in the lease, might have been justified. This not having been done, it may deserve serious consideration, whether by fair implication the plaintiff was not bound to leave, for the benefit of the estate, alterations and improvements made by himself, under the stipulations in the lease. But if in conformity with the liberal rule, which prevails between landlord and tenant, the plaintiff had a right to remove the furnace as his property, the authorities require, that it should be exercised during the term. 2 *Kent*, 346.

In *Lee* v. *Risdon*, 7 *Taunton*, 188, it was held, that the tenant may sever fixtures, erected by himself, during his term but not afterwards, and that having ceased to be goods and chattels, and becoming part of the freehold, unless so severed, trover cannot be maintained for them. And the authority of this case was recognized in *Colegrave* v. *Dios Santos*, 2 *Barn. & Cress.* 76. Where a tenant affixed bells to a house, which he did not remove during

his term, it was held, that they became the property of the owner of the house. *Lyde* v. *Russell*, 1 *Barn. & Ald.* 394. In *Gafield* v. *Hapgood*, 17 *Pick.* 192, this subject was examined, and it was held that the tenant must exercise his right during the term. *Penton* v. *Robert*, 2 *East*, 88, may seem to maintain a different doctrine. But that was the case of a mere ground lease. The buildings were erected by permission, and remained therefore personal property, as this Court has decided in *Russell* v. *Richards & al.* 1 *Fairf.* 429. It does not follow, that the same rule is to be applied to additions made, or fixtures attached, to an existing house, taken on lease, and not removed during the term.

Here the lease expired, by its own limitation, on the first of *July*, 1837. In such case, notice to quit, to determine the lease, is not required even by the English law. *Messenger* v. *Armstrong*, 1 *T. R.* 54; *Flower* v. *Darby*, *ibid.* 162. The plaintiff had a right to hold longer, upon his electing so to do; but he expressly declined to have his term enlarged, and so notified the agent of the defendant. After the expiration of the year then, he had no rights whatever in the house, although his subsequent occupancy was justified by the rent received up to and inclusive of the seventh of *August*. If the lease had been determinable at will, and it had been determined by the lessor, the lessee would have been entitled to a reasonable time to remove his effects, with the right of ingress and egress for this purpose. And by statute, thirty days notice must be given, to entitle the lessor to maintain forcible entry and detainer. *Davis* v. *Thompson*, 13 *Maine R.* 209. But in this case the duration of the plaintiff's right in and to the house was fixed by the lease. If the plaintiff had left in the house, after his term a personal chattel, which the defendant had retained, and had refused to deliver up on demand, the plaintiff might have maintained trover, as an apt remedy for redress. But the furnace had ceased to be a personal chattel, and had become a part of the freehold. The plaintiff, instead of severing it therefrom during his term, had suffered it to remain, incorporated with the house, sometime after its termination. If the defendant would not then permit him to sever it, whatever other remedy may exist, if any, it appears to us, that he cannot be held liable in trover.

Exceptions sustained.

CASES

IN THE

SUPREME JUDICIAL COURT

IN THE

COUNTY OF HANCOCK, JULY TERM, 1840.

DAVID LEACH *vs.* TIMOTHY PERKINS.

The rights of parties are to be determined by law, and not by any local custom or usage, unless there be proof that such custom or usage is certain, general, frequent, and so ancient as to be generally known and acted upon, and unless it shall be adjudged to be reasonable.

Such usage may be admitted to explain the intention of the parties in making a contract, but is not to be received to establish the right, or to prove the origin of the relation by which the parties become responsible to each other.

In an action for labor upon a vessel, built by several owners, against one of them, proof of the usage of the place "that the owners were not jointly responsible for materials and labor for the vessel, and that no one was authorized to make contracts for materials and labor for the vessel so as to bind the owners generally," is inadmissible.

EXCEPTIONS from the District Court, for the Eastern District, ALLEN J. presiding.

Assumpsit for labor done upon the schooner *Coral*. With the general issue there was a brief statement setting forth, that the promise, if any was made, was made jointly with the defendant and seven others, and not by the defendant alone; "it having been agreed between the parties, that all matters both in bar and abatement might be taken advantage of by the defendant under the general issue and brief statement."

Testimony was introduced by the plaintiff, tending to show, that the plaintiff was hired by the defendant to perform the labor. It was proved, that the vessel was built by the defendant and the seven others named in the brief statement, who owned her in different proportions.

The plaintiff offered evidence to prove, that there was a custom in the town where the vessel was built and in the neighboring towns, that where vessels were built by several individuals, that each of them should be individually responsible for such labor and materials as he engaged; that the owners were not jointly responsible for the materials and labor for the vessel, and that no one was authorized to make contracts for materials and labor for the vessel, so as to bind the owners generally. This testimony was objected to by the defendant's counsel. The Judge overruled the objection, and the evidence was admitted to show the terms on which the vessel was built. The verdict being against the defendant, he filed exceptions.

W. Abbott and *C. J. Abbott*, for the defendant, contended, that evidence of usage was inadmissible to control the general principles of law.

The commercial law extends over the whole country, and cannot be altered by the practice of the people in a few towns. The usage of a place cannot be resorted to where the principles of law are well settled. 1 *Bl. Com.* 76; 3 *Salk.* 111; 2 *Wash. C. C. R.* 70; 6 *Cowen*, 266; 4 *T. R.* 750; *Donnel* v. *Col. Ins. Co.*, 2 *Sumner*, 366; *Bryant* v. *Commonwealth Ins. Co.* 6 *Pick.* 131.

Hinckley, for the plaintiff, contended, that the evidence was properly admitted, because it showed an understanding among the builders and workmen that the vessel was built in conformity with such usage, and that the contract in this instance was made under the expectation of being bound by the usage. Nothing more is intended by the term than the practice of a class of individuals on the seaboard in the prosecution of their business as ship builders. The custom here proved is beneficial, as it enables several persons to associate together, each liable only for his own contracts, to build a vessel which could not be accomplished by any one of the number by himself. The admission of evidence of general usage

is in conformity to the practice in this State. *Farrar* v. *Stackpole*, 6 *Greenl.* 154; *Emerson* v. *Fisk*, *ib.* 200; *Williams* v. *Gilman*, 3 *Greenl.* 276. A similar practice prevails in *Massachusetts*. *Macomber* v. *Parker*, 13 *Pick.* 182; *Meldrum* v. *Snow*, 9 *Pick.* 445; *Thompson* v. *Harrington*, 12 *Pick.* 425.

The opinion of the Court, (EMERY J. taking no part in the decision, having been employed in trying jury causes in the county of *Washington*, when the case was argued,) was drawn up by

SHEPLEY J. — The rights of parties are to be determined by law, and not by any local custom or usage, unless there be proof, that such custom or usage is certain, general, frequent, and so ancient as to be generally known and acted upon. In such cases, if the Courts adjudge it to be reasonable, it affects the rights of the parties upon the presumption, that they have made their contract with reference to it. 3 *Wash. C. C. R.* 149; 8 *S. & R.* 539. The usages of trade in a particular city or place, are thus received to explain the intention of the parties, and to ascertain their rights under a contract presumed to be made with reference to them. 2 *B. & P.* 432; 3 *B. & P.* 23; 7 *Mass. R.* 36; 3 *Wend.* 283. The usage of trade has also been admitted to explain what the parties intended by the use of a doubtful word, or phrase, or term of art, in a policy of insurance, bill of lading, and deed. 7 *Johns. R.* 385; 8 *S. & R.* 535; 6 *Greenl.* 154. And in a particular profession, art, or branch of trade; as among printers. 1 *S. C. Const. R.* 308; 3 *Greenl.* 276. And among carriers. 2 *Nott & M'C.* 9; 3 *Day*, 346; 3 *Conn. R.* 9. And in the lumber trade. 6 *Greenl.* 200.

The usages of banks in certain cities and places have been received upon the presumption, that the parties contracted with reference to them. 11 *Mass. R.* 85; 9 *Wheat.* 581. So has a custom in certain places, that a tenant should take "the way going crop," 5 *Binn.* 287; or receive compensation for labor for the benefit of the forth coming crop. 1 *Brod. & B.* 223. In these and many other cases, usage has been received to explain the intention of the parties in making a contract, and thus to have an influence upon their rights. But custom does not appear to have been received to establish the right, or to prove the origin of the

relation by which the parties become responsible to each other. Mr. Justice *Thompson*, in speaking of the admission of the usage of the departments of the government to allow a commission on the disbursements of the public money, excludes any inference that it might be received for such a purpose, remarking that "it was not for the purpose of establishing the right, but to shew the measure of compensation and the manner in which it was to be paid." 7 *Peters*, 28.

The case of *Thompson* v. *Harrington*, 12 *Pick.* 425, has been regarded in the argument as authorising the reception of usage as corroborative proof of the existence of a contract. In the report of the case it is stated, that the Judge instructed the jury, that "usage might serve in some measure to shew what was the intention of the parties, *or to substantiate the testimony*" of the witnesses. In the opinion of the court no allusion is made to any such instruction, and the principle upon which the court sustained the admission is in accordance with the preceding cases in that State. The language of the court is, "usage was admissible in evidence to explain the act of the owners, and to enable the jury to determine whether that act amounted to a letting to hire, or an appointment of a master."

The customs or usages here alluded to are not those customs, which have existed in a place or country so long, that the memory of man runneth not to the contrary, and which, when established as the rules of the common law require, become a part of it; but are such as are to be established by the proof of the facts showing the accustomed mode of dealing or of conducting a certain trade or branch of business. And when the mode of conducting the business, or in other words, the usage is proved, the law determines, as in other cases, what are, under the circumstances, the rights of the parties. And it is no more competent to prove, what would be the legal rights of the parties arising out of such usage, than to prove by witnesses the law of the contract in any other case.

Whether a usage is proved, is a fact for the jury to find. 2 *G. & J.* 136. But it would be the duty of the Court to instruct them, that if it was not proved to be certain, and general, and to partake

of the other requisites before stated, that the testimony should have no influence upon the rights of the parties.

The custom as stated in this bill of exceptions is presented rather as a mode agreed upon among the parties interested to build vessels, than as a well established method of actually conducting the process of building; and proof was admitted "that the owners were not jointly responsible for materials and labor for the vessel and that no one was authorized to make contracts for materials and labor, &c. for the vessel so as to bind the owners generally," apparently as part of the proof of the custom. It is alleged in argument, that testimony to prove not only the custom but its legal effect upon the rights of the parties was not in fact admitted but the language used does not appear to be susceptible of any other construction. It may be that upon a new trial the facts in relation to the manner of building in the place where the vessel was built will be so fully proved as to establish a usage with all the necessary requisites to authorize the presumption, that these parties contracted with reference to it; but as it is presented in this bill of exceptions the evidence should not have been admitted.

If the plaintiff fails in establishing any usage, he may prove, that the parties building the vessel agreed among themselves as stated, and that his contract was made with a knowledge of and in obedience to such agreement, and thus be entitled to recover. Nor is there any necessity, as the argument supposes, that such a mode of building vessels should be abandoned if the usage fails, for the parties may accomplish the object of relieving themselves from responsibility for the whole of the materials and labor by an agreement to that effect among themselves, and by taking care to make it known to each one with whom a contract is made, so as to have proof, that he contracted with a knowledge, that he must rely only upon the person with whom he contracted.

Exceptions sustained and new trial granted.

APPENDIX.

MEMOIR

OF THE LIFE AND CHARACTER

OF THE

LATE CHIEF JUSTICE MELLEN.

By S. GREENLEAF, LL. D.,
ROYALL PROFESSOR OF LAW AT HARVARD UNIVERSITY.

At a Meeting of the Members of the Cumberland Bar, *December* 31, 1840. The death of The Hon. PRENTISS MELLEN, late Chief Justice of the Supreme Judicial Court having been announced, it was

Resolved, That Simon Greenleaf, Esq., Professor of Law at Harvard University, formerly a Member of this Bar, and intimately associated with the late Chief Justice, by the ties of friendship, and as Reporter of the decisions of the Supreme Court, nearly through the period of his administration — be requested to prepare in such form as he may deem proper, a notice of the life, character and services of the late distinguished head of the Court.

A true copy from the record,

JOHN D. KINSMAN, Sec. Cumb. Bar.

At a Meeting of the Members of the Cumberland Bar, *April* 14, 1841,

Voted, That the letter of Brother Greenleaf and the memoir accompanying the same, be recorded in the records of the Cumberland Bar, and that the memoir be placed in the hands of John Shepley, Esq., with the request of the Cumberland Bar, that the same be published in the next volume of the Maine Reports.

A true extract from the record,

JOHN D. KINSMAN, Sec. Cumb. Bar.

A brief Memoir of the Life and Character of the Hon. PRENTISS MELLEN, LL. D., *late Chief Justice of Maine.*

THERE are few men whose lives are more barren of materials for popular biography, than is that of a practising lawyer. Entering at an early period into a laborious and absorbing profession, his life is a constant round of toil, limited to the walls of his study and the humble arena of the legal forum, and exhausted for the most part, upon the controversies of private individuals, often trivial in amount, and destitute of interest. His holiest efforts, as a peace-maker, are scarcely known, except to his client. By the public, he is seen only in those collisions at the bar, which display rapidity of ignition, oftener than effective force, and delight by brilliancy of corruscation, rather than instruct by lessons of wisdom. It is unfortunate too, for the profession, that the causes which collect the greatest crowds, seldom call forth the best talents of the lawyer; and are interesting to the public, rather for the gladiator-like exhibitions of ready repartee and angry retort, whose piquancy delights the multitude, at the expense of the combatants themselves. The profoundest disquisitions, and the highest efforts of intellect, are witnessed only by the regular attendants on a Law Term, namely, the Judges, the adverse counsel, the sheriff, and that common voucher, the crier.

It is in the bosoms of his cotemporaries of the profession, and of his clients and personal friends, that the memory of the lawyer is embalmed. No brilliant passages of arms emblazon his fame; no records, beyond Judgments and Reports, attest the power of his mind; and of his private charities, the memory is sealed up, till publication at the great day.

These truths are confirmed by the evidence afforded by the sages of the law. Those alone who have mingled in the politics and general science of the day, have impressed their characters upon the tablet of history. *Bacon* is now known only as a philosopher and a courtier. Even the ponderous tomes of *Coke* have almost ceased to be turned over, except by the legal antiquary; and he will be recognized by our successors mainly as the formidable enemy and rival of *Bacon*, and the sturdy opponent of a vain but

despotic king. And of *Littleton's* life and private character, almost the only authentic indication is contained in an old wood-cut, in which he is represented in his closet, devoutly repeating the *miserere*, on his bended knees.

No conclusion, therefore, can be drawn, unfavorable to the private worth or active virtue and usefulness of any lawyer, from the paucity of materials left for his biographer.

These reflections have been suggested by the recent decease of Chief Justice MELLEN, and the very natural desire of his friends that some memoir should be written of his life, while the materials still subsist, in the recollection of his cotemporaries. This tribute to his memory has already been elegantly paid by one fully competent to that service; leaving to others only a repetition of the same narrative, in a less attractive form.

His life furnishes a striking illustration of the justness of the preceding remarks, since it was that of one almost exclusively conversant with the active practice of the law.

Prentiss Mellen was the third son of the *Rev. John Mellen*, a respectable congregational clergyman in *Sterling*, in *Massachusetts;* and was born at that place, *Oct.* 11, 1764. For the memory of his father he cherished to the last, a most affectionate and filial regard; and loved to speak of him as a fine specimen of the old clergy of *New-England*, distinguished alike for good learning, simplicity of manners, and christian purity of life. His mother was the daughter of the *Rev. Mr. Prentiss*, of ——— a lady of great prudence and piety, combined with that playful wit, which delighted to amuse all, without giving pain to any; a trait for which all her children were equally remarkable. Of this family, the elder brothers, the *Rev. John Mellen* of *Cambridge*, and *Henry Mellen, Esq.* a respectable lawyer of *Dover, N. H.* both graduates of *Harvard College*, were more frequently mentioned by the Chief Justice; but these, with both parents, another brother, and his sisters, a family of nine, all preceded him to the tomb. His father died at *Reading, Mass.* in 1807, at the advanced age of 85.

Prentiss, the last of this honored stock, was prepared for college under the personal instruction of his father; and was graduated at *Harvard College* in 1784; on which occasion he took part in a forensic disputation in *English*, upon the question "*whether the*

knowledge and practice of religion are not more promoted by that diversity in the sentiments and modes of worship which subsists among christians, than they would be by an entire uniformity." On the same day, among the candidates for the second degree, a disputation was held between *John Davis*, now U. S. Judge of the District of *Massachusetts*, and *Elijah Paine*, late a Judge of the Supreme Court of *Vermont*, upon the utility of sumptuary laws, in a republic ; and the exercises were closed with an *English* oration, by the celebrated *Samuel Dexter*.

After leaving college, *Mr. Mellen* spent a year as a private tutor in the family of *Joseph Otis, Esq.* of *Barnstable*, and then pursued his professional studies in the same town, in the office of that eccentric, but popular lawyer, *Shearjashub Bourne*. Of his advantages, or rather the want of them, for acquiring a knowledge of the law, at that period, he used often to speak with pleasantry, but with regret; illustrating the legal science of his "master *Bourne*," by reference to his habit of citing *Strange's Reports*, as "the decisions of the twelve Judges of *England*;" and by his standing argument against the allowance of costs, that "they were not allowed in *England, even upon a certiorari*."

On the completion of the usual term of study, *Mr. Mellen* was admitted to the bar at *Taunton*, in *Oct. Term*, 1788; and immediately commenced practice in his native town. But the business of a quiet country village, like *Sterling*, proving quite too small an inducement to remain there, he removed, about eight months afterwards, to the south parish in *Bridgewater*. Having but "small practice," as he termed it, at the latter place, in *Nov.* 1791, he visited his brother *Henry*, who was about seven years his senior, and had established himself in the practice of law in *Dover, N. H.* in order to select, with his advice, a more eligible residence. He remained with his brother during the ensuing winter and spring; and in the following summer, by the advice of his stedfast friend, the late Judge *Thacher* of *Biddeford*, he removed to that place, took rooms in the common tavern of the village, and made a rude beginning of that career of usefulness and honor, which placed him at the head of the bar in *Maine*. He used to dwell, with evident pleasure and gratitude, on the disinterested friendship of "*honest George Thacher*," in thus offering a share of his own

practice to an enterprising lawyer, with no other motive than the pleasure of his society, and the gratification of serving a young friend. In *May*, 1795, he married *Sarah Hudson* of *Hartford, Conn.* consummating an engagement formed at *Bridgewater*, during his residence there.

The absence of *Mr. Thacher*, in Congress, soon opened to his friend an extensive field of practice in the county of *York;* and his celebrity as a leader soon calling him into the neighboring counties in *Maine* and *New-Hampshire*, he commenced in 1804, making the circuit of *Maine* with the S. J. Court; and in 1806 he removed to *Portland;* from which time, till his appointment to the bench in 1820, he practised with eminent success in every county, and was retained in nearly every important cause.

During this period, he was engaged in conflict with the ablest lawyers in the State — *Parker, Davis, Chase, Symmes, Lee, Hopkins, Orr* — and others yet living, whose powers were disciplined by constant practice in the legal school and under the able and accomplished administrations of *Dana, Parsons, Sedgwick* and *Sewall*, and at a period when the law was ripening into the rich maturity of the present day. But his most constant opponent was the present Mr. Justice *Wilde*, of *Massachusetts*, whose deep learning, vigorous powers of analysis, rapidity of perception, and abundant intellectual resources, rendered him a very formidable adversary. Their course of forensic warfare, adopted by tacit consent and from similarity of taste, was to place the cause on its merits, produce all the facts, and fight the battle in open field, honorably, and without favor. A generous warfare like this, could not but create a generous friendship between the combatants, which was terminated only by death. They have often been heard to speak of each other and of those scenes, in animating terms, both concurring in the opinion that causes were never more fairly tried, nor substantial justice better done, than on those occasions, though frequently but few hours elapsed between their first engagement in the cause and the return of the verdict.

With such minds as these, it was no easy task to contend; requiring, as it did, accurate research, patient thought, constant vigilance, and exhaustless energy, to sustain the generous but strenuous competition.

At the bar Mr. *Mellen* was always ardent — at times impetuous — and frequently impatient of restraint; — but, in the expressive language of one of his compeers, it may justly be said that "in all his conflicts with his brethren, he was singularly fortunate in never being by his ardor, so far transported as to be left, even unintentionally, to inflict the slightest wound upon their feelings. He was ever gentlemanly and kind." With untiring industry and zeal he pursued the interests of his client, as far as they consisted, in his opinion, with law and justice; alike prepared for adverse as for propitious turns of fortune. He availed himself, with remarkable readiness and tact, of every weak point in the position of his adversary, which he rapidly assailed with resistless force; and attacking him in his stronger fastnesses with the compacted energy of argument and the missiles of wit, he dealt his blows, in the heat of the conflict, with the frequency of *Entellus*: —

> "Nec mora, nec requies; quam multa grandine nimbi
> Culminibus crepitant; sic densis ictibus heros
> Creber, utrâque manu, pulsat versatque Dareta."

He was not only an able, but sometimes a very eloquent advocate; — throwing himself, heart and soul, into the cause, with all the glowing warmth of imagination, and the intensity of purpose for which he was distinguished.

In the intervals of professional labor, he cultivated poetry, music, and general literature, with success, and administered the hospitalities of social life with all that graceful liberality and good taste which were exhibited by gentlemen of what we now with melancholy truth, denominate "*The* Old *School.*"

He may be said to have grown up with the law of the State; having commenced practice almost as soon as an *American* Law book was known, and long before one had found its way into *Maine*. The lawyers of that day labored in the mines of *Coke*, *Plowden* and *Saunders*, and accomplished themselves with the elegant text of *Blackstone;* the rest of their apparatus consisting mainly, in native powers of reasoning and readiness in applying the doctrines of the common law, and the great principles of truth and justice, to the case under discussion. It is no small praise, that in the midst of so extensive a practice, he was as familiar with the modern as with the more ancient decisions, and kept pace

to the end of his career, with the progressive learning of his profession.

Though popular as a lawyer, it was never his lot to be a candidate for popular suffrages, except as an Elector at large, for President of the *United States*, in 1816. Yet he was elected, by the legislature of *Massachusetts*, a member of the Executive Council, in the years 1808, 1809 and 1817; in which last mentioned year, he was chosen one of her Senators in Congress. In this responsible office, "he was conspicuous for his sound discrimination, and his devotedness to the best interests of the whole country, and happy in the sincere esteem of the great and good men, with whom he was associated." Few men in that dignified assembly, inspired more general confidence and respect than he acquired by that straight forward honesty which marked his character through life.

This office he resigned in 1820, on the separation of *Maine* from *Massachusetts;* and on the organization of the new State government, he was appointed Chief Justice of the Supreme Judicial Court. For this elevated and honorable station, he was eminently qualified, by the high order of his legal attainments, his long experience, readiness in the despatch of business, and love of justice and equity. His manifest endeavor was to administer justice to every suitor, and that without delay; suffering no cause to remain on the docket, if it could be fairly disposed of; and to bring the parties, if practicable, to a friendly adjustment and mutual compromise. After the close of a term, and in the freedom of private intercourse, he sometimes spoke, with evident pleasure, of the number of causes he had been the favored instrument of adjusting, and the number of angry litigants whom he had probably reconciled and dismissed as friends; and nothing seemed to afford him higher satisfaction in the discharge of his official duties, than to find that the general law coincided with the particular equity of the case before him. Yet his love of equity was not that morbid sentiment which often leads to a blind sacrifice of the principles of law. His vigorous understanding clearly discerned the mischiefs that would result from the introduction of so much uncertainty into the science of jurisprudence, and led him fully to assent to the truth of the trite observation, that in the hands of a weak Judge, "hard cases are the shipwreck of the law." Hence, with the

strongest desire to meet the particular circumstance of the case, he always held the established principles and rules of the law as too sacred to be disregarded, and no Judge bowed, with more profound respect, to the settled law of the land. Those who were in his confidence, can testify to the reluctance with which he sometimes rendered judgment, where the law seemed to bear heavily, and with too great severity, upon the losing party; and will remember the earnestness with which he strove to find some mitigating circumstance, which would justify a different decision. On the other hand, his gratification was heartfelt and undisguised, when by the application of any rule of law however stern, he was enabled to promote the great ends of substantial justice, or to frustrate an apparent attempt to gain an inequitable though apparently legal advantage.

The enduring evidence of his sound judgment, his just discrimination, and great learning, and the lasting impress of his powerful mind, are contained in his printed judicial opinions; which will always be resorted to, as the foundations of the jurisprudence of *Maine*.

On the 11th of *Oct.* 1834, he became legally superannuated, by arriving at the constitutional limit of seventy years, beyond which no judicial office could then be held in *Maine*. Of the wisdom and expediency of any such limitation, various opinions are entertained, which possibly, may be found, on examination, to favor or oppose it, in exact proportion to the party's own distance from that limit. In particular States, which have adopted it, the change may generally be traced to a single instance of inconvenience from the administration of an old and weak Judge, who might otherwise have been disposed of; while the absence of any such limit, in the national judiciary, may show that the general sense of the community is against it.

On the occasion of his retirement from office, the Chief Justice was addressed by the members of Cumberland Bar, to which he belonged, in terms expressive of their high respect and esteem. He was sensibly touched with this mark of affectionate regard, and replied to the address, with characteristic warmth of feeling, and in a manner evincive of the modest estimate he formed of his own powers, and of the habitual liftings up of his heart to the Judge of

all. "Even at the age of *seventy*," said he of this address, "it is adapted, not only to awaken the liveliest gratitude, but to warm my heart, and give to its pulsations much of the animation of youth. It is not strange, while enjoying the pleasure which your goodness and partiality have afforded me, if I pause to consider how much, I fear you have overrated my humble labors, during my official course. At such an hour, it is pleasant to enjoy the consciousness that I have faithfully endeavored to discharge the duties of the office acceptably, — declining no labor or fatigue, which those duties required. I feel conscious, also, that on all occasions I have acted with integrity and directness of purpose, under a deep sense of responsibility to Him who seeth the heart, and knoweth all things. Thus far, I trust, the ermine of justice has not been soiled by any agency of mine. I have aimed at truth and legal correctness, and carefully searched to find them. How far these endeavors have been successful, it is the province of others to decide."

This question, we know, had already been decided by the consenting suffrages of the profession and of the whole community. Seldom have judicial honors been more worthily worn, or the ermine of justice been transmitted more pure and unsullied to those on whom it was devolved.

His domestic affairs, as well as the active habits of his whole life, alike required, that he should return to the bar; and he accordingly resumed the practice, with unabated vigor and zeal.

Of the brief remainder of his career, it is enough to say, that it was in perfect keeping with the rest of his life; and that, in his own oft repeated exhortation to others, he "filled up time with duty." His professional conduct continued to be marked with the same urbanity and kindness, the same fidelity to his client, the same vigor of intellect and affluence of professional learning, which had hitherto distinguished him; till, in a ripe old age, he was summoned, as we trust, to higher honors.

Twice he was selected, in conjunction with other gentlemen, to revise the statutes of the State; — a task for the successful accomplishment of which, few, if any, possessed a happier combination of all the requisite talents and attainments; — exact learning — patience of research — familiar acquaintance with the entire code

of statute and common law, — great experience — love of labor — and equal love of order and method. The happy result of such labors upon the first revision, affords the surest augury of the success of the other which has been recently completed.

The crowning trait of his character, was his sterling integrity — his high moral principle — his religious and abiding sense of accountability to God; of whose omnipresence and holy attributes he was early imbued with a filial and profound reverence. No instance is recollected by his intimate friends, in which the name of the Supreme Being was irreverently taken upon his lips, or in which a profane expression escaped from his tongue. Such language from others, always grated harshly on his ear, causing an involuntary shudder. His life was clear and transparent; — regulated by motives drawn from a pure and permanent source, and directed by expansive benevolence, and a deep sense of moral duty. Though he was constitutionally timid, shrinking from the remotest appearance of danger; yet, when the King of Terrors approached, he addressed himself to the final conflict, with the courage of a christian man; attesting by his calmness, patience, self-possession, and perfect resignation, the sincerity of his faith, and the firmness of his principles. If he manifested any impatience, it was for the long delayed hour of departure. He often and tenderly dwelt upon the hope of mercy and pardon through the merits of his Saviour Jesus Christ; and in that faith and hope he meekly obeyed the last summons, yielding up his spirit on the 31st day of *December*, A. D. 1840, in the 77th year of his age; — and leaving to those of the profession who survive, and those who may succeed him, the legacy of a good example.

Cambridge, March 13, 1841.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

BOND.

CONVEYANCE.

ERRATA. — Erase the word *parol* in the third line of the abstract of the case *Smith* v. *Wadleigh*, page 353, or the words *unless made in writing* in the fourth line; both having been incautiously suffered to remain.

Page 487 — Executors, &c. 1. third line, insert *or* before *of*.